

1996 CarswellAlta 63, 20 R.F.L. (4th) 281, 177 A.R. 370

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Nowakowski v. Nowakowski

SALLY KATHLEEN NOWAKOWSKI v. MARTIN NICHOLAS NOWAKOWSKI

Alberta Court of Queen's Bench

LoVecchio J.

Judgment: January 29, 1996

Docket: Docs. 4801-78155, 9201-09567

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Counsel: *Diann P. Castle*, for petitioner/plaintiff/applicant.

*Edward McCann*, for respondent/defendant/respondent.

Subject: Family

Family Law --- Support — Child support — Duty to contribute — Means of parents.

Family Law --- Support — Spousal support under Divorce Act — Entitlement — Economic disadvantage of marriage.

Children — Maintenance — Quantum — Mother applying for child support — Father earning \$85,000 per year and mother earning \$18,000 — Father ordered to pay \$2,400 per month for two children of marriage.

Children — Maintenance — Factors governing award — Ability to pay — Mother living common law with man after separation and applying for child support — Father ordered to pay \$2,400 per month — Mother not continuing to be stay-at-home mother — None of common law husband's income attributed to her for purpose of child support.

Children — Maintenance — Factors governing award — Apportionment of child-care costs — Father ordered to pay child support of \$2,400 per month for two children of marriage — Support reduced by amount mother receiving as child tax credit — No amount deducted for day care — Subsistence amount included with respect to concerns for earning capacity of mother and common law husband.

Children — Maintenance — Orders for maintenance — Indexed — Mother applying for child support with cost of living adjustment — Support granted but not cost of living adjustment — Additional costs from increase in child support being contingent on changes in financial circumstances of parents relative to each other.

Maintenance — Interim maintenance — Lump sum — Parties separating and husband paying child support but never any spousal support — Wife returning to school for retraining to obtain employment — Mother awarded \$25,000 spousal support to cover expenses while retraining.

Maintenance — Factors governing award — Assumption of new obligations — Wife and common law husband buying property after her separation — Mortgage of property being burden on couple — Husband ordered to pay wife support of \$1,000 per month for 12 months — Inappropriate to saddle husband with burden but not inappropriate that he have ongoing obligation while wife achieving self-sufficiency — Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.).

Maintenance — Factors governing award — Economic disadvantage — Wife and common law husband buying property after her separation — Mortgage of property being burden on couple — Husband ordered to pay wife support of \$1,000 per month for 12 months — Inappropriate to saddle husband with burden but not inappropriate that he have ongoing obligation while wife achieving self-sufficiency — Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.).

The parties were married in 1981 and separated in 1992. There were two children of the marriage, aged three and seven. During the marriage, the parties agreed that the mother would stay at home and raise the children. After the separation, as it was not feasible for the mother to resume her former career, she took a two-year training program to become an industrial electronic technologist. She found employment and her gross annual income was \$18,000. She entered into a common law relationship and together with her common law husband, purchased property. The children lived with the mother after the separation. In her budget, the mother claimed that the cost of raising the children was \$2,700 per month. Of that amount, \$450 was attributed to the children for mortgage expenses on the property. The father's gross annual income was \$85,000. He claimed his monthly expenses were \$1,000. The mother applied for child support and spousal support.

**Held:**

The application was granted.

The father was ordered to pay \$2,400 per month in child support. Although the mother worked restricted hours, if she had increased them, the added income would have been paid in day-care expenses. The mother had made a decision with her common law husband not to continue as a stay-at-home mother. Therefore, none of his income was attributable to her. The attribution of mortgage expenses to the children in the mother's budget was inappropriate since the mortgage flowed directly from the decision of the mother and her common law husband to buy the property, rather than from the marriage breakup. The matrimonial home, on the other hand, had been more modest and mortgage free. The father's claim for monthly expenses was somewhat excessive and his costs should be fixed at \$600 per month. The father should pay spousal support of \$1,000 per month for 12 months. There was still some residual economic disadvantage which flowed directly from the parties' joint decision that the mother remain at home to raise the children and the mother's employment situation was not certain. The father should also pay \$25,000 for the period during which the mother was re-training, which was slightly in excess of the debts incurred during that time.

**Cases considered:**

*Lauderdale v. Lauderdale* (1996), 180 A.R. 81 (Q.B.) — *referred to*

*Levesque v. Levesque*, 20 Alta. L.R. (3d) 429, 4 R.F.L. (4th) 375, [1994] 8 W.W.R. 589, 155 A.R. 26, 73 W.A.C. 26, 116 D.L.R. (4th) 314 (C.A.) [additional reasons at (1995), 165 A.R. 319, 89 W.A.C. 319 (C.A.)] — *followed*

*MacMinn v. MacMinn* (1995), 17 R.F.L. (4th) 88, 174 A.R. 261, 102 W.A.C. 261 (C.A.) — *followed*

*Moge v. Moge*, [1993] 1 W.W.R. 481, 43 R.F.L. (3d) 345, 145 N.R. 1, 81 Man. R. (2d) 161, 30 W.A.C. 161, [1992] 3 S.C.R. 813, 99 D.L.R. (4th) 456, R.D.F. 168 (headnote only) — *considered*

*Shuparski v. Mair*, [1995] N.W.T.R. 4 (S.C.) — *applied*

*Snelgrove-Fowler v. Fowler* (1993), 46 R.F.L. (3d) 353, 138 A.R. 192, 13 Alta. L.R. (3d) 432 (Q.B.) — *applied*

*Willick v. Willick*, 6 R.F.L. (4th) 161, 173 N.R. 321, 125 Sask. R. 81, 81 W.A.C. 81, 119 D.L.R. (4th) 405, [1994] 3 S.C.R. 670 — *considered*

#### **Statutes considered:**

Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) —

s. 15

Matrimonial Property Act, R.S.A. 1980, c. M-9

Application by mother for child and spousal support.

#### ***LoVecchio J.:***

1 Sally Kathleen Nowakowski ("Mrs. Nowakowski"), who is respectively, the Petitioner in a Divorce Action (No. 4801-78155) and the Plaintiff in a Matrimonial Property Action (No. 9201-09567) and Martin Nicholas Nowakowski ("Mr. Nowakowski"), who is respectively, the Respondent and the Defendant in such actions, were married on November 14, 1981 in Regina, Saskatchewan. After 10 1/2 years of marriage, they separated on June 8, 1992. Mrs. Nowakowski petitioned for their divorce pursuant to the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.) by commencing the Divorce Action on June 5, 1992 and she sought the division of their matrimonial property pursuant to the *Matrimonial Property Act*, R.S.A. 1980, c. M-9 by commencing the Matrimonial Property Action on June 5, 1992.

#### **I — Background**

2 Under the Divorce Action, Mrs. Nowakowski sought custody of their two children namely, Brandy Teniel Nowakowski, born November 5, 1984 and Amber Danielle Nowakowski, born December 16, 1986 with reasonable and generous access to Mr. Nowakowski, support for the children in an amount deemed just, support for herself in an amount deemed just and costs. Mr. Nowakowski filed an Answer to the Petition for Divorce on May 12, 1993 which did not really raise any new issues but rather simply suggested joint custody and stated that Mrs. Nowakowski was capable of being self sufficient.

3 At trial, the amount actually claimed on a per child basis having regard for the budgets submitted and the argument made was effectively \$1,113.06 net per month per child (\$1,199.99 based on certain income assumptions and using the "litmus" test in the case of *Levesque* which is referred to below) and it was asked that this amount be made retroactive to the date of separation. The effect of such retroactivity is to seek additional compensation of \$26,182.82 net (\$36,590.00 using such Litmus test). The spousal support claim was quantified in terms of a lump sum payment of \$46,820.67 and ongoing spousal support in the amount of \$1,000.00 per month for 18 months. Counsel for Mrs. Nowakowski acknowledged at trial that the lump sum amount claimed should be reduced by \$12,138.67 as two of the items claimed (the amount of \$7,138.67 for an RRSP and the amount of \$5,000 which was a Company Asset) were ultimately made part of the Matrimonial Property settlement consent. This reduces the lump sum amount claimed to \$34,682.00.

4 Shortly after their separation, Mr. Nowakowski commenced paying to Mrs. Nowakowski the sum of \$2,600 per month as support for her and the two girls (with no allocation as between child support and spousal support having been made). This was being done pursuant to an Order of Mr. Justice McBain of this Court dated August 17, 1992. This

amount has been received by Mrs. Nowakowski as a before tax amount and thus the net amount available to her to meet expenses after tax has been lower by a significant amount. It is appropriate to note that, as at the date of the trial, there were no arrears in respect of these amounts and that pending my reserve on spousal support and child support, such Order continues in full force and effect. While the parties have a legitimate difference of opinion on the quantum which should have been paid in the past and what should be paid in the future, one cannot suggest that they have not discharged their joint interim responsibilities in a fashion which is a credit to both of them.

5 Under the Matrimonial Property Action, Mrs. Nowakowski sought the division of their matrimonial property subject to the recognition of any appropriate exemptions and, in the defence to such action, Mr. Nowakowski sought the recognition of certain significant asset value he brought to the marriage and distribution of the matrimonial property in accordance with the provisions of the *Matrimonial Property Act*.

6 A Summary Divorce was granted on March 24, 1994 and the balance of the issues arising from the two proceedings were severed. A trial of the remaining issues was held before me commencing on December 11, 1995 and required 3 days. At the commencement of the trial, Counsel advised the Court that no custody issues remained and I invited them to submit to me an appropriate consent order in this regard. The custody arrangements which have been agreed between the parties provide for the sole custody of the two girls to be given to Mrs. Nowakowski with specified liberal access to Mr. Nowakowski. In addition, the parties have an agreement with respect to the resolution of the Matrimonial Property Action. Such agreement is contained in Schedule "A" to this Judgement. This agreement is the work of Counsel for the parties with some input from the undersigned. I wish to thank Counsel for their assistance in the resolution of this part of the case in a very professional manner. The trial was thus reduced to child support and spousal support and at the conclusion of the hearing I reserved my decision on these matters.

7 I heard another divorce action and matrimonial property action the week before and one of the Counsel in that matter is also one of the Counsel in this matter. The issues raised are quite similar in many ways and any similarity between the thinking or the wording in this judgment and the thinking or the wording in that judgment is more than coincidental (See *Lauderdale v. Lauderdale*, Action No.'s 4801 84100, 9501 06828 and 9501 07323 [reported at (1996), 180 A.R. 81 (Q.B.)]).

## II — The Facts

8 There were really no critical factual issues which were in dispute other than the earning capacity of the two parties and the appropriateness of the budgets of the two parties. The parties each presented themselves extremely well. In was never in evidence before me what the cause of their marital difficulties had been but it was clear that they have grown apart considerably and that they do not seem to be able to communicate directly on a number of issues. In Mrs. Nowakowski's case, she is living in a common law relationship with Keith Anderson ("Mr. Anderson") who gave evidence at trial and I sincerely hope their life together is rewarding for both of them. In Mr. Nowakowski's case, he seems to be enjoying his life as a bachelor and I wish him well. In the middle of this are the two girls. Obviously all is not perfect with the children but we are dealing with individuals who are aware of the problems and for the most part have tried to keep their differences and the children's best interest separate. Also, there was no suggestion at trial by either Mrs. Nowakowski or Mr. Nowakowski that the other was not a good parent and concerned about the well being of the children.

9 There are however a few facts which emerged from the trial which should be set forth as they have a significant impact on some of the rulings that I must make in this case. Mr. Nowakowski is currently employed as a Senior Marketing Analyst with Canmar which is a division of Amoco Canada Petroleum Company Ltd. He has worked for this Com-

pany for a number of years both onshore and offshore. He has been away from home a considerable amount of the time and this has probably been both good and bad for their relationship. It was good in the sense that by working on the Canmar rigs offshore Mr. Nowakowski earned a considerable amount of money. He unfortunately has a current tax problem associated with his offshore status which is under appeal. This problem lead to their liquidation of what was referred to at trial as the Okotoks Property. From Mrs. Nowakowski's perspective his long periods away from home left her with responsibility on the home front both in terms of the care of the girls and the day to day management of their finances. It also lead to them having, I suspect, quite independent lives. She was a good manager of their affairs and they, from essentially his income in the latter years, enjoyed a comfortable lifestyle, paid down their mortgage, purchased an investment property which was the Okotoks Property, contributed to RRSP's and went on holidays to Palm Springs.

10 In Mrs. Nowakowski's case, she was a Medical Lab Technologist prior to her marriage and she continued with that employment till the birth of their first child. She by a joint decision became a stay at home mother from 1984 until their separation. Just prior to their separation she started a jewellery business which unfortunately was unsuccessful. She has been unable to resume her career as a Medical Lab Technologist for several reasons all beyond her control. These include the general cutbacks in the field but more specifically the technology has become computer based and she would need significant retraining which given the cutbacks does not seem to be a prudent use of her skills. She is very industrious and during the period of their separation she attended SAIT and is now certified as an Industrial Electronic Technologist. She entered SAIT when it became clear to her that her first job after separation which was as a Service Technician for Cell Builders and only paid her \$8 an hour, just was not going to provide for her care. It is significant that she has made an honest effort to become self sufficient on their separation as the law mandates she must. Her continued employment beyond the Spring of 1996 is not assured at this time as she is on a temporary contract. In addition, she is not functioning at full earning capacity as she has special hours so as to avoid the necessity of Day Care. She does, as stated above, have a new companion with whom she is living in a common law relationship. Mr. Anderson at one time had his own business which was sold. He is currently employed as a real estate agent and he makes a contribution to their living expenses. His earning capacity at present is not substantial. They have purchased a home together and I will be commenting more about that below when the matter of budgets is reviewed. Mrs. Nowakowski was clearly the primary care giver for the two girls and she immersed herself in their various activities. They are at the age when the number of such activities is on the increase as are the expenses associated therewith.

### **III — The Matrimonial Property Action**

11 As previously stated, this has been settled by the Consent of the parties and reference should be made to Schedule "A" to this judgment which is a work sheet I prepared in Microsoft Excel Version 5.0 setting forth the equalization payment and the special payment it will be necessary for Mrs. Nowakowski to make to Mr. Nowakowski in order to give effect to the resolution of the Matrimonial Property Action.

12 Having regard for the consent of the parties expressed during the trial either in documents filed or representations to the Court, my Order in respect of the Matrimonial Property Action is that the matrimonial property listed in Schedule "A" shall be valued at and shall be distributed to the person under whose name it is listed all as set forth in Schedule "A". In addition, each shall be responsible for any debts they acquired during the period commencing on their date of separation but prior to the date of their divorce. It should be mentioned that the matrimonial home which was occupied by Mrs. Nowakowski under Order for exclusive possession and the Okotoks Property were not part of the settlement as they were both sold while the parties were separated. There was some evidence adduced that there was not total unanimity in all aspects of these dispositions but each party was advised by Counsel in connection with the sales and the proceeds have been substantially divided except for some residual cash which is referred to in Schedule "A" as the Trust Account (Ed McCann). The difficulty with the trial process in these matters is we sometimes are required to reopen old wounds when

we need to find away to focus on the future.

#### **IV — The Divorce Action**

##### ***Child Support and Custody***

13 Mrs. Nowakowski has asked for child support for the two girls. As noted earlier pursuant to the consent of the parties, she is to have sole custody of the two girls with Mr. Nowakowski having certain agreed access and, as stated above, I invite Counsel to submit an appropriate consent order to give effect to these arrangements.

14 I must now make a determination of the level of child support which should be awarded in this case.

15 The jurisdiction of the Court to grant a child support Order in divorce proceedings is found under s. 15 of the *Divorce Act*. It is on the basis of the wording of this section that the Alberta Court of Appeal in *Levesque v. Levesque* (1994), 20 Alta. L.R. (3d) 429 (C.A.) enunciated a series of guidelines to be followed when determining the child support obligations of each parent. In that case, the Court was dealing with a situation where both parents worked outside the home and the issue of spousal support was not before the Court. The situation in this case is slightly different in that spousal support is before the Court as an issue. The guidelines enunciated in *Levesque* have been considered in many cases since then where the issues are broader than just child support and have become the accepted starting point for all child support considerations. These guidelines require that I must consider and make determinations respecting the following: (1) The combined gross incomes of Mr. and Mrs. Nowakowski; (2) The costs of bringing up the two girls; (3) The apportionment of that cost between Mr. and Mrs. Nowakowski; (4) Adjustments to the assigned share for the tax consequences arising from the support award; and, (5) Adjustments to the assigned share for any special circumstances of the two parties.

##### ***(1) Combined Gross Income***

16 For the reasons which follow, I find the gross income of Mr. and Mrs. Nowakowski to be \$103,000 of which \$85,000 is attributable to Mr. Nowakowski and \$18,000 is attributable to Mrs. Nowakowski. In *Levesque* (at p 434), the Alberta Court of Appeal considered that a broad definition of income should be used and that "income" should include "the income the spouse can generate by personal effort and the prudent investment or sale of existing assets". In making the determination of the income of the parties, I did not factor in the sale of any existing assets for a number of reasons. The assets are the object of the Matrimonial Property Action and are being divided equally between the parties pursuant to this judgment. There are no liquid assets of the parties, other than their RRSP's and the cash which is to be retained by Mr. Nowakowski after he make the two payments referred to above. This cash will total approximately \$8,000.00. I do not in this case see the disposition of their RRSP's with the resultant immediate tax consequences which would result and the long term harm to the retirement benefit they will provide for Mr. and Mrs. Nowakowski as being prudent. In this regard it is to be noted that she has already cashed in one of her RRSP's. In my view the level of support requested should be sustainable (barring some emergency) from a more limited definition of income without also considering the disposition of assets.

17 In the case of Mrs. Nowakowski she is currently earning \$18,000.00 gross per annum. For the purposes of the Program, (referred to below), I deducted from this amount non-discretionary expenses of \$77.32 per month for her UIC and CPP contributions. This is her current situation. While she has restricted working hours, she has not tried to increase these hours as, given her current earning capacity, she would pay as much in day care as she would earn while working the extra hours. She has not made a lifestyle choice with Mr. Anderson that she will continue to be a stay at home and raise the two girls. As such I intend to treat Mr. Anderson's position differently in this case than I did in the other case

that I just heard. In that case the spouse had made a decision to continue to be a stay at home mother with the person with whom she was living in a common law relationship. She in that case was not pursuing any serious employment opportunities which is quite different from this case. In the other case I attributed income from the new common law spouse to the stay at home mother following the case of *Snelgrove-Fowler v. Fowler* (1993), 138 A.R. 192 (Q.B.). This case falls more squarely within the ambit of the ruling of the Court of Appeal in *Levesque* (at p 388) that:

Unless a legally recognized parental or guardian's obligation arises as between that person and the child, no obligation of support exists on the part of the new cohabitant.

18 This does not mean, however, that Mr. Anderson is completely irrelevant. He and Mrs. Nowakowski have made a lifestyle choice in the property (the "Delacourt Property") they purchased jointly in the country north east of Calgary. The Delacourt Property is an acreage and was clearly something they wanted. Mrs. Nowakowski had occupied the matrimonial home on Madiera Crescent in north east Calgary prior to the purchase of the Delacourt Property. The matrimonial home was more modest in many respects. Mr. Anderson and this purchase are to me special circumstances and will be dealt with below when budgets are discussed (See *Levesque* which mandates adjustments to the assigned share of child care expenses for special circumstances). I also plan to utilize the approach of Madam Justice Hetherington, a judge of the Alberta Court of Appeal who was sitting as a trial judge of the Northwest Territories Supreme Court in the recent case of *Shuparski v. Mair* (18 January 1995) Yellowknife CV 05191 (N.W.T. S.C) [reported at [1995] N.W.T.R. 4], namely, that the sums received as child tax benefits should be treated as direct contributions to the support of the children rather than as income to Mrs. Nowakowski which may or not be used for that purpose. In this case, Mrs. Nowakowski has been able to arrange her schedule such that no amount appears in her budget for day care for the two girls. This arrangement does, however, affect her earning capacity. In view of this arrangement and her common law relationship with Mr. Anderson the tax deductibility of "child day care expenses" and the "equivalent to married tax credit" are not personally relevant to her income or tax position. In respect of the child tax credit, Counsel for Mrs. Nowakowski estimated this at \$110.00 per month. The actual amount which will be received by Mrs. Nowakowski is a function of her actual income. Based on the child support payments Mrs. Nowakowski will receive under this judgment which were determined in part through the use of Support.Works Version 2.1 (the "Program"), the Program calculated such amount at \$82.41 per month.

19 The income level of Mr. Nowakowski has been set at \$85,000 after a review of his employment income history for the past eight years (See Exhibit - 1 Tab 7), a review of a letter from Amoco Canada Petroleum Company Ltd. dated December 4, 1995 (Exhibit - 1 Tab 9) and his testimony at trial. In reviewing such employment history for the years 1987 to 1994 inclusive, the income of Mr. Nowakowski has ranged from \$125,813.00 as a high in 1993 to \$76,512.00 as a low in 1987 and averaged \$92,743.46. Based on the Amoco letter his income for 1995 will be \$79,500.00 and he may expect a bonus of between 0-1.5% of his salary for the year. I factored into the Program non-discretionary deductions in respect of UIC and CPP of \$1,245.12 and \$806.00 annually based on his return for 1994 (See Exhibit 1, Tab 4). Mr. and Mrs. Nowakowski appear to have been very good money managers during their marriage and if Mr. Nowakowski had not been required to pay \$66,312.39 in taxes, interest and penalties associated with his offshore work status they would probably still have the Okotoks Property. This assessment is under appeal and I do not want to be seen as in anyway leaving the impression Mr. Nowakowski was cute or on the line in his tax planning. He appears to have claimed the Overseas Employment Tax Credit on the advice of his advisors.

## (2) *The Costs of Bringing up the Two Girls*

20 At trial, there were a number of documents introduced which impact on the determination which must be made by me of the appropriate budget for the raising of the two girls. Specifically the most relevant documents tendered were: (a)

the Financial Statement produced by Mrs. Nowakowski (Exhibit - 6), (b) the Calculation of Family and Child Care Expenses of Mr. Nowakowski (Exhibit - 1 Tab 2) and (c) the Affidavit of Mrs. Nowakowski dated June 5, 1992 (Exhibit - 7) which was filed by Mrs. Nowakowski in support of her application for interim support. Exhibit 6 when dealing exclusively with child care costs has them set at the level of \$2,731.34 which is to be reduced by \$60.00 for the school lunch program which was included in error. Exhibit 7 had them at \$1,949.00 which in cross-examination it was acknowledged included an amount for a mortgage when, in fact, the matrimonial home was free and clear. The amount included was \$350.00 which it was suggested was the payment required for the mortgage on the Okotoks Property. I note even removing this item some additional amount must be added under housing costs for property tax, utilities and the like. I mentioned earlier the decision of Mrs. Nowakowski and Mr. Anderson to purchase the Delacourt Property. She was in a home which was free and clear. Under her current budget (Exhibit - 6) the portion of the mortgage for Delacourt which she attributes to the two girls is \$446.49. This to me is an inappropriate amount as it flows directly from a choice she made in her new relationship with Mr. Anderson and was not a result of the breakup of the marriage. I note in her Affidavit (Exhibit - 7) she stated "I believe it is in the best interests of the children for the children to continue to reside with me within the matrimonial home, as they have resided within the matrimonial home all of their lives". She gave evidence at trial that the neighbourhood had declined since that time but her testimony to me was not convincing. In my view when she said she had a dream about living in the country she said it all. This means the appropriate number for the child care costs of Mrs. Nowakowski is somewhere between \$2,224.85 and \$1,599.00. I find that the amount of \$850.00 per month per child net should be used in this case. This is exclusive of the educational fund which is part of the Consent on Matrimonial Property. I believe this amount, namely \$300.00, should also be deductible as child support for Mr. Nowakowski.

21 This brings me to the amounts claimed by Mr. Nowakowski in his budget (Exhibit - 1 Tab 2). He claims the amount of \$1,800.00 per month. He includes in this amount the sum of \$800.00 which is an allocation of a part of his current support payment of \$2,600.00 per month. This means he is really talking about \$1,000.00 per month. He allocates a portion of his rent (\$300.00) and a portion of his debt payments (\$200.00) to the children. His surroundings based on his evidence are not in any way extravagant. He does have a spare room so the girls can stay with him overnight. He also allocates a substantial amount of his telephone bill and car expenses to the children. I find some of this to be excessive and fix his costs at \$600.00 for cost sharing purposes. In running the sensitivities which I did through the Program, I aggregated in the "Analysis of Child Support Requirements" the more detailed classifications which appear in the Exhibits to 8 namely, Food, Clothing, Personal Care, Transportation, Day Care, Recreation & Ent, General and Shelter. The costs of Mr. Nowakowski appear under the heading "General" of the Total Child Care Cost Table. When comparing the projected annual number of \$27,600.00 to the Edmonton \$18,328.00 and Calgary \$18,698.00 standards in the sensitivities, the numbers are of course high. When dealing with the Litmus test as set forth in *Levesque*, the number is lower but within the range.

*(3) Apportionment of Child Care Costs and (4) Adjustment for the Tax Consequences of the Support Award*

22 These two items will be dealt with together and at this stage the Program has been extremely useful. I have relied upon the Program to apportion the child care costs between the two parties and to calculate the support required to be given to Mrs. Nowakowski. She will receive under this Order \$2,352.18 per month before tax to yield approximately \$1,600.00 after tax. There is also the education fund of \$300.00 per annum. Schedule "B" to this judgment is printed output from the Program. The first material is the model I chose for the purposes of this judgement. In reviewing this schedule a few assumptions should be highlighted. The child tax credit, as determined by the Program, which will be received by Mrs. Nowakowski has been shown as a reduction of child care expenses and given the relationship of Mrs. Nowakowski she is not entitled to the "Married Equivalent" deduction. No amount was included for daycare. The Program makes the necessary adjustments for these assumptions. I also, in this case, provided for a subsistence amount for

each as I have some concerns for the earning capacity of Mrs. Nowakowski and Mr. Anderson. The effect of this provision in this case is to slightly increase the burden of Mr. Nowakowski in cost sharing.

(5) *Special Circumstances*

23 Under this category of the *Levesque* analysis, two points should be addressed. The first relates to the notional determination of the child support obligation of each parent without regard to the particular parties ability to meet that obligation. There would appear to be a subtle difference of view between the position taken by the Alberta Court of Appeal in *Levesque* and that taken by Madame Justice L'Heureux-Dubé who spoke for the minority in the case of *Willick v. Willick* (27 October 1994) (S.C.C.) [unreported], [reported at 6 R.F.L. (4th) 161]. In *Levesque*, the children's needs came first while in *Willick*, Madame Justice L'Heureux-Dubé held at p 20 of her judgment that "the court should deduct from each party's total income a sum needed to achieve subsistence, in order to arrive at a more realistic assessment of the respective incomes available for child support". In this case the debate on the point is really more academic in nature as Mr. Nowakowski has sufficient net cash after support that will keep him above the subsistence threshold I have inserted in the Program.

24 Counsel for Mrs. Nowakowski asked that the child support amount include a cost of living adjustment. The same issue was considered by the Court of Appeal in *MacMinn v. MacMinn* (3 October 1995) (Alta. C.A.) (unreported) [reported at 17 R.F.L. (4th) 88] and the Court had the following to say about the issue at p 14:

However, we decline, given the current economic circumstances, to provide for an automatic cost of living adjustment. Indeed, which parent should bear the additional costs arising from any increases in child support costs will be contingent upon the changes in each parent's financial circumstances relative to the other. In other words, providing for additional costs to be increased in accordance with the apportionment we have made herein would only be appropriate if the father's and mother's respective financial positions improved or deteriorated in exactly the same proportion that each now bears to the other. We have no evidence on this point.

Given the circumstance of this case I adopt that reasoning and decline in this case as well.

25 This brings me to the claim for retroactive child support. In *MacMinn* a recent decision of the Alberta Court of Appeal, the Court had the following to say about this issue at p. 5:

Dealing first with the issue of the jurisdiction and ability of the trial judge to make adjustments at trial to interim support orders, we note that interim support is just that — interim support. It is frequently ordered without benefit of discoveries, full production of documents, viva voce evidence and generally the safeguards of a trial designed to determine the actual state of the parent's respective financial affairs.

26 In this judgement, I have set the level of child support at \$2,393.50 before tax to yield approximately \$1,600.00 after tax. On an interim basis Mrs. Nowakowski received \$2,600.00 per month before tax for the period commencing August of 1992 to date. This amount was for both child support and spousal support. Counsel for Mrs. Nowakowski in formulating the claim attributed this all to child support in arriving at what the net claim should be. I intend to adopt the same approach as the net result will be the same when spousal issues are also considered. For the 1994 tax year, Mrs. Nowakowski had a total tax liability of \$8,023.75 based on total income of \$39,390.07 of which \$31,200.00 was alimony or maintenance income (See Lines 128, 150 and 435 of Exhibit - 4). She had three non-recurring items on her return which should be ignored for this part of the analysis. They were the RRSP funds, which she withdrew, in the amount of \$7,138.67, the SAIT scholarship she received in connection with her retraining efforts of \$5,000.00 and a business loss for her jewellery business of \$3,948.60. The net effect of these items accounts for the difference between the alimony or

maintenance number and the total income number on her tax return. During that tax year, she had a marginal tax rate of 26% and enjoyed the benefit of the Married Equivalent deduction of \$5,380.00 which was a benefit to her of approximately \$2,000.00 in tax savings (\$5,380 x 26%, which is her marginal tax rate, plus her Alberta tax equivalent, roughly 45.5% of the federal tax). If the 26% marginal tax rate is used and it is combined with the Alberta tax equivalent roughly a third of her support payments would have gone to the tax department in 1994 in a worst case scenario. This means that she would have had available from the \$31,200.00 (Line 128 of Exhibit - 4) only \$21,000.00 or \$1,750.00 per month. This is of course a worst case as it applies the 26% marginal tax rate to the child support payments and does not factor in the lower marginal rate of 17% which should be applied to at least a part of the such \$31,200.00 which should be done in a perfect calculation as the child support payments take her over the 17% marginal tax rate threshold into the 26%. Under this judgement she is to receive \$2,352.18 gross or approximately \$1,600.00 net plus the education fund and, as a result, the claim for retrospective support must be rejected.

### **Spousal Support**

27 I dealt with the issue of Child Support first as the income flow of Mrs. Nowakowski had to be established to utilize the Program. Having made the determinations I did, I must now turn to the issue of spousal support which in the case at bar really has three facets: (1) the level of spousal support Mrs. Nowakowski should have received on an interim basis, (2) what ongoing obligation should Mr. Nowakowski have to Mrs. Nowakowski having regard for the presence of Mr. Anderson, and (3) assuming the net effect of (1) and (2) is a financial obligation should that obligation be satisfied by ongoing periodic payments or a lump sum settlement?

#### ***Issue (1)***

28 This issue arises out of *MacMinn*. Given the attribution of the \$2,600.00 per month currently being paid by Mr. Nowakowski wholly to child support as I did above, Mrs. Nowakowski has effectively received no spousal support from Mr. Nowakowski to date. Counsel for Mrs. Nowakowski has suggested that Mrs. Nowakowski should have received the sum of \$1,500.00 per month for two years while she was retraining, or the sum of \$36,000.00. She also claims the amount of \$1,000.00 for 18 months. When the two amounts are combined you end up with \$48,000.00. She also framed the demand through moneys spent and debts incurred. Under this analysis, she arrives at the number of \$46,820.67. This is the number I referred to above under "Background" which included \$12,000.00 for a Nanny. I am very dubious about this amount as Mrs. Nowakowski has been quite meticulous about the family finances. No claim for child care expense appears on her tax return for 1992 (Exhibit - 3), a claim of \$4,367.36 appears for 1993 (See line 214 of Exhibit - 1 Tab 5) and no claim appears for 1994. Given she has unpaid taxes for 1993 and 1994, if my scepticism is misguided she should refile her returns for those years and on the 1/3 tax basis she may be entitled to a credit of slightly under \$3,000.00. In dealing solely with issue (1) however, the claim for \$1,500.00 per month gross while not excessive is slightly more than the budgeted amounts both under the Interim numbers (Exhibit - 7) and considerably less than the budgeted numbers (Exhibit - 6). I have some sympathy for her position on the retraining as it was clearly a joint decision that she would be a stay at home mother. She has made an honest effort to retrain and is in fact presently working and earning income. It is my intention to award her the sum of \$25,000.00 under this part which is slightly in excess of the debts she incurred during her retraining.

#### ***Issue (2)***

29 Under this head of the analysis, we are really dealing with two distinct concerns which are always quite fact specific. In this case as stated earlier, I have borrowed quite extensively from my own analysis in another case which I heard a few days before the present case. Those concerns deal with choices individuals make for the future and the con-

sequences which flow from marriage breakdown. In *Moge v. Moge* (1992), 43 R.F.L. (3d) 345 (S.C.C.) the Supreme Court mandated that on marriage breakdown it was appropriate that a stay at home mother be compensated for the economic disadvantage which she has in trying to reenter the workforce on the breakup of her marriage. The other case which I heard was a classic example of that principle. This case is quite different. There is no doubt that Mrs. Nowakowski was at an economic disadvantage in 1992 when they separated. Her previous training as a Medical Lab Technologist was of little value. To her credit she did not sit around. She tried to make a go of the jewellery business but that failed and she also worked at Cell Builders but, as stated, at \$8 per hour she realized that was not the answer. She started retraining at SAIT in September of 1993 and graduated in May of 1995 with honours. She has unfortunately also made a few decisions which were not connected to Mr. Nowakowski and do not flow from her marriage breakdown. Specifically the decision to buy the Delacourt Property which has created a debt burden which is making it hard for her to make ends meet. While it is inappropriate for me to saddle Mr. Nowakowski with the economic burden of that decision, it is not inappropriate that he have an ongoing obligation until such time as she has completed that transition to self sufficiency which the *Divorce Act* mandates and, clearly, she has made considerable progress in that area.

30 But, what is her future spousal claim today, for as regards the future she has made a lifestyle choice with Mr. Anderson which will hopefully provide her with the happiness and support she deserves. There is in my mind still in her case some residual economic disadvantage which flows directly from her decision made with the concurrence of Mr. Nowakowski to interrupt her career and become a stay at home mother. Her employment situation is not certain and under this head it is my intention to award her the sum of \$1,000.00 per month for 12 months in the hope that she will during that period find employment at a slightly higher level as she attains that level of self sufficiency the *Divorce Act* mandates be promoted to the extent possible. In her case it has not been easy for her to retrain herself, integrate herself back into the workforce and at the same time have the primary responsibility to manage the care of the two girls.

### **Issue (3)**

31 The obligations will be satisfied partly in lump sum and partly in a periodic payment.

### **Conclusions**

32 In the result: (1) Child support shall be fixed at \$2,400.00 per month (\$1,200.00 per child and rounded from the \$2,352.18 amount appearing above). Payments at this level shall commence with the payment due for February 1996 and shall remain in effect so long as that child is a child as defined in the *Divorce Act*. The education fund shall be maintained as contemplated by Schedule "A". In addition, all obligations for child support, including the education fund, shall be binding on Mr. Nowakowski's Estate. (2) Commencing with the month of February 1996, monthly payments of \$1,000.00 per month in respect of spousal support for Mrs. Nowakowski shall commence and continue for 12 months. In respect of the retrospective spousal support, the amount of \$25,000.00 has been awarded and Mr. Nowakowski will be given 9 months from the date of this judgment to satisfy this obligation. (4) The Matrimonial Property shall be distributed and dealt with pursuant to the consent of the parties all as set forth in Schedule "A".

### **VI — Costs**

33 Counsel may speak to me regarding the matter of costs during the next 30 days failing which Mrs. Nowakowski shall be entitled to costs in respect of the Divorce Action in accordance, I believe, with Schedule C and each side will bear their own costs in respect of the Matrimonial Property Action.

*Application granted.*

## Appendix "A"

## Matrimonial Property Division

Asset Description	Value(1)	Sally	Martin
Retirement Assets			
-----			
ScotiaBank RRSP			
#200002(2)	7,138.67	7,138.67	
#200003	6,424.89	6,424.89	
#13175104(3)	14,100.64	14,100.64	
#3161973(3)	9,235.73	6,177.87	3,057.86
Royal Bank RRSP			
#501279260	6,553.03	6,553.03	
#501330019	8,090.52	8,090.52	
Royal Trust RRSP			
#Z02244539	27,835.81		27,835.81
Amaco Canda			
Amaco RAP	7,325.89	7,325.89	
Amaco SPA	3,417.15	3,417.15	
Amaco Pension Plan	6847.36	6847.36	
Other Assets			
-----			
Contents of Matrimonial Home	16,196.00	15,724.00	472.00
Martin's 1991 Income Tax Refund	10,625.54		10,625.54
Sally's Jewelry Business	200.00	200.00	
Sapporo Car	650.00	650.00	
Mediation and Gavin-Sally's Share	850.00	850.00	
416341 Alberta Inc.			
Sally Distribution	5,000.00	5,000.00	
Bank Account	1,669.96	1,669.96	
Trust Account (Ed McCann)	12,278.88		12,278.88
-----			
Total(4)	144,440.07	72,579.58	71,860.49
	1/2 each		
	72,220.04	72,220.04	72,220.03
Equalization payment to Martin			359.54

Special payment to Sally (5)	3,850.00
Net payment to Sally	3490.46

Notes:(1) The value assigned to any particular asset is by agreement between the parties.

(2) This RRSP Account in fact no longer exists it having been collapsed by Sally and any tax associated with such collapse is for her account.

(3) The amounts shown to the credit of Sally in fact are in the name of Martin and he will arrange for the transfer of such sums to an account for the credit of Sally at the same institution on a tax free rollover basis within 30 days of the date of this judgment.

(4) The total assets figure from which the equalization payment was determined does not give effect to the following agreement between the parties respecting certain additional matters which they have undertaken to pursue in the ordinary course and account to the other or the children as appropriate:

(i) Martin was reassessed in respect of certain overseas employee tax credits claimed by him in the years 1989, 1990 and 1991. The aggregate tax paid by him inclusive of interest and penalties was \$66,312.39. He is in the process of appealing such reassessments and in the event he is successful on such appeals Martin will forward to Sally, as soon as is reasonable practicable after receipt by him of a refund in respect of such appeals, 1/2 of the amount received by him inclusive of interest if applicable. In the event such appeals have not been filed prior to the date of this judgment, Martin shall effect such appeals within sixty days of the date of this judgment. In view of the fact both parties were surprised the tax credits claimed were not allowed, any professional fees he incurs in such appeals will be for their joint account.

(ii) Martin and Sally opened certain bank accounts into which certain deposits have been made for the future post secondary education costs of their two children namely, Brandy Teniel and Amber Danielle Nowakowski. Martin shall within thirty days of the date of this judgment have such accounts redesignated so that the funds stand to the credit of Brandy and Amber separately and that the proceeds are either invested in either GIC's of the financial institution holding the deposit or bonds of the Government of Canada or Alberta. Any interest earned shall be reinvested for their benefit and Sally shall ensure that appropriate tax returns are filed for them. In addition, Martin shall during the month of October commencing in October of 1996 purchase for each of Brandy and Amber a GIC or bond similar to those stipulated above in the amount of \$300.00. Such obligation shall continue up to and including the year in which such child turns 21. The proceeds of this provision shall be available to pay the post secondary education costs of the respective child. In the event a child does not attend a post secondary institution then after the last investment has been purchased in the 21st year of such child's life any amount accumulated to that point in time shall be delivered to such child. In the event one of them should die before attaining the age of 21, then any amounts standing to such child's benefit shall to the extent possible be made available to the other. In the event neither attains the age of 21 then on the death of the last to die any amounts then available shall be divided equally between Sally and Martin or the survivor of the two in the event they are not both alive at the relevant time.

(iii) Martin holds certain life insurance. The beneficiary of such policy shall be changed to Brandy and Amber or their survivor and such designation shall not be changed while either or both of them survives Martin and Martin shall maintain such policy in good standing during his lifetime.

(iv) Sally shall be entitled to retain the balance in the bank account of 416341 Alberta Inc. for her use, it being understood that she was required to make an equalization payment of \$359.54 to Martin which payment is being made

by way of setoff from his special payment to Sally referred to below. In addition, Martin shall within 30 days of the date of this judgment transfer to Sally any share or other interest he has in such company for \$1 and ensure that Sally becomes the sole signatory in respect of the bank account. Any costs associated with such transfer shall be for the account of Sally. Except for such bank account, it is the understanding of Martin and Sally that such company does not have any other assets or liabilities as at the date of the trial. In the event there are undisclosed liabilities each shall indemnify the other as to 1/2 and in the event there are undisclosed assets each shall be entitled to 1/2. As Sally will be the custodian of the company after such transfer, she shall affect any transfer of undisclosed assets as soon as is reasonably practicable after their discovery.

(5) Martin shall instruct his Counsel Mr. Ed McCann to pay the sum of \$3,490.46 (\$3,850.00 - 359.54) from the funds which he holds in trust for the benefit of Martin under this matrimonial property settlement to Sally within thirty days of the date of this judgment. This is a special payment which the parties have agreed is to be made and with which they are content is appropriate.

### **Analysis of Child Support Requirements — Nowakowski vs Nowakowski**

Prepared for JUSTICE LOVECCHIO on Support.Works v 2.1  
prepared using 1994 tax tables

#### INDEX

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### **Summary of Approach and Assumptions**

#### ***(1) Objective***

This analysis is designed to quantify the financial obligation of separated parents to their children. It divides this obligation on the basis of their relative financial resources. The objective of the analysis is to determine the amount of support required by the parent who retains custody of the children (recipient parent) from the children's other supporting parent (payor parent). As the recipient must include the support in taxable income, this amount must be adjusted to neutralize the recipient's tax costs. After determining each parent's child support obligation we must consider whether they have the ability to meet this obligation.

#### ***(2) Allocation of Tax Benefits***

The tax system provides three main tax benefits to help offset child care expenses. These benefits include:

- A. The Child Tax Benefit,
- B. The "equivalent to married" tax credit, and
- C. The tax deductibility of certain child care expenses (daycare, etc.).

The allocation of these benefits will affect how the payor's share of the child care expenses will be adjusted.

#### *A. Child Tax Benefit*

The Child Tax Benefit has been treated as a tax benefit designed to offset a portion of the child care costs and it has been deducted from the child care expenses, before the termination of each parent's financial obligation.

#### *(3) Allocation of Child Care Expenses Between Payor and Recipients*

The child care expenses are allocated between the payor and recipients based upon their proportionate share of gross family income, less a subsistence living allowance for both the payor and the recipient and non-discretionary deductions.

#### *(4) Calculation of Support Amount*

The payor's portion of the child care expenses includes both those expenses paid directly by the payor and those paid to the recipient. The support equals the amount of before tax dollars required to ensure that the after tax amount received is equal to the payor's portion of child care expenses.

#### *(5) Tax Deductions*

In calculating the tax consequences of support, non-discretionary tax deductions have been taken into account.

#### **Summary of Results**

	PAYOR		RECIPIENT	
	MONTHLY	ANNUALLY	MONTHLY	ANNUALLY
SURNAME	NOWAKOWSKI		NOWAKOSKI	
PROVINCE	AB		AB	
SUBSISTENCE AMOUNT	15000.00		15000.00	
NON-DISCRETIONARY EXP	2051.12		927.84	
GROSS INCOME	7083.33	85000.00	1500.00	18000.00
GROSS SUPPORT AMOUNT	2352.18	28226.17	2352.18	28226.17
AFTER TAX VALUE OF SUPPORT	1285.59	15427.11	1560.13	18721.52
AFTER TAX DOLLARS	4495.05	53940.63	1191.84	14302.11

(NET OF NON- DESCRETIONARY DED) AVAILABLE BEFORE SUPPORT AFTER TAX DOLLARS (NET OF NON- DESCRETIONARY DED) AVAILABLE AFTER SUPPORT	3209.46	38513.52	2751.97	33023.63
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\* "AFTER TAX (NET DEDUCTIONS) AVAILABLE BEFORE (AFTER) SUPPORT" (RECIPIENT) DOES NOT INCLUDE CHILD TAX BENEFIT OF \$ 988.86/YEAR (\$ 82.41/MONTH)

NUMBER OF CHILDREN            2

	MONTHLY	ANNUAL
ESTIMATED RECIPIENT CHILD CARE COSTS	1700.00	20400.00
ESTIMATED PAYOR CHILD CARE COSTS	600.00	7200.00
ESTIMATED TOTAL CHILD CARE COSTS	2300.00	27600.00
CHILD TAX BENEFIT RECEIVED	82.41	988.86
DEDUCTIBLE PORTION OF DAY CARE	0.00	0.00

**Worksheet**

Payor's Gross Income	A	85000.00
Less Subsistence	B	15000.00
Less Non-Descretionary Deductions	C	2051.12
Payor's Adjusted Income	D=A-B-C	67948.88
Recipient's Gross Income	E	18000.00
Less Subsistence	F	15000.00
Less Non-Descretionary Deductions	G	927.84
Recipient's Adjusted Income	H=E-F-G	2072.16
Total Family Income, Net Subsistence	I=D+H	70021.04
Deductible Portion Of Day Care	J	0.00
Projected Annual Child Care Expense	K	27600.00
Less Child Tax Benefit	L	988.86

Less Tax Benefit Of Day Care Deduction	M	0.00
Less Equivalent To Married Tax Credit	N	0.00
Net Annual Child Care Expenses	O=K-L-M-N	26611.14
Payor's Portion Of Annual Child Care Costs	P=O*(D/I)	25823.63
Add Recipient's Portion Of Tax		
Savings From Marginal Rates	Q	97.49
Less Child Care Expenses Paid Directly		
By Payor	R	7200.00
Payor's Portion To Be Paid To Recipient	S=P-R	18721.12
Recipient's After Tax Income (Before Support)	T	15229.95
Recipient's After Tax Income Required	U=T+S	33951.07
Recipient's Gross Income Required	V	46226.17

Annual Support Required To Have Recipient

**Child Support Using a Range of Child Care Expenses**

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AFTER TAX DOLLARS
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CHILD CARE EXPENSES		PAYOR'S PORTION	SPOUSAL SUPPORT	TOTAL SUPPORT REQUIRED	
MONTHLY	ANNUAL			MONTHLY	ANNUAL
2100.00	25200.00	16389.52	0.00	2030.89	24370.71
2150.00	25800.00	16973.33	0.00	2110.95	25331.34
2200.00	26400.00	17556.53	0.00	2190.63	26287.52
2250.00	27000.00	18138.87	0.00	2271.15	27253.78
2300.00	27600.00	18721.12	0.00	2352.18	28226.17
2350.00	28200.00	19303.36	0.00	2433.00	29195.98
2400.00	28800.00	19885.61	0.00	2514.01	30168.15
2450.00	29400.00	20467.85	0.00	2594.91	31138.86
2500.00	30000.00	21050.09	0.00	2675.96	32111.46

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**Total Child Care Cost Table**

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AGE	11	9	MONTHLY	ANNUAL
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			TOTAL	TOTAL
FOOD	300	300	600	7200.00
CLOTHING	100	100	200	2400.00
PERSONAL CARE	50	50	100	1200.00
TRANSPORTATION	75	75	150	1800.00
DAY CARE	0	0	0	0.00
RECREATION & ENT	150	150	300	3600.00
GENERAL	300	300	600	7200.00
	0	0	0	0.00
-----	0	0	0	0.00
-----	0	0	0	0.00
-----	0	0	0	0.00
SUBTOTAL	975	975	1950	23400.00
SHELTER	175	175	350	4200.00
TOTAL	1150	1150	2300	27600.00

### Comparative Tables

	CHILD CARE EXPENSES	MONTHLY SUPPORT REQUIRED<*>
PROJECTED	27600.00	2352.18
EDMONTON (1)	18338.00	1116.77
CALGARY (2)	18698.00	1164.79
LEVESQUE "LITMUS TEST"<*><*>	33990.00	3214.26

(1) INDEXED BY 0%

(2) INDEXED BY 0%

<\*> Indicates monthly support as calculated using the selected child care expense allocation options.

<\*> The above calculation refers to the Alberta Court of Appeal "Litmus Test" for the reasonableness of child care expenses. The "Litmus Test" does not include day care expenses incurred by the recipient, which have been budgeted at \$0.00 annually.

### Comparitive Tables (Annual)

INDEX	PROJECTED n/a	EDMONTON 0%	CALGARY 0%
FOOD	7200.00	2576.00	2756.00
CLOTHING	2400.00	1502.00	1502.00
PERSONAL CARE	1200.00	1642.00	1642.00
TRANSPORTATION	1800.00	684.00	654.00
DAY CARE	0.00	7470.00	7470.00
RECREATION & ENT	3600.00	1362.00	1332.00
GENERAL	7200.00	0.00	0.00
-----	0.00	0.00	0.00
-----	0.00	0.00	0.00
-----	0.00	0.00	0.00
-----	0.00	0.00	0.00
SUBTOTAL	23400.00	15236.00	15356.00
SHELTER	4200.00	3102.00	3342.00
TOTAL	27600.00	18338.00	18698.00

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