**SUPREME COURT OF NOVA SCOTIA**
**(FAMILY DIVISION)**

**Citation:** *Sorckoff v. Melvin*, 2016 NSSC 252

**Date:** 20160926
**Docket:** SFHISOV-099629
**Registry:** Halifax

**Between:**

Amanda L. Sorckoff

Applicant

v.

Kevin A. Melvin

Respondent

**Judge:** The Honourable Justice Beryl A. MacDonald

**Heard:**
June 27, 2016

**Counsel:** Amanda L. Sorckoff, self-represented;
Kevin A. Melvin, self-represented

**By the Court:**

**Procedural Issues**

[1] On January 9, 2016 the Mother completed a variation application pursuant to the *Interjurisdictional Support Orders Act*, S.N.B. 2002, c.I-12.05. That variation application is to be determined pursuant to section 34 and 35 of the *Interjurisdictional Support Orders Act*, S. N.S. 2002 c. 9. The relevant procedural portions of that legislation are:

> 34 (1) Where the designated authority receives a support-variation application from an appropriate authority in a reciprocating jurisdiction with information that the respondent habitually resides in the Province, it shall serve on the respondent, in accordance with the regulations,
>
> (a) a copy of the support-variation application; and
>
> (b) a notice requiring the respondent to appear at a place and time set out in the notice and to provide the information or documents required by the regulations.
>
> (1A) For greater certainty, the applicant is not required to be served with the notice, information or documents referred to in clause (1)(b).
>
> 35 (1) When the Nova Scotia court receives a support-variation application under Section 34, the clerk shall serve on the respondent, in accordance with the regulations,
>
> (a) a copy of the support-variation application; and

> (b) a notice requiring the respondent to appear at a place and time set out in the notice and to provide the prescribed information or documents.
>
> (2) For greater certainty, the applicant is not required to be served with the notice, information or documents referred to in clause (1)(b). 2002, c. 9, s. 35; 2015, c. 40, s. 3
>
> 36 (1) In dealing with a support-variation application, the Nova Scotia court shall consider
>
> (a) the evidence provided to the Nova Scotia court; and
>
> (b) the documents sent from the reciprocating jurisdiction.
>
> (2) Where the Nova Scotia court needs further information or documents from the applicant to consider making a support variation order, the Nova Scotia court shall
>
> (a) send the designated authority a direction to request the information or documents from the applicant or the appropriate authority in the reciprocating jurisdiction; and
>
> (b) adjourn the hearing

[2] Prior to the recent amendments to this *Act*, the Mother was to receive notice about the hearing date and she was to be delivered documents filed by the Father. The Mother was given notice about the hearing date and she received the documents filed by the Father.

[3] After I heard from the Father I had several questions to be answered by the Mother. Rather than use the lengthy and time consuming process provided by

section 36(2) of the *Act*, pursuant to the rules of this court, I requested a conciliator to speak with the parties about my inquiries and prepare a report.

[4] In addition to the oral testimony given by the Father, the material I have reviewed in reaching my decision is as follows:

- the Support Variation Application and all of the attachments sworn to by the Mother on January 9, 2016;
- the financial statement of the Father and all attachments filed May 20, 2016;
- the Father's T1 General 2015 income tax return
- the Father's bank account details of activity from May 1 to May 31, 2016;
- the Father's parenting statement filed May 20, 2016;
- the Interim Order issued by the Court of Queen's Bench of New Brunswick dated July 9, 2002;
- other orders issued by the Court of Queen's Bench to which reference will be made in this decision;
- the statement of expenses called Bills: provided by the Father during the hearing;
- the ADR Conciliation Record issued September 14, 2016.

In this decision the words child maintenance and child support are used interchangeably.

**Background**

[5] In her variation application the Mother requested a variation to previous orders that had been issued in respect to the child maintenance to be paid by the

Father. The Mother believed the Father earned considerably more income than he did at the date of the last issued order. She requested a retroactive recalculation of child maintenance from January 1, 2011.

[6] The Mother's variation application was not filed in the Supreme Court of Nova Scotia until April 6, 2016. On May 3, 2016 the variation application and all of the accompanying documents were served on the Father. Several attempts were made by court staff to engage the parties in a conciliation procedure but the Mother refused to participate. The Father was required to appear at a hearing and he did so on June 27, 2016. After hearing from the Father I reserved my decision and requested a court conciliator to contact the Mother to receive her response to various questions I had relating primarily to the delay in her application and the frequency of the access exercised by the Father. The Mother was once again invited to participate in a conciliation process but she refused.

[7] Under the rules of our court the conciliation record may be considered in a proceeding and I have done so in respect to the decision I have reached and in particular in respect to the responses provided to the conciliation officer by the Mother about the questions I had raised. As a result, the Mother had ample opportunity to participate in this proceeding although not in the traditional way by

appearance before me having an opportunity to cross-examine and be cross-examined. Recognizing the complications posed by geography and finances for parents who no longer live in the same province, the *Interjurisdictional Support Orders Act,* supra gives a court authority to make decisions without engaging all aspects of the typical adversarial process.

[8] The parties in this proceeding were in a very short relationship from September 2000 until August 2001. On November 30, 2001 their son was born. The Father was present when the child was born and he visited the child at the hospital after the child's birth. He acknowledges parenthood.

[9] On July 9, 2002 an Interim Order was issued by the Court of Queen's Bench of New Brunswick in a proceeding commenced by the Father in which he requested joint custody, access with the child and information about the child. The Mother responded and requested child maintenance. The Interim Order required the Father to pay $125.00 each month for child maintenance. It also required the Father to inform the Mother about changes in his financial situation and contemplated a return to court if the parties were not able to resolve the parenting and support issues to conclude the proceeding. This is the only reference requiring

the Father to provide financial information to the Mother. Subsequent orders were silent in respect to financial disclosure. No further orders were issued until 2008.

[10] The Interim Order indicated that the Father was self-represented. The Mother had legal counsel.

[11] In August 11, 2008 an order was issued establishing the Father's gross annual income at $49,000.00. The order provided in paragraph 11 "*the parties have agreed that the Father incurs significant expenses associated with his access, bearing in mind the fact that he lives in the City of Halifax, Province of Nova Scotia. The parties have agreed to deviate from the Federal Child Support Guidelines as a result of the costs associated with access and visitation. The parties have agreed and it is ordered that the Father shall continue to pay $375.00 monthly for the support of the child, to be paid directly by the Father to the Mother"*. The Father was to maintain the child on a policy of health and dental insurance that was available through his place of employment. Both parties were self-represented.

[12] There were several orders granted after the order dated August 11, 2008. These dealt primarily with issues about information exchange and access. In some of those proceedings the Mother had legal counsel.

[13] On December 9, 2011 a consent order was issued requiring the Father to pay child support in the amount of $216.00 per month noting that the Father's income had changed and he was on EI benefits providing an approximate annual income of $26,000.00 Both parties were self-represented.

[14] In July 2014 the Father increased his child support by $84.00 per month for a total monthly payment of $300.00. He paid the $84.00 directly to the Mother and continued to send $216.00 per month to the New Brunswick Family Support Orders Service.

[15] In April 2015 the Father began paying for the child's recreational activity and the required monthly payment is $40.00 per month. The Mother requests that he continue to pay this amount as a "section 7 expense". The Father suggests the cost is more than $40.00 per month because he pays for the cost for transportation, and events. The Father gave me an estimate of $75.00 per month but it was imprecise. I have used the $40.00 per month amount in calculating what he has paid for child support.

[16] In approximately May 2015 the parties discussed increasing the Father's child support but they were unable to come to an agreement about an increase.

[17] Up until December 2011 the Father was required to pay $375.00 per month as child support based upon an income of $49,000.00 When the Father applied to reduce his child support payment, because of his changed employment situation, he was receiving EI benefits. The Mother had an opportunity, at that time, to request disclosure about his earnings in 2011 prior to the change in his employment. She consented to a change in the order based upon those benefits only and as a result I am not prepared to retroactively recalculate any amount for the year 2011.

[18] I think it is important to mention that the Father's annual income has included CPP benefits he receives as a result of the death of his wife. She died in 2008 leaving him as the sole parental care giver for their infant son. That child continues to live with him and is a dependent child. Recently his income also includes some rental income but occasionally this results in a negative number thus reducing his line 150 income. I can readjust this income if I decided the "losses" are for amounts that should not be deducted in a calculation of income for child maintenance. I have reviewed the Father's 2015 Income Tax Return and have decided the deductions are appropriate and I will use only his Line 150 incomes in this decision.

[19] Since 2011 the father's total annual incomes are as follows:

| | |
|---|---|
| 2012 | $45,094.00 |
| 2013 | $66,914.00 |
| 2014 | $62,765.00 |
| 2015 | $52,783.00 |

Had an adjustment been made in any of these years the Father would have paid considerably more child maintenance than he has.

**Prospective Child Maintenance**

[20] The Father's earned income for 2016 is expected to be similar to his earnings in previous years. However, there is variation from year to year and I have determined the appropriate income to use for workplace income is $60,000.00.

[21] There is also an unexplained increase in the CPP amounts paid to the Father. I have chosen to use only the regular amount he generally has received, approximately $3,500.00 in calculating his 2016 income. The increased amount is included in his 2015 line 150 income. I have included nothing in my estimate of his total 2016 income for rental income or loss. This investment is increasing his capital but produces little to contribute to the financial support of this child. It does reduce his tax obligations and this helps him pay the child maintenance but a court

will continue to look carefully at this investment and may in the future decide to impute income to him even if this investment produces a loss.

[22] Each year the Father will be required to provide the Mother with his Income Tax Return for the previous year, completed with all attachments, and also provide all Notices of Assessment prepared by the Canada Revenue Agency for that return. If, in 2016 or any subsequent year, the Father's income is greater than my estimate, or if he declares a financial loss from rentals the Mother can decide whether a future variation application should be made.

[23] The Father's income for 2016 is $63,500.00. Commencing October 1, 2016 the Father must pay $537.00 each month for table guideline child maintenance.

[24] The Father requested payment of an amount different from the amount required by the table guideline. He has considerable expense to exercise access with his son and he pays for a recreation he believes the Mother will not pay from the child maintenance she receives.

[25] Unfortunately for the Father, these issues cannot be considered in the calculation of prospective child maintenance unless he has filed a successful undue hardship application. He has not filed that application. These applications are very complex and require knowledge of the law and calculations beyond the

understanding of most self-represented applicants. They require an analysis of each parent's standard of living, based primarily on household incomes. A parent who earns significantly more than the other parent often cannot meet the required "test" to permit a court to deviate from the guideline. Only governments can change these provisions to provide courts with a better means to adjust child maintenance under these circumstances. However, these issues can be examined in claims for retroactive recalculation when a court is considering whether that recalculation will cause "hardship".

[26] The Mother has requested an order requiring the Father to pay for a recreational expense that cannot be classified as "extraordinary" under the definition provided in the Nova Scotia Child Maintenance Guidelines. The recreation presently paid for by the Father is not an extraordinary expense. It is an expense that can be paid from the child maintenance she will receive. I cannot order the Father to pay this expense. I cannot order the Mother to continue to pay this expense but I would expect she would continue to do so because she now will be receiving the appropriate table guideline amount for child maintenance and because the child appears to enjoy and benefit from the recreation.

**Retroactive Recalculation**

[27] The Supreme Court of Canada in *DBS v. SRG, LJW v. TAR, Henry v. Henry, Hiemstra v. Hiemstra*, 2006 SCC 37) described the factors a court is to consider when asked to retroactively calculate child maintenance. They are:

1) whether there is or is not an existing court order or agreement
2) status of the child/children
3) delay by the recipient in seeking the award
4) conduct of the payor parent
5) financial circumstances of the child/children
6) hardship imposed by a retroactive award

[28] The majority decided that if a retroactive award is justified there are three possible commencement dates:

1) The date when the payor was given "effective" notice that child support or a change in child support was being requested. Effective notice "*does not require the recipient parent to take any legal action; all that is required is that the topic be broached." (para. 121)*

2) If there is delay and the matter has not been adjudicated upon, even where effective notice has been given, *"it will usually be inappropriate to make a support award retroactive to a date more than three years before formal notice was given to the payor parent*." (para.123)

3) However, the presence of "blameworthy" conduct by the payor will *"move the presumptive date of retroactivity back to the time when circumstances changed materially." (para. 124).* As a result, the date

> when the total income of the payor increased may be an appropriate date for the beginning of the retroactive order.

[29] Bastarache, J. discusses blameworthy conduct in *D.B.S.* at paragraphs 105 to 109 of that decision. Much emphasis has been placed on his comment "*... courts should take an expansive view of what constitutes blameworthy conduct in this context. I would categorize as blameworthy conduct anything that privileges the payor parents own interests over his/her children's right to an appropriate amount of support*." These words must be interpreted, with the assistance of the examples he later provides, about what may or may not be considered blameworthy conduct. He says:

> [106] . . . thus, **a payor parent cannot hide his/her income increases** from the recipient parent in the hopes of avoiding larger child-support payments:. . . . **A payor parent cannot intimidate** a recipient parent in order to dissuade him/her from bringing an application for child support . . . 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]. . . 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: . . .
>
> [108] **On the other hand, a payor parent who does not increase support payments automatically is not necessarily engaging in blameworthy behavior. . .** (my emphasis).

[30] The Supreme Court addressed the quantum to be awarded retroactively and agreed that the quantum must fit the circumstances. *"Blind adherence to the amounts set out in the applicable Tables is not required – nor is it recommended." (para.128)*. The presence of undue hardship can yield a lesser award and there is a suggestion that undue hardship calculations required by section 10 of the child support guidelines are not required to make this finding. Sections 3(2), 4 and 9 are other areas where there is discretion to determine quantum. The majority also suggested courts could affect the quantum of awards by *"altering the time period that the retroactive award captures. . . For instance, where a court finds that there has been an unreasonable delay after effective notice was given, it may be appropriate to exclude this period of unreasonable delay from the calculation of the award." (para 130)*.

[31] The rationale for the Supreme Court's decision to confirm the court's discretion when considering a retroactive recalculation is described in paragraph 95:

> [95] It will not always be appropriate for a retroactive award to be ordered. Retroactive awards will not always resonate with the purposes behind the child-support regime; this will be so where the child would get no discernible benefit from the award. Retroactive awards may also cause hardship to a payor parent in ways that a prospective award would not. In short, while a freestanding obligation to support one's children must be recognized, it will not always be appropriate for court to enforce this obligation once the relevant time period has passed.

**Court Order**

[32] There is an order in this proceeding.

**Status of the Child**

[33] The child remains as a dependent child.

**Delay**

[34] The Mother did not file any applications to increase child maintenance until she commenced this application. She informed the conciliation officer “she did not know support could be changed”. Because the parties have appeared before the court on numerous occasions, including times when child maintenance has been changed, and because the Mother often had legal counsel during those proceedings I place little weight on the Mother’s response.

[35] The Mother suggests that when she discussed money with the Father he would always convince her that he was suffering economic hardship. Because the Father has other persons he is supporting and the Mother, at least until December 2015, had a partner supporting her this also may have influenced her decision not to start a variation application. Her failure to do so did lead the Father to believe he was paying an appropriate amount of child support.

[36] The Mother did have discussions with the Father about an increase in child support in May 2015. She did not accept his proposal but she did nothing subsequent to their discussions to resolve the matter.

[37] There has been delay.

**Conduct of the Father**

[38] The Father knew he should pay more child maintenance when his income changes. However, I make no finding that he deliberately avoided disclosing his income or in any way sought to intimidate the Mother. He did want to settle what he should pay taking into consideration his expense for access and his support of another child.

[39] The Father did not engage in blameworthy conduct.

**Financial Circumstances of the Child**

[40] This child will benefit from any additional money that comes into the Mother's household.

**Hardship**

[41] The Father does regularly make arrangements to, either visit with the child in St. John, New Brunswick, or by transporting him to Nova Scotia. This requires

transportation paid for by the Father. He tries to visit his son once monthly but lately this has been reduced to approximately once every six weeks. The Mother suggests he does not visit with his son frequently. I put little weight on her comments given the number of times the schedule for this child has been revised by court order. I accept the Father's evidence that he has done everything he could to maintain regular contact with his son and that to do so he frequently had to request court assistance.

[42] The Father does have another dependent child and he has a partner. He will struggle to pay recalculated child maintenance.

[43] Under the circumstances of this case, and in particular considering the Mother's delay, the Father's access costs and his support of another child, I will not recalculate child support for 2012 or 2013. I will recalculate from January 1, 2014. For the period under consideration I have compared what the Father should have paid, based upon table guideline child support, with what he did in fact pay for the support of this child including a monthly estimate of $40.00 per month as payment for the child's recreational activity.

**Child Support Payments Made**

[44] From January 1, 2014 until June 1, 2014 the Father paid $216.00 per month, a total of $1,296.00.

[45] From July 1, 2014 until December 1, 2014 the Father paid $300.00 per month, a total $1,800.00.

[46] From January 1, 2015 until March 1, 2015 the Father paid $300.00 per month, a total of $900.00.

[47] From April 1, 2015 until December 1, 2015 the Father paid $340.00 per month, a total of $3,060.00.

[48] From January 1, 2016 until September 1, 2016 the Father paid $340.00 per month, a total of $3,060.00.

**Table Guideline Child Support Payments Required**

[49] From January 1, 2014 until December 1, 2014 the Father should have paid a table guideline amount of $6,372.00. He paid $3,096.00, a difference of $3,276.00.

[50] From January 1, 2015 until December 1, 2015 he should have paid a table guideline amount of $5,328.00. He paid $3,960.00, a difference of $1,368.00.

[51] From January 1, 2016 until September 1, 2016 he should have paid a table amount of $4,833.00. He paid $3,060.00, a difference of $1,773.00.

[52] The total the Father would owe according to the above calculations is $6,417.00. Because of the Father's financial resources, including his ownership of a rental accommodation, I am not satisfied he will suffer hardship if given time to pay this amount.

[53] Commencing October 1, 2016, the Father must pay an additional $175.00 per month for this retroactive child support until it is paid in full. As a result the total monthly amount to be paid by the Father, commencing October 1, 2016, is $712.00. This amount will revert to $537.00 when the retroactive amount owing is paid in full unless a subsequent order varies the amount to be paid for ongoing child support.

[54] The child support is to be paid through the New Brunswick Family Support Orders Service and it is expected its records will be adjusted to reflect the details of this decision.

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Beryl A. MacDonald, J.