Date: 20011106
Docket: 1201-39179P

IN THE SUPREME COURT OF NOVA SCOTIA
[Cite as *MacDonald v. MacDonald* , 2001 NSSC 158]

BETWEEN:

GORDON E. MACDONALD

Petitioner/Respondent

and

NONA CATHERINE MACDONALD

Respondent/Applicant

D E C I S I O N

HEARD BEFORE:	The Honourable Justice John M. Davison
PLACE HEARD:	New Glasgow, Nova Scotia
DATE HEARD:	September 18, 2001
DECISION:	November 7, 2001
COUNSEL:	Milton J. Veniot, Q.C. for the Petitioner/Respondent
	Ian H. MacLean for the Respondent/Applicant

DAVISON, J:

[1] This is an application to vary the terms of a corollary relief judgment issued December 15, 1987 as it relates to child support. The children are Matthew Gordon Earl MacDonald, born on June 15, 1979 and Joshua Joseph MacDonald, born on January 8, 1981. The corollary relief judgment provided for basic monthly child support of $800 per month. This was subsequently changed to child support of $1,000 per month. On May 1, 1997 the parties signed an agreement to the effect Gordon E. MacDonald (the father) pay to Nona Catherine MacDonald (the mother) the sum of $1,028 per month for child support.

[2] The application was made under s. 17 of *The Divorce Act* 1985 as amended in 1997. Relevant portions of *The Divorce Act* are as follows:

> 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.
>
> ...
>
> Factors for child support order
>
> (4) Before the court makes a variation order in respect of a child support order, the court shall satisfy itself that a change of circumstances as provided for in the applicable guidelines has occurred since the making of the child support order or the last variation order made in respect of that order.
>
> ...
>
> Guidelines apply
>
> (6.1) A court making a variation order in respect of a child support order shall do so in accordance with the applicable guidelines.

[3] In *Willick v. Willick*, [1994] 3 S.C.R. 670 the Supreme Court of Canada stipulated that an application to vary child support under s. 17 of the *Divorce Act 1985* requires the applicant to show a material change of circumstances.

Since the amendments to the *Divorce Act* in 1997, the variation order shall be, according to s. 17 (6.1), in accordance with the Guidelines. Section 14 of the Guidelines states that which is a change in circumstances under s. 17(4) of the *Act*. Section 14 reads:

Circumstances for variation

14. For the purposes of subsection 17(4) of the Act, a change of circumstances is

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

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

(c) in the case of any order made May 1, 1997, the coming into force of section 15.1 of the *Act*, enacted by section 2 of chapter 1 of the Statutes of Canada, (1997).

[4] The amendments to the *Divorce Act* in 1997 and the Guidelines are deemed to be, by s. 14(c) of the Guidelines, a material change in the circumstances.

[5] The sons have been living with the mother since the divorce in 1987. Matthew, who is now 22 years of age, is in his final year of a two-year business program at the University College of Cape Breton. It is his intention to return to his studies in the autumn of 2002 to enroll in a Masters of Business Administration program which will take one or two years. In September, 1997 he commenced a two-year engineering diploma program at the Nova Scotia Agricultural College which turned out to be an unwise choice because he lacked interest or aptitude for this field of study and discontinued those studies in January 1998. In September 1998 he enrolled in a one-year business related program at the Nova Scotia Community College in Stellarton, and this was followed by a second one-year business program at the Community College from which he graduated and received the Governor General's bronze medal for the highest academic standing in the graduating class.

[6] Joshua is 20 years of age and is starting his third year at Dalhousie University in a Bachelor of Science program. It is alleged that his marks for the first two years "were quite good, but the results of the 2000/2001 winter term were disappointing to put it mildly". He has three years left to complete his Bachelor of Science program. It is the position of the father that he will continue to support Joshua as a child of the marriage, but desires to pay the child support directly to Joshua and not to the mother.

CHILD OF THE MARRIAGE

[7] One issue raised by the father is that Matthew is no longer a "child of the marriage". A child of the marriage is defined in para. 2 of *The Divorce Act* as follows:

> Definitions
>
> 2. (1) In this Act,
>
> "child of the marriage" means a child of two spouses or former spouses who, at the material time,
>
> (a) is under the age of majority and who has not withdrawn from their charge, or
>
> (b) is the age of majority or over and under their charge but unable, by reason of illness, disability, or other cause, to withdraw from their charge or to obtain the necessaries of life;

[8] The amendments to the *Act* in 1997 changed the definition which formerly referred to a child in relation to 16 years of age.

[9] It is the position of the father that Matthew ceased to be a child of the marriage when he finished his fourth year of post secondary studies. Counsel makes reference to a number of authorities with a view to supporting that submission, but the Nova Scotia Court of Appeal has clearly set out a number of factors to assist trial judges in dealing with this question in *Martell v. Height* (1994), 130 N.S.R. (2d) 318. Freeman J.A. stated at p. 320:

> [7] It is clear from the various authorities cited by counsel that courts recognize jurisdiction under s. 2(1) of the Divorce Act to hold parents responsible for children over sixteen during their period of dependency. How long that period

> continues is a question of fact for the trial judge in each case. There is no arbitrary cut-off point based either on age or scholastic attainment, although as these increase the onus of proving dependency grows heavier. As a general rule parents of a bona fide student will remain responsible until the child has reached a level of education, commensurate with the abilities he or she has demonstrated, which fit the child for entry-level employment in an appropriate field. In making this determination the trial judge cannot be blind to prevailing social and economic conditions: a bachelor's degree no longer assures self-sufficiency.

[10] A stipulated time period is a matter of discretion, and the court has to consider the limitations of a bachelor's degree as a level of education to support the self-sufficiency of the student. In this case it is clear, and I find that Matthew has proved to be an excellent student, and he is applying himself towards attainment of an education and the father should remain responsible to assist Matthew until he has "reached a level of education commensurate with the abilities he ... has demonstrated, which fit the child for entry-level employment in an appropriate field." I would find that Matthew would remain within the definition of "child of the marriage" until after his undergraduate degree is attained and after he pursues for one or two years his Masters of Business Degree unless there should exist in that time period a material change of circumstances. It is my finding from the evidence he has taken the "right path" and is diligently pursuing his education with a view to attaining appropriate employment. Both parents should provide child support.

[11] There is nothing in the 1997 amendments to the *Act* or the Guidelines which detract or change the nature of the comments of the Nova Scotia Court of Appeal in *Martell v. Height (supra)*.

RETROACTIVITY

[12] It is the position of the father that there should be no variation of the maintenance order behind the date the order is made. Counsel for the father refers to authorities which decide that no order made should be prior to the date of the commencement of the variation application unless there are exceptional circumstances to justify it. Counsel goes further and submits that any modification in child support should only be payable from the date of the order by reason of what is said to be a lack of diligence on the part of the mother in pursuing this application and supplying information to the father.

[13] The mother testified at the hearing and expressed the view that it was her desire that the court should effect the changes by retroactivity to May of 1997. It is not clear on what basis she suggested this date, but counsel submit that the father admitted underpaying child support for a period of time and the affidavit of the mother suggested that in about 1996 there were

discussions between the parents about education expenses and that the father offered to give the mother $14,292 to compensate for the fact the support payments that he was making were lower than he would probably be ordered to make by a court.

[14] The Courts of Appeal in British Columbia and Alberta have determined that there should be no order made which would set the changes in the previous order effective prior to the date of the filing of the variation application unless there are exceptional circumstances to justify it. Retroactivity is available as an alternative to the court pursuant to s. 17(1) of the *Act* and counsel have referred to *Ennis v. Ennis* (2000), 5 R.F.L. (5th) 302, a decision of the Alberta Court of Appeal to which I make extensive reference to comments commencing at p. 312:

> 28 The British Columbia Court of Appeal undertook an exhaustive review of the jurisprudence with respect to retroactive orders in L.S. v. E.P., (1999), 175 D.L.R. (4th) 423 (B.C. C.A.). The court considered a number of policy concerns regarding the discretion to award retroactive maintenance. One of these was unfairness to the payor parent. The court stated at 438:
>
> > In the context of an application for retroactive child maintenance, the concern is that the parent paying support may be treated unfairly by a sudden demand to pay support for a period which that parent reasonably thought was past.
>
> The court went on to conclude at 438:
>
> > It is not surprising then that the "norm" in awarding retroactive child maintenance is to restrict the backdating of the maintenance order to the date of the application for the order: see Headrick v. Headrick (1969), 8 D.L.R. (3d) 519 (Ont. C.A.), per Laskin J.A., cited with approval in Pritchett v. Pritchett, [1996] B.C.J. No. 2704, (16 December 1996), New Westminster D026544 (S.C.).
>
> 29. The "norm" of making maintenance orders retroactive to the date of the initial application is also the law in Alberta. In MacMinn v. MacMinn (1995), 174 A.R. 261 (C.A.), the Court stated at 266:
>
> > Certainly, from the time an action has commenced, the custodial parent has evinced an intention to pursue his or her claim against the non-custodial parent. The fact that it may take one or two years to bring an

> action to trial in no way diminishes the obligation of the non-custodial parent for the support of his or her child.
>
> 30. An order directing payment of child support in accordance with the Child Support Guidelines should generally be backdated to the date of filing of the application. Once notice of the intention to seek maintenance in accordance with the Guidelines is made known in this concrete fashion, there is no unfairness to the non-custodial parent. This is particularly so since the implementation of the Child Support Guidelines in May of 1997. Today, it is a relatively simple matter for a parent to look at the appropriate table and determine the amount of child maintenance payable. Where, as here, the parent does not seek an exemption from the Guidelines, there is no just reason to deprive the child of the money owed from the non-custodial parent.

[15] In my view there are no extraordinary circumstances in this case which would dictate effecting the change to a date prior to February 4, 2000 the date this application for variation was filed. To do so would effect an extraordinary demand on the father at this date.

[16] Subject to any credits to which the father is entitled by reason of his payments toward educational expenses I find that there is no basis in the matter before me to direct that order be effective as of the date of the order.

[17] The mother in her affidavit states that when the children were going to Community College, they made their home with her and in university, they used her home as their “home base” and spent Christmas and the school break with her. There were periodic visits during the school term to her. She has not charged the boys board or rent or required that they contribute to the purchase of groceries.

[18] The mother attested to the fact that when the children need financial assistance, she is the one they call upon for assistance. She says that Joshua is a poor money manager, and that since the father started making support payments to him, he goes through the money quickly and calls on the mother for further support when he needs money.

[19] In her affidavit, the mother says that she believes that the child support payments paid by the father were reduced from $1,028 per month to $514 per month for the period from September 1999 until September 2000 and that during that period the father gave Joshua $12,000 for educational expenses. She states that in September 2000 the father started paying the boys directly at the rate of $514 per month for each boy and that as of July 2001, he stopped making payments to or for Matthew but continues to pay Joshua $514 per month. It would appear from the evidence of the mother

that she believes that the father paid Matthew $15,000 in 1997 and $12,000 to Joshua in 1999.

[20] In support of the submission that the increase in payments should increase as of the date of the order, the father maintains in his affidavit that the mother never quantified a claim for him which would assist him in making assessment of financial aspects of the claim. He states in his affidavit that there was no activity on the file from October 9, 2000 to May 7, 2001 and that his solicitor requested information and responses from the mother on five occasions and states that at this point "the ball was in my former wife's court".

[21] It seems to me, and I say with respect, that the ball is at all times in the court of both parents, and as stated by the Alberta Court of Appeal in *MacMinn v. MacMinn (supra.)*, any delays on the part of either parent does not diminish "the obligation of the non-custodial parent for the support of his or her child". It would have been clear to the father he was not contributing child support to the extent required by the Guidelines and in my view, notwithstanding any delay in the application, support for the child should have increased. The best interest of the children prevails, and I find that any change in the child support provisions should be effective as of the date the application for variation was filed - February 4, 2000 but subject to factors and credits referred to in these reasons which relate to contributions both parents have made to child support, particularly relating to educational expenses.

INCOME OF THE PARTIES

[22] The mother is employed with Michelin North America (Can.) and her earnings have been:

1998	$39,694
1999	41,841
2000	44,673

[23] The father is a dentist and has formed, with two other dentists, a corporation entitled Shiretown Dental Incorporated. His income as set out in line 150 of his income tax return has been:

1998	$103,324
1999	103,476
2000	114,666

There was filed the affidavit of Brian Craig, a chartered accountant, who was asked to adjust the father's income in accordance with s. 16 and schedule III of the Guidelines. He did so as reflected in exhibit "A" of his affidavit which reads:

GORDON E. MACDONALD

"ADJUSTED INCOME"

	Sched III Ref.	1998	1999	2000
Total income per line 150		$103,324	$103,476	$114,668
Add: -Non taxable portion of capital gains	Sec 16.6	981	2,781	3,574
Deduct: -Gross up of dividends from taxable Canadian corporations	Sec 16.5	(2,745)	(190)	(5,149)
Reserve inclusion with respect to final year of business	Sec 16.10	(24,025)	-	-
-Carrying charges & interest	Sec 16.8	(1,380)	(2,919)	(3,507)
Adjusted income		$76,155	$103,148	$109,586

[24] Section 16 of the Guidelines reads:

> 16. Subject to sections 17 to 20, a spouse'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 Customs and Revenue Agency and is adjusted in accordance with Schedule III.

The adjustments to income under Schedule III used by Mr. Craig read:

> **Dividends from**
>
> **taxable Canadian**
>
> **corporations**
>
> **5.** Replace the taxable amount of dividends from taxable Canadian corporations received by the spouse by the actual amount of those dividends received by the spouse.
>
> **Capital gains and**

capital losses

6. Replace the taxable capital gains realized in a year by the spouse by the actual amount of capital gains realized by the spouse in excess of the spouse's actual capital losses in that year.

. . .

Carrying charges

8. Deduct the spouse's carrying charges and interest expenses that are paid by the spouse and that would be deductible under the *Income Tax Act*.

Additional amount

10. Where the spouse reports income from self-employment that, in accordance with sections 34.1 and 34.2 and the *Income Tax Act*, includes an additional amount earned in a prior period, deduct the amount earned in the prior period, net of reserves.

[25] I am prepared to accept the figures of Mr. Craig except the additional amount of $24,025 as I do not consider the past income reasonably reflects the father's income in 1998. This would change the adjusted income figure for 1998 to $100,180.

[26] Section 17(1) of the Guidelines states:

Pattern of income

17. (1) If the court is of the opinion that the determination of a spouse's annual income under section 16 would not be the fairest determination of that income, the court may have regard to the spouse's income over the last three 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.

[27] In the year 2000 the father received a $20,000 dividend from Shiretown Dental Incorporated. It is alleged that the dividend from the company will not be repeated, but, except for a blanket statement in the father's affidavit and the reference in his *viva voce* evidence, there was no evidence to support the statement and there were dividends from corporations reflected in the tax returns for 1998 and 1999. I am not prepared to find the dividends from Shiretown Dental Incorporated are unusual.

[28] It is my view that the average of the income figures over three years, using $100,180 for 1998, is a more fair and reasonable basis for fixing income for child support. The income from his dental practise increased by fifty percent in 1999. I fix the income for the father for child support purposes at $104,304 rounded to $104,300. I fix the income for the mother at $41,673, rounded to $41,600. Under the table in the Guidelines the father would be required to pay $1,288 per month.

CALCULATION OF CHILD SUPPORT

[29] At this point I want to deal in a general way with the number of factors I have to consider in arriving at a fair and appropriate figure for child support and in particular to that which each parent should contribute to the education costs of the sons. I have made calculations which can only be a guide by reason of the unknown quantum of support given by the mother over the last several years. The calculations are illustrative and not intended to be a precise determination of child support. The object is to achieve a sum which is in the best interest of the children and a sum which is, to the extent possible, fair and reasonable to both parents.

[30] Consideration is to be given to the claim for add-on expenses for post secondary education. Consideration is to be given to any deduction from those expenses by reason of any payments made by the father, in the past, for the education costs of his sons and to any deduction of any contributions of the child pursuant to s. 7(2) of the Guidelines. There are other factors to be considered.

[31] The father gave Matthew $15,000 in September of 1997 and $12,000 to Joshua in September 1999 at the start of their university studies. The payment for Joshua was made directly to Joshua who, according to the mother, is a poor manager of finances.

[32] The agreement dated May 27, 1998 increasing child support payments to $1,028 per month was based on the father's annual income, at that time, of $72,000. Counsel points out these payments continued from May 1, 1997 to August 1999, but from September 1999 to September 2000 the rate of payment was reduced to $514 per month. The reduction was based on the fact that Joshua had received $12,000 in September 1999 from his father. From October 2000 to June 2001 the father paid each son $514 a month and continues to pay that amount to Joshua. He has made no payments to Matthew since June 2001.

[33] On the amount to be paid under the tables in the Guidelines, it would appear that since February 2000 the father is short $5,720 on payments to be made to and including November 2001. It would also appear that with the failure to pay child support to Joshua for one year, the contribution to his educational expenses in September 1999 was reduced from $12,000 to approximately $6,000.

[34] There is a deficit in the child support payments to Matthew over the last five months of about $3,220. To add this figure to the deficit calculated from the date of the application leaves a total deficit of $8,940, rounded to $9,000. This reduces the sum given to Matthew in September 1997 for education purposes to $6,000.

[35] I accept the evidence of the mother with respect to the financial contributions she made to her sons. While the boys resided at universities, they made use of her home as their "home base" at Christmas, school breaks and periodically throughout the school year. The boys spent the summer at the mother's home which is a period of 4 ½ months. She maintains a car for the sons and pays maintenance and insurance costs on the vehicle. She states in her affidavit repair expenses this year cost $1,475.51 and insurance premiums were $873. She has purchased bedding, towels, dishes, pots/pans and the first grocery order for each son. The mother states when the boys need financial assistance, it is she that advances that assistance. Her affidavit indicates she contributed to Joshua's education expenses $4,500 in the year 2000 and $3,000 in 2001. She borrowed $3,000 from a bank and contributed that to Matthew in September 2000. I am satisfied from her evidence she has been the source of financial assistance to her sons to an extent greater than that advanced by the father.

[36] In determining the process of child support in the future I would adopt the system advanced in *Simpson v. Palma*, [1998] S.J. No. 581 where a judge of the Family Law Division of the Saskatchewan Court of Queen's Bench directed table amounts payable to the mother be advanced when children who were students of university lived with the mother during summer months and that the parents pay to the children their proportionate share of s. 7 post secondary education amounts when the children are living at the university.

[37] From the evidence I determine that in the past Matthew and Joshua spent five months with their mother and her husband considering the summer vacation, Christmas vacation and study breaks. If this pattern should

continue, I would direct the father to pay the table amount of $1,288 a month to the mother while the two children live in the residence of the mother.

[38] During the time the sons are attending university and residing in residence each parent should submit directly to the child his and her proportionate share of the post secondary education expenses.

[39] I have considered the lump sums given by the father toward education expenses of the sons, the fact the father is responsible for the large proportion of education expenses, the failure of the father to submit payments to the mother commensurate with amounts set out in the tables to the guidelines and my finding that for the most part the mother has born the major responsibility, financially and otherwise, with respect to the support of the children, I have made calculations and assess that the most fair and reasonable manner to consider matters retroactively is to direct the father to pay the mother forthwith the sum of $3,000.

[40] There are arrears owing to the sons for s. 7 post secondary education expenses for three months - September 2001 to November 2001. These arrears should be paid to the sons by each parent according to their proportionate share.

[41] What are the appropriate post secondary education expenses? Joshua's education expenses are set out in his mother's affidavit and the expenses of Matthew are in his own affidavit.

[42] Joshua's expenses for 2000 and 2001 are said to be:

Expense	2000	2001
Tuition	$5,500	$5,800
Books	500	500
Residence	3,565	3,600
Transportation	350	380
Meal Plan	2,275	4,800
Computer parts	600	
Clothing	2,100	
Entertainment	200	200

There were no scholarships offered to Joshua, and he secured a student loan in 2000 of $5,695 and the sum of $6,700 in 2001. He said his mother contributed $4,500 in 2000 and $3,000 in 2001. From summer employment he earned $3,891 in 2000 and $9,725 in 2001.

[43] Matthew's expenses are said to be as follows:

Expense	2000	2001
Tuition	$4,282	$4,592
Books	800	800
Apartment or Residence	5,950	3,120
Transportation	500	500
Clothing, food	5,000	5,000

Matthew earned $3,008 for summer employment in 2000 and $6,600 for summer employment in 2001. He had a scholarship in 2000 worth $1,000 and contributed $1,200 to his expenses from his employment in 2000. He had a student loan of $9,062 in 2000. In 2001 he did not receive a scholarship, but obtained a student loan of $7,875. He contributed $4,000 from his employment income.

[44] Matthew was cross examined on his affidavit and admitted to an error when he made reference to a separate item for food which expense was included in his residence expense. I find that the figures advanced with respect to both sons to be reasonable except the amount attributed to food and clothing, and I will remove those expenses from the calculations. In my view it would be fair to use $11,000 as the figure for both sons in calculating the relevant annual educational costs.

[45] I agree with counsel for the father that there exists a duty on the students to take all reasonable steps to secure employment during the summer months. It would not be my view to extend this obligation to seek employment during the period of studies. It is important for these students to devote their time to their studies during that period. Matthew and Joshua have been fortunate in securing employment which has rendered a good wage. I would set $6,000 as an appropriate wage in the summer months out of which $4,000 be paid by the sons toward educational expenses.

[46] The question whether student loans should be deducted depends on the circumstances. If the parents are of modest means, a student loan may be the appropriate source of funds. In this case the parents are making over $150,000 a year, and I do not see that the sons should be required to take on the responsibility of paying for a loan. Certainly the contribution of the parents should not be reduced by the amount of the loan.

[47] The amount of scholarship normally should be deducted from the expense figure, but no scholarship was received for 2001, and I will not grant any deduction.

[48] An annual expense of $11,000 less income of $4,000 leaves a net expense of $7,000 or $1,000 a month from September to March inclusive. Based on an income proportion, the father should pay to each son $714.60 per month and the mother should pay to each son $285.40 each month. The arrears for the months of September to November 2001 should be paid with dispatch. The obligation of each parent would be reduced by amounts they have paid toward educational expenses this scholastic year.

SUMMARY

[49] The father shall pay the mother $3,000 forthwith. The father shall pay the mother $1,288 per month according to the tables in the guidelines for the period both sons live at home. If only one son lives at home, the father should pay the mother $804 in accordance with the tables.

[50] The father should pay to each son $2,143.80 representing his share of s. 7 post secondary education expenses for the months of September, October and November 2001. Representing the same period the mother shall pay to each son $856.20. Each parent is entitled to deduct, upon proof of payment, any sums they have paid the sons for the educational expenses for the year 2001-2002.

[51] There was a request that I reserve on the question of costs. Normally in matrimonial matters the parties pay their own costs, but I will consider any submissions on the issue.

J.