IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Robertson v. Robertson, 2007 NSSC 128

Date: May 3, 2007
Docket: 1206-004908
Registry: Sydney

Between:

Mary Robertson

Applicant

v.

Ronald Robertson

Respondent

DECISION

Judge:	The Honourable Justice Theresa M. Forgeron
Heard:	October 13, 2006 and November 16, 2006 in Sydney, Nova Scotia
Written Decision:	May 3, 2007
Counsel:	Elaine Gibney-Conohan, counsel for Mary Robertson William Burchell, counsel for Ronald Robertson

By the Court:

I. INTRODUCTION

[1] The matter before me for determination concerns the divorce between Mary Robertson and Ronald Robertson. As all jurisdictional issues have been proven, and as there is no possibility of reconciliation, I grant the divorce pursuant to ss. 8.(1) and 8.(2)(a) of the *Divorce Act*. Further, Ms. Robertson's application to change her surname to her maiden name of Tremblett is likewise granted.

II. ISSUES

[2] I have been asked to decide the following issues:

(a) What is the appropriate division of the pensions?

(b) What is the appropriate child support order?

(c) Should a retroactive maintenance award be granted?

(d) What is the appropriate order in relation to insurance [medical and life]?

III. BACKGROUND INFORMATION

[3] The parties were married on June 26, 1981 and separated on September 6, 1999. They have one child, namely Sara Beth who was born on November 9, 1986. Sara Beth remains a child of the marriage.

[4] The Petitioner, Mary Robertson is 51 years old. She is a registered nurse and is currently employed as manager of Resident Patient Care at the Harbourstone Hospital in North Sydney. Her salary since separation has steadily increased from $43,177.00 to $71,647.00 per annum. Ms. Robertson also won $100,000.00 in a lottery post separation.

[5] The Respondent, Ronald Robertson is 50 years old. He is a stationary engineer and a longtime employee of Marine Atlantic. His salary since separation has ranged from $51,837.00 to $78,839.00 per annum.

[6] Although the parties separated on September 6, 1999, no court application was made until Ms. Robertson initiated divorce proceedings on June 8, 2005 wherein she claimed a divorce, division of property, custody, child support and costs. An interim conciliator's order for child support issued on November 15, 2005 which required Mr. Robertson to pay $546.00 per month effective December 1, 2005.

[7] The child, Sara Beth was 13 years old at the time of separation and is now 20 years old. Sara Beth has been attending St. Mary's University in Halifax

since September 2005. She changed academic programs on several occasions, but is now working toward a Bachelor of Business Administration.

[8] After separation, both parties made an assignment in bankruptcy as they were unsuccessful in their attempts to sell their home and pay off their bills. Ms. Robertson remained the defacto custodial parent, and she and Sara Beth moved to a small house in Alder Point. Mr. Robertson commenced another relationship and lives with his partner when he is not working aboard ship with Marine Atlantic.

IV. ANALYSIS

[9] What is the appropriate division of the pensions?

[10] Although neither party presented any real argument to the court on the pension division issue, no agreement was reached between them. No claim for an unequal division was made, and the facts do not support such a claim in any event.

[11] I therefore grant an equal division of the parties' pensions [including, but without limiting the forgoing, all pension benefits earned through employer contributions, employee contributions, indexing, life expectancy and

interest] from the dates of plan entry until the date of separation, together with all indexation, interest and other benefits accruing on that portion of the pensions which existed prior to separation to the date of division, in keeping with **Morash v. Morash** 2004 CarswellNS 42(C.A.) at para 33. In the event the pension administrators of the pension plans of the parties are unable or unwilling to implement the terms of this order, the party in whose name the pension is held shall be the Trustee for the other party to the fullest extent required to provide the other party with the benefits and rights contemplated in this decision. The pension administrators are authorized to provide either party with any and all information and documentation requested respecting the pension of the other party for the period subject to division without the consent of the party in whose name the pension is held.

[12] What is the appropriate order with respect to child support?

(a) Position of the Parties

[13] Ms. Robertson seeks the table amount of child support for Sara Beth together with s. 7 add-ons for university expenses commencing with the 2005 academic year. Specifically, Ms. Robertson seeks the payment of $8,263.00 from Mr. Robertson for the 2005/2006 school year, and the sum

of $7,609.00 for the 2006/2007 school year. Thereafter she seeks the table amount for periodic support and a prorating of the university expenses of approximately $17,000.00 until Sara Beth ceases to be a child of the marriage within the meaning of the *Divorce Act*.

[14] Mr. Robertson challenges this application. Mr. Robertson states that the payment of the table amount of child support is inappropriate while Sara Beth is attending university in Halifax and not residing with Ms. Robertson. In addition, Mr. Robertson disputes some of the university expenses put forth by Ms. Robertson. Mr. Robertson seeks to further reduce his prorata share by having the court assign a significant financial contribution to Sara Beth for the payment of her own university expenses.

(b) Legislation and Law

[15] Section 15 of the *Divorce Act* provides the court with the jurisdiction to make an order for child support in conformity with the applicable guidelines. Section 3(1) of the *federal Child Support Guidelines* states the presumptive rule for the payment of child support where the child is under the age of majority:

> **Presumptive rule**
>
> 3. (1) Unless otherwise provided under these Guidelines, the amount of a child support order for children under the age of majority is

> (a) the amount set out in the applicable table, according to the number of children under the age of majority to whom the order relates and the income of the spouse against whom the order is sought; and
> (b) the amount, if any, determined under section 7.

[16] Section 3(2) of the *Guidelines* states that the appropriate amount of child support payable for a child the age of majority or over:

> **Child the age of majority or over**
>
> 3(2) Unless otherwise provided under these Guidelines, where a child to whom a child support order relates is the age of majority or over, the amount of the child support order is
> (a) the amount determined by applying these Guidelines as if the child were under the age of majority; or
> (b) if the court considers that approach to be inappropriate, the amount that it considers appropriate, having regard to the condition, means, needs and other circumstances of the child and the financial ability of each spouse to contribute to the support of the child.

[17] Section 7(1)(e) of the *Guidelines* provides the court with the jurisdiction to order additional support for the payment of university expenses:

> **Special or extraordinary expenses**
>
> 7. (1) In a child support order the court may, on either spouse's request, provide for an amount to cover all or any portion of the following expenses, which expenses may be estimated, taking into account the necessity of the expense in relation to the child's best interests and the reasonableness of the expense in relation to the means of the spouses and those of the child and to the family's spending pattern prior to the separation:
> ...
> (e) expenses for post-secondary education; and

[18] The guiding principle to be applied in determining the sharing of expenses is stated in s 7(2) of the *Guidelines*:

> **Sharing of expense**
>
> 7(2) The guiding principle in determining the amount of an expense referred to in subsection (1) is that the expense is shared by the spouses in proportion to their respective incomes after deducting from the expense, the contribution, if any, from the child.

[19] The court must also take into account subsidies, benefits, tax deductions/credits available in relation to the expense in its calculation as is stated in s. 7(3) of the *Guidelines*:

> **7(3)Subsidies, tax deductions, etc.**
> (3) In determining the amount of an expense referred to in subsection (1), the court must take into account any subsidies, benefits or income tax deductions or credits relating to the expense, and any eligibility to claim a subsidy, benefit or income tax deduction or credit relating to the expense.
> SOR/2000-337, s. 1; SOR/2000-390, s. 1(F); SOR/2005-400, s. 1.

[20] In **Lu v. Sun** 2005 CarswellNS 338(C.A.), leave to appeal to the Supreme Court of Canada refused at 2005 CarswellNS580 (SCC), the Court of Appeal reviewed child support principles applicable to this case. The court stated that the noncustodial parent will be required to pay the table amount of support for a child, under the age of majority, who lives in a city other than where the custodial parent resides while attending university. However the noncustodial parent will benefit from a reduction in the university shelter

costs to avoid double accounting for the shelter costs which are assumed in the table amount.

[21] The court further stated that once a child becomes an adult, it is appropriate to reduce the table amount of support payable to the custodial parent for the time period when the adult child is not residing with the custodial parent on a full-time basis. In **Lu v. Sun**, supra, the court confirmed that one half of the table amount was appropriate in the factual situation presented and in recognition of the "ongoing costs" borne by the mother in maintaining the daughter's permanent home and in covering incidentals that she as the custodial parent must provide [para 28].

(c) Analysis of the Section 3. (2) Payment

[22] In light of these principles, I have determined that the table amount of support was not appropriate as of November 2005 and for the period of time that Sara Beth was living in Halifax while attending university. While attending university in Halifax, 50% of the table amount of support is the appropriate amount to be paid in the circumstances given the ongoing costs to Ms. Robertson to maintain a permanent home for Sara Beth and to provide clothing, toiletries and incidentals to Sara Beth. When Sara Beth is

residing with her mother from May to September (four months) the table amount of support is the appropriate amount to be paid.

[23] Ms. Robertson applied for child support in June 2005. The conciliator's order did not require child support to be paid until December 2005. Mr. Robertson's income, after deducting union dues was $66,251.00 for 2005. Pursuant to the 2005 tables, child support at a rate of $539.00 per month was due from June to October 2005. However, Mr. Robertson will receive a credit of $539.00 against the residence costs for September and October as Sara Beth was residing in Halifax while attending university. One half the table amount is due for November and December 2005 as Sara Beth turned 19 and did not reside with her mother on a full time basis. Mr. Robertson will also receive credit for the $546.00 paid pursuant to the conciliator's order. The total therefore due from June to December 2005 for periodic support is $2,149.00.

[24] Mr. Robertson's income in 2006 and 2007, will likely be $66,500.00. Mr. Robertson no longer earns the overtime that he had in the past. Child support will be based upon an income of $66,000.00 at this time and I have assumed a deduction for union dues. From January 1, 2006 to April 2006, one half of the 2005 table amount was due monthly - $268.50. From May 2006 until

August 2006, child support was payable at a rate of $574.00 per month while Sara Beth was living with her mother. Commencing September 2006, child support is payable at a rate of $287.00 per month while Sara Beth is attending university and residing in Halifax (September to April) and at a rate of $574.00 per month while Sara Bath is residing with her mother (May to August). The total due for the 2006 periodic support is $4,518.00. Mr. Robertson paid $6,552.00. Mr. Robertson is therefore owed $2,034.00. The total due for 2007 to April 30 is $1,148.00. Mr. Robertson paid $2,184.00 Mr. Robertson is therefore owed $1,036.00.

(d) Analysis of the Section 7 Payment

[25] I now must calculate the section 7 expenses which will be shared between the parties after determining the contribution required from Sara Beth and after deducting the applicable subsidies, benefits and tax credits.

[26] **(i) Allowable university expenses:** Before detailing the allowable expenses, I will review Mr. Robertson's objections to those claimed by Ms. Robertson. Mr. Robertson questioned the apartment expense incurred by Sara Beth in her second year. Mr. Robertson stated that Sara Beth should have lived in residence. I find in the circumstances, that it was reasonable for Sara Beth to obtain an apartment for the approximate eight months that she is in Halifax. It is reasonable that Sara Beth should have a residence which is not noisy and is conducive to better study habits. The claimed shelter expense for her second year inclusive of meals and utilities equals $7,280.00. Conversely the cost of residence, meals and phone for the first year equalled $6,485.00. This represents a difference of only $795.00. I have not included the rental payment for the four months Sara Beth is residing with her mother. Sara Beth has an obligation to sublet the apartment or in the alternative she will be responsible for that cost on her own as Mr. Robertson cannot be expected to share in the cost of an apartment rental plus pay the full table amount of support.

[27] Mr. Robertson notes that Sara Beth failed some courses and is currently only registered in four courses. I will not penalize Sara Beth for the academic difficulties which she encountered during her first and second years of

university. I find that Sara Beth has experienced relationship difficulties with her father. As such it is not surprising that Sara Beth would encounter academic challenges as she was adjusting to a new stage in her life. Therefore, the extra costs of credits at Cape Breton University for the first and second years are allowable expenses.

[28] For year one, I allow the following expenses:

Tuition SMU	$4,885.74
Tuition CBU (2 half credits)	$1,180.00
Campus Renewal Fee	$240.00
Student Association Fee	$119.00
Class/ Lab Expenses	$165.00
Science Tech. Fee	$60.00
Books	$1,100.00
Computer	$1,464.00
Residence	$3,725.00
Meals	$2,600.00
Phone	$160.00
Travel	$700.00
Tutoring	$640.00
Journal Fee	$4.00
Youth Pass/ Metro Transit	$115.00
TOTAL	**$17,157.74**

[29] For year two, I allow the following expenses:

Tuition SMU	$4,464.00
Campus Renewal Fee	$248.00
Student Association Fee	$125.50
Extended Health Fee	$134.00

Books		$1,100.00
Journal Fee	$4.00	
Apartment Rent (8 mons)		$3,600.00
Meals		$3,200.00
Phone		$480.00
Travel		$700.00
U-Pass Metro Transit		$115.00
Tuition CBU		$1,180.00
TOTAL		**$15,463.50**

[30] For each following year, I find that university expenses will total approximately $16,000.00.

(ii) **Contribution from Sara Beth**

[31] Ms. Robertson suggested that the appropriate contribution for Sara Beth in year one is $500.00 which represents the scholarship that she obtained from St. Mary's University. In year two, Ms. Robertson stated that the appropriate contribution from Sara Beth was $500.00 which represents summer employment savings.

[32] Mr. Robertson seeks a greater contribution from Sara Beth. Mr. Robertson suggested that Sara Beth should contribute more savings from employment income and that she should obtain a student loan.

[33] Courts have not definitively stated that adult children must obtain student loans to assist in the payment of university expenses. The law appears

unsettled: **Maynard v. Maynard** 1999 CarswellBC 333 (SC), **Pollock v. Rioux** 2004 CarswellNB 599 (CA), **Nelson v. Nelson** 2005 CarswellNS 18 (SC), **Cook v. Burton** 2005 CarswellOnt 178 (SCJ) ; and **Boundford v. Jacobs** 2006 CarswellNfld 203 (SCTD).

[34] In **Maynard v. Maynard**, supra, Cowan J. held that a student loan was not a benefit within the meaning of s. 7(3) of the *Guidelines* and should not be considered for child support purposes at paras 18 and 19:

> 18 I find application of the *ejusdem generis* principle appropriate to interpretation of "benefit" in s. 7. The word "benefit" is much more general in its meaning than are the surrounding words "subsidy" and "income tax deductions or credits". Accordingly, the meaning of "benefit" in s. 7(3) must be confined to things of the same kind as a "subsidy" or "income tax deductions or credits". The defining common characteristic of "subsidies" and "income tax deductions or credits" is that they are net transfers of resources to an individual, made without expectation of repayment. Similarly, "benefit" must also mean that the individual receiving it ultimately receives a net transfer of resources without expectation of repayment.
>
> 19 The only sense in which a student loan is a "benefit" is that it permits deferral of payment of present expenses. That is, a student loan is a present transfer of funds to an individual, with a corresponding obligation to repay the capital of the loan, plus interest. While the government may pay the interest on the loan for the discrete period during which the student actually attends studies, this does not alter the fundamental character of the transaction. The plaintiff will be responsible for payment of interest once she completes her studies. As Master McCallum put it, "The loan, no matter how one views it, is just that; a loan." Accordingly, in my view, a student loan is not a "benefit" within the terms of s. 7(3) of the Guidelines.

[35] In **Nelson v. Nelson**, supra, Warner J. held that in assessing a child's contribution pursuant to s. 7(2) of the *Guidelines*, it is appropriate to consider contributions from student loans at paras 35 and 38:

> 35 It is not unfair that a student who receives the most significant and direct benefit from post secondary education should be obligated to contribute to her own education and living expenses to the extent of her ability. Mariah's contribution of approximately one-third of her annual expenses represents a fair contribution by her. There are several decisions where Courts have imposed upon students an obligation to borrow money in circumstances where their parents' income is limited and where the students do not contribute as significantly as Mariah does from her own employment income towards her annual expenses.
> ...
> 38 It is noteworthy that some Courts will impose on students an obligation to contribute to their school costs by loans; such determinations are made on a case by case basis. This Court accepts that Mariah's contribution of one-third of her actual twelve month living and school expenses is a fair contribution by her on the facts of this case.

[36] In determining whether or not a student loan is required, various factors must be examined including the income and means of the parties, the income and means of the child, the expectation of the parties prior to separation if such can be determined, and the efforts which have been made by the child to contribute reasonably to the university expenses.

[37] Mr. and Ms. Robertson each earn a sizeable income. Neither have any other dependent children to support. Neither have marriage-based debt as each

made an assignment in bankruptcy post separation. Both have improved financial circumstances since separation as Ms. Robertson won a lottery and Mr. Robertson is able to share living expenses with his new partner.

[38] There is no direct evidence as to the pre-separation expectation of the parties on the issue of student loans. I infer, however, that the parties would not have required Sara Beth to obtain a student loan in the event they had not separated. Both acknowledged that Sara Beth was a "spoiled child" who lacked nothing from a material perspective. I find that the post separation circumstances of the parties are such that Sara Beth should not be required to shoulder the burden of a student loan at least at the undergraduate level, subject to Sara Beth saving sufficient employment income to pay her reasonable contribution.

[39] There is an obligation upon Sara Beth to make reasonable efforts to obtain employment and to use a significant portion of these earnings to defray the cost of the university expenses. I do not accept that $500.00 per annum is an acceptable or reasonable contribution from Sara Beth. No evidence was led to explain why Sara Beth did not earn and save income prior to attending her first year of university. I therefore find that Sara Beth should have contributed $1,500.00 toward her university costs during the first year which

includes the $500.00 university scholarship. During the second year, Sara Beth should have contributed $3,500.00 toward her expenses by working and saving more despite taking summer courses. In subsequent years, Sara Beth is expected to contribute at least $4,000.00 toward her university expenses.

(iii) prorata calculation of university expenses after considering income tax implications:

[40] Mr. Robertson's income was $66,251.00 for 2005 and is $66,000.00 per annum commencing in 2006. Ms. Robertson's income for 2005 was $71,647.00 less dues of $407.00. This includes interest income of $2,157.39 earned on the lottery winnings. Some of the lottery winnings have been spent. I therefore find that Ms. Robertson's income for 2006 onward will be approximately $70,000.00, and I have included the deduction for professional dues.

[41] After considering the income tax benefits associated with the education transfer to Ms. Robertson, and after deducting Sara Beth's contribution, I find that Mr. Robertson's prorata share of the university expenses for year one is $6,936.00. For year two and in subsequent years, Mr. Robertson's contribution is set at $5,232.00 per annum or $436.00 per month.

[42] Mr. Robertson has overpaid periodic support by $921.00 [paras 23 and 24] which is applied against the 2005 university expenses. The total, as of April 30, 2007, owing by Mr. Robertson for his prorata share of the section 7 university expenses is $12,991.00 [$6,936.00 + $5,232.00 + ($436.00 x 4) - $921.00]. Mr. Robertson will continue to pay his prorata share of the university expenses at a rate of $436.00 per month commencing May 15, 2007 and continuing on the 15th of every month thereafter while Sara Beth remains a university student and a child of the marriage. The $12,991.00 shall be payable at a rate of $200.00 per month commencing May 15, 2007 and continuing every month thereafter until the lump sum is paid in full.

[43] Ms. Robertson shall forward the following documentation to Mr. Robertson on June 1st of each year:

(a) A copy of Sara Beth's income tax return with all attachments, and notice(s) of assessment for the prior year;
(b) A copy of Ms. Robertson's income tax return, with all attachments, and notice(s) of assessment for the prior year;
(c) A copy of Sara Beth's university marks for the prior academic year; and
(d) confirmation of the university expenses for the prior year.

[44] Mr. Robertson shall provide Ms. Robertson with a copy of his income tax return, with all attachments and notice(s) of assessment for the prior year on June 1st of each year.

[45] What is the appropriate order in respect of the retroactive maintenance claim?

(a) Law

[46] In **S.(D.D.) v. G.(S.R.)** 2006 SCC 37 Bastarache J, for the majority, confirms several principles relating to the payment of retroactive support including the applicable principles governing a retroactive award where there had been no prior court order as follows:

1. Child support is the right of the child and such right survives the breakdown of the relationship of the child's parents [para 38].

2. The child loses when one of his/her parents fails to pay the correct amount of child support [para 45].

3. Parents have an obligation to support their child according to his/her income and this obligation exists independent of any statute or court order [para 54].

4. Absent special circumstances, it is unreasonable for a non-custodial parent to believe he/she was fulfilling his/her obligation if child support has not been paid [para 80].

5. Child support is payable for persons who fall within the definition of "children of the marriage" at the time the application is made [para 89], and for whom a discernible benefit will flow [para 95].

6. The payment of a retroactive award is not an exceptional remedy [para 97].

7. A retroactive maintenance award should be payable from the date the custodial parent gave effective notice to the non-custodial parent [para 118]. It is generally inappropriate to make a retroactive award more

than three years prior to the date when formal notice was provided to the noncustodial parent [para 123].

8. The quantum of a retroactive award must be tailored to fit the circumstance of the case, and strict compliance with the table amount is not recommended [para 128].

[47] The court must examine four factors when determining the issue of retroactivity. Bastarache J. stated that the first factor concerns the reasonableness of the custodial parent's excuse for failing to make a timely application in the face of the nonpayment of child support or in the face of an insufficient payment of child support. Bastarache J. states at paras 101 and 104:

> ¶ 101 Delay in seeking child support is not presumptively justifiable. At the same time, courts must be sensitive to the practical concerns associated with a child support application. They should not hesitate to find a reasonable excuse where the recipient parent harboured justifiable fears that the payor parent would react vindictively to the application to the detriment of the family. Equally, absent any such an anticipated reaction on the part of the payor parent, a reasonable excuse may exist where the recipient parent lacked the financial or emotional means to bring an application, or was given inadequate legal advice: see Chrintz v. Chrintz (1998), 41 R.F.L. (4th) 219 (Ont. Ct. (Gen. Div.)), at p. 245. On the other hand, a recipient parent will generally lack a reasonable excuse where (s)he knew higher child support payments were warranted, but decided arbitrarily not to apply.
>
> ...

> ¶ 104 In deciding that unreasonable delay militates against a retroactive child support award, I am keeping in mind this Court's jurisprudence that child support is the right of the child and cannot be waived by the recipient parent: Richardson, at p. 869. In fact, I am not suggesting that unreasonable delay by the recipient parent has the effect of eliminating the payor parent's obligation. Rather, unreasonable delay by the recipient parent is merely a factor to consider in deciding whether a court should exercise its discretion in ordering a retroactive award. This factor gives judges the opportunity to examine the balance between the payor parent's interest in certainty and fairness to his/her children, and to determine the most appropriate course of action on the facts.

[48] The second factor relates to the conduct of the non-custodial parent. If the noncustodial parent engages in blameworthy conduct, then the issuance of a retroactive award is usually appropriate. Bastarache J. confirms that the determination of blameworthy conduct is a subjective one based upon objective indicators [para 108] and the court should take an expansive view as to what constitutes blameworthy conduct in the face of the nonpayment or insufficient payment of child support. Bastarache J. states at paras. 106 and 107:

> ¶ 106 Courts should not hesitate to take into account a payor parent's blameworthy conduct in considering the propriety of a retroactive award. Further, I believe courts should take an expansive view of what constitutes blameworthy conduct in this context. I would characterize as blameworthy conduct anything that privileges the payor parent's own interests over his/her children's right to an appropriate amount of support. A similar approach was taken by the Ontario Court of Appeal in Horner v. Horner (2004), 72 O.R. (3d)

> 561, at para. 85, where children's broad "interests" -- rather than their "right to an appropriate amount of support" -- were said to require precedence; however, I have used the latter wording to keep the focus specifically on parents' support obligations. Thus, a payor parent cannot hide his/her income increases from the recipient parent in the hopes of avoiding larger child support payments: see Hess v. Hess (1994), 2 R.F.L. (4th) 22 (Ont. Ct. (Gen. Div.)); Whitton v. Shippelt (2001), 293 A.R. 317, 2001 ABCA 307; S. (L.). A payor parent cannot intimidate a recipient parent in order to dissuade him/her from bringing an application for child support: see Dahl v. Dahl (1995), 178 A.R. 119 (C.A.). And a payor parent cannot mislead a recipient parent into believing that his/her child support obligations are being met when (s)he knows that they are not.
>
> ¶ 107 No level of blameworthy behaviour by payor parents should be encouraged. Even where a payor parent does nothing active to avoid his/her obligations, (s)he might still be acting in a blameworthy manner if (s)he consciously chooses to ignore them. Put simply, a payor parent who knowingly avoids or diminishes his/her support obligation to his/her children should not be allowed to profit from such conduct: see A. (J.) v. A. (P.) (1997), 37 R.F.L. (4th) 197 (Ont. Ct. (Gen. Div.)), at pp. 208-9; Chrintz.

[49] The court must also determine if the noncustodial parent has contributed to the child in a way that satisfied his/her obligation or a portion of that obligation [para 109].

[50] The third factor to be balanced focuses on the circumstances, past and present [para 10] of the child, and not of the parent [para 113], and include an examination of the child’s standard of living [para 111].

[51] The fourth factor requires the court to examine the hardship which may accrue to the noncustodial parent as a result of the noncustodial parent's current financial circumstances and financial obligations [para 115], although hardship factors are less significant if the noncustodial parent engaged in blameworthy conduct [para 116].

(b) Position of the Parties

[52] Ms. Robertson is seeking retroactive child support from January 1, 2001 in the amount of $31,985.00. Ms. Robertson stated that she and Mr. Robertson agreed that Mr. Robertson would pay Sara Beth's expenses during the first year of separation, and thereafter Mr. Robertson would provide child support to Ms. Robertson. Ms. Robertson said that Mr. Robertson requested a one year reprieve in order to get his financial affairs in order. Ms. Robertson confirmed that Mr. Robertson fulfilled his financial obligation voluntarily to Sara Beth during the first year of separation.

[53] Ms. Robertson stated that she and Mr. Robertson were supportive of each other during the first year of separation. After the first year, Ms. Robertson advised Mr. Robertson that there was no chance of reconciliation. She requested child support, but Mr. Robertson threatened through various

verbal exchanges to “turn” against the family if a formal application was filed by Ms. Robertson. Ms. Robertson advised that Mr. Robertson slowly began to withdraw from Sara Beth at a crucial time in Sara Beth’s life. Ms. Robertson stated that Mr. Robertson also threatened to quit his job if she made an application for child support, although Ms. Robertson did not believe that Mr. Robertson would do so.

[54] Ms. Robertson stated that she did not go forward with an application in the face of the nonpayment of child support for two reasons. First and primarily, Ms. Robertson said she was concerned that if she made an application for child support, Mr. Robertson would withdraw completely from Sara Beth. She indicated that Sara Beth was becoming a troubled teenager. Ms. Robertson was not willing to risk the complete severance of the relationship between Sara Beth and her father by making an application for child support.

[55] Second, Ms. Robertson stated that she could not afford a lawyer as she had made an assignment in bankruptcy. Ms. Robertson acknowledged during cross examination that she was aware that she had a right to seek child support following the separation. Ms. Robertson also admitted that she was aware that she could claim retroactive child support. Her knowledge was

based upon general discussions which she had with various co-workers and friends at the time.

[56] Ms. Robertson stated that in January 2005 she asked Mr. Robertson to pay her $600.00 per month in child support and if he did, she would not make a claim for retroactive support. Ms. Robertson stated that in March 2005, Mr. Robertson paid her the equivalent of $600.00 after deducting the telephone charges which Sara Beth had incurred on her cell phone. This process continued until June 2005 when Mr. Robertson simply provided Sara Beth with $300.00 as a high school graduation gift and gave no money to Ms. Robertson.

[57] Ms. Robertson made an application for child support as part of the relief sought in the divorce petition which she arranged to have issued in June 2005.

[58] Mr. Robertson disagrees with the payment of retroactive child support. He said he gave money to Sara Beth and paid for some of her expenses. He rejects Ms. Robertson's claim that his financial support was limited to the first year of separation. He acknowledged that he had a fairly good relationship with Sara Beth until after the parties' separation. Mr. Robertson admitted that his relationship with Sara Beth at present is "chilly" and that

he has had little communication with her since approximately June 2005. He stated that Sara Beth was rude and vulgar to him and she is the cause of the breakdown in their relationship.

[59] Mr. Robertson stated that Ms. Robertson did not request financial disclosure from him until after the divorce had been filed, but that she was generally aware of his income as he was generally aware of her income. Mr. Robertson indicated that he was aware that he had an obligation to support Sara Beth following the separation. His knowledge came from general discussions with friends and family within the community. Mr. Robertson indicated that he fulfilled this obligation by making direct payments to Sara Beth when requested and by paying for Sara Beth's clothing, toiletries, personal sundry items and all cell phone charges including long distance. He stated that he also fulfilled the role of a general "taxi driver" for Sara Beth.

[60] Mr. Robertson acknowledged that Ms. Robertson complained about the direct payments of money which he made to Sara Beth. Mr. Robertson indicated that Ms. Robertson was concerned that Sara Beth was getting more than what "most little girls were getting." He acknowledged on a few occasions that Ms. Robertson told him to pay her the support, and not to

provide money to Sara Beth directly. Mr. Robertson confirmed that sometime in 2005, he could not recall the exact date, Ms. Robertson demanded $300.00 every two weeks and if he did not agree, Ms. Robertson threatened to take Mr. Robertson to court where she would "skin him".

[61] Mr. Robertson confirmed that he is current with the court order. Mr. Robertson indicated that he was not aware that Ms. Robinson was unhappy with the *ad hoc* financial arrangements which had been reached. In fact he felt "like things were going tickety boo". He also stated that Ms. Robertson would never know the number of twenties and fifties that went through his hands to Sara Beth.

[62] Mr. Robertson indicated that he is not in a financial position to pay a lump sum amount toward retroactive support. He stated that he could not obtain a non secure loan given his assignment in bankruptcy. Further Mr. Robertson indicated that he is involved in another relationship and is supporting his partner. Mr. Robertson acknowledged that he purchased a new vehicle for approximately $33,000.00 or $34,000.00 in the spring of 2006 with a loan - his third vehicle since separation. He confirmed that he smokes and also drinks beer, although he denied gambling to any significant degree.

(c) Findings of Fact

[63] I have considered the evidence of the parties. Mr. Robertson is not a credible witness. He was evasive, and at times inconsistent when testifying. This was evident during the cross examination of Mr. Robertson's budget. I also find that on occasion, Ms. Robertson down played Mr. Robertson's financial contribution to Sara Beth and minimized her own responsibility to take legal action to secure maintenance.

[64] I make the following findings of fact:

> (a) After Ms. Robertson informed Mr. Robertson that there was no chance of reconciliation, Mr. Robertson became angry and vindictive. I find that Mr. Robertson slowly began to disengage himself from Sara Beth as a result of Ms. Robertson's refusal to reconcile.
>
> (b)Sara Beth became a troubled teenager who desperately sought the love and attention of Mr. Robertson. I accept the evidence of Ms. Robertson as it relates to Sara Beth's difficulties which she experienced after separation and after Mr. Robertson began to withdraw from her. I accept that Ms. Robertson was legitimately concerned for Sara Beth.
>
> (c) Ms. Robertson is an intelligent and articulate woman who was quite capable of making an application for child support independent of legal counsel in the event she was unable to afford a lawyer.
>
> (d) Ms. Robertson was aware that she was entitled to child support and that she was generally aware that she could make an application for retroactive support in the future. As a result Ms. Robertson felt strategically that it would be better to wait until Sara Beth was older to make an application for prospective and retroactive child support.

(e) From time to time, Ms. Robertson made innocuous suggestions to receive money directly from Mr. Robertson, but she did not provide Mr. Robertson with effective notice until January 2005.

(f) Mr. Robertson was aware that he had an obligation to pay child support, but did not want to do so once he understood that there was no possibility of reconciliation between he and Ms. Robertson.

(g) Mr. Robertson contributed financially to Sara Beth on an *ad hoc* basis providing her with spending money and other monies from time to time when they met or when there was a request, including paying for Sara Beth's cell phone and other goods. I find that such contribution fell below the guideline amount and was less than the amounts which Mr. Robertson had paid during the first year of separation.

(h) Mr. Robertson knowingly refused to pay child support until the date of the conciliator's order. Mr. Robertson has been current with all maintenance payments flowing from the conciliator's order.

(i) Ms. Robertson seeks retroactive child support to assist with the cost of counselling for Sara Beth and also to assist with the purchase of a home. I do not accept that Ms. Robertson intended to purchase a vehicle for Sara Beth with the retroactive child support as Ms. Robertson did not mention this in her evidence. Ms. Robertson also acquired a $5,000.00 line of credit to help pay for expenses which she incurred prior to the payment of support.

(d) Analysis

[65] I have reviewed the legislation, case law and the evidence. I have assigned the burden of proof to Ms. Robertson as it is her application. The standard is the civil standard of proof on the balance of probabilities. In balancing the factors and applying the principles stated in **S. (D.B.) v. G. (S.R.**), supra, I

have determined that a retroactive award is appropriate, however not to the extent claimed by Ms. Robertson. Ms. Robertson had a reasonable excuse for not seeking child support for a period of time. Mr. Robertson engaged in blameworthy conduct. However, Mr. Robertson's blameworthy conduct is somewhat tempered by the fact that Mr. Robertson did provide direct financial support to Sara Beth. Further Ms. Robertson by her inaction acquiesced to the situation with the hope that she could obtain a retroactive award at some point in the future. Effective notice was not provided until January 2005.

[66] I have also considered the circumstances of Sara Beth, past and present, and the benefit which will flow to Sara Beth through a retroactive award. Sara Beth will benefit from counselling and a retroactive award will help pay for the counselling costs. A retroactive award will assist with the payout of the line of credit used to pay for expenses which Ms. Robertson could not meet prior to the payment of child support. I do not find that Sara Beth will benefit significantly from Ms. Robertson owning a home. Sara Beth only resides permanently with her mother for about four months of the year. She is not a young child and the stability factor is not applicable to Sara Beth's circumstances. In any event, Ms. Robertson is already renting a home, not

an apartment. I find that only a slight benefit will flow to Sara Beth as a result of Ms. Robertson owning a home.

[67] I have also considered the hardship argument put forth by Mr. Robertson. This argument is not compelling as Mr. Robertson was the author of his own misfortune and could have paid the child support to Ms. Robertson. Further Mr. Robertson's obligation to Sara Beth takes priority over his new common law relationship. In addition, the maintenance obligation trumps Mr. Robertson's expenses associated with smoking, drinking alcohol, driving a new vehicle, expensive gift giving, and buying back past pension benefits.

[68] Pursuant to **S. (D.B.) v. G. (S.R.)**, I find that it is inappropriate to strictly adhere to the table amount in the calculation of a retroactive award in the circumstances of this case. I therefore award $7,000.00 in retroactive child support which will be payable in monthly installments.

[69] In determining the rate of payment, I accept that Mr. Robertson's access to bank loans is limited. I have also considered Mr. Robertson's obligation to pay periodic support, section 7 university expenses, and section 7 arrears. I have considered his net disposable income and his reasonable expenses. I order Mr. Robertson to pay an additional $200.00 per month toward the

retroactive award which shall be paid on the 1st day of each month until the retroactive award is paid in full commencing June 1, 2007.

[70] Mr. Robertson's total maintenance obligation for periodic, retroactive, and section 7 university expenses, past and prospective, is $1,219.00 per month, averaged over the year. Such a payment will provide Mr. Robertson with a net disposable income of approximately $2,350.00 per month, which is sufficient to meet his reasonable expenses after suitable adjustments to his lavish budget.

[71] **What is the appropriate order in relation to insurance [medical and life]?**

[72] There was no significant dispute relating to the insurance issues, although no agreement was reached**.** I therefore Order that both parties retain Sara Beth on his/her health/dental/medical plans for so long as his/her plans will allow.

[73] Mr. Robertson was uncertain as to the life insurance coverage available through his employment or union. If Mr. Robertson has such insurance, he shall name Ms. Robertson as the beneficiary of such insurance in the amount of $50,000.00. Life insurance is to secure the payment of child support which has been ordered. Proof of compliance with this provision shall be provided within 30 days.

V. Conclusion

[74] The following relief is granted:

(a) the divorce;

(b) Ms. Robertson's surname is changed to her maiden name of Tremblett upon the issuance of the Certificate of Divorce;

(c) An equal division of the pensions;

(d) Mr. Robertson shall pay child support prospectively in the amount of $287.00 per month while Sara Beth is attending university in Halifax for eight months, and in the amount of $574.00 per month when Sara Beth is living with Ms. Robertson during the months of May, June, July and August. The first payment shall commence on May 1, 2007;

(e) Mr. Robertson shall pay $436.00 per month in university expenses commencing May 15, 2007;

(f) Mr. Robertson shall pay $200.00 per month until the $12,991.00 outstanding is paid in full, which sum represents Mr. Robertson's prorata share of the university expenses up to April 30, 2007;

(g) Mr. Robertson shall pay $7,000.00 in retroactive support which sum shall be paid at a rate of $200.00 per month commencing June 1, 2007;

(h) Both parties shall name Sara Beth on their health/dental/ medical plans available through their employers; and

(i) Mr. Robertson shall name Ms. Robertson as beneficiary of his life insurance in the amount of $50,000.00 to secure the maintenance obligation.

[75] If either party wishes to make an application for costs, he/she is to provide written submissions within 20 days. If a submission is made, I will allow 10

days for a written response. If neither party makes an application for costs within 20 days, costs will not be ordered.

[76] Ms. Gibney-Conohan is directed to draft the Corollary Relief Judgment and Divorce Judgment.

_____

Justice Theresa Forgeron