

SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION

Citation: *Smith v. Poirier*, 2015 NSSC 162

Date: 2015-06-02

Docket: *Halifax* No.SFHF-000801

Registry: Halifax

Between:

Carrie Lee Smith

Applicant

v.

Daniel Joseph Poirier

Respondent

Judge: The Honourable Justice Moira Legere Sers

Heard: May 5th, 2015, in Halifax, Nova Scotia

Written Release: June 2, 2015

Counsel: Suzanne Robichaud, counsel with Daniel Poirier
Carrie Smith, Self-Represented

By the Court:

[1] On March 3, 2014 Ms. Smith commenced an application to vary child support retroactively to 2003. She seeks to amend the maintenance enforcement records subsequent to the variation.

[2] The Applicant is self-represented, the Respondent is represented by counsel.

History of Child Support

[3] The parties entered into an “Agreement to Pay Maintenance” in June 1999, registered with the Court in July of the same year.

[4] The Respondent agreed to pay \$127 per month in child support commencing July 1, 1999 forward for his two year son, Jaten Poirier Smith (born May 1, 1997). The Agreement contained no provision for section 7 expenses.

[5] On June 27, 2003 by court order, the Respondent’s income was determined to be \$21,691.65 which yielded a child support payment of \$175 per month.

[6] The Order spoke clearly of the Respondent’s obligation to disclose his income on a bi-monthly and annual basis as well as his obligation to pay in accordance with the *Child Support Guidelines*. The order directed as follows:

18. All support payments shall be payable to Carrie Lee Smith and shall be forwarded to the Office of the Director of Maintenance Enforcement, P.O. Box 803, Halifax, Nova Scotia B3J 2V2, while the order is filed for enforcement with the Director

19. Daniel Joseph Poirier agrees to provide to Carrie Lee Smith **a copy of his income tax return, his T4 slip and a recent pay stub on or before June 1st of each year** pursuant to the Federal Child support guidelines.

20. During the period of this order Daniel Joseph Poirier **shall provide on a bi-monthly basis updated financial information to Carrie Lee Smith , including a recent pay stub setting out his employment income earned and Daniel Joseph Poirier agrees to pay child support to Carrie Lee Smith pursuant to the *Federal Child Support Guidelines* in accordance with the Nova Scotia Tables and in accordance with his monthly income.**

21. Daniel Joseph Poirier agrees that any employment which materially affects his income **shall be reported to Carrie Lee Smith within twenty-four hours of confirmation** by Daniel Joseph Poirier of said employment.

22. Daniel Joseph Poirier and Carrie Lee Smith shall each pay the special or extraordinary expenses of the child pursuant to section 7 of the *Federal Child Support Guidelines*. Each parties **share of the section 7 expenses shall be prorated** and based on their respective incomes. For the purpose of Section 7 payments, **Carrie Lee Smith shall provide a copy of her income tax returns, T4 slip and a recent pay stub by June 1st of each year** pursuant to the *Federal Child Support Guidelines* for the purposes of calculating each parties contribution.

[7] The father enrolled himself in the Maintenance Enforcement Program in 2003.

[8] The next order dated March 18, 2015 identified the father's income as \$197,410, yielding a child support payment of \$1,580.32 per month commencing April 15, 2015. At this time his son was 17 years old.

[9] Costs were awarded against the Respondent in the amount of \$750 for failure to appear.

Triggering Event

[10] The child has been in the primary care of the Applicant throughout.

[11] In February 2014 for a very brief few days the child left home to live with his father, the Respondent, the Respondent's wife and new child. The child returned to the Applicant's home shortly afterward.

[12] The Respondent withheld the February 2014 payment.

[13] While the child stayed with the Respondent, the Respondent immediately contacted Maintenance Enforcement to alter his obligations. He was informed there was a credit in excess of \$40,000 in his name.

[14] Each party became aware of the Maintenance Enforcement statement recording this credit.

[15] The Applicant became aware of the Respondent's actual income, the significant difference between child support she received and child support based on the Respondent's actual income.

Maintenance Enforcement

[16] At this point, based on the 2003 order, the records show that Mr. Poirier has a credit of \$44,386 as of March 2014 based on a payment of \$175 per month.

[17] Mr. Poirier has not and could not claim to be misled by this letter.

[18] Each year the Respondent and his wife calculated his child support obligations using online tables and information he received from Maintenance Enforcement.

[19] Until he contacted the Maintenance Enforcement Office, he was unaware of their records or the credit. Thus, he was not operating on this information when calculating what he owed each year.

[20] The enforcement records show a fluctuation in payments from \$127 each month until a change on June 1, 2003 to payments of \$175 per month.

[21] In July 2003 the payments changed to \$133 per month with variable payments of greater or lesser amounts. His actual income should have generated payments of \$235.

[22] In April 2012 there is a marked difference in the payments. They rose to \$1,099 per month when they should have been \$1,189 and in May 2013 to \$1,348 when they should have been \$1,580.

[23] As the evidence did not include an updated record from Maintenance Enforcement, the court requested an update.

Retroactive Calculation Based on Actual Income

[24] The Applicant calculated what she believes the Respondent should have paid for base amount and section 7 expenses based on actual income using the effective date of June 1, 2003 as per the November 2003 order.

[25] According to the Applicant's calculations, had the respondent complied with the terms of the order and paid in accordance with his income, he should have paid an additional \$30,381 in base amount of support up to and including the 2014 year. He should have paid approximately \$16,715 in extraordinary expenses, divided proportionately to their actual incomes as specified in the court order.

[26] The following chart reflects the best evidence available to the court. The conciliation record dated August 21, 2014 highlights at page 2 and 3 the use of pre and post 2006 tables and the 2011 table depending on the year of payments.

Payor's income	Table	Average/ Month	Recipient's Income	%
2003**	\$27,076	235	139	
2004*	\$23,518	195	123.08	
2005*	\$69,341	561	350.92	\$10,939 86%
2006	\$87,419	687/743	414.08	\$18,214 83%
2007*	\$87,183	742	349.6	\$9,117 91%
2008	\$67,293	585	372	\$12,424 84%
2009	\$66,579	579	381.16	\$17,428 79%
2010*	\$102,250	857	515.33	\$19,276 84%
2011	\$101,619	852	625.91	\$6,784 94%
2012*	\$147,121	1198	815.91	\$15,456 90%
2013	\$197,410	1580	1249.25	\$16,386 92%
2014	\$192,203	1541	1337.08	\$48,887 80%
2015**	To June	1541	1503.47	

*Altered by Respondent

**Altered by court order

YEAR	BASED ON ACTUAL INCOME (rounded)	ACTUALLY PAID	DIFFERENCE
June 2003	\$1645	\$1033	\$612
2004	\$2340	\$1670	\$670
2005	\$6732	\$4211	\$2521
2006	\$8692	\$4969	\$3723
2007	\$8904	\$4196	\$4708
2008	\$7020	\$4462	\$2558
2009	\$6948	\$4574	\$2374
2010	\$10284	\$6184	\$4100
2011	\$10224	\$7511	\$2713
2012	\$14376	\$9791	\$4585
2013	\$18960	\$14991	\$3969
2014	\$18492	\$16045	\$2447
2015	\$7705	\$7517.35	\$187.65
TOTALS			\$35,168

[27] The Respondent's 2015 income statement estimates income of \$180,601 yet his pay stub to April 18, 2015 shows year to date of \$72,787.86 which includes income from his bonus program and vehicle allowance. Prorated this would amount to an income in excess of \$252,331. However, I recognize calculating an annual salary based on this April statement is premature.

[28] The income I will use for 2015 is the 2014 income. Should there be a significant difference, the award may be adjusted retroactive to January 2015 to reflect his actual income with provision for payment of any outstanding amount.

Employment

[29] The father is employed on a 10 day work 4 day off schedule. He works in Newfoundland, residing in Nova Scotia where he maintains a home for his wife and young child.

[30] The mother has worked as a casual home care support worker and cleaner. Her contract expired in July 2014. At the time of this hearing her employment insurance claim ended and she awaited another contract.

Access

[31] The mother's evidence established that she has been the principal and sometime sole parent responsible for all activities including school activities and camps, except hockey and soccer.

[32] The father's attendance at his son's events was less than was available to him. His employment also takes him out of province on a regular basis. He also advised his son he preferred to avoid confrontation with the mother.

[33] The access schedule designed in 2003 has largely been altered to adjust to the father's schedule and lifestyle changes and the changing age and stage of development of the child.

[34] In his parenting statement, the father seeks to maintain the same flexible schedule. Given the age of the dependent child this seems to be a reasonable approach.

Household Standard of Living

[35] From the child's perspective, the discrepancies between what his father paid in child support and what he should have paid are considerable, particularly when one looks at the child's household income living with the mother.

[36] I do not have specific information about the father's wife's historical income. I do know she took some maternity leave in the past which would have interrupted her earnings.

[37] The father did not disclose his household income although there was some late admission that his wife earned in excess of \$60,000.

[38] This certainly impacts on the disparity between households.

Section 7 Expense

[39] The existing order stipulated that section seven expenses were to be proportionate to the parents' income.

[40] However, out of court and after the order, the parties made an agreement that they would share these based on a 60/40 percent split.

[41] The Applicant was ordered to provide her annual income information to the Respondent to assist in calculating their proportionate share of section 7 expenses. There is no evidence she complied with this directive.

[42] The Applicant has submitted estimates of the historical costs of section 7 expenses not all of which are supported by invoices.

[43] She is asking to be reimbursed any underpayments in the hockey and soccer expenses, child care and other expenses in accordance with the order and an accurate proportionate sharing.

[44] The Respondent does not dispute the existence of these fees, costs of activities and equipment, travel, etc.

[45] Neither party have submitted invoices or a full and exact account of the total costs and what each contributed. Neither kept complete receipts. Both relied on the agreed 60/40 percent split.

Dental

[46] The orthodontic costs have been covered by the Respondent and his wife's plan.

Drivers Ed. / Cell Phone

[47] The Respondent has also paid for his driver's education and the child's cell phone.

Hockey and Soccer

[48] The child has been significantly involved in hockey, soccer and other extracurricular activities most of which have been shared as they agreed. Based on their incomes, this agreement favoured the father considerably.

[49] There have been 12 years of hockey and 13 of soccer registration. The annual hockey registration was approximately \$1,000 per year except for the last year where the fees were \$3,000.

[50] Hockey registration alone between 2005 and 2014 was \$9,075. The Applicant paid 40 percent totalling \$3,630 and the Respondent paid \$5,445.

[51] The maternal grandparents often supplemented the Applicant's share and assisted her in transportation. Proof of some of their financial contributions has been provided.

[52] Based on a recalculation on actual salary and proportionate sharing, the Applicant believes the father has underpaid hockey fees by \$6,520; soccer by \$3,760, day care by \$3,250, day camps by \$1,800 and hockey equipment by \$1,385 for a total of \$16,715.

[53] The Respondent provided proof of payments made by him.

[54] The Applicant acknowledges the Respondent's actual payments made to both hockey and soccer.

[55] In addition, there were equipment costs, transportation costs, costs of trips and excursions.

[56] Both parents testify they each purchased equipment and it is impossible on the evidence provided to quantify this retroactively.

Other

[57] The Applicant's calculation includes other courses, French camps, trips, golf sponsorship and youth leadership to illustrate her contribution to her son, largely without equal or adequate contribution from the father.

[58] She also included school clothing and supplies, all of which are part of the ordinary bases amount and not classified as extraordinary.

[59] The father refused to contribute to some of these extra costs.

Maternal Grandparents Support

[60] The grandparents have provided both emotional, social and financial support to the mother and their grandchild. They have supplemented to a large extent his extra expenses and his basic needs to assist the mother in addressing her 40 percent share.

Child Care Costs

[61] The mother absorbed the child care costs without contribution from the father. For a three year period in question she *estimated* she paid \$7,500.

Knowledge/Notice

[62] Mr. Poirier's evidence is that he was self-represented when he entered into the first agreement.

[63] He was advised by Maintenance Enforcement that his payments were a reflection of his income. He was advised when his income changed he should calculate his annual income and pay on that basis. He acknowledged that Maintenance Enforcement provided him with a chart; although when, is unclear.

[64] He was, however, represented by counsel for the 2003 court Order.

[65] This Order specifically identified its interim nature and his obligations to advise the Applicant of his income every second month and to pay and adjust in accordance with the Nova Scotia tables.

[66] He was also to provide the standard yearly financial disclosure.

[67] The Respondent indicates he did not know the table amounts increased twice since 2003. He also advises that as soon as he discovered the child maintenance tables changed he adjusted the monthly amount by using his monthly income.

[68] The records indicate the first change that exceeded the ordered amount occurred in June 2004. His payments should have increased from \$175 to \$195. His average monthly payment for 2004 was \$123.

[69] The second noticeable change from \$177 to \$250 per month occurred in February 2005. At this time according to the Table he should have been paying \$561.

[70] Between May 2005 and August 2007, payments, while varied, were less than \$600 per month when they should have been \$687 for January to April and \$743 from May to December of 2006 and \$742 for 2007.

[71] Between September and December 2007, payments were between \$600 and \$700 per month and reverted back to under \$500 until August 2010. In 2010 he should have been paying \$857 per month.

[72] From September 2010 to February 2012, the payments were between \$500 and \$700 per month when they should have been between \$857 and \$1,198 per month.

[73] From April 2102 forward to May 2013 the payments were in the \$1,099 range. Subsequently they were \$1,358. In April 2015, the payments were as ordered.

[74] Whether or not the Respondent's recollection is correct, it is clear he was aware of his obligation to change his child support payments with changes in his income.

[75] The evidence of the terms of the original agreement and the terms of the Court Order contained express information and reference to the *Child Support Guidelines*.

[76] There were conversations between the mother and the father's wife indicating that the Respondent's wife was making the adjustments to the table amount based on line information.

[77] Maintenance enforcement gave the Respondent a chart indicating how they would change and that he was to calculate his annual income by using his monthly to come up with an annual amount on which he should base the child support.

[78] The Respondent was clearly aware that his payment was based on his income in accordance with the *Child Support Guidelines*.

[79] The Order was never changed and the payments, while changed, did not accurately reflect his significant increases in income.

[80] The Respondent was in possession of this information. He did not disclose his information to the mother contrary to the directions in his court Order.

[81] He said that she never asked him for his income information. She says she did and he continued to put her off.

[82] The father offers four explanations in an effort to limit the mother's recovery to a three year period.

1. The mother never asked him to disclose his income;

2. He acted in good faith to adjust what he was required to pay although the adjustments may have fallen short of the proper table amount;
3. His child has not suffered as a result of his underpayments;
4. He asks the court to limit the retroactive assessment. If one occurs, to make the proceeds payable to the child directly or in trust.

The evidence supports that the father's contributions to his son largely relate to his hockey and soccer events.

The Law

[83] The law concerning retroactive assessment of child support is comprehensively discussed in *D.B.S. v. S.R.G.*; *L.J.W. v. T.A, R.*; *Henry v. Henry*; *Hiemstra v. Hiemstra* 2006 SCR 37.

[84] At paragraph 94, the court begins the discussion of when to use the court's discretion to award retroactive support.

Benefit to the Child

[85] The purpose of the child support regime is to benefit the child. The Court decided the child must get a benefit from a retroactive award.

[86] *Historically*, this dependent child would have benefited from the Respondent's appropriate contribution given the Respondent's income and household standard of living and the Applicant's annual income.

[87] Both parties acknowledge that their son has been able to participate in expensive extracurricular activities that clearly rounded his development.

[88] *Prospectively*, this dependent child will remain a dependant through post-secondary education.

[89] The mother's historical income and the child's needs required the supplemental support of her parents to sustain this child at an appropriate level.

[90] Her parents' contribution do not diminish the Respondent's obligations.

[91] While the father suggests he will cover all university costs in the future he has not historically paid in accordance with his ability.

Direct payments

[92] The Respondent has requested the court allow him to pay directly to his son both retroactive and prospective support.

[93] If the father pays directly, monitoring and enforcement may become an issue. How will the mother know whether university costs are being covered according to their child's needs and ability and the parents individual and collective responsibility?

[94] How does one verify or enforce this offer without transferring the responsibility for receiving and managing child support from the Applicant to the dependent child?

[95] Historically, the mother has proven to be responsible in managing her sons needs and her means. There is no evidence to suggest she would not wisely administer the child support herself .

[96] The Applicant has testified that during the period of this proceeding, their son, to his detriment, has found himself involved in this monetary dispute.

[97] In this case removing the burden from the parents and placing enforcement on the child is not a wise decision.

Hardship

[98] The court must consider the hardship to the payor.

[99] The father has not disclosed his wife's income nor put forward household information that would allow me to measure financial hardship.

Fairness and certainty

[100] This is not a situation where the court is relying on the freestanding obligation of all parents to support the child in the absence of an Order. There are previous orders in place.

[101] The father knew or ought to have known about his obligation to report his income and adjust his child support. The originating maintenance agreement and Variation Order speak specifically to his obligations.

[102] A retroactive award would not offend any notion of certainty. The father knew that as his income changed so should his support.

[103] Historic adjustments to his child support in accordance with his income would have defined a new and predictable status quo similar to the intent of prospective awards according to the Supreme Court of Canada. The adjustment would not have caused uncertainty or unpredictability.

Delay

[104] With the failure to provide financial information, the Applicant was not in a position to know of her entitlement. Although she could have insisted on this information earlier, her knowledge arose when the child temporarily moved to the Respondent's place and the Respondent instigated an enquiry to stop payments.

[105] This recipient asked for disclosure and was put off. In this case, the payor parent did not dutifully inform the recipient parent of his significant changes in income.

Blameworthy Conduct

[106] In considering blameworthy conduct, the Courts are advised to take an expansive view. Specifically, Bastarache J. suggests that conduct that privileges the payor parent's own interests over his/her child's right to an appropriate amount of support is blameworthy.

[107] The Respondent had access to online resources and could have obtained legal advice in the event he was confused.

[108] This was the child's right to support that was avoided.

[109] The Respondent followed his methodology and adjusted his payments to reflect the rise and fall of his monthly income. This does not explain the discrepancies between what he should have paid and actually paid.

[110] His payments continued to be less than guideline until April 2015 in spite of the fact he had engaged counsel, once this application was commenced in March 3rd, 2014 he had counsel throughout; he was directed several times to attend Parent Information Program where guideline information is made available and his counsel attended the conciliation hearing in August 2014, at which time the calculations produced information concerning the discrepancy in his payments.

[111] The Respondent relies on the fact that the Applicant did not ask him to vary his payments and did not commence an application.

[112] She advises she asked for his income information and was never given access to it.

[113] Costs were assessed against the Respondent at the 2015 hearing for failure to attend and to provide timely disclosure.

[114] He was directed by myself to provide his 2014 income tax returns to verify his 2014 income. This information was not received until May 27, 2015, after the hearing took place.

[115] His reluctance to share his financial information is historic.

[116] There is nothing in the evidence to suggest there is any blameworthy conduct on the part of the Recipient *except as it relates to disclosure of her income to calculate section seven expenses.*

[117] While addressing the issue of fairness regarding the request for a retroactive award and reassessment of section seven expenses due to the failure of the Applicant to exchange her income as directed and the amount of unspecified

historic section seven and extracurricular expenses, I decline to specify an award relating to the deficiency in section seven expenses.

[118] The Applicant carried an unfair proportion of these expenses; however, this could have been rectified because both had an obligation to disclose and both had an available remedy.

Retroactive Date

[119] The Supreme Court of Canada outlines four choices for the date of retroactivity. The date when the application was made to a court (March 2014), the date when formal notice was given to the payor parent (March 2014), the date of effective notice (March 2014) and the date when the amount of child support should have been increased (2005).

[120] The payor was aware from the beginning that his payment should be adjusted when his income increased. (2003)

[121] In 2005, the Respondent experienced an increase in his pay in the amount of \$42,265.

[122] His contribution to section seven expenses was less than he should have paid proportionally from at least 2005 forward.

[123] In relation to the base table amount, weighing all factors including the decision to refuse to retroactively vary the section seven expenses, there is sufficient evidence here to go beyond the three year presumptive rule.

[124] The difference between what should have been paid and what was paid from June 1st 2003 to December 31 2013 was \$35,168.

[125] It is not unusual, where the necessary elements have been proven, to consider a three year retroactive award.

[126] In this case, I take the unusual step to reassess back to 2003 and go beyond the three year retrospective assessment due to the significant discrepancies between the parents incomes, the significant unreported increases within two years of the court order, the fact that the respondent knew or should have known he was

significantly underpaying child support despite his ability to do so; his refusal to provide his financial disclosure which operated to his advantage. The Applicant relied on the respondent to pay his fair share. The child was disadvantaged.

[127] Their agreement to share extracurricular expenses unfairly required her to pay above and beyond her financial capacity. The respondent advantaged himself with the shared percentage arrived at early in the process when his salary was significantly lower.

[128] The Applicant will not recover financially those contributions he should have made had his true income been disclosed.

[129] On the other hand, despite the overwhelming evidence that the Respondent did not pay in accordance with what he ought to have known he should pay, there are some mitigating factors to consider.

[130] This is a significant lump sum payment to consider in the context of the father's ongoing obligation to his first son retrospectively and prospectively, and to his second child.

[131] The Respondent has prospective obligations to contribute to post-secondary education.

[132] He contributed regularly to extensive extracurricular activities.

[133] He has offered, as partial relief for his underpayment, a promise to pay all post-secondary expenses.

[134] Enforcing these areas must be balanced on the prospective needs of the child.

[135] Considering all the evidence and weighing all the above factors, I fix the underpayment at \$35,168 up to and including May 2015.

Prospective post-secondary expenses.

[136] The Respondent agreed in court to finance the graduation clothing and costs of tickets. I accept his agreement to do so.

[137] The Respondent shall continue to pay the ordered monthly amount to and inclusive of August 2015 child support in the amount of \$1,541 per month.

[138] Should the child return to his mother's for the 2016 and subsequent year summer months, the father shall pay to the mother for 2016 child support for the months of May to and including August 2016 and continuing each summer as long as the child resides with the mother based on the adjusted amount for his then current income, payable through the Maintenance Enforcement Program.

[139] I order the Respondent to pay forthwith a lump sum of \$15,000 directly to the Applicant for the retroactive support of the child.

[140] I order the father to pay the balance of the retroactive assessment (\$20,168) towards the dependent child's first year university costs.

[141] He shall pay to the Applicant, through the Maintenance Enforcement Program, the balance in two installments; the first payment in the amount of \$10,084 by September 1, 2015 and the second payment of \$10,084 by January 2, 2016.

[142] By August 1, 2015 for the 2016-2017 academic year and each subsequent academic year while the child remains in post-secondary education, the student shall make available to each parent the total of his expenses for university inclusive of his living expenses.

[143] In August 2015 the parents and child shall disclose to both parents any scholarships or other bursaries, as well as the dependant child's summer savings, to assist the parents in determining a reasonable contribution towards his university expenses.

[144] The Applicant shall apply each payment, first to the university to satisfy the costs of registration and the necessary installments, and the balance for distribution to the son to cover necessary residence, food, travel and costs of living.

[145] The second installment shall be paid to the Applicant in January 2016 or sooner if required, first to the university for the second term to first satisfy the

son's tuition and other fees, and secondly to the Applicant to contribute to the remaining lodgings and food and other necessary living expenses.

[146] The Applicant shall provide an accounting and verification in writing or by email to the Respondent and to maintenance enforcement as to any and all payments made out of the deposits.

[147] Should there be any funds left after all necessary education expenses are satisfied, those shall be credited towards the second year university costs.

[148] All other clauses unrelated to retroactive and prospective child support not addressed in this order remain unchanged.

[149] The Respondent shall continue to provide coverage for his son under his medical plan.

[150] Each year, the parents shall exchange full and complete copies of their income tax returns on or before June 1st while their son continues to be a dependant and they shall then determine each contribution.

[151] Should either parent fail to exchange with one another and file with maintenance enforcement their full and complete income tax returns, the reasonable costs of obtaining that information shall be paid by the defaulting party.

[152] For the 2016 academic year and beyond, they may apply to the court in the event they are unable to arrive at a consent on their son's contribution to his education and each of the parent's contribution.

[153] Should they have difficulties with enforcement through the Maintenance Enforcement Program, they may return to court.

[154] Counsel of the Applicant shall draft the order.

Moira Legere Sers, J.