

IN THE SUPREME COURT OF NOVA SCOTIA

**Citation:** Cavanaugh v. Cavanaugh, 2001NSSC200

BETWEEN:

RANDALL JOHN CAVANAUGH

APPLICANT/RESPONDENT

- and -

SHERRI LYNN CAVANAUGH

RESPONDENT/PETITIONER

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D E C I S I O N

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HEARD: At Truro, Nova Scotia, on January 30, 2001.

BEFORE: The Honourable Justice Donald M. Hall.

DECISION: May 23, 2001.

COUNSEL: Alison P. Brown,  
Counsel for the Applicant/Respondent

Sherri Lynn Cavanaugh - represented self.

Hall, J.

[1] The applicant, Randall Cavanaugh, has applied for a variation downward of the amount of the support payment that he is required to pay to the respondent, Sherri Lynn Cavanaugh, for their son, Brandyn Mitchell Cavanaugh, born March 4, 1994.

[2] The principal issue to be decided in this proceeding is whether the maintenance payment ought to be adjusted downward at this time based on the applicant's apparent current employment and income prospects. There is also a question of whether arrears were outstanding at the time of the hearing. As well, the respondent has indicated that she is seeking an adjustment in the maintenance payments for the period January, 2000 to December, 2000.

[3] The parties were divorced November 4, 1997. Under the terms of the corollary relief judgment the respondent and applicant have joint custody of the child with primary care to the respondent. The applicant was ordered to pay maintenance for the child.

[4] By order of this Court dated April 29, 1999, the child support provisions were varied so that maintenance would be payable at the rate of \$234.00 per month based on an annual income of \$27,012.00, plus a contribution toward child care expenses of \$160.00 per month, reducing to \$63.00 per month after September 1, 1999. The order included the following provision:

THAT the Applicant, Randall John Cavanaugh, shall provide to the Respondent, a copy of his Notice of Assessment and Tax Return no later than the 15th day of May each year.

[5] For a number of years the applicant was employed with the maintenance staff of the Chignecto-Central Regional School Board. His income would vary from year to year due to the fact that he would be laid-off for periods of time due to lack of work. During these lay-offs the applicant would received employment insurance benefits. For the past three years his total income was:

1998	\$ 27,012.00
1999	\$ 33,628.00
2000	\$ 26, 037.86

[6] In November of last year the applicant was laid-off from his employment. Contrary to previous experience, this time the employer informed him that the date of return to work was "uncertain". At the time of trial he had not been recalled and continued to draw employment insurance benefits. The applicant was of the opinion that he is unlikely to be recalled and has been seeking other employment, but without success. He projects his current year's income to be \$15,340.00.

[7] After being divorced from the respondent the applicant entered into a common law relationship with Ms. Robin Green. Twin children have been born to them. In addition a child of Ms. Green's from a previous relationship resides with them. The applicant is also

obliged to provide maintenance of \$102.00 per month for a child that resulted from a relationship that he had prior to his marriage to the respondent.

[8] The respondent is employed full time as a Litigation Secretary. In 1999 she had income of \$22,305.82 which included employment insurance maternity benefits of \$3,700.00. She returned to her regular employment April 10, 2000, but her income for that year is not clear. Since the divorce, the respondent has also entered into a common law relationship. She and her partner had a child born to them October 14, 1999.

[9] The applicant is seeking to have his maintenance obligation reduced to an amount based on his projected current income of \$15,340.00. He is also seeking suspension of his obligation to contribute to child care expenses.

[10] The respondent objects to a variation at this time maintaining that his current lay-off is only temporary and that he will soon return to work as usual. She is also seeking an adjustment in maintenance for all of the year 2000, since the applicant did not provide her with his 1999 income as he was obliged to do under the order referred to above.

[11] At first I was inclined to the view that the applicant was premature and that the applicant should have waited a while longer until his 2001 income and employment patterns were established before making the application. On reflection, and in view of the persuasive argument of his counsel, Ms. Brown, I can see that he is currently in an impossible situation. He has arranged his affairs so that he is obliged to contribute to the

support of five children and, indeed, appears to be the main source of support of the three children in his present family.

[12] Although the underlying principles of the **Guidelines** seem to suggest that maintenance payments are to be fixed based on the payor's previous year's income, cases such as **MacDonald v. Rasmussem** (1997) 34 R.F.L.(4th) 451; **Holtby v. Holtby** (1997) 30 R.F.L.(4th) 70 and **Lee v. Lee** (1998) 43 R.F.L.(4th) 339, indicate that it is not a rule that must be rigidly adhered to. Indeed, ss. 2(3) provides that "the most current information must be used". The concern is, of course, that applying this provision too liberally could lead to a multiplicity of applications where the payor's income would be virtually constantly under review as a result of temporary variations in his or her income. It seems to me that that is why there is a reference to "pattern of income" in s. 17, that is, to avoid constant applications for a variation.

[13] In this instance, however, I am satisfied that the applicant's income potential has changed significantly as a result of his lay-off from his former employment. As a result I have concluded that the **Guideline** amount ought to be varied downward in line with his projected income of \$15,340.00. This would produce a monthly maintenance payment of \$128.00. The reduced payment is to take effect as of February 1, 2001. When the applicant resumes employment he is to immediately inform the respondent and the Court so that the maintenance payment may be adjusted.

[14] I am not, however, satisfied that the obligation to contribute to child care expenses should be suspended. This is a continuing necessary expenditure on the part of the respondent. There is no reason why she should bear the entire burden, if indeed, she is able to do so. As ss. 7(2) provides, the guiding principle respecting such expenses is that they be "shared by the spouses in proportion to their respective incomes . . . ."

[15] With respect to the question of arrears, the evidence and the positions of the parties in this respect are not clear and I wish to have a further hearing in this respect.

16] Finally, as to the requested adjustment with respect to the maintenance payments for the year 2000, I am satisfied that an adjustment should be made. The applicant was clearly in breach of his obligation to provide his income information for 1999. Had he done so, undoubtedly the maintenance payment would have been increased. The applicant's response that the respondent did not ask for it is no excuse. She was not obliged to do so. This Court had ordered that he provide the information to her. I am not satisfied, however, that this matter was dealt with satisfactorily at the hearing and I wish to hear the parties further. I will ask the Prothonotary at Truro to arrange a hearing at the earliest possible date that is convenient to the parties. The form of the order is to be fixed at that time.

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Donald M. Hall, J.