IN THE SUPREME COURT OF NOVA SCOTIA
Citation: W.G.B. v. C.D.R., 2004 NSSF 112

Date: 20041208
Docket: 1201-54909
Registry: Halifax

Between:

W.G.B.

Petitioner/Applicant

v.

C.D.R.

Respondent

Judge:	The Honourable Justice Moira C. Legere-Sers
Heard:	September 27, 2004, in Halifax, Nova Scotia Final Written Submissions: Applicant - September 27, 2004 Respondent - October 8, 2004
Counsel:	W.G.B., self-represented C.D.R., self-represented

By the Court:

[1] On April 11, 2003, Mrs. W.G.B. applied to vary access between T. and her father. She wants the Respondent to be available for more access time with his daughter. If he refuses, she wants the Court to order him to pay the costs of providing respite for her care. The father refuses to increase his access time and asks that the cost of respite care be provided out of the monies Mrs. W.G.B. receives from any governmental assistance allotted for T.'s care.

[2] Mr. C.D.R. responded by application dated December 8th and 12th asking for a variation of child support respecting all three children. By way of reply, Mrs. W.G.B. amended her application on March 11, 2004. Mrs. W.G.B. is seeking a variation of child support respecting her sons, C. and N..

[3] The parties married on November 30, 1975, separated in March, 1998 and were divorced on August 24, 2002. This was a 23-year marriage.

[4] They shared joint custody of two children, T., born [...], 1983 and C., born [...], 1985. The oldest child, N., was born [...], 1980. T. was 19 at the time of divorce; C. was 16; and N. was 21.

[5] Mr. C.D.R. moved from the matrimonial home in the summer of 1998. He and Mrs. W.G.B. shared custody of T. and C. on a week on/week off basis. T. requires constant care and supervision due to her significant medical and developmental difficulties.

[6] In April, 2002, prior to the divorce, Mr. C.D.R. decided that shared custody was no longer in the best interests of the children for a number of reasons. These included:

> (a) the location of his home was not convenient for the children;
>
> (b) it took C. away from his friends;
>
> (c) C.'s possessions remained in the matrimonial home;
>
> (d) his work-related commitments required him to be away from home during the day and evenings;

(e) he did not have the time to spend with the children;

(f) he was not at that time emotionally equipped to care for the children as he would want to;

(g) he suffered from depression which began prior to the parties' separation.

[7] At divorce, the Court took into account the effect the burden of total child care placed on Mrs. W.G.B., including the fact that T. required supervision almost on a 24-hour basis.

[8] At the time of the divorce Mr. C.D.R.'s salary was estimated at $70,940 and Mrs. W.G.B.'s imputed to be $17,500. Mr. C.D.R. was ordered to pay for the support of the children $1,208 per month. The parties agreed and were ordered to pay one-third each of N.'s university costs to the completion of his undergraduate degree, anticipated to be the spring of 2003. N. was to contribute one-third.

[9] Extraordinary expenses were split on a 20/80 percent basis.

T.: Born [...], 1983:

[10] T. is now 21 years old. She has been assessed by Community Services as requiring Level 1 care. This rating takes into consideration many factors resulting in her need for community placement with sustained services. She requires assistance with her personal care. She is able to work in a very structured environment and benefit from placement in a small options community housing. The government allows for a per diem of $127.92. Unfortunately, T. is number 57 on a waiting list for placement and there are currently no small options placements available.

[11] There is a moratorium on new small options homes. Unless in crises, T. is unlikely to be regarded as a priority placement. Until then she remains in her mother's home.

[12] Neither of her parents want her in the adult protection program because this would mean placement anywhere in Nova Scotia. She would have to be in a

position of neglect or risk of abuse to trigger intervention by agents for the Minister of Health for intervention under the *Adult Protection Act*.

[13] Without her parents T. is unable to care for herself.

[14] Prior to the divorce, Mr. C.D.R. did not respond positively to Mrs. W.G.B.'s request to assist her by providing respite care/access visits, in taking a month in the summer, two weeks in the winter, and more extended contact with T. in order to assist in and relieve the costs of caring for her.

[15] In the event he could not exercise access from Friday after school until Sunday, Mr. C.D.R. was ordered in the Corollary Relief Judgment to arrange and pay for respite care for T. to cover his access time.

[16] The Learned Trial Judge was not prepared at the time to order the payment of long term respite care over and above the every second weekend, in the event Mr. C.D.R. failed to exercise access.

[17] Mr. C.D.R. continues to indicate he cannot increase his day-to-day care of T.. At this time there are no acceptable options. T. has to be maintained in Mrs. W.G.B.'s home, unless they wish her to be placed in the care of the Department of Health as an adult in need of protection. Both have testified they do not want this to happen.

[18] As noted by the Trial Judge, T.'s care has been emotionally and physically exhausting for both parents. They love her and have supported her. They have not found the support they thought existed in the community through government sponsored community-based housing. *This shortfall has further taxed the parents and pits them one against the other to provide for T.'s extensive needs as she enters her adult life, still unable to withdraw from dependance on her parents, community and government support.*

[19] According to s. 2(1)(b) of the *Divorce Act*, T. is still a child of the marriage unable by reason of disability to withdraw from the support of her parents.

[20] In ***Giorno v. Giorno*** (1992) 110 N.S.R. (2d) 87; 229 A.P.R. 87(C.A.), the Court of Appeal discussed the definition of "other cause" in 2(1)(b) of the *Divorce*

Act and concluded that it *usually* meant the pursuit of higher education although it is not limited to such. In this case, the daughter was 17, left high school, was in receipt of EI, and pregnant. She was not held to be a child any longer. Likewise, in ***Todd v. Todd*** (1995), 144 N.S.R. (2d) 340; 416 A.P.R. 340 (S.C.).

[21] Section 3(2) of the *Federal Child Support Guidelines* allows for support for an older child unable to withdraw from dependancy on a parent, although, there is an allowable discretion to deviate from the ordinary table amount and application of the guideline formula.

[22] Case law recognizes there are circumstances where a child (including a disabled child over the age of majority) still requires support from their parent. The amount ordered tends to be an award made after considering what is available from the relevant government agency.

[23] ***Butler v. Butler*** (1996), 148 N.S.R. (2d) 126 (S.C.); ***Grimes v. Grimes*** [2002] A.J. No. 981 (Q.B.) (Q.L.) considered the benefits paid to the child by the province and ordered the father to pay the difference between the daughter's expenses and the amount she received in benefits each month.

[24] In ***Harrington v. Harrington*** (1981), 22 R.F.L. (2d) 40 (Ont. C.A.), the child was unable to withdraw from parental dependency due to her own mental impairment. After considering the benefits paid to the child, the court did not order child support. The court considered the needs of the child, the benefits paid and the father's limited means.

[25] In ***King v. Sutherland*** [2004], O.J. No. 3569 (Ont. Sup. Ct.), Stong, J. ordered support and held the state responsible for the difference between the child's expenses and the child support ordered. He said: *"Mr. Sutherland cannot avoid his obligation to support his disabled child by contracting out of the statute-created Divorce Act obligation."*

[26] Of particular interest in this case noted above, is the fact that the Minister of Community Services had been added as a party to the action. **The Ministry of Community and Social Services asked to be removed as a party to the motion. Stong, J. said:**

> "While it is a giant leap from simply recognizing the reasonable expectation of some sort of social security response to holding the Ministry of Community and Social Services responsible for providing such response, ***I am of the opinion in the year 2004 an informed and enlightened society such as ours is ready willing and able to tend to the needs of its weakest and most vulnerable members and expects its governmental ministries to be responsible, at least in part, for providing for them a lifestyle and experience in keeping with the general lifestyle enjoyed by the rest of the community."*** (My emphasis)

I endorse these comments.

[27] The *Age of Majority Act*. R.S., c.4, s. 1 specifies that a person is considered an adult at 19. The *Adult Protection Act*. R.S., c. 2, s. 1 defines an adult as a person over 16 years and incapable of caring for themselves.

[28] To trigger intervention and thus be assessed as an adult, the adult in need of protection must be in a situation of neglect and/or abuse and unable to protect themselves. Were it not for the commitment of her parents and their ability to assist in sustaining her, T. would be classified, not under child protection legislation, rather under adult protection legislation.

[29] The department responsible for her classification admits she qualifies for placement but they have no place for her. They have provided some financial assistance for her personal needs and respite care.

[30] The father cannot emotionally and physically provide for her day-to-day care. The mother has ho option if she wants her child to stay out of the adult protection environment with the current lack of placement options. The mother remains underemployed in order to provide for her daughter.

[31] In these very difficult circumstances, given T.'s disability and the parents' desire to keep her out of the *Adult Protection Act* legislation, there are few options but to order the father to provide respite care. There is the legislative framework that allows for this.

[32] Recovery pursuant to the *Divorce Act*. R.S., 1985, c. 3 and the guidelines ought not to be seen to replace or exonerate the community as represented by government from living up to the expectations as described by Stong, J. in ***King v.***

Sutherland; as set out in the *Social Assistance Act*; as stated in the purpose of the *Adult Protection Act.* There is every reason to believe this young disabled adult could function in a community based option if one were available.

[33] The department has historically provided $250 per month for respite. More recently they have added to the monthly respite budget $1,400 to assist the mother in hiring a support person. T. also receives $403 per month for her personal needs.

[34] The mother determines she can hire someone for $9 an hour to provide supervision for a 40-hour week. Both parents seek more than supervision for their child, expecting the person hired to provide education and social stimulation as well. $9, it seems to me, is optimistic. $9 per hour, $1,400 per month, yields approximately 35 hours per week.

[35] The mother continues to provide this level of care for her daughter. Providing this in her home has resulted in keeping the mother underemployed. This appears to be a child who will make some progress but will not be able to sustain herself or live independently. The lack of available community-based options directly restricts the financial contribution the mother can make to her other children. This situation exacerbates their entire family functioning. It is taxing them to the limits of their ability to provide. It creates ongoing hostilities between parents.

Result re T.:

[36] Mr. C.D.R. agrees to share all educational and medical expenses or devices not covered by assistance yet necessary to enhance T.'s life. Those purchases will be discussed between the parties and shared on a 50/50 basis.

[37] He also agrees to participate in the presentation and evolution of the community-based plan. Should there be a need to review this, the parties may bring that back when it is more than speculative.

[38] ***Andrews v. Andrews*** (1999) describes the three criteria to be considered under s. 7(1)(d):

1) They must be extraordinary;

> 2) The Court must consider the necessity of the expense in relation to the best interests of the child;
> 3) The Court must consider the reasonableness of the expense having regard to the means of the parents and their spending patterns for the children during cohabitation.

[39] They must assess the expenditures necessary for T. within the context of their family and the needs of the children (***McLaughlin v. McLaughlin*** (1998), C.A. 023706). Once expenses are found to be extraordinary, the Court must determine whether the expenses are necessary in relation to the children's best interests and reasonable, having regard to the means of the spouses and those of the child and the family's spending pattern prior to the separation.

[40] Thus the Court must have regard to the family's historical spending patterns and belief system in considering the reasonableness of the expense.

[41] The Court has the discretion to adjust the amount required under the guideline when the child is over the age of majority. T. receives $403 per month, $300 of which is expected to address her room and board and $100 is her spending money.

[42] I will not order a base amount of support given the contribution to her care. However, I will order access costs to be paid by Mr. C.D.R. in the event he does not or cannot make himself available for regular periodic and increased block access.

[43] Mrs. W.G.B. indicates if Mr. C.D.R. will agree to more access, the respite assistance will go with T. during access week. Mr. C.D.R. will have that choice. Otherwise, he will provide monies for respite care to cover the balance of the week hours not covered by respite care, for a four-week period in the summer (one of those weeks is the vacation week he takes), one week in the winter, and half of the Christmas and Easter holidays.

[44] He will continue with his current access pattern and if unavailable for the weekends he shall also provide respite care for the uncovered hours.

[45] Should any of the monies allocated for respite care be terminated due to this order requiring the father to supplement respite care to that covered by the $1,400

per month, the parties may apply to vary this order. This order is intended to supplement the existing services and cover those costs necessary yet not covered by the current budget.

[46] Mr. C.D.R. is asking for reimbursement of child support ordered for T. while she attended a course away from her mother's home for a five-month period from February to June, 2004. He seeks reimbursement of $2,860. I decline to order that reimbursement. Her place in Mrs. W.G.B.'s home has to be maintained at all times. Reimbursement in this situation would not promote a reasonable or equitable sharing of the burdens these parents face.

N.: Born [...], 1980:

[47] N. is the oldest child and at the time of divorce he was 22, attending his third year university with an anticipated graduation date in spring, 2003. The parties and the Learned Trial Judge acknowledged that N. was deeply affected by the divorce. At the time of divorce he was living with his mother.

[48] His mother argued that he was a dependant at the time of divorce, even though he had left the parental care for intervening months. The Learned Trial Judge indicated he was a child of the marriage unable by reason of university attendance to withdraw from parental support, because he had returned to his mother's home in 1999. He was considered a dependant child of the marriage while in attendance up to his graduation in the spring, 2003.

[49] In July, 2002 after the divorce, N. moved in with his father. He continued with his father for a period of time. He has had a number of residential changes. In 1998-99 he lived with his mother and attended Dalhousie University full time. In 1999-2000 he moved to an apartment. He returned home in 2001-02 and took four credits while working a 30-hour week. Between August 2002 and April, 2003, he moved to California for a spiritual retreat. He returned to Halifax with his girlfriend and lived with his father. He attended Dalhousie University commencing in September, 2004.

[50] In July, 2002, when N. moved into his father's home, the applicant paid no support directly to Mr. C.D.R. for N.. However, she supported him in other ways

and paid his girlfriend's transportation costs to return to her home. This was required if N. was to continue to live with his father.

[51] Mr. C.D.R. seeks an order that the maintenance enforcement records be adjusted to rescind arrears shown to be owing for N. for 27 months at $272, for a total of $7,344. **It is agreed that the maintenance enforcement records be adjusted and that these arrears be deleted.**

[52] He seeks an order for an adjustment in his favour indicating that at that time they agreed to take N. off the order, maintenance enforcement incorrectly noted that he ought to be paying $936 per month based on his income of $70,900, rather than $925. This amounts to, in his view, an overpayment for 27 months at $11 for a total of $297. **I decline to make that adjustment.**

[53] This argument assumes that his income was correctly stated in the Corollary Relief Judgment and it was not. It also assumes that there were no changes to his income. His income has increased in the 2002 year and did not include the total rental income to which he was entitled according to the divorce judgment. In referencing the decision, I note that some of the rental income was included in the Learned Trial Judge's calculations and considered in a spousal support award. The calculations took into consideration a multitude of factors.

[54] His 2003 and 2004 income is higher. Taking his argument to the logical conclusion, he would not simply have N. removed from the order in July, 2002. Had a court known the correct amount of child support owing at the time, his support payments for two children would have been adjusted.

[55] Although N. had difficulties, both parents believe that he has come to his own. They love him and support him as they can. His mother describes him as well-grounded, spiritual, an A-plus student on the dean's list.

[56] Mr. C.D.R. seeks support for N. for the months he lived with his father after the divorce; a 15-month period at 2003 rates. He seeks monthly support starting September, 2004 according to the guidelines until he graduates in spring, 2005. Currently, N. is going to complete his degree.

[57] N.'s residential history includes many months away from either home while he sought and obtained some redirection in his life. They confirmed that he is now solid and they are both prepared to support him to the completion of his undergraduate degree. They endorse, historically, a method of sharing between themselves and their children (1/3, 1/3, 1/3). N. moved back into his mother's residence at the time of this variation hearing. She asks only a one-third sharing of educational expenses.

[58] Mrs. W.G.B. asks that I determine the amount payable in the event that N. decides to go to graduate school. This request is premature. At this time I would not be prepared, given the rather meandering history of educational pursuit, to require either parent to support N. in graduate studies, without a clear understanding of what his contribution is, what their position is as to whether they feel obligated or able to continue to support him in graduate studies, with a disabled child to worry about and a younger son to put through university.

[59] In ***Crook v. Crook*** (1992) 115 N.S.R. (2d) 258; 314 A.P.R. 258; 42 R.F.L. (3d); 297 (T.D.), the children had achieved bachelor degrees and had part time employment. The court found the reasonable prima facie limitation to the words "other cause" would follow for a child who had already obtained a university degree or where the child had already completed education to the level of a diploma in a trade or vocation.

[60] N., again, was residing away for the summer, 2004. He came back to live with his father in September, 2004. As of the night before the hearing, I was advised that N. removed himself from his father's residence to his mother's residence.

[61] N. is now 23 and well past his anticipated graduation date of 2003. His parents want to continue to support him by contributing to his extraordinary expenses. They have consistently adopted a formula for these educational costs at a 1/3, 1/3, 1/3 split, quite a reasonable requirement. Both are prepared to support this. I will incorporate this into the order. A base amount in these circumstances is not appropriate.

[62] While Mr. C.D.R. provided for N. in his home, and no doubt he provided in ways which he did not account for to the Court, Mrs. W.G.B. also provided for N..

His evidence indicates that Mr. C.D.R. provided the accommodation and she paid $600 for his return airfare and train trip; $595 to send his girlfriend home when Mr. C.D.R. indicated that they would have to leave the home if N. was to remain there with his girlfriend. She provided food, clothing, transportation, spending money, and the children went to her home to do their laundry.

[63] I have no way of calculating the amount of money or contribution that was completed other than to conclude that both parties wanted N. to complete his undergraduate studies and both recognized the effects of the divorce on him. Both also recognized that the Learned Trial Judge at trial acknowledged he left the matrimonial home eight months prior to 1999, returned to the mother's home, and when Mr. C.D.R. argued that he was no longer a dependent child, notwithstanding he was in university, the Learned Trial Judge indicated that he in fact was unable to withdraw from the support of the parents because he was attending university.

[64] The age of majority is 19 in Nova Scotia. The Court has the jurisdiction under the *Divorce Act* and the guidelines to order support in circumstances where the child is over the age of majority.

[65] Section 2(1)(b) of the *Divorce Act* defines "child of the marriage" to include one who 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 necessities of life."* Should the Court find this 24-year old a dependant, requiring support, the guidelines allow for discretion when applying the guideline principles (s. 3(2)).

[66] The Learned Trial Judge already took into consideration the effect of the divorce on N.. The parents agreed and allowed him some leeway in the completion of his degree. They are pleased with his progress and supportive of his endeavour. They agree to continue on this one-third basis to fund his extraordinary expenses pending completion after another extension to spring, 2005.

[67] Given the starts and stops, the travel and the delay, I cannot be satisfied that N. is unable, by reason of schooling, to withdraw from the support of his parents. He has shown evidence of the contrary by travelling and engaging in other living arrangements other than dependence on his parents. He has decided to take a considerable period of time to complete his degree. To further adjust the expected

date of completion is not supported on the facts. It is not reasonable to keep the parents indefinitely liable for child support absent excuse.

[68] There is an expectation that once embarking on a course of studies it ought to be completed within a reasonable period of time, especially since these parents have other financial responsibilities.

[69] His parents *volunteer* to continue to assist him, his father provided a home for him. There is no factual basis to simply extend the obligation to support him past the legislative requirement. They can support their son as they see fit. At this stage I order no base amount.

C.: Born [...], 1985:

[70] As with T., up until April, 2002, the parties had an equal shared custody arrangement. As with T., C. was returned to his mother's home and continued to live there up to his graduation from high school in June, 2003. He remained there with Mrs. W.G.B. up until August, 2003.

[71] He did not do well in grade 12, displayed minimal interest in school, was often late, skipped classes and did not complete assignments. He graduated with poor marks. Mrs. W.G.B. attempted in the fall of 2002 to discuss plans for C. with Mr. C.D.R.. Mr. C.D.R. acknowledges that he has not communicated with Mrs. W.G.B. because of his own emotional state with respect to these issues.

[72] He now criticizes Mrs. W.G.B. for C.'s lack of performance.

[73] Mrs. W.G.B. believes that C. should now return to grade 12 to improve his marks and earn his way into a local university. Mr. C.D.R. disagrees and thus C. was sent away to school.

[74] C. was enrolled by Mr. C.D.R., against Mrs. W.G.B.'s wishes, in Bethel College, U.S.A., from mid August, 2003 until May, 2004. He returned in May, 2004 to his mother's residence.

[75] Bethel College gave C. a tennis scholarship. He is an accomplished tennis player. He was dismissed from the tennis team. He completed the year but he has one credit which he can take into his next educational pursuit. He has not been employed this summer.

[76] Mrs. W.G.B. submits the letter from the Bethel College coach setting out the particulars surrounding C.'s dismissal from the team. C. has an attitudinal problem not a competency problem. He received an athletic and an academic scholarship to Bethel.

[77] The costs include the recruiting agency expenses, video of C.'s tennis abilities, the scout fees. Mr. C.D.R. paid $1,000 US to a scout in June, 2003. The offer based on the SAT scores was a $1,000 US academic scholarship; $8,500 US tennis scholarship; for a total of $9,500 US..

[78] The direct cost for tuition, room and board was $8,147.70. They anticipated C. would be at the top of their lineup. The school gave him an opportunity. He did not respond well to the opportunity presented to him.

[79] Mr. C.D.R. seeks to recover 31 percent of the costs of $8,216 or $2,546. In addition, Mr. C.D.R. continued to pay for two children for the eight months that C. was in Bethel College.

[80] Mr. C.D.R. is prepared to send him away again, this time to a Florida school. Mr. C.D.R. has, immediately prior to the hearing before me, informed C. that if he wishes to be supported by him he will have to live with him.

[81] The parties historically insisted with their children that university is a privilege and not a right; that each one must contribute to the university costs.

[82] Without consultation and now against the known wishes of the mother, Mr. C.D.R. hired another scout and found another placement for C. in Florida. He seeks to have Mrs. W.G.B. contribute to those expenses.

[83] Mrs. W.G.B. met with an admissions officer at St. Mary's University on two separate occasions; one with C. and one without. C. has been accepted to St. Mary's University. She has some difficulty obtaining a transcript to confirm

acceptance. Until the debt to Bethel College is paid (for a laptop computer), a confirmed transcript of marks will not be sent.

[84] The parents are not able to communicate. It is not unusual to see a situation in which a young person involved in the middle of the conflict has trouble during an academic year. It is not unusual, in the best of circumstances, to see children flounder in university until they get a solid footing. It is unfortunate that he failed at this enterprise. In reading the documentation provided, it was certainly an opportunity for C. to excel academically and athletically.

[85] Mr. C.D.R. seeks a sharing of the total cost to him of placing C. in Bethel. Those total costs are $8,216. He is also seeking reimbursement for the child support he paid for the eight months that C. was at Bethel while he continued to pay child support to Mrs. W.G.B..

[86] Determining where the two boys are at any particular time is a work-in-progress. As of the trial date, both boys appeared to be either with the mother or the father and had moved, literally, the evening before. It is, therefore, difficult to suggest that they are in anyone's primary care or custody.

[87] There are a number of factors to consider:

1. This is not an ordinary situation. His request for a variation in the payment schedule and the calculation of child support when children are away from home and in school elsewhere is a valid request. However, this is a request he makes in response to the application of Mrs. W.G.B. for more assistance with their disabled child. She needs him to spend more time with the child and to continue to pay to maintain this child in her home, something both of them want to do rather than have her in the community at large without a proper placement. This request is not made in a timely fashion and it could result in a windfall to him and an onerous repayment by Mrs. W.G.B..

2. There is great disparity in their incomes. It is quite valid to suggest that, having supported Mrs. W.G.B. in completing a strategy and proposal towards re-education which was her strategy, she has now abandoned that and seeks to work in partnership with her husband who

is a real estate agent. The Trial Judge took that into consideration and, in fact, while her income was minimal from real estate, he *deemed* an income as if she were a substitute teacher. At this state, it is not any longer reasonable or practical to pretend that she is going to pursue the teaching degree, for reasons set out in her evidence. I now look at her real income and income potential.

3. In April, 2002, prior to the divorce, Mr. C.D.R. was participating in child care and parenting other than by financial efforts. He was engaged in a shared custody arrangement which he abruptly ceased, delivering the children to Mrs. W.G.B.. He refused thereafter to be anything but an access parent. He is critical of Mrs. W.G.B.'s efforts but he adamantly refuses to increase his time with their disabled child and insists that the child remain in her home while they attempt to work out a solution in the community. He does not participate actively in the extensive efforts made by Mrs. W.G.B. and other parents of disabled children to put forward a plan to the Minister of Community Services to house their child.

   The disparity of incomes is *partially* as a result of Mr. C.D.R.'s arbitrary stand with respect to participating in the physical and day-to-day care of their disabled daughter.

   The parents agree that they both want their boys to complete their education and both agree that they wish to continue to provide for their boys by way of one-third sharing in the cost of tuition.

4. A further factor is that Mr. C.D.R. calculates the arrears that he wishes paid to him and the arrears that he wishes forgiven, based on the income that he projected to the trial judge at the divorce hearing. These were incorrect.

Conclusion re C.:

[88] C. is an able student, competent and, obviously, an able tennis player. Mrs. W.G.B. wanted him to go back to grade 12, pick up his marks, focus on his studies

and enter a local university where he could be cared for. This is a real consideration for these individuals, given the fact that they have a disabled daughter to support and had two boys in university.

[89] No doubt he would not have been able to attend Bethel College and to participate in that opportunity without his father's solid support. It was a risk and in retrospect, it was a mistake. It was a plan entered into solely by the father without consultation with anyone. It would be unreasonable to expect him to be reimbursed in this situation, having entered into this contract on his own.

[90] Mrs. W.G.B. testified that were the parties together, they would not have considered it appropriate for their children to attend university outside the HRM area. They told N. this when he suggested he go away for university. Given their then current obligations they could not afford to send N. away.

[91] In assessing the expenses and deciding whether they are extraordinary expenses, one consideration is whether they are necessary, having regard to the children's best interests, and reasonable having regard to the means of the spouses' and the children's and to the family's spending pattern prior to separation.

[92] Can a joint custodial parent enter into a contract for education without any discussion or regard for the reasonableness of the expense and expect to be compensated regardless of the amount or nature of the expense? Mr. C.D.R. admitted he knew little of C.'s circumstances, his opportunities and the rationale for his poor performance in school and in his mother's home.

[93] To conclude that there is no limit on the ability of a parent to engage another in undertaking a liability without some discussion, knowledge and, if not explicit consent, then implicit consent or authority to act on behalf of both, flies in the face of the ordinary principles of contract law.

[94] The proposal to seek retroactive sharing of liability from the court, ought to be reviewed in the circumstances of their lives. In this case, Mr. C.D.R. undertook this liability having extracted himself from hands-on parental responsibility and the knowledge that comes with day-to-day care. This decision to send him away has no reasonable foundation in fact. It contravenes what the parents set out as a principled basis of assistance to their other children.

[95] I will not require the mother to finance a proposal such as the one advanced. I will order her to return the child support she received during his months at Bethel.

[96] Regarding C., if he works and does not return to school, the mother shall pay until December, 2004 to the father the table amount based on the income of $34,701 (2003). If he continues to live with his father and attends either grade 12 again or St. Mary's University, she shall continue to pay the table amount. If he attends university and lives with his father, the parents have agreed to pay 1/3, 1/3 with C. paying 1/3. His father encouraged him not to work over the summer against his mother's wishes. C. shall be responsible for the 1/3 or make arrangements with the father to be covered by a loan for the 1/3.

[97] In the event C. does not pass the majority of his courses if at St. Mary's University, he shall be considered an adult after Christmas and he will have to work thereafter to support himself unless the parents agree otherwise.

[98] If C. resides at his mother's residence for the September to December semester, his father shall pay the table amount of $611 based on his income as declared in 2003 ($7,337) from September to December plus one-third of his extraordinary expense including tuition.

[99] Unfortunately, Mr. C.D.R. is pursing another college in Florida and I have heard the evidence on the possibilities open to C.. C. has shown no more commitment to university or college than he had when he left high school. In addition, the college that he is supposed to go to is not much different than that proposed in Bethel and, unless there is significant change in C.'s attitude, it appears to be a waste of money.

[100] In the event C. goes to Florida without Mrs. W.G.B.'s consent, he and Mr. C.D.R. will be responsible for his care and maintenance. The father cannot arbitrarily without consultation enter into a contract and expect the mother to contribute when it may not be in C.'s best interests.

[101] The proposal put forward by Mrs. W.G.B. seems to be the most reasonable. If C. wishes to go to university, he must make a responsible commitment to upgrade

his marks and/or proceed to St. Mary's where he has been accepted at a more reasonable cost to the parents and apply himself.

[102] In my view, if he entered university here in September, he would be a child of the marriage but on a very tentative basis. If he did not apply himself by December, in my view, he would cease to be a dependent child and he would be required to commence supporting himself. Any contribution by the parents at that point would be voluntarily.

[103] Mr. C.D.R. should be repaid for the monies paid into the household while C. was at Bethel. I do note that Mrs. W.G.B. supported him by sending him money for a period of time and in other ways, in spite of the fact that she disagreed adamantly with the choices that were made on his behalf. She shall be given credit for $600 Canadian to cover spending money that she sent to him during this time.

[104] The parties may need to set up a review date if they are unable to agree on where the children are living and what the child support table amount should be.

Income:

Mr. C.D.R.:

[105] At the time of the divorce in August, 2002, it was determined that Mr. C.D.R. had an income of $70,940 and Mrs. W.G.B. had an income of $17,500.

[106] I now have the benefit of the income tax returns from 2001 to 2004, together with an updated financial statement from the parties. They reveal the following:

Mr. C.D.R.'s Income	Employment Income	Total
2001	$71,264	$74,742
2002	$72,082*	$78,130
2003	$69,784	$76,337
2004	$69.780	$75,780

*An adjusted income for 2002 would include one-half of the rental income necessarily claimed by Mrs. W.G.B. in her 2000 income tax. Mr. C.D.R.'s share

would bring this income for 2002 from $78,130 to $117,054. Some of these funds were considered at trial.

Mrs. W.G.B.:

	Employment Income	Other Income	Rental Income
2001	$35,966.07	$12,374	$23,591
2002	$20,704.16 (Adjusted to reflect her half of the rental would yield a 2002 income of $59,628.16)		
2003	$24,818.00 (net)	$ 9,883 = ($34,701)	
2004	$30,897.48 (estimate)		

[107] At divorce (p. 22 of the decision), Mrs. W.G.B. retained any rental income she received prior to July 1, 2002. She was responsible for tax payable on those funds. After July 1, 2002, any net rental income and tax liability would be shared equally on the closing date of the sale of the property.

[108] The Trial Judge had a great deal of difficulty, based on the lack of information provided, calculating the exact incomes for both parties as of 2002. He allowed for Mr. C.D.R.'s' employment income to be $66,540, estimated his dividend income to be $3,000, and he did not include interest income. He imputed $250 per month interest income and allowed for a deduction of $166 carrying charges and $120 per month for professional dues. It was on this basis that he arrived at an income of $70,940 for 2002.

[109] Mr. C.D.R. indicated he wouldn't have interest income. In fact, he had interest and other investment income of $4,096.87 and dividends from taxable Canadian corporations of $1,663.38 in addition to other income of $289.76, which brought his total income from employment of $72,082 to $78,132.76, adjusted to include his rental income of $117,054.

[110] Mrs. C.D.R.'s actual income was also in excess of that anticipated at the divorce hearing in that she had an income of $27,004.16 as opposed to $17,500 which, when adjusted, equalled $59,628. Clearly, the *Child Support Guideline* amount did not accord with their actual incomes.

[111] With respect to Mrs. W.G.B.'s income, he had equal difficulty and he arrived at the figure imputing income for substitute teaching plus summer employment positions.

Retro-evaluation of extraordinary expenses:

[112] I decline to reevaluate retrospectively the share of extraordinary expenses. The parties are responsible for putting credible evidence before the divorce court. To seek a variation based on radically different incomes retroactively won't achieve fairness.

[113] It is not unusual to have evidence of actual income that differs from the projected income. Absent fraud, the parties have access to counsel, discovery and disclosure and retroactively adjusting where there is not a dramatic difference discourages finality.

[114] The Learned Trial Judge worked with the figures he had and concluded that his income from employment would be $66,540. The income tax return available to me shows that his employment income was $72,082.75. Mr. C.D.R. predicted that his dividend income would be in excess of $3,000. It was, in fact, $1,663.38. However, he indicated there would be no investment income and there was investment income in the amount of $4,096.87 bringing his 2002 actual total from all sources of 2002 to $78,132.76.

[115] In addition, the Trial Judge noted that subsequent to July, any rental income after expenses would be shared equally, even though it would have to be declared on Mrs. W.G.B.'s income tax return. She shows an additional income which, when divided in half, would bring Mr. C.D.R.'s 2002 income to $117,054.

[116] I simply do not have enough information about the actual child care extraordinary expenses to do a retroactive assessment in the manner in which Mr. C.D.R. requests.

[117] The court will draft the order.

[118] Each party shall bear their own costs.

J.