

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Muise v. Fox, 2011 NSSC 258

Date: 20110630

Docket: SFH MCA 075135

Registry: Halifax

Between:

Margaret Elizabeth Muise

Applicant

v.

Leonard Walter Fox

Respondent

Judge: The Honourable Justice Elizabeth Jollimore

Heard: June 21, 2011

Counsel: Joyce Ruck De Peza on behalf of Pegi Muise
Cheryl Arnold on behalf of Leonard Fox

Introduction

[1] Pegi Muise and Leonard Fox have two sons, Colton and Zachary. The boys live in a shared parenting arrangement which resulted from their parents' agreement. While Ms. Muise and Mr. Fox were successful in resolving this most important issue of how their sons would be raised, they weren't able to resolve Ms. Muise's claims for interim maintenance for herself and the boys, so I am to determine those claims. These claims are pursuant to the *Maintenance and Custody Act*, R.S.N.S. 1989, c. 160, sections 3(2) and 9.

[2] Section 3A(1) of the *Maintenance and Custody Act* dictates that I am to give child maintenance applications priority over spousal maintenance applications, so I will deal with child maintenance first.

Child maintenance

[3] In dealing with Ms. Muise's application for interim child maintenance, I'm governed by the Supreme Court of Canada's decision in *Contino v. Leonelli-Contino*, 2005 SCC 63. That decision was written in the context of the *Divorce Act*, R.S.C. 1985 (2nd Supp.), c. 3 and section 9 of the *Federal Child Support Guidelines*, SOR/97-175, but its reasoning is equally applicable to the families governed by the *Maintenance and Custody Act* and its *Child Maintenance Guidelines*, N.S. Reg. 53/98.

[4] Ms. Muise has provided a Statement of Income, a Statement of Expenses and a Statement of Special or Extraordinary Expenses for the boys. Mr. Fox has provided a Statement of Income and a Statement of Expenses. Each parent has provided a Statement of Property.

Step one: section 9(a)

[5] The first step of my analysis is identified at paragraph 44 of *Contino v. Leonelli-Contino*, [2005 SCC 63](#) as determining a simple set-off between the maintenance that each parent would pay the other pursuant to the applicable table.

[6] Mr. Fox argues that I should determine Ms. Muise's income to include the money she receives from all sources: social assistance payments, Canada Child Tax Benefit payments and HST Credit payments.

[7] I reject Mr. Fox's argument. Section 9(a) of the *Child Maintenance Guidelines* requires that I determine the amounts "set out in the applicable tables for each of the parents". The tables are applied to each parent's annual income and annual income is determined according to sections 16 to 21 of the *Child Maintenance Guidelines*. In particular, section 16 says a parent's annual income is determined using the sources of income listed under the heading "Total Income" in the T1 General form issued by the Canada Revenue Agency and adjusted in

accordance with Schedule III. The *Child Maintenance Guidelines*, in section 1, adopt Schedule III of the *Federal Child Support Guidelines*. Section 4 of the *Federal Child Support Guidelines* instructs me to “[d]educt any amount of social assistance income that is not attributable” to Ms. Muise. While Ms. Muise receives social assistance income, no amount has been identified that is not attributable to her, so I make no deduction.

[8] Ms. Muise receives the Canada Child Tax Benefit and the HST Credit. These are not sources of income under the “Total Income” heading on the T1 General form. In determining Ms. Muise’s income, I am only to consider her social assistance payments of \$834.00 each month. Her annual income is \$10,008.00 and her monthly child maintenance payment is \$61.00.

[9] Mr. Fox’s annual income is \$66,456.00, so his monthly child maintenance payment is \$937.00.

[10] The set-off amount is \$876.00.

[11] This set-off amount has no presumptive value. According to Justice Bastarache at paragraph 49 in *Contino v. Leonelli-Contino*, 2005 SCC 63, the value of the set-off is bringing my focus on both parents’ contribution, measuring each parent’s fixed and variable costs so I can make adjustments to consider the increased costs attributable to shared custody and, then, further adjustments to ensure “the final outcome is fair in light of the conditions, means, needs and other circumstances of each spouse and child for whom support is sought.”

Step two: section 9(b)

[12] The second step of my analysis involves taking into account any additional costs that arise by virtue of shared custody. This requires me to consider the exact nature of the boys’ shared parenting arrangement.

[13] The shared parenting arrangement is one where Colton and Zachary are with each parent for two weekdays each week and from Friday afternoon until Monday morning on alternate weekends. During the school year, Ms. Muise supervises the boys after school every weekday from approximately 2:15 until 6:30. This summer, since an injury prevents her from working, the boys will be with her every weekday, including from 7:30 a.m. until 6:30 p.m. on days when they are in their father’s custody. Throughout these times, she’ll be providing meals for the boys in addition to paying whatever other costs might be incurred. I have no evidence of what this will entail. This arrangement means Mr. Fox doesn’t need to pay for child-care.

[14] Mr. Fox says his monthly expense for groceries is \$600.00 while Ms. Muise claims a monthly expense of \$350.00 for groceries. I would not expect that Ms. Muise’s grocery expense would continue to be less than Mr. Fox’s when she is providing the boys with more than half their meals.

Step three: section 9(c)

[15] At paragraph 68 of Justice Bastarache's decision he tells me that section 9(c) vests me with "a broad discretion for conducting an analysis of the resources and needs of both the parents and the children" and reminds me to be especially concerned with the children's standard of living in each household and each parent's ability to manage the costs of maintaining the appropriate standard of living.

[16] At paragraph 51 of his reasons in *Contino v. Leonelli-Contino*, 2005 SCC 63 Justice Bastarache says that "one of the overall objectives of the *Guidelines* is, to the extent possible, to avoid great disparities between households." While this comment was made in his remarks about section 9(a) of the *Guidelines*, it was in the context of explaining why I retain discretion to modify the set-off amount if, considering the parents' financial realities, the set-off would "lead to a significant variation in the standard of living experienced by the children as they move from one household to the other".

[17] Ms. Muise's Canada Child Tax Benefit and HST Credit income was not relevant to determining her income for child maintenance purposes. However, this income is relevant to my analysis of each parent's resources and the parents' and the children's needs pursuant to section 9(c) of the *Child Maintenance Guidelines*.

[18] The boys' shared parenting arrangement dates from May 2011. Until it began, Ms. Muise received a monthly Canada Child Tax Benefit payment \$643.00. She was the sole eligible recipient for this payment.

[19] Ms. Muise testified that her rent is paid by social assistance and she receives the remainder of \$214.00, which she uses to pay her power, phone and utilities. Her electricity costs \$100.00 each month while her telephone and cable bill is \$150.00 each month, so the money which remains after her rent is paid cannot pay these bills in full. Ms. Muise said that she uses the Canada Child Tax Benefit payment for food and clothing and it "puts gas in the car, pays the cable and internet". Her monthly food bill is \$350.00, clothing costs \$75.00 and gas costs \$320.00. Using all her available income (including her quarterly HST Credit payment), Ms. Muise isn't able to pay her expenses for rent, electricity, phone, cable, food, clothing and gas. Paying just these expenses leaves her with a monthly deficit of approximately \$55.00.

[20] Starting July 2011, an amendment to the definition of "eligible individual" contained in section 122.6 and an amendment to section 122.61(1.1) of the *Income Tax Act*, R.S.C. 1985 (5th Supp.), c. 1, will allow each individual in a shared parenting arrangement to receive child benefit and credit payments throughout the year. The Canada Child Tax Benefit will be calculated as if the child to whom the benefit relates is an eligible dependant and the recipient will be paid fifty percent of the benefits associated with the child each month.

[21] Ms. Muise's income will decrease as a result of these amendments. She will receive a monthly CCTB payment of \$321.50, a social assistance payment of \$834.00 and, on a monthly basis, \$83.33 as an HST Credit. Her total monthly income will be \$1,238.83. Paying her rent, electricity, phone, cable, food, clothing and gas expenses costs \$1,615.00, leaving her with a

shortfall of \$376.17 for just these few items. This shortfall exists without considering costs for any other expense.

[22] Mr. Fox has a current monthly income of \$5,538.00. Last year his income was \$72,265.00. The paystub he provided showed that he had earned \$18,566.00. The date on the paystub was illegible, but it is clear this was stub for the seventh of twenty-six pay periods. Extrapolating that earning level over a year suggests he may earn as much as \$68,959.00 this year. Mr. Fox claims he has monthly expenses of \$5,446.00 before his taxes are paid. He estimates that he pays income tax of \$1,531.00 and that he has a monthly deficit \$1,434.00 based on his stated earnings of \$5,538.00.

[23] Mr. Fox's Statement of Income was successfully challenged in a number of regards. He budgeted for monthly home renovations of \$1,000.00 and a car payment of \$150.00. He admitted he does not incur an expense for home renovations and that the car payment is a notional one, intended to reflect the cost he would have incurred to purchase a vehicle, if he had not used an inheritance to buy his vehicle. Mr. Fox claimed that his monthly heating cost was \$350.00, but on closer examination the amount was actually \$300.00. Mr. Fox indicated a monthly expense of \$250.00 for Canada Pension premiums and \$97.00 for Employment Insurance premiums. These amounts exceed the legislated premiums by approximately \$70.00 and \$35.00, respectively.

[24] Once I have adjusted Mr. Fox's Statement of Expenses to deduct expenses he does not actually incur (home renovations and the car payment) and to replace his heating cost, CPP and EI premiums with actual amounts, his expenses are reduced by \$1,305.00 each month and his monthly deficit (after payment of his income taxes) is \$134.00.

[25] Mr. Fox's \$134.00 deficit exists where he budgets for a number of expenses that Ms. Muise does not have (property insurance, water, holidays, pension, medical and long-term disability insurance) and expenses she cannot afford such as school supplies, children's activities and allowances, laundry, household supplies and toiletries, and car insurance, to name a few.

[26] It is artificial to compare the Statements of Expenses filed by Ms. Muise and Mr. Fox, since Ms. Muise's income simply doesn't allow her to pay for the expenses she'd like to have. However, the comparison does make clear the amount Mr. Fox says he pays for certain expenses and the amount that Ms. Muise would like to dedicate to similar expenses though she cannot. The comparison is made in the table below.

Category	Ms. Muise's budget	Mr. Fox's budget
Food	350.00	600.00
Toiletries and household supplies	50.00	200.00
Clothing	75.00	200.00
Laundry and dry-cleaning	20.00	100.00
Christmas, birthdays, events and gifts	100.00	350.00
Holidays		100.00

Entertainment	60.00	50.00
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[27] I start by considering the boys' direct costs which the parents have itemized. Ms. Muise allocated \$158.33 for their sports, \$20.00 for their school supplies and \$100.00 for their allowances and activities. There are amounts she cannot afford to pay. Mr. Fox allocated \$20.00 for school supplies, \$20.00 for allowances and activities and, as I've said, he actually paid the boys' hockey and soccer costs. The annual expense of \$1,900.00 for hockey and soccer is actually paid by Mr. Fox, though he doesn't show the expense on his Statement of Expenses.

[28] Because Ms. Muise's income is so low, she has not been able to take advantage of the Children's Fitness Tax Credit. As a non-refundable tax credit, the amount paid for a child's fitness activities is offset against the income taxes of the parent with whom the child resides. Since Ms. Muise doesn't pay income tax, the credit was of no value to her.

[29] While Ms. Muise hopes to spend \$1,200.00 for gifts and parties for the boys each year, Mr. Fox testified that he spends \$1,500.00 at Christmas, between \$300.00 and \$500.00 on each boy's birthday, between \$1,000.00 and \$1,500.00 at Easter and \$100.00 on each boy for grading. This totals to an approximate annual expenditure of \$3,750.00 for the boys. Mr. Fox spends additional amounts on gifts for his extended family.

[30] The set-off amount calculated pursuant to section 9(a) is \$876.00. This amount would be sufficient to allow Ms. Muise a level of spending equivalent to Mr. Fox's for groceries, clothing and school supplies. It would leave her with approximately \$480.00 to pay household costs not financed by her other income, such as expenses for toiletries and household supplies, laundry, car insurance and maintenance, haircuts and prescriptions while leaving less than \$160.00 each month for gifts and entertainment. At this point of my analysis, it appears that the set-off amount on its own isn't sufficient to allow her to afford the standard of living that is available at Mr. Fox's home.

[31] I return to Justice Bastarache's comments:

- (a) be especially concerned with the children's standard of living in each household and each parent's ability to manage the costs of maintaining the appropriate standard of living (at paragraph 68 in *Contino v. Leonelli-Contino*, 2005 SCC 63;
- (b) shared parenting may not result in any saving for Pegi Muise (at paragraph 54 of *Contino v. Leonelli-Contino*, 2005 SCC 63); and
- (c) "one of the overall objectives of the *Guidelines* is, to the extent possible, to avoid great disparities between households" at paragraph 51 in *Contino v. Leonelli-Contino*, 2005 SCC 63.

[32] I have determined the set off amount doesn't allow Pegi Muise to replicate the lifestyle which is available to the boys at their father's home. Ms. Muise asks that I order Mr. Fox to pay child maintenance of \$900.00 each month. To ensure that each parent has the ability to absorb

the costs required to maintain the appropriate standard of living in these circumstances, I do order that Mr. Fox pay interim child maintenance of \$900.00 per month to Ms. Muise and, in addition, that he continue to pay the boys' expenses for their hockey and soccer. I make this order to ensure there is not a significant disparity of income between the boys' households.

Spousal maintenance

[33] Ms. Muise asks that I award her interim spousal maintenance of \$577.00. This is the "high" amount of spousal maintenance calculated by the *Spousal Support Advisory Guidelines*. Mr. Fox does not dispute Ms. Muise's need for assistance. He argues that he cannot afford to pay spousal support once he has contributed to his sons' maintenance and their sports costs.

[34] This is an appropriate case for spousal maintenance. Mr. Fox does have the ability to pay, though it will require him to budget his expenditures more conservatively than he has in the past.

[35] Mr. Fox is paying more child maintenance than provided for by section 3 of the *Child Maintenance Guidelines*. As well, he supports his sons while they reside with him. In order that he may do this, he cannot pay spousal maintenance in the amount sought by Ms. Muise. I order Mr. Fox pay spousal maintenance of \$300.00 each month to Ms. Muise. I specifically note section 3A(2) of the *Maintenance and Custody Act*: the amount of maintenance I am ordering for Ms. Muise is less than it otherwise would have been as a result of giving priority to child maintenance. As a result, any subsequent reduction or termination of child maintenance shall constitute a change of circumstances for the purposes of an application to vary in respect of Ms. Muise's maintenance.

[36] Maintenance payments shall be paid on the first of each month. My decision is being released on June 30 which makes it extremely difficult for Mr. Fox to make his first payment on July 1. His July 1 payment may be made before July 15 and, beginning on August 1, his maintenance payments shall be made on the first of the month.

Elizabeth Jollimore, J.S.C. (F.D.)

Halifax, Nova Scotia