

IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Unser v. Yourex, 2010 NSSC 421

Date: 20101115

Docket: SFHISO-65536

Registry: Halifax

Between:

Tammy Leanne Unser

Applicant

v.

Walter Edward Yourex

Respondent

Judge: The Honourable Associate Chief Justice Robert F. Ferguson

Heard: July 19, 2010, in Halifax, Nova Scotia

Written Decision: November 15, 2010

Counsel: Damian Penny, for the respondent

By the Court:

[1] Tammy Unser (the applicant) of Alberta, in June of 2009, made application seeking that Walter Yourex (the respondent) of Nova Scotia provide to her child support for two children, Konner Alex Unser born December 15, 2004, and Brilynd Walter Unser born June 20, 2008. The application is pursuant to the *Interjurisdictional Support Orders Act* of Alberta and heard in Nova Scotia pursuant to the *Interjurisdictional Support Orders Act* of this province.

HISTORY/BACKGROUND

[2] The documentation in support of this application submits the applicant and the respondent are the parents of the previously mentioned children; that they began living together in July of 2007 and separated in late January of 2008. The document further notes that the applicant seeks “only” the support Guidelines table amount for these children.

[3] A hearing date was scheduled for December 9, 2009. Prior to the hearing (November 10, 2009), the respondent filed documentation including an affidavit in response to the application.

[4] The hearing took place as scheduled. The respondent testified and tendered three exhibits.

[5] The respondent admitted he is the father of Konner and Brilynd who reside with the applicant in Alberta. He testified that, since moving to Nova Scotia in July of 2008, he has provided child support to the applicant in the amount of between \$400.00 and \$500.00 per month which he continues to do at this time.

[6] The respondent provided the following financial information:

- his sworn Statement of Financial Information completed in November of 2009 indicating a current income of \$41,478.84;
- Canada Revenue Agency’s IT Income Tax Return information/regular for the following years:

2006	150 line	\$71,023.00
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2007	150 line	\$81,404.00
2008	150 line	\$30,620.00

[7] The respondent also provided pay stubs which would indicate his 2009 gross income would be, if his income continued as it has up to this date, in excess of \$49,000.00.

[8] The respondent acknowledges his responsibility to provide child support to the applicant for the couple's two children in her care. He submits, however, that, if he is required to provide the amount stipulated by the *Child Support Guidelines*, he would suffer "undue hardship" as enumerated in paragraph ten of the *Guidelines*.

[9] The hearing was adjourned and further information as to the income of the applicant and her "household" was requested. An Interim Order was issued requiring the respondent to provide child support to the applicant in the amount of \$400.00 a month beginning December 15, 2009, and continuing on each month until further order of the court.

[10] The financial information requested was provided to the court and to the respondent. The matter came forward on April 12, 2010, and was adjourned until July 19, 2010. On that occasion, the respondent gave further evidence.

RELEVANT LEGISLATION

[11] The *Interjurisdictional Support Orders Act* of Nova Scotia, particularly paragraph 13(c) which states:

in determining the amount of support for a child, the Nova Scotia court shall apply Nova Scotia law.

[12] The *Maintenance and Custody Act* of Nova Scotia. This act provides the authority to the court to order maintenance be paid for a dependant child. Paragraph 10(1) states:

When determining the amount of maintenance to be paid for a dependent child, or a child of unmarried parents pursuant to Section 11, the court shall do so in accordance with the Guidelines.

[13] The *Nova Scotia Child Maintenance Guidelines*, particularly paragraphs 15, 16 and 17 which state:

Determination of annual income

15 (1) Subject to subsection (2), a parent's annual income is determined by the court in accordance with Sections 16 to 20.

...

Calculation of annual income

16 Subject to Sections 17 to 20, a parent's annual income is determined using the sources of income set out under the heading "(Total Income)" in the T1 General form issued by the Canada Revenue Agency and is adjusted in accordance with Schedule III.

Section 16 replaced: O.I.C. 2000-554, N.S. Reg. 187/2000; amended: O.I.C. 2007-321, N.S. Reg. 294/2007.

Pattern of income

17 (1) If the court is of the opinion that the determination of a parent's annual income under Section 16 would not be the fairest determination of that income, the court may have regard to the parent's income over the last 3 years and determine an amount that is fair and reasonable in light of any pattern of income, fluctuation in income or receipt of a non-recurring amount during those years.

Subsection 17(1) replaced: O.I.C. 2000-554, N.S. Reg. 187/2000.

[14] And paragraph 10 entitled *Undue Hardship*, more particularly paragraphs 10(1), 2(b), 3, 4, 5, 6 which state:

Undue hardship

10 (1) On the application of a parent, a court may award an amount of child maintenance that is different from the amount determined under any of Sections 3

to 5, 8 or 9 if the court finds that the parent 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 parent or child to suffer undue hardship include the following:

...

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

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 parent who claims undue hardship would, after determining the amount of child maintenance under any of Sections 3 to 5, 8 or 9, have a higher standard of living than the household of the other parent.

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 referred to in Schedule II.

Reasonable time.

(5) Where the court awards a different amount of child maintenance under subsection (1), it may specify, in the child maintenance 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 maintenance order in a different amount under this Section, it must record its reasons for doing so.

[15] The respondent has provided evidence of his cost to travel to Alberta and remain in that province for a period of time for the purpose of having access to his children. In particular, he made reference to the cost of airfare (between \$358.00 and \$736.00 plus appropriate taxes, car rental and fuel costs) while travelling between his parents' home and his children's location.

[16] In his affidavit of November 9, 2009, he states he intends to exercise access with his children at least once per year.

[17] He testified he has visited his children in Alberta on one occasion since returning to Nova Scotia in January of 2008. He hastens to add the reason he has not visited his children more often was because he could not afford to do so.

[18] On being provided with the income of the applicant's "household," being her own and that of both her parents, the respondent completed the standard of living test as required and outlined in section 10(3) and (4) of the *Guidelines*. He submits the results indicate that, if he was required to pay in accordance with the *Guidelines*, the applicant's household would have a higher standard of living than his.

[19] The applicant does not agree with the submissions of the respondent.

ISSUES

[20] The issues are:

- 1) The current income of the respondent; and
- 2) Should section 10 of the *Guidelines* be applicable to the respondent's obligation to provide child support?

In this regard the respondent must first provide evidence as to the circumstances that may cause undue hardship; second, convince the court, if he was required to pay child support in accordance with the *Guidelines*, the applicant's household would have a higher standard of living.

CONCLUSION

[21] For purposes of his submissions, the respondent submits his income should be \$30,620.00 per year which corresponds to his Income Tax Return gross income for 2008. However, further evidence, particularly his own filings, indicate his current income is \$41,478.14 and disclosed pay stubs that would indicate his current income could possibly be in excess of \$49,000.00 for 2009.

[22] I find the respondent's current income for the purpose of deciding his child support obligation to be \$41,500.00.

[23] The respondent submits he has unusually high expenses in relation to exercising access to his children.

[24] The respondent's children live in Alberta. He lives in Nova Scotia. If he is responsible to provide an opportunity for he and his children to spend time together – and it appears at the moment that he is – his submitted costs are relevant.

[25] Given that the respondent has returned to Alberta to be with his children once since separation and has indicated his intention of being with his children at least once a year, I do not find his expenses to be “unusually” high. Access parents who live in close proximity to their children and see them on a regular basis would, over the course of a year, have expenses associated with that access which would closely resemble the expense as outlined by the respondent.

[26] As to the respondent's second obligation – the standard of living test – I also have concerns.

[27] In providing the comparison of the standard of living test, the respondent showed his income as being \$30,620.00 per year; however, as previously noted, he has personally provided information to the court that allowed me to conclude his income should be at a minimum \$41,500.00. I also have concern as to the income attributed to the applicant. She is living with her parents who both have income which was used in the respondent's calculations. I do not conclude that the applicant is receiving an “economic benefit” similar to a situation where she may have been living with a partner whose income was similar to that of her parents.

[28] The respondent has proposed that the undue hardship provision of the *Guidelines* are applicable in this situation. The burden is on him to have the court come to this conclusion. I find he has not satisfied this burden.

[29] I have previously mentioned some concerns with regard to the respondent's submission. The primary reason for my conclusion has to do with my belief he has used a figure as to his annual income which is \$10,000.00 less than the conclusion I have reached.

[30] I have previously concluded that the respondent's income is \$41,500.00. I order that he pay child support in accordance with our *Guidelines* table in the amount of \$573.00 per month beginning December 15, 2009.

[31] The respondent's cost of effecting access with his children could be considered in another context. It is not unusual for the court when concluding parenting provisions (custody and access) to require both parties to share in the cost of reasonable and appropriate access between the children and the access parent.

J.