2001 Prothonotary's File No. 1206-003300/107586

IN THE SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION

BETWEEN:

GREGORY ANTHONY ROBERTSON

APPLICANT/RESPONDENT

- and -

TONI DELORENZO

RESPONDENT/APPLICANT

DECISION
Cited at 2002 NSSF9

HEARD **Before the Honourable Justice M. Clare MacLellan on March 3, 2001, June 12, 2001 and June 26, 2001.**

DECISION RENDERED: **November 30, 2001**

PLACE: **Sydney, Nova Scotia**

COUNSEL: **Lee Anne MacLeod-Archer for Gregory Robertson**
Theresa Forgeron for Toni Delorenzo

DECISION: MacLellan: J

FACTS:

1. The parties GAR and TFD were married on May 26, 1979.

2. The children of the marriage are LMR born 24 May, 1981 and TBR born 10 April, 1983.

3. The parties separated on May 15th, 1993.

4. A Separation Agreement purporting to settle all matrimonial matters was executed on the 30th day of August, 1993 provided:

(i) Parties agreed to a Joint Custody arrangement, defacto custody to the mother, TFD.

(ii) Visitation was specified..

(iii) Spousal support was waived.

(iv) Child support was set at $650.00 per month for the two children, payable by the father “so long as the children are either attending high school or an undergraduate program full time or a recognized Canadian university.”

(v) Assets and liabilities were divided.

(vi) TFD relinquished any claim she may have had in GAR’s apartment buildings jointly owned with his uncle, AA.

(vii) The parties were represented by counsel during negotiation of the agreement.

5. The Separation Agreement became a court order on August 30, 1993 pursuant to Section 52 of the Family Maintenance Act.

6. (i) The parties divorced on April 28, 1999.

(ii) The Corollary Relief Judgement chronicles the parties annual income at that time as $42,00.00 each from all sources.

(iii) The parties agreed to a “split custody” arrangement the older daughter residing with the father and the younger daughter with the mother.

(iv) The parties agree that no child support would be paid given the “split custody regime” and the equal income of the parties.

(v) Paragraph 10 of the Corollary Relief Judgement specified neither party would be required to calculate RRSP collapsed sums in income calculation. TFD was not required to calculate retroactive pay increase in income calculation. GAR was not required to calculate:

(i) pension overpayment,

(ii) a portion of a severance package for 1998; and

(iii) capital gains occasioned from the sale of an apartment building; as income for the purpose of determining child support.

7. (i) The Corollary Relief Judgement incorporates the Separation Agreement in

relation to division of assets.

(ii) The parties were represented by counsel through out the divorce.

(iii) Certificate of Divorce was granted May 31, 1999.

8. GAR filed an application for child support for the two daughters on September 23, 1999. GAR maintains TBR left her mother's residence in August 1999 when TFD moved to British Columbia. TBR lived with her father from August 3, 1999 to April 21, 2000 then lived with her mother in May 2000 and returned to her father's home in June 2000.

9. The parties were unable to agree on maintenance prior to TFD's departure for British Columbia. GAR advised TFD was unwilling to pay maintenance. TFD advised GAR would only accept maintenance in the quantum he specified.

10. GAR sought and obtained an ex-parte injunction on August 6, 1999 to preclude distribution of proceeds of sale of TFD's home until she made arrangements to support her daughters.

11. TFD sought to have the injunction rescinded which was granted on August 16, 1999 by consent. Costs in relation to this proceeding are to be dealt with by this Court upon completion of the variation hearing.

12. TFD secured a six month leave of absence from her position and moved to British Columbia

to continue a relationship with KM. The relationship did not thrive and TFD moved back to Nova Scotia in February 2000.

13. TFD paid no maintenance from August 1999 to July 2001. TBR returned to live with her mother in April 21, 2000. By the time the parties gave evidence in June 2000, TBR had moved in with her father GAR. The parties agreed she would live with each parent six months of each year. TBR lived with GAR for one week in June and returned to her mother TFD until October 31, 2000.

14. From the end of October 2000 to the end of June 2001, TBR continued to reside with her father. During this nine-month period, TFD did not pay child maintenance for either daughter.

15. TFD's income for 1999 was $33,565.75. Prior to her move her projected income for 1999 was $42,000.00. GAR's income increased to $47,000.00 in 1999. The increase was communicated to him on May 7, 1999 with an adjustment due retroactively to March 1999. TAR received a bonus in 2000 of $1,000.00 to bring his total annual income fro 2000 to $48,000.00. He did not receive a bonus in 1997, 1998 or 1999. He was unaware if he will receive a bonus for 2001.

16. TFD applied to vary the child maintenance provisions of the Corollary Relief Judgement on

June 22, 2000.

17. LMR attended Unversite de Sainte-Anne where she studied during the university term from September 1999 to April 2000, and September 2000 to April 2001. Her studies are to continue for the academic year 2001 - 2002.

18. TFD was ordered in July, 2001 to pay $323.00 per month interim maintenance based on an annual income of $38,600.00 for TBR until post-trial submissions were completed and a decision rendered. No order was granted for LMR at that time as quantum was in dispute. LMR is 20 years old.

19. LMR gave evidence of these expenditures for her first year and endorsed Exhibit #1 as an accurate summary of her expenses totalling $13,443.31 for her first year in university. Her stated expenses for tuition, meal plan, student union fee, books, sports fee, and university fee equal $8,774.75.

The complete costs for 1999-2000 are:

Expenses:

Fee		$ 30.00
Tuition	3,869.00	
Cafeteria		2,404.00
Sport		60.00
Association fee		111.75
Book		300.00
Spending money ($250 x 8 months)	2,000.00	
Residence		2,000.00

	$10,774.74	$10,774.74

The total is $10,774.74, not $11,028.75 as claimed in **Exhibit #13.**

Extra Expenses:

Start up for college	$ 1,069.11	
Phone (5 Months)	536.80	
Oct & Nov Trip home	111.17	
Stock up for college (Walmart)	112.00	
Trip home for summer	127.15	
Shoes and jacket	165.51	
Feb & Mar (Walmart & Shoppers)	95.82	
Loan (48 x 4 months to date - interest)	192.00	
	$ 2,409.56	$ 2,409.56

Total Expenses: $13,438.31

Resources:

GIC (in both parents' names)	$ 2,101.20		
Province		800.00	
Scholarship		500.00	
Savings (earned $2,231.95)	925.00		
Loan (Credit Union)	5,000.00		
	$ 9,326.00		$ 9,326.20

Shortfall **$ 4,112.11**

20. LMR stated residence costs are $2,00.00 for 1999-2000 and $2,917.00 for next year as she plans to change her

residen

ce.

21. LMR's funding and expenses for university for 2000-2001 as presented by her father GAR and per **Exhibit 12** and **Exhibit 14** are:

Expenses Per CSL:

Tuition, books. Living and transportation	$11,122.00
Loan Interest	1,174.88
Spending	1,068.01
Phone	502.21
Start-up	949.73
Thanksgiving	543.40
X-Mas Travel	105.00
Jan-Feb Misc.	238.53
Year end Travel	165.88
	$15,869.64

Resources:

Bursary	$ 1,200.00
CSL	2,424.00
Savings	1,500.00

	5,000.00	
	$10,124.00	$10,124.00
Shortfall		**$ 5,745.64**

22. LMR believes she was not eligible for a student loan for the year 1999-2000. GAR advised that over and above all resources, LMR would need only $2,800.00 to finance her year; however, TFD would not contribute. It was GAR's wish to finance LMR's first year without a student loan. When GAR examined the possibility of a student loan, his inquiry was late and the response was negative. In any event, no application was made for funding to student loan that year.

23. TBR completed High School in June 2001. She plans to attend St. Thomas University in the fall of 2001. Her projected costs of education for that year are:

Tuition	$ 3,290.00	(Exhibit 12)

Obviously, there will be other costs associated with this year.

24. Her sources of income for college funding are:

GIC (in both names)	$ 2,257.00
Scholarship	500.00
Summer employment (Exhibit 12, page 9)	1,507.00

25. GAR seeks contribution from TFD for start up costs for TBR to start Grade 12. These costs include: $721.00 for her first two months in Grade 12 which is $266.00 in clothing, $100.00 for soccer related expenses and a sum for books plus $180.00 towards TBR's winter carnival. TFD paid for one formal dress as well.

26. GAR states the start up costs for LMR's first year were $1,061.00 which included clothes, a second hand fridge, groceries and toiletries.

27. GAR advised LMR is prudent with her money. She and he worked out a budget for her before she started university. When LMR buys clothes she buys them on sale. Her mother TFD believes LMR ought to have made better use of her graduation gifts of $600.00 and summer income of $2,231.95. LMR saved $925.00 for university in 1999-2000. GAR received the tax benefit for the two years LMR was in university.

28. With the exception of a GIC for both daughters for first year university, driver's education, sports equipment and some pocket money, the mother has not provided any financial support except when ordered by the court in July 2001 for TBR. She has provided gifts (and one or two gowns). As well, she supported TBR when TBR resided with her mother, and provided some of the transportation to and from university.

29. The parties disagree as to the nature of discussion of child support once TBR moved with her father and TFD left for British Columbia.

30. GAR advised he asked TFD to go over the children's costs but she was not prepared to

discuss the topic. TFD disagrees with this version and advised she told GAR she would discuss the matter once she relocated to British Columbia. In any event, no discussion took place and no support was paid for their child.

31. TFD advised that GAR did ask her for a share from the proceeds from the sale of her home ($14,400.00). TFD was not willing to meet this request and by her own evidence used this sum to pay loans, and for a down payment of $5,000.00 to purchase a house upon her return to Cape Breton and to lease a car.

32. TFD she believed TBR would reside with her once TFD returned to Cape Breton. TBR lived with her mother a total of six months from August 2, 1999 to July 2001.

33. TFD earned as follows:

1998 Employment and EI	$42,000.00
1999 Employment and EI	$33,662.00
2000 Employment and EI	$38,600.00

Her net income per week is $307.72 after compulsory and elective deductions are made. As

well she earns $56.00 per week as a nutritional lecturer; however, she is unsure how many lectures she will have per week. If she obtains the number of classes hoped for her annual income will increase to $41,100.00.

34. TFD has purchased a new home with a basement apartment which she has not been able to rent on a consistent basis. TFD advises she exists on her line of credit as she has difficulty making ends meet on her income.

35. She confirms that the parties had plans to support their daughters through college. The three apartment buildings and the Registered Education Plan were acquired to achieve that end. Two apartment buildings have been sold to finance litigation between the parties.

36. Parties agree they have little, if any, communication relating to their daughters. TFD advised she only learns of education paths after the course is selected. She believes she should be part of the decision making process from the onset if she is expected to contribute. However, TFD agrees she glanced at information given to her about St. Thomas and she did attend an information session.

37. TFD believes LMR should have saved more from her summer earnings. LMR earned $2,231.00 and saved $921.00. LMR spending money for the university year of $2000.00 is excessive in her mother's view. TFD believes he daughter should not have had a private

phone while living in residence.

38. TFD maintains the parents can not afford to have two children attend university away from home.

39. TFD admits she agrees in August 1999 to pay support if the proceeds of sale of her home were released and once she became employed in British Columbia; however she did not pay support. TFD was out of jurisdiction for a total of four months and out of the work force for six months. TFD did not find employment in British Columbia.

40. TFD paid $5,000.00 down payment on her house and $2,300.00 on lease for a vehicle upon her return to Cape Breton.

41. TFD does agree if TBR is at university away from home her health would require her to have her own room.

ISSUES/DECISION

45. I find there is a change in circumstances entitling a review of child support as meant by **Willick** v. **Willick**, (1994), 6 R.F.L. 4th, 161 as reviewed by Justice Goodfellow in **Marshall** v. **Marshall** , [1998] N.S.J. No 311

> 1. The court is not bound by the terms of a separation agreement as it relates to the position of the children.
>
> 2. Different considerations arise with respect to child support rights and obligations as compared to spousal support rights and obligations.
>
> 3. Child maintenance, like access, is the right of the child and cannot be extinguished or diminished by consent or agreement of the child's parents; or with respect to an application to vary as it relates to child support, Sopinka, J. at p. 169: "it must be assumed that as long as the provisions of the judgement of the Court stand un-reversed, this duty was carried out (s. 11(1)(b) and that at the time of the judgment it provided reasonable arrangements for the support of the children.

And also as p. 179:

> "therefore, in a variation proceeding, it must be assumed that, at that time it was made, the original child support order or the previous variation order accurately assessed the needs of children having regard to the means of the parents. At such, the correctness of the previous order must not be reviewed during the variation proceeding." s. 17(4)
>
> The statutory requirement for variation requires a material change in circumstances not reasonably anticipated at the time of entry to the agreement and the agreement of the parents offer strong evidence that adequate provision for the need of the children at the date of entering the agreement. Consequently, parents agreements for their children will continue to be given considerable weight.

46. Pursuant to restrictions placed on the income calculation of GAR in the Corollary Relief Judgement I find his income to be as follows:

1999	$47,00.00

2000	$48,000.00 (included $1000.00 bonus)
2001	$47,000.00 (bonus unclear)

47. TFD as well had income calculation restrictions in 1999 which cause her income by agreement to be less than the actual amount received if RRSP surrenders were calculated. Her income over the same time period is:

1999	$42,00.00 (Projected)
1999	$33,662.86 (actually earned)
2000	$37,033.93
2001	$38,584.00 (not including lecturing fees)
2001	$43,222.00 (per Tab 8 exhibit 15 YTD)
2001 (projected from lectures)	$ 4,638.00 ($2319.00 for 6 months X 2)

48. Given the fluctuating nature of the salary income evidence I selected the income according to the best evidence available. TFD wishes to calculate GAR's income to include sources excluded by the terms of the Corollary Relief Judgement.

49. Similarly in relation to college expenses actually incurred for LMR, I selected those expenses according to the best evidence available. In future, college expenses

should be specified item by item with receipts attached. The entire budget can comprise one page with relevant supporting documents attached. The Court should not be given brochures from universities to shift through.

50. Calculations are further complicated by TBR's moves between household and TFD's move out of the jurisdiction without paying reasonable maintenance.

51. At the end of a two day hearing which took one year to complete, which was originally booked for one-half day, the movements of TBR appear to be as follows:

Point 1:

The Parties had agreed in April 1999 that they would have a joint custody arrangement with LMR with the father and TBR with the mother; no party was to pay maintenance for the other party due to the split custody regime and the equal income of the parties.

Point #2:

In June 1999, the mother decides to take a six month leave of absence to pursue a relationship she has with a gentleman in British Columbia. Her daughter does not wish to go to British Columbia. TMR moves in with GAR in August 1999.

Point 3:

(1) The father has both daughters from August 1999 to April 21, 2000 which

equals 9 months.

(2) Mother returns and daughter TBR lives with mother for the majority of the time from April 21 to November 4, 2000 (minus 1.5 weeks with father) TBR is with mother approximately six months.

(3) November 4, 2000 TMR moves with her father and remains there.

(4) LMR the oldest daughter has been in university since the fall of 1999. When not at university she resided with her father. 1999-2000, 2000-2001, 2001-2002.

(5) TBR, the younger daughter, finished high school in the early summer of 2001.

52. With the exception of: (1) jointly held GIC for both daughters; (2) occasional gifts, gowns, and a drive to university; (3) the time TBR actually resided with her mother; I find TFD did not provide any child support until July 21, 2001 when ordered to do so and no Section 7(e) support for LMR for the university years 1999-2000, 2000-2001, 2001-2002 and no Section 7(e) support for TBR for university year 2001-2002.

53. The pivotal time to begin assessment is August 1999. The parties worked out an arrangement in April 1999 which was changed materially in June 1999 when the mother planned to move to British Columbia and the father had custody of both daughters. The father had full care of both girls by August 2, 1999. Attempts to

work out finances failed and so the daughters and GAR were left to fend as best they could financially.

54. The financial situation became more critical due to GAR's wish to complete LMR's first year of college funding without a student loan. While this was laudable it was not possible for two people in two different homes a combined income of $100,000.00 one child in university and another child about to enter university.

55. The financial situation became more difficult when TFD left to go to British Columbia to pursue a relationship when she has no employment there. The nest egg she took to British Columbia and back to Cape Breton did not go to her children's needs.

56. I find as a fact that TFD was imprudent in her manner of move to British Columbia. Section 19(1) of the Child Support Guidelines provides as follows:

> **19(1) Imputing Income**: The court may impute income to a spouse as it considers appropriate in the circumstances which circumstances include the following:
>
> (a) the spouse is intentionally underemployed or unemployed other than where the undue-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.

57. In this case TFD pursued a lifestyle change that was not in her children's best interest. It would be hard for the parties to cover all university expenses for the

children if they had remained a couple. It became more difficult when they moved to separate homes and even more difficult when TFD suffered at least a $10,000.00 per annum loss to pursue her personal interest.

58. Even when TFD returned she failed to use all or part of her nest egg of $7,400.00 to help the children. This sum formed part of the proceeds of the, sale of her home, of $14,400.00 would have possibly served as her share of responsibility to guideline requirements and extraordinary expenses. These expenses take precedent over the purchase of a house or financing a new car. The law on this issue is set out clearly by the late Justice Pugsley in **Montgomery v. Montgomery,** [2000] N.S.J. 1 NSCA. Justice Pugsley commenced his review of Section 19 with an examination of the objectives of s.1 which provide:

> [para30] Any application of the provisions of the Guidelines must be made in light of the objectives set out in s. 1, which provide:
>
> 1. (a) to establish a fair standard of support for children that ensures that they continue to benefit from the financial means of both spouses after separation;
>
> (b) to reduce conflict and tension between spouses by making the calculation of child support orders more objective;
>
> (c) to improve the efficiency of the legal process by giving courts and spouses guidance in setting the levels of child support orders and encouraging settlement; and

> (d) to ensure consistent treatment of spouses and children who are in similar circumstances.

[para31] We are directed to the remarks of Judge Vertes of the Northwest Territories Supreme Court in Williams v. Williams (1997), 32 R.F.L. (4th) 23, where in dealing with the interpretation of s. 19(1) of the Guidelines he stated at 29:

> It seems to me that the use of the word "intentionally" implies a deliberate course of conduct related to the purpose of the Guidelines, i.e., the provision of support. The intentional under-employment must be for the purpose of undermining or avoiding the parent's support obligation. The court should not impute income in the absence of such a motive since to do so would impose onerous financial obligation on any parent who chooses to make a change in employment, for example, however bonafide. One may legitimately choose a career path with short-term pain for long-term gain. In such a case the child should benefit as the non-custodial parent's income eventually increase.

[para32] The appellant acknowledges that there has been an evolution in the law since *Williams v. Williams* as new fact situations arise. One such situation arose in *Hunt v. Smolis-Hunt* (1998), 39 R.F.L. (4th) 142 when Justice Johnstone of the Alberta Court of Queen's Bench concluded that s. 19(1)(a) of the Guidelines encompasses situations "where a payor recklessly disregards the needs of his children in furtherance of his own career aspirations" (p.178).

[para33] The appellant submits that there was no evidence before the Chambers judge that he was seeking either to frustrate or avoid his maintenance and support obligations, rather the change in employment arose from his desire to secure a type of employment which would be more satisfying to him, and which would, in the long run, result in an increased level of income for him, and also for those who are economically dependent upon him.

[para 34] He further submits that there is no evidence before the chambers judge of any recklessness or wanton disregard

on his part respecting the interests of the respondent or the children of the marriage.

[para35] 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.

[para36] 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.

[para37] 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.

[para 38] Section 11(1)(b), 15.1 and 17 of the Divorce Act were amended to enact the Child Support Guidelines on May 1, 1997

> ...to require courts to ensure that reasonable arrangements have been made for the financial support of the children of the marriage "having regard to the applicable Guidelines" and court as are required to make child support orders " in accordance with the applicable Guidelines" (Veit, J in *Strand v. Strand*,[1999] A.J. No. 545.)

[para 39] the Chambers judge has, in effect, determined that the appellant's election to work as an articled clerk for a period of twelve months a approximately one-third of his previous income, did not constitute a "reasonable educational need" of the appellant pursuant to the provisions of the Guidelines.

[para 40] Despite the appellant's submission that short-term pain will result in long-term gain for both him, and his dependents, his acknowledgment under cross-examination that it might take at least ten years after admission to the Bar

for him to achieve a range equivalent to that he previously earned in the Department of Environment, casts considerable doubt on the validity of his assertion.

[para 41] The appellant suggested that if he was successful in securing a position in private practice afer he completed his articles, his prospective earnings could excess very shortly the salary he received from the Department of Environment. However, there was no evidence before the Chambers judge of the likelihood of this scenario. If it was a realistic game plan, one wonders why there is no evidence the appellant had made any attempt to arrange bridge financing from a financial institution before the one-year period.

[para 42] In *Pishori v. Levy*, [1990] N.S.J. No. 9, the respondent, a professional engineer, earning a gross annual salary of $32,500.00, decided to improve his career opportunities by enrolling in a two-year MBA program. At the time the decision was made, he was obligated to pay the sum of $250.00 per month for maintenance of a child which he fathered. The relevant statue in *Pishori v. Levy* was not the Divorce Act, but rather the Family Maintenance Act, S..H.S. 1980, c.6.

[para 43] Section 8 of the Act required a parent to “provide reasonable needs for the child except where there is lawful excuse for not providing the same”.

[para 44} Section 12 obliged the court to consider the “reasonable needs of the child” when determining the amount of maintenance.

[para 45] the comments of Cacchione, C.C.J. (as he then was) are applicable to the present case:

> The evidence disclosed that the respondent’s change in circumstance was self-induced. It was as a result of his wish to advance his career prospects. ...the situation the respondent found himself in was his own making and not unforeseen. In making plans for furthering his education the respondent should not have lost sight of his obligation to his son...In allowing the

> application to vary the learned trial judge effectively made the appellant and her child underwriters for the respondent's career goals. He cast the appellant and her child in the role of short-term bankers for the respondent, in order to allow him to further his career plans. As such, the learned trial judge failed in his duty to ensure that the reasonable needs of the child were met.

59. I find as a fact, based on all evidence that TFD actions did not meet her children's needs. Her employment plan was not reasonable given her responsibilities. I impute her income for 1999, 2000 and 2001 to be $42,000.00 as projected in the Corollary Relief Judgement of April 1999.

60. TFD wishes to have a fluctuating maintenance for when the girls are in college and when they are with GAR. Also, she requests the court to examine whether the college fees are reasonable.

The relevant legislation provides:

> 3.(1) Unless otherwise provided under these Guidelines, the amount of a child support order for children under the age of majority is:
>
> > (a) the amount set out in the applicable table, according to the number of children under the age of majority to whom the order relates and the income of the spouse against whom the order is sought; and
> >
> > (b) the amount, if any, determined under s. 7.

Child the age of majority or over

3.(2) Unless otherwise provided under these Guidelines, where a child to whom a child support order relates is the age of majority or over, the amount of the child support order is

> (a) the amount determined by applying these Guidelines as if the child were under the age of majority; or
>
> (b) if the court considers that approach to be inappropriate, the amount that it considers appropriate, having regard to the condition means, needs and other circumstances of the child and the financial ability of each spouse to contribute to the support of the child.

7.(1) In the child support order the court may, on either spouse's request, provide for an amount to cover the following expenses, or any portion of those expenses, taking into account the necessity of the expense in relation to the child's best interest and the reasonableness of the expense, having regard to the means of the spouses and those of the child and to the family's spending pattern prior to the separation:

(a) child care expenses incurred as a result of the custodial parent's employment, illness, disability or education or training for employment;

(b) that portion of the medical and dental insurance premiums attributable to child;

(c) health-related expenses that exceed insurance reimbursement by at least $100 annually per illness or event, including orthodontic treatment, professional counseling provided by a psychologist, social worker, psychiatrist or any other person, physiotherapy, occupational therapy, speech therapy and prescription drugs, hearing aids, glasses and contact lenses;

(d) extraordinary expenses for primary or secondary school education or for any educational programs that meet the child's particular needs:

(e) expenses for post-secondary education; and

(f) extraordinary expenses for extracurricular activities.

Sharing of expense

(2) The guiding principle in determining the amount of an expense referred to in subsection (1) is that the expense is shared by the spouses in proportion to their respective incomes after deducting from the expense, the contribution, if any, from the child.

Subsidies, tax, deductions, etc.

(3) In determining the amount of an expense referred to in subsection (1), the court must take into account any subsidies, benefits or income tax deductions or credits relating to the expense, and any eligibility to claim a subsidy, benefit or income tax deduction or credit relating to the expense.

Justice Goodfellow in **Marshall** v. **Marshall**, [1998] N.S.J. No. 311 states:

[37] There is some merit in this point of view, however, it overlooks two fundamentals:

1. Both these children reside at home with the custodial parent. The basic chart Child Support Guideline is intended to cover the basic expenses for another person residing in a family unit. It does not represent the cost of a person residing alone. It is meant to take into account the basic economies of scale, for necessaries, such as shelter and food. Shelter in particular, is only marginally increased in most circumstances by the presence of another person in the household. Shelter costs include rent, mortgage, heat, electricity, basic telephone, fire insurance and where ownership is involved, taxes, basic property maintenance, etc. These costs are not transferrable to the children and must be met by the custodial parent. When you are dealing with food, it is quite correct to say that child can add a considerable dimension to one's food bill, but nevertheless, the economies of scale to the extent they exist, derive from the custodial finances of the household and rarely

> would it be appropriate to have child support paid directly to a child. This is also so where the child may have a temporary mailing address while away at university, trade school or training establishment, other than the continued place of residence occupied by the custodial parent and available for the return, periodically by the child.
>
> 2. Unless there is valid reason to do so, the changing of child support from an existing pattern of payment to the custodial parent to the child, ought not to take place without the consent of the custodial parent, as it would otherwise be subject to misinterpretation, i.e., some type of perceived inability on behalf of the custodial parent to handle finances. Actual inability to handle finances adequately has, on occasion in the past, resulted in all or some of the child support payment going to third parties direct or to the child.
>
> 38. It will take consent or exceptional circumstances before the court should order direct payments to a child.

61. As well, consideration must be given the reasonableness of the college budgets presented. Both daughters worked at summer employment and both saved earnings from this summer employment. The student loan plan requires a family contribution based on the situation of the parties.

62. The finances of this family are such that they cannot afford four separate residences for eight months of the year. I accept TBR ought to have attended the local university for her first year. Her attendance of UCCB should result in no expense for start up costs, long distance travel residence fees and long distance phone calls. No evidence was provided to explain why she did not attend UCCB for her first year. Evidence was provided to explain why LMR's first year was at

Universite de Sainte-Anne.

63. In the family's financial circumstances, both students ought to have applied for student loans. It was clear from the evidence LMR did not for her first year but planned and did receive student loan for her second and subsequent years.

64. As TBR is not 19 until April 2002, I order TFD to pay Guideline amount for her on a salary of $42,000.00 from August 1999 to April 2002 minus the six months TBR resided with her mother. TFD will pay the sum of $350.00 per month for this time period. This would be a reasonable contribution on TFD's income given the additional contribution she must make to LMR 's expenses.

65. From April 2002 to September 2002 the mother shall continue to pay the Guideline amounts for both daughters in the sum of $579.00 per month. I acknowledge both daughters are over 19 years of age by April 2002; however, they cannot be expected to contribute to their own household expenses and save summer earnings to pay for university at the same time. As they are required to save summer earnings for college, their day-to-day expenses must be met by the parents.

66. From September 2002 the mother shall pay the pro-rated residual costs of a reasonable academic year after student loans, bursaries, and 60% of summer earnings are calculated for both daughters plus $200.00 per month to GAR to assist in maintaining the home while the

girls are at university.

67. For LMR to have a private phone while in residence is inappropriate. This expense ought to be deleted and replaced with $200.00 per year appropriate costs for long distance calls on a calling card plan. As well, she ought to have saved 60% of her summer income given she earned $2,231.95 during the summer months, had substantial graduation monetary gifts ($600 to $800) and lived at home. It is unclear how much of the summer salary earned by LMR went toward clothes and start up costs. Exhibit 13 indicates the father paid $1,069.11 in start up costs for one year in residence. It appears LMR ought to have saved $1,338.60 or $400.00 more then she did. Spending money of $250.00 per month in 1999-2000 is excessive especially where she also has a meal ticket at the university cafeteria. Overall I reduce her 1999-2000 budget as follows:

Summer Earnings	$ 400.00
Phone	$ 336.00
Spending money ($150 X 8)	$ 1,200.00
Reduction	$ 1,936.00

68. To Exhibit 13 (LMR's college cost for 1999-2000) must be added to the residence fee. I have set this fee at $2,000.00. Counsel for GAR asks the court to add $2,917.00 as a

residence fee in post-trial submission. This is $917.00 more than the court could decipher from LMR's evidence for 1999-2000. Upon providing a receipt from the university to her mother and clarifying that the $917. residence fee has not already been calculated in her estimates, this additional charge shall be pro-rated between the parties as set forth in paragraph 69.

69. LMR's budget configured is as follows:

Expenses			
Fees		$ 30.00	
Tuition	3,869.00		
Cafeteria		2,404.00	
Sports		60.00	
Association Fee		111.75	
Books		300.00	
Spending Money		800.00	
Residence		2,000.00	**$ 9,574.75**
Extra Expenses			
Start up for college		$1,069.11	
Phone		200.00	
Trips home		111.17	
Stock up		112.00	
Trip home - summer		127.15	
Clothes		165.51	
Feb. & March		95.82	
Loan($48 x 4 Months)		$ 192.00	**$ 2,073.36**
Total:			**$11,648.11**
Resources:			
GIC		$ 2,101.20	
Province		$ 800.00	
Scholarship		$ 500.00	
Savings		$ 1,228.60	
Loan		$ 5,000.00	
Total			**$ 9,740.80**
Short Fall			**$ 1,908.11**

The shortfall of $1,908.11 will be shared by the parents prorated according to their respective incomes as found by the court.

TFD $42,000.00

GAR $47,400.00 (mean of 1999 to 2000)

$\frac{4200}{89500}$ X 100% = 47%

= $ 897.00 from TFD

$\frac{47500}{89500}$ X 100% = 53%

= $1,011.24 from GAR

The court does not calculate tax advantages for 1999-2000 as TFD paid no contribution and no maintenance. This past tax advantage shall remain with the father to mitigate late maintenance payments for both daughters.

LMR ‘s second year was not sufficiently broken down to explain the increase in costs over the year before. Given the tax benefit given to the father for two years I delete the interest on the loan of $1,174.88. Spending money is reduced by $268.00 to $100.00 per month for eight months, the start up costs were not substantiated. A similar reduction is made to the phone expenses of $302.21. The Thanksgiving expense is also unclear and is deleted ($543.00). These recalculations result in a deduction of $2,287.00 for a total expense of $13,582; that is $15,869.64 - $2,287.00.

Resources are:

Bursary	$ 1,200.00	
CSL	2,424.00	
Savings	1,500.00	
Loan	5,000.00	
Total		**$10,124.00**
Shortfall		**$ 3,458.00**
TFD's income	$42,000.00	2000-2001
GAR's income	$47,500.00	2000-2001

42000 X 100% =.47 X $3,450.00 = $1,621.50
89500

47500 X 100% = .53 X $3,450.00 = $1,828.50
8700

70. Given the treatment of the tax benefit and the removal of the loan payment, the father shall remain responsible to pay the interest on LMR's Credit Union Loan for the years 1999-2000, 2000-2001.

71. TBR's expenses for university if she had attended a local university shall be pro-rated between the parties. Any tax benefit for her for the years 2001-2002 shall be pro-rated between the parities. The shortfall occurring due to her attendance at St. Thomas shall be borne by her father. As she will receive guidelines amounts for this entire period this may be used to mitigate the St. Thomas account. Any tax advantage for this sum will be claimed by GAR.

72. When the girls are home for the summer the mother shall pay the Guideline amounts. In future years in university the mother shall pay the pro-rated amount after all other sources of university income is exhausted. When the girls are home she shall pay the Guideline amount for two children. While in university she shall pay pro-rated university expenses plus $200.00 per month to GAR to maintain a home for the two girls. I find this is a modest amount given the increase in costs to retain a home for three for 12 months a year although the girls may only be home four or five months of the year. I find, based on GAR's budget, shelter costs are higher than those projected in ***Marshall v. Marshall***. If GAR was not required to provide a home for the two girls, he could live in a single bedroom apartment which would greatly reduce his deficit.

73. The mother is entitled to be consulted as contemplated by the Corollary Relief Judgement. I acknowledge consultation is difficult given the one point not in dispute is that the family's financial reserves for university were virtually depleted through litigation.

74. TFD must learn to prioritize her daughters first. She has failed to do so. Perhaps she cannot afford her current lifestyle or the use she makes of her assets. It is hard to accept she can rent her basement apartment to her boyfriend for a few months for $850.00 and then not be able to find another tenant even at a reduced rate. Her unfortunate use of assets and poor planning cannot be permitted to impede her children's education.

75. Parents must expect to feel the financial pinch of helping their children achieve academically. It is hard enough when the couple still cohabit and have only one set of household expenses. It is even more difficult financially when there are two households.

76. The parties earn approximately $100,000 per year and have two homes. Their two daughters can only earn so much and borrow so much. In these circumstances there are reasonable deficits. The parents have to help if they have the financial ability. I interpret financial ability to include the ability to borrow if necessary. I find TFD has the ability to meet these reasonable needs of her children.

77. If the parents have a somewhat reduced life style because they had to borrow money, this is their responsibility. They have to use all their abilities to insure the children reach their full potential as meant by the Supreme Court of Canada in **King** v. **Lowe**. (1985), 44 R.F.L. (2d), 113 (S.C.C.).

78. GAR must realize he cannot afford to educate his daughters in the manner he wishes without aid from other sources. However his efforts and consistency are laudable. Without his consistent efforts, it is doubtful these children would be able to have attended university.

79. The daughters are both doing well academically but as young adults must be realistically aware there is little extra in their family's resources.

80. I acknowledge the need to approximate some figures in this decision. After three full days of reviewing the evidence I concluded mathematical certainty is not possible nor is it required.

81. I am satisfied on a balance of probability the figures arrived at are reasonably accurate given the fluid nature of this case. I hope the parties can be reasonable in their future calculations and focus on the health and needs of these young scholars and not the animosity of the last eight years that depleted their resources. The approximations made in the best interests of the daughters.

82. The parties are to exchange complete income statements, T-4's and Notices of Assessment by June 30th of each year.

83. I am asked to award costs regarding the injunction. This application was another example of the parties inability to communicate. However, I am satisfied it was necessary albeit ineffective given the subsequent consent to vacate. TFD did agree to pay maintenance if the injunction was vacated. It was, and she did not although she left this jurisdiction with $14,000.00 and one child in university.

84. I exercise my discretion and award costs to GAR in the amount of $600.00 payable forthwith

for the injunction hearings and an additional $600.00 for the variation hearing.

85. If the parties have difficulty with calculations I will hear counsel on short notice for a noontime chambers appearance.

_____

M.C. MacLellan
J.

Sydney, Nova Scotia
November, 2001