

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

**Citation:** *Desrosiers v. Pastuck*, 2016 NSSC 308

**Date:** 2016-11-09

**Docket:** *Sydney* No. 94297

**Registry:** Sydney

**Between:**

Danielle Desrosiers

Applicant

v.

Andrew Pastuck

Respondent

Judge: **The Honourable Justice Theresa Forgeron**

Heard: April 25, 26, 27, 28 and May 26, 2016 in Sydney, Nova Scotia

Oral Decision: November 9, 2016

Written Release: November 15, 2016

Counsel: TJ McKeough, Counsel for the Applicant  
Carolyn MacAulay, Counsel for the Respondent

**By the Court:**

**Introduction**

[1] In many respects, seven year old Ashten has a happy, stable and balanced life. He has a loving and supportive family and many friends. He is involved in hockey, baseball and numerous outdoor activities. He enjoys school and has parents who assist to ensure success. He lacks very little from a material perspective. In spite of these favourable observations, Ashten's well-being is nonetheless compromised because of his exposure to parental conflict.

[2] For many years, Ashten's parents were involved in a turbulent relationship that was punctuated with periods of separation and reconciliation. Although the parties separated for the final time in 2013, the turbulence unfortunately did not end.

[3] The conflict eventually gave rise to this litigation, which centers around a twofold dispute. First, Ashten's parents cannot agree on the parenting plan. Ashten's father, Andrew Pastuck wants a joint custody order, with shared parenting features. Ashten's mother, Danielle Desrosiers agrees with joint custody, provided she has final decision making authority and is the primary care parent. Second, the parties disagree about some of the child support issues, including the calculation of Mr. Pastuck's income, the determination of s. 7 expenses, and retroactive child support.

[4] The contested hearing was held on April 25, 26, 27, 28 and May 26, 2016. The court received evidence from each of the parties and the maternal and paternal grandmothers. At the conclusion of the hearing, I put an interim parenting arrangement in place in the hopes of diffusing the situation pending the release of a final decision.

**Issues**

[5] This decision will address the following issues:

- What principles must be considered when determining Ashten's best interests?
- What parenting plan is in Ashten's best interests?
- What is Mr. Pastuck's income?
- What is the appropriate s.7 order?
- Should retroactive child support be granted?

## Analysis

### [6] What principles must be considered when determining Ashten's best interests?

#### *Burden of Proof*

[7] All court decisions involving children must be based on their best interests. In determining best interests, the court applies the civil standard of proof. In **C. (R.) v. McDougall**, 2008 SCC 53(S.C.C.), Rothstein, J. confirmed that there is only one standard of proof in civil cases - proof on a balance of probabilities. The evidence, in its totality, must be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test.

#### *Credibility and Reliability Assessment*

[8] When crafting decisions, courts often make assessments about reliability and credibility. Guidelines applicable to credibility assessment were canvassed by this court in paras. 18 to 21 of **Baker-Warren v. Denault**, 2009 NSSC 59, as approved in **Hurst v. Gill**, 2011 NSCA 100, which guidelines include the following:

- Credibility assessment is not a science. It is not always possible to "articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events:" **R. c. Gagnon**, 2006 SCC 17 (S.C.C.), para.20. ... "[A]ssessing credibility is a difficult and delicate matter that does not always lend itself to precise and complete verbalization:" **R. v. M. (R.E.)**, 2008 SCC 51 (S.C.C.), para. 49.
- There is no principle of law that requires a trier of fact to believe or disbelieve a witness's testimony in its entirety: **Novak Estate, Re**, 2008 NSSC 283 (N.S.S.C.). On the contrary, a trier may believe none, part or all of a witness's evidence, and may attach different weight to different parts of a witness's evidence, **Novak Estate, Re**, *supra*.
- Demeanor is not a good indicator of credibility: **R. v. Norman** (1993), 16 O.R. (3d) 295 (Ont. C.A.) at para. 55.
- Questions which should be addressed when assessing credibility include:
  - a) What were the inconsistencies and weaknesses in the witness' evidence, which include internal inconsistencies, prior inconsistent statements, inconsistencies between the witness' testimony and the documentary evidence, and the testimony of other witnesses: **Novak Estate, Re**, *supra*;
  - b) Did the witness have an interest in the outcome or were they personally connected to either party;

- c) Did the witness have a motive to deceive;
- d) Did the witness have the ability to observe the factual matters about which they testified;
- e) Did the witness have a sufficient power of recollection to provide the court with an accurate account;
- f) Is the testimony in harmony with the preponderance of probabilities which a practical and informed person would find reasonable given the particular place and conditions: **Faryna v. Chorny**, [1952] 2 D.L.R. 354 (B.C.C.A.);
- g) Was there an internal consistency and logical flow to the evidence;
- h) Was the evidence provided in a candid and straight forward manner, or was the witness evasive, strategic, hesitant or biased; and
- i) Where appropriate, was the witness capable of making an admission against interest, or was the witness self-serving?

#### *Legislative Factors*

[9] When crafting a parenting order, the court must choose the course that will best provide for the child's healthy development: **K. (K.) v. L. (G.)**, [1985] 1 S.C.R. 87 (S.C.C.) and s. 18 (6)(d) of the *Maintenance and Custody Act*, all within the context of the child's best interests.

[10] Section 18(6) of the *MCA* stipulates the factors which the court must consider when determining a child's best interests. The factors focus on the ability of each of the parents to meet the unique needs of the child based on an analysis of the competing parenting plans, in the context of a number of considerations, including those related to:

- The child's physical, emotional, social and educational needs;
- The parent's ability to foster the child's relationship with the other parent;
- The history of child care;
- The proposed parenting plans;
- The child's cultural, linguistic, religious and spiritual heritage;
- The child's views and preferences;
- The nature, strength and stability of the relationship between the child and each parent and important family members;
- The parent's ability to communicate and cooperate;
- The history of family violence.

[11] Further, s. 18 (4) of the *MCA* confirms that parents are joint guardians and are equally entitled to the care and custody of their child unless otherwise provided.

*Position of the Father*

[12] Mr. Pastuck is seeking an order for joint custody, with shared parenting features based upon his employment schedule. Mr. Pastuck is a Red Seal pipefitter who has been employed out of province for about 11 years. His work schedule varies depending on the job. He typically works a rotating schedule, alternating between working in another province followed by days off spent at home. In addition, Mr. Pastuck is typically on layoff during the summer and at Christmas. Mr. Pastuck has also always been home for Ashten's birthday.

[13] Mr. Pastuck wants Ashten in his care the majority of the time when he is not working. Mr. Pastuck wants to share holidays. Mr. Pastuck states that his plan is in Ashten's best interests for a number of reasons, including the following:

- Ashten and he share a deep and loving bond.
- Ashten is used to being in Mr. Pastuck's care because he has been an involved and dedicated father since Ashten was a baby.
- He is more than capable of continuing to meet all of Ashten's needs.
- Ashten and he share similar interests in hockey, baseball, sports, riding, racing and outdoor activities.
- Ashten shares a close and loving relationship with his family, and in particular his mother, who provided primary care for many months when he and Ms. Desrosiers were working out of province.
- Ms. Desrosiers does not appreciate the importance of his role in Ashten's development.
- Ms. Desrosiers has attempted to undermine his relationship with Ashten.

[14] In addition, Mr. Pastuck wants to be actively involved in all decisions affecting his son because he is a loving father who has an obvious and vested interest in all of Ashten's outcomes. Mr. Pastuck also notes that parental communication has improved significantly in recent months.

*Position of the Mother*

[15] Ms. Desrosiers seeks a joint custody order with primary care while maintaining final decision-making authority, except in the area of recreational activities which can be left to Mr. Pastuck. Ms. Desrosiers wants to share holidays. Ms. Desrosiers states that her plan is in Ashten's best interests for a number of reasons, including the following:

- Ashten and she share a deep and loving bond.

- She has always been Ashten's primary care provider and is best suited to continue in this capacity.
- She has always been primarily responsible for Ashten's medical, dental, educational and social welfare needs.
- Ashten has developed into a bright, happy and well-rounded boy under her primary care. There is no reason to disrupt this status quo.
- Ashten is young and needs the stability that is achieved through a primary care arrangement.
- She is not violent; Mr. Pastuck can be violent when he is angry or upset. Mr. Pastuck is not a good role model when he is violent.
- Reasonable parental communication is impossible when Mr. Pastuck is angry or upset. Parental communication is also negatively affected by the damaging over-involvement of Mr. Pastuck's mother.
- Ashten has a close and loving relationship with his step-father and extended family, including another sibling who was recently born to Ms. Desrosiers and her fiancé.

*Decision*

[16] Before giving my decision on the parenting plan that will meet Ashten's best interests, I will apply the evidence to the best interests factors, and in so doing make factual findings upon which my parenting decision will be based.

*Physical Needs*

[17] Both parents are more than capable of meeting Ashten's physical needs. Mr. Pastuck owns his own home where Ashten has stayed since he was a baby. It is a comfortable, safe and child friendly home.

[18] Similarly, Ms. Desrosiers' home environment is also appropriate, safe and child friendly. Although Ashten has moved several times while in Ms. Desrosiers' care, the court has no concerns about the quality of Ashten's home environment while living with his mother.

[19] Further, both parents have no difficulty ensuring that Ashten is fed nutritious meals and is appropriately clothed.

[20] Neither party has a stronger claim when this factor is examined.

*Emotional Needs*

[21] In the introduction to this decision, I expressed concern for Ashten's emotional well-being because of his exposure to parental conflict. If Ashten continues to be exposed to parental conflict he will be harmed. Mr. Pastuck and Ms. Desrosiers must assign a higher priority to Ashten's well-being by accepting personal responsibility for their own actions and by learning and applying skills to improve parental communication. Both parties must therefore participate in therapeutic counselling for the following stated purposes:

- To obtain education about the short and long term effects arising from Ashten's exposure to parental conflict and violence.
- To obtain better insight into the dynamics of parental conflict.
- To obtain better insight into the role that personal reflection, accountability and responsibility plays in the reduction of parental conflict.
- To learn skills to communicate respectfully, reasonably and responsibly with the other parent.

[22] Provided they each participate in therapeutic counselling, both parents have the capacity to make the necessary changes to ensure that Ashten is no longer dragged into their parenting dispute. Both parties must file confirmation of their successful completion of the ordered therapeutic counselling. Both parties must do more to ensure Ashten's psychological needs are met.

*Social and Recreational Needs*

[23] Ashten is an active little boy who shares his father's love for sports and outdoor activities, including hockey, baseball, racing, skidoos and trail riding. Both parties actively encourage Ashten in most of his activities, although Mr. Pastuck plays a more significant role. Ms. Desrosiers' commitment is also evident and important, although her focus is not as strong as that of Mr. Pastuck.

[24] Both parties are equally equipped to ensure that Ashten's social and recreational needs are maintained. Caution must, however, be exercised to ensure that Ashten is not over extended and over scheduled. Ashten must have sufficient time for relaxation, free play and social visits with his extended family.

[25] Mr. Pastuck's social and recreational plan is slightly superior to that of Ms. Desrosiers.

*Educational Needs*

[26] Ashten is in grade one. At the outset of the school year, Ashten was not reading at grade level. He participated in a reading resource program at school, which was supplemented by

home support. Both parties actively encourage Ashten in his school work, although Ms. Desrosiers plays a more significant role. Mr. Pastuck's commitment is also evident and important, although his focus is not as strong as Ms. Desrosiers.

[27] Both parties must continue to support Ashten's educational pursuits by attending parent teacher meetings, communicating with Ashten's teachers, supervising the completion of homework and school projects, and by reading daily with Ashten.

[28] Ms. Desrosiers' educational plan is slightly superior to that of Mr. Pastuck.

#### *Ability to Foster Relationship with Other Parent*

[29] Contrary to that suggested by Mr. Pastuck, I find that Ms. Desrosiers was and is the parent who is better equipped to foster a relationship between Ashten and the other parent. For example, despite Mr. Pastuck's violence, Ms. Desrosiers ensured that Ashten spent liberal time with his father, and when his father was absent, with the paternal family. Ms. Desrosiers did not terminate access for any extended period of time after Mr. Pastuck spit on her, nor did she terminate access after Mr. Pastuck breached the terms of his provincial court undertaking, nor did she terminate access when Mr. Pastuck unilaterally stopped paying child support. Ms. Desrosiers understands that Ashten needs to spend quality time with his father. Ms. Desrosiers has fostered that relationship even in the face of Mr. Pastuck's challenging conduct.

[30] In contrast, I have concerns about Mr. Pastuck's ability to foster Ashten's relationship with his mother when Mr. Pastuck is angry, frustrated or upset. During such times, Mr. Pastuck often acts in an uncontrolled and violent fashion towards Ms. Desrosiers, even when Ashten is present. Uncontrolled and violent conduct destroys, rather than enhances, the parent child relationship.

[31] Ms. Desrosiers is better poised to foster the parent child relationship with the other parent.

#### *History of Child Care*

[32] Although both are active and involved parents, Ms. Desrosiers nonetheless assumed the role of primary care provider throughout Ashten's life, both before and after separation. Mr. Pastuck spent more time working out of province than did Ms. Desrosiers. Ms. Desrosiers, by default, was the primary care provider. After separation, Ashten lived primarily with his mother, while Mr. Pastuck exercised liberal access. When both parties worked out of province, both grandmothers provided child care on an approximately equal basis<sup>1</sup>.

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<sup>11</sup> I prefer the evidence of Ms. Desrosiers and her mother over the evidence of Mr. Pastuck and his mother. I note in particular, that Ms. Nancy Pastuck not only mislead the court, but she also fabricated notes on a calendar in an attempt to bolster her position.



[33] Further, Ms. Desrosiers does not intend to work out west in the future, rather she plans to find local employment. By working locally, Ms. Desrosiers will be home at night, on week-ends and holidays thus enhancing Ashten's stability. In contrast, Mr. Pastuck plans to continue working out of province as he has for the last 11 years. In such circumstances, Ms. Desrosiers will continue to be the primary care provider.

[34] Ms. Desrosiers is in a stronger position when the history of child care is examined.

*Cultural, Linguistic, Religious and Spiritual Heritage*

[35] Both parties have similar plans in relation to these factors because they both share the same cultural, linguistic and religious background. Both parents are committed to ensuring that Ashten is appropriately exposed to his heritage. Neither party's plan is superior in this regard.

*Child's Views and Preferences*

[36] Although the court does not have the benefit of a child's wish assessment, I am confident that Ashten wants to spend quality time with each of his parents.

*Relationship between the Child and Each Parent and Extended Family*

[37] Ashten has a stable relationship with each of his parents and his extended family, although the stability of his relationship with Mr. Pastuck is eroded when Mr. Pastuck is aggressive. Ashten loves both of his parents, his grandparents and extended family members. Ashten usually experiences a sense of love, happiness and confidence from his parents and his extended family, except when he is exposed to violence and parental conflict.

*Parent's Ability to Communicate and Cooperate*

[38] By agreeing to joint custody, both parents made a commitment to jointly discuss important matters affecting the health, education and general well-being of their son in a respectful, reasonable and reflective manner. I am nonetheless concerned about Mr. Pastuck's ability to be respectful, reasonable and reflective in his communication with Ms. Desrosiers given his past conduct. I nevertheless approve the joint custody agreement with the caveat that all communication on a go-forward basis must be child centered, respectful, reasonable and reflective. Aggressive behaviour has no place in a joint custody order.

*Family Violence*

[39] Violence and aggression are important factors in this decision because Mr. Pastuck can respond violently and aggressively when he is angry, upset or frustrated<sup>2</sup>. Examples to support this conclusion include the following:

- Mr. Pastuck was physically and verbally abusive to Ms. Desrosiers before Ashten was born and while the parties were living in Slave Lake, Alberta.
- On another occasion, after attending a wedding, Mr. Pastuck angrily pulled Ms. Desrosiers out of his cousin's car into his own car and then kicked her out of his vehicle.
- On two occasions when she was pregnant, Mr. Pastuck assaulted Ms. Desrosiers, once by throwing a chair at her and once by pushing her.
- When Ashten was about six months old, Mr. Pastuck smashed the microwave in anger; Ms. Desrosiers fell and cut herself on the broken glass.
- When Ashten was about three years old, Mr. Pastuck spit on Ms. Desrosiers' face after an angry exchange. He then grabbed Ashten and raced off in his truck with wheels spinning.
- While on conditions to have no contact with Ms. Desrosiers, Mr. Pastuck sent text messages to Ms. Desrosiers who called the police out of fear of further escalation. Mr. Pastuck did little to assume personal responsibility for the breach charges. Instead, Mr. Pastuck seemed to blame his incarceration on Ms. Desrosiers.

[40] Mr. Pastuck has taken courses on domestic violence and anger management through the domestic violence court. Although Mr. Pastuck acquired new insights from this programming, much more is required. I note that Mr. Pastuck continued to minimize and deny the violence, and at times, deflected blame to Ms. Desrosiers who he felt was "trying to get under my skin".

[41] Mr. Pastuck requires further therapy to help curb his violent and aggressive tendencies, which therapy is to focus on the recognition of triggers, de-escalation techniques, healthy relationships and anger management skills.

[42] All violence and aggression must end because violence is never in a child's best interests. Violence erodes confidence and self-esteem. Violence perverts a healthy family life. A child who is exposed to violence learns that violence is an acceptable way to resolve disputes. It is not. A child who is exposed to violence learns that violence is an acceptable way to express love. It is not. Mr. Pastuck must ensure that violence does not reoccur.

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<sup>2</sup> I accept the evidence of Ms. Desrosiers where it conflicts with the evidence of Mr. Pastuck.

*Summary on Best Interests Factors*

[43] I find that for the most part, Ashten has a family life that is nurturing, supportive and stable. Past exposure to family violence and parental conflict, however, jeopardizes Ashten's well-being. Both parents have the ability to recognize the danger that their conduct poses to Ashten's psychological well-being. I am hopeful that with therapeutic counselling, they each will effect permanent changes in their approaches to each other, if for no other reason than their desire to do what is best for their son.

[44] I further find that Ms. Desrosiers is in a better position to provide the day-to-day care for Ashten based on my examination of the best interests factors stipulated in the *MCA*. Ms. Desrosiers will safeguard Ashten's emotional, psychological, educational and social welfare needs. She will provide a structured, timely and organized routine, while ensuring the father son relationship is respected and maintained. Mr. Pastuck's involvement will continue to be liberal and essential to Ashten's development.

[45] **What parenting plan is in Ashten's best interests?**

*Final Decision Maker*

[46] Mr. Pastuck seeks a joint custody order where there is no final decision maker in the event the parties are unable to reach agreement after timely and meaningful consultation. In contrast, Ms. Desrosiers seeks final decision making authority for all important matters involving Ashten's health, education and general well-being, except those decisions involving sports and activities, which she agrees can be made by Mr. Pastuck.

[47] I have determined that given the circumstances, it is in Ashten's best interests that a final decision maker be designated. Joint custody is the optimal parenting arrangement because it ensures that the child benefits from the perspective and life experiences of the two people who love the child the most. A joint custody arrangement, however, ceases to be beneficial, and indeed becomes destructive, when parental communication is rift with distrust, anger and hostility, as in this case.

[48] Given the current conflict, and the history of decision making, it is in Ashten's best interests that Ms. Desrosiers be vested with final decision making authority on all important matters, with the exception of Ashten's enrolment in two sporting activities per season for which final decision making is vested in Mr. Pastuck.

*Parenting Plan*

[49] The parenting plan that is in Ashten's best interests is as follows:

*Joint Custody*

[50] Andrew Pastuck and Danielle Desrosiers will share joint custody of Ashten Lawrence Davis Desrosiers-Pastuck born \*. Danielle Desrosiers will have primary care of Ashten according to the parenting schedule stated in this order.

*Decision Making Authority*

[51] Danielle Desrosiers and Andrew Pastuck must consult with each other, on a timely basis, about important decisions which impact Ashten's health, education, religion, heritage and general welfare. All such discussions must be meaningful, child focused and respectful. If after meaningful discussions, the parties are unable to reach agreement, then Danielle Desrosiers will have final decision making authority on all issues, including the choice of Ashten's school, with the exception of the sporting activities in which Ashten is enrolled, which will be determined by Andrew Pastuck, to a maximum of two organized sporting activities per season.

[52] In the event of a medical emergency, the party having physical care of Ashten will be entitled to make decisions which are necessary to alleviate the emergency, and will notify the other parent as soon as possible, as to the nature of the emergency and emergency treatment.

[53] Routine day-to-day decisions, including child care decisions, will be made by the party who is scheduled to have physical care of Ashten.

*Communication*

[54] All communication between the parties must be child focused and respectful. Both parties will exchange e-mail addresses to assist with communication. Text messages should be avoided where possible.

[55] Neither party will speak disparagingly of the other party, or their family, in the presence or hearing distance of Ashten.

[56] Neither party will use Ashten to relay messages to the other party.

[57] Each party must notify the other by email of the following routine decisions made while Ashten is in their care: particulars of minor illnesses and any medication that was administered; particulars of homework assignments, projects and tests; particulars involving activities, practices, games and tournaments; and particulars relating to significant social welfare matters. All such notifications must be timely, and also must provide sufficient details so that both parties can attend any of Ashten's special functions, if they are able to do so. All such communication must be respectful and child focused.

*Meetings, Concerts and Activities*

[58] Both parties are entitled to attend parent teacher meetings, and all major school events, including concerts, programs and activities. In the event tickets are limited to such performances,

each parent will have priority for tickets. The use of any additional tickets will be determined by the parent who has physical care of Ashten on the day the special event occurs.

[59] Each party must ensure that Ashten attends school, his activities and birthday parties where at all possible, except when Ashten is ill or is away from the area, or in the case of inclement weather, or such other reasonable excuse.

#### *Educational Assistance*

[60] Each party is responsible for supervising the completion of homework and assignments by Ashten when they have physical care of Ashten, and each party must cooperate with educators to ensure that Ashten's educational needs are met.

#### *Medical, Dental, Health Cards and Insurance Forms*

[61] Both parties will be provided with Ashten's health card number, and both parents will share particulars and forms of any health plan which covers Ashten.

#### *Access to Professional Records and Information*

[62] Each party has the right to communicate with all professionals involved with Ashten's care, and each has the right to obtain information and documentation respecting Ashten from all medical professionals, educators, health professionals and social welfare professionals without the further consent from the other party.

#### *Travel*

[63] Each party will notify the other of travel plans involving Ashten. Notice will include dates of travel, location, address, and telephone numbers where Ashten can be reached, and any applicable flight details. Both parties will accommodate any requirements for passport documentation to allow Ashten to vacation with the other parent outside Canada, and both parties will sign any necessary letter to permit travel outside of Canada. Ashten's passport will be maintained by Danielle Desrosiers but will be made available to Andrew Pastuck for vacation plans outside of Canada.

#### *Telephone Contact*

[64] Each party will have reasonable telephone contact with Ashten while Ashten is in the care of the other party.

#### *Therapeutic Interventions*

[65] Andrew Pastuck must attend therapeutic counselling with the following stated objectives:

- To obtain education about the short and long term effects arising from Ashten's exposure to parental conflict and violence.

- To obtain better insight into the dynamics of parental conflict.
- To obtain better insight into the role that personal reflection, accountability and responsibility plays in the reduction of parental conflict.
- To acquire skills to communicate respectfully, reasonably and responsibly with Danielle Desrosiers on matters affecting Ashten.
- To acquire skills to ensure that Ashten is not placed in the middle of the parental conflict.
- To recognize triggers for violence and to acquire de-escalation techniques, healthy problem solving practices, and healthy anger management skills.

[66] Danielle Desrosiers must attend therapeutic counselling with the following stated objectives:

- To obtain education about the short and long term effects arising from Ashten's exposure to parental conflict.
- To obtain better insight into the dynamics of parental conflict.
- To obtain better insight into the role that personal reflection, accountability and responsibility plays in the reduction of parental conflict.
- To acquire skills to communicate respectfully, reasonably and responsibly with Andrew Pastuck on matters affecting Ashten.
- To acquire skills to ensure that Ashten is not placed in the middle of the parental conflict.

[67] Each of the parties must file with the court and each other proof that they have successfully completed therapeutic counselling on the stated objectives.

#### *Regular Parenting Schedule*

[68] The regular parenting schedule will be based on the following two scenarios:

[69] *Working Out of Province:* When Andrew Pastuck is working a rotating schedule out of province, Ashten will be in his father's care from the day of his return, meeting at the airport if possible, and continuing for the next four days, whereupon Ashten will return to the care of his mother for the next two days, and continuing this alternating pattern until Andrew Pastuck returns to work out of province. Ashten will be the physical care of Danielle Desrosiers when Andrew Pastuck is out of province.

[70] *During Periods of Lay Off:* When Andrew Pastuck is on lay off and is no longer working a rotating schedule out of province, Ashten will be in his care every Saturday at 6 p.m. until Tuesday when he drops Ashten off at school, or until 3:00 p.m. if there is no school. Ashten will be in the care of Danielle Desrosiers for the balance of the week.

#### *Special Occasions and Holidays*

[71] The regular schedule will be suspended for special occasions and holidays, and the following parenting schedule will be followed instead, unless the parties reach an alternate arrangement as confirmed in writing:

[72] *Mother's Day and Father's Day:* Ashten will spend the Mother's Day weekend with Danielle Desrosiers and the Father's Day weekend with Andrew Pastuck, commencing after school on Friday and continuing until 6:00 p.m. on Sunday, at which time the parties will revert back to the regular schedule.

[73] *Summer Vacation:* Each party will have Ashten in their care for 10 consecutive days during the summer. During the even numbered years, Andrew Pastuck will provide notice to Danielle Desrosiers of the 10 days he wishes to take no later than May 1st, and Danielle Desrosiers will advise Andrew Pastuck of the 10 days she intends to take no later than May 30th. During the odd numbered years, Danielle Desrosiers will provide notice to Andrew Pastuck of the 10 days she intends to take no later than May 1st, and Andrew Pastuck will advise Danielle Desrosiers of the 10 days he intends to take no later than May 30<sup>th</sup>.

[74] *Christmas:* Christmas is deemed to cover the period from 2 p.m. on December 23rd until 2 p.m. on January 3rd. *During the even numbered years,* Ashten will be in the care of Andrew Pastuck from 2 p.m. on December 23rd until 2 p.m. on December 25th, and from 2 p.m. on December 28th until 2 p.m. on December 31st. *During the even numbered years,* Ashten will be in the care of Danielle Desrosiers from 2 p.m. on December 25th until 2 p.m. on December 28th; and from 2 p.m. on December 31st until 2 p.m. on January 3rd, at which time the parties will revert back to the regular schedule. *During the odd numbered years,* Ashten will be in the care of Danielle Desrosiers from 2 p.m. on December 23rd until 2 p.m. on December 25th; and from 2 p.m. on December 28th until 2 p.m. on December 31st. *During the odd numbered years,* Ashten will be in the care of Andrew Pastuck from 2 p.m. on December 25th until 2 p.m. on December 28th, and from 2 p.m. on December 31st until 2 p.m. on January 3rd, at which time the parties will revert back to the regular schedule.

[75] *Spring Break:* Spring Break is deemed to cover the period from 9 a.m. on Friday of the last day of school until 9 a.m. on Sunday before school recommences. Ashten will be in the care of Danielle Desrosiers during the March breaks of the even numbered years, and in the care of Andrew Pastuck during the March breaks of the odd numbered years. The parties will revert back to the regular schedule after the conclusion of the Spring Break holiday.

[76] *Easter:* Easter is deemed to cover the period from after school on Holy Thursday until Easter Monday at 2 p.m. Ashten will be in the care of Danielle Desrosiers during the Easters of the even numbered years and with Andrew Pastuck during the Easters of the odd numbered

years. The parties will revert back to the regular schedule after the conclusion of the Easter holiday.

[77] *Birthdays*: The parent who is not ordinarily scheduled to have care of Ashten on his birthday will exercise access to Ashten from 3:00 until 5:00 pm unless Ashten is on vacation.

#### *Ad Hoc Special Family Events*

[78] The parties will use their best efforts to accommodate any special family reunion, wedding, or other event that is scheduled at a time when Ashten is in the care of the other party. Written notice will be provided, well in advance of the scheduled event, to determine if the regular schedule can be altered to permit Ashten's attendance at the special function. The parties will be as flexible as possible in such circumstances, however, no change in the schedule will occur without the written authorization of the party in whose care Ashten is scheduled to be at the time of the special family function. If accommodation cannot be made, the party refusing must provide the other party with written reasons for their refusal. Make up time will be provided to the party who agrees to rearrange the schedule as that party requests.

[79] **What is Mr. Pastuck's income?**

#### *Legislation and Law*

[80] When fixing the table amount of child support, the court must first determine the current income of the payor by examining financial records, including historical earnings and patterns of income. In the past, Mr. Pastuck was employed seasonally through a corporation of which he was the sole shareholder. Mr. Pastuck's company claimed many business expenses which have been accepted as reasonable by Revenue Canada, but which are disputed by Ms. Desrosiers. In addition, Mr. Pastuck is now in the process of disbanding his company. In the future he will receive employment income and EI benefits.

[81] Mr. Pastuck was searching diligently for work at the time of the hearing, having been laid off for several months because of injuries sustained while operating his motorcycle. Mr. Pastuck anticipates finding out of province work fairly quickly.

[82] Given these facts, it is important to review relevant legal principles which are applicable to the determination of Mr. Pastuck's income. These principles include the following:

- Courts must base child support on an annual income; it is incorrect to adjust for seasonal employment changes. It is the payor's responsibility to budget: **Peters v. Evenson**, [2003] B.C.J. 948 (S.C.)
- The burden is on the payor to prove that their income will be less than in previous years: **MacLellan v. MacDonald**, 2010 NSCA 34.



- The objectives of the *Child Support Guidelines* must be applied when interpretation issues arise, including the objective that child support awards should ensure consistent treatment for parents and children who are in similar circumstances.
- Section 18 of the *Guidelines* does not require proof of bad faith before it is invoked.
- Section 18 of the *Guidelines* authorizes the court to attribute all or part of the pretax corporate income to the payor's annual income for child support purposes. The only guidance as to how much of the corporate's pretax income should be included is the reference to s.17, which in turn references historical income patterns and non-recurring gains and losses.
- In the absence of evidence from the shareholding payor to establish that the company's pretax income is unavailable to him, the court will presume availability: **Richards v. Richards, 2012 NSCA 7.**
- Personal benefits paid to, or on behalf of shareholders will be considered by adding the value of those benefit back into the pretax corporate income: **Jenkins v. Jenkins, 2012 NSSC 117.**
- Section 19 of the *Guidelines* also applies in that s.18 references s.16 which in turns references ss. 17 to 19. Section 19 (1)(g) provides the court with the jurisdiction to impute income where the payor unreasonably deducts expenses from income. Section 19(2) states that the reasonableness of a deduction is not solely governed by whether the deduction is permitted under the *Income Tax Act*.
- A business owner cannot simply file a copy of their most recent income tax return and expect that their net business income will be equated with their income for child support purposes. The business owner must demonstrate, among other things, that the deductions should reasonably be taken into account in the determination of income for the purpose of calculating child support: **Wilcox v. Snow, 1999 NSCA 163.**
- The burden is on the payor to supply meaningful disclosure to support the expense, failing which an adverse inference can be drawn: **Wilson v. Wilson, 2011 ONCJ 103.**
- A payor who seeks to deduct a business expense must provide reasons for the expense, and must provide documentary proof in an organized fashion to enable the court to make a proper determination: **Monohan-Joudrey v. Joudrey, 2012 ONSC 5984, paras 33 – 34.**
- When examining business expenses, the court will likely accept expenses which are necessary to earn income. In contrast, discretionary expenses, such as entertainment or promotional expenses, even if deductible from taxable income, will be more readily

reduced or disallowed: *Child Support Guidelines in Canada, 2015*, Julien and Marilyn Payne, Irwin Law, p. 210.

- The court must take a principled approach by balancing the business necessity of the expense against increasing the quantum of the disposable income available for child support. What is the extent of the personal benefit derived from the expense, if any? Is it reasonable in the circumstances? Does the deduction, in its entirety, result in a fair representation of the payor's disposable income?: *Child Support Guidelines in Canada, 2015*, Julien and Marilyn Payne, Irwin Law, pp 204-205.

### *Position of the Parties*

[83] Mr. Pastuck states that all business expenses were properly claimed and required for the business; all business expenses are reasonable in the circumstances.

[84] In contrast, Ms. Desrosiers argues that many of the business expenses should be added back into Ms. Pastuck's income, especially in the absence of an evidentiary foundation to support their alleged reasonableness.

### *Decision*

[85] I must calculate Mr. Pastuck's income for 2014, 2015 and 2016 because retroactive and prospective support is being sought. No assessments or reassessments were provided and some of the income tax attachments were missing. Further the court was supplied with two versions of Mr. Pastuck's 2014 income tax return.

[86] Mr. Pastuck reported the following personal income for 2014 to 2016:

#### **2013 Income Tax Return**

\$120,000 including \$75,000 in dividends

#### **2014 Income Tax Return (Pages 125 – 129 of exhibit 1)**

\$141,600 from dividend income

#### **2014 Income Tax Return (Pages 130 – 145 of exhibit 1)**

\$127,600 including \$82,600 in dividend income.

#### **2015 Income Tax Return**

\$40,900.76 inclusive of \$3.70 in dividend income.<sup>3</sup>

\$6,335 in insurance benefits, although paid in 2016, they arose in 2015.

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<sup>3</sup> Mr. Pastuck was injured in a single vehicle motorcycle accident and was not employed from July to November.

**2016 Income Information**

\$40,027 in employment earnings until April 23, 2016, a period representing approximately four months.

[87] Mr. Pastuck's company reported the following gross and net business expenses in 2013, 2014 and 2015:

**2013 Corporate Tax Return**

Gross Revenue	\$165,995
Expenses	\$103,499 including wages of \$47,054 <sup>4</sup>
Pretax Income	\$62,496
Dividends	\$60,000

**2014 Corporate Tax Return**

Gross Revenue	\$178,481
Expenses	\$96,602 including wages of \$48,573
Pretax Income	\$81,879
Dividends	\$70,000

**2015 Corporate Tax Return**

Gross Revenue	\$87,239
Expenses	\$50,936 including wages of \$23,527
Pretax Income	\$36,303
Dividends	\$0

[88] Minimal evidence was led to support the substantial expenses deducted from the corporate gross income. It is difficult to assess the reasonableness of the claimed expenses in such circumstances. It is difficult to balance the business necessity of the expense. It is difficult to assess the extent of the personal benefit derived from the expenses. In such circumstances, it is appropriate to draw an adverse inference.

[89] Despite the limitation in the evidence, I am satisfied that Mr. Pastuck did incur some business expenses that should be considered when calculating his available income for child support purposes. Mr. Pastuck incurred professional fees, some travel expenses and other miscellaneous expenses. I do not accept that all of the travel, transportation related expenses, and other expenses are appropriate deductions given the lack of evidence.

[90] I have determined that Mr. Pastuck's income for child support purposes in 2014 and 2016 is \$145,000. For 2015, I find that Mr. Pastuck's income is \$75,000.

[91] The table amount of child support due for 2016 is \$1,183 per month.

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<sup>4</sup> Mr. Pastuck was the only paid employee of the corporation.

[92] **What is the appropriate prospective s.7 order?**

[93] The claim for s.7 expenses relates to Ashten's activity expenses. In an unusual twist, the claim is put forth by Mr. Pastuck because he is the parent who organized and paid for many of the past expenses, with some assistance from his mother and with Ms. Desrosiers also paying for some expenses.

[94] Mr. Pastuck's claim for activity expenses falls under the rubric of ss. 7(1) and 7(1.1) (b) of the *Guidelines*. In order to qualify, I must decide whether the expense is necessary in relation to Ashten's best interests and whether it is reasonable in relation to the means of the parents and those of Ashten and to any applicable pre-separation spending pattern. Further, I must account for any applicable subsidies, benefits or income tax credits or deductions. I must also determine whether, in their totality, the activity expenses are extraordinary by examining the five listed legislative factors. The analysis is subjective and fact specific.

[95] I make the following findings in respect of my analysis:

- The activity expenses are necessary in relation to Ashten's best interests. He enjoys organized sports. He is talented. His involvement is an excellent diversion from the past parental conflict and provides an avenue for Ashten to acquire confidence and self-esteem and to learn healthy communication, leadership and problem solving skills.
- The activity expenses are reasonable in relation to the means of the parties. Both parties are financially secure and can afford the expenses. Ms. Desrosiers will eventually return to the labour force once she completes her maternity leave. Ashten is too young to be expected to contribute.
- Neither party presented evidence of any applicable tax credit.
- Actual costs associated with many of the activities are reduced because of the gratuitous contribution from grandparents who in the past purchased gear and equipment as gifts.
- Both parents are committed to Ashten's participation in sporting events.
- The cumulative costs for all activities is high given the costs associated with registration fees, tournaments costs, some gear and equipment charges and miscellaneous items.
- It is unfair to expect Mr. Pastuck to be solely responsible for activity expenses given that he is the payor and it is presumed that the table amount that Ms. Desrosiers receives covers most activity expenses.

[96] I am granting Mr. Pastuck's claim for prospective s.7 expenses in all of the circumstances. Ms. Desrosiers will contribute 50% of all registration expenses, tournament fees and reasonable costs associated with gear and equipment, to a maximum of \$1,200 per year. Ms. Desrosiers will pay her share of the expenses within 30 days of being presented with a receipt. The retroactive claim for s. 7 expenses will be discussed in the analysis of the next issue.

[97] **Should retroactive child support be granted?**

*Position of the Parties*

[98] Ms. Desrosiers claims retroactive child support from September 2014 onward. She indicates that Mr. Pastuck unilaterally stopped making regular child support payments at the time, although he occasionally paid some support albeit at a reduced rate.

[99] Mr. Pastuck states that no retroactive support should be ordered because Ashten was not in the primary care of Ms. Desrosiers for some of the period, that he was without income for a portion of 2015, and that he paid expenses for Ashten.

*Law*

[100] The test for a retroactive increase in child support is set out by the Supreme Court of Canada **S. (D.B.) v. G. (S.R.)**, 2006 SCC 37 (S.C.C.). Bastarache J., states as follows:

- Child support is the right of the child and such right survives the breakdown of the relationship of the child's parents [para 38].
- The child loses when one parent fails to pay the correct amount of child support [para 45].
- Parents have an obligation to support their child according to their income and this obligation exists independent of any statute or court order [para 54].
- The payment of a retroactive award is not an exceptional remedy [para 97].
- 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 non-custodial parent [para 123].
- The quantum of a retroactive award must be tailored to fit the circumstances of the case [para 128].
- The court must examine and balance four factors when determining the issue of retroactivity [para 99].
- 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 [paras 101 and 104].

- The second factor relates to the conduct of the noncustodial parent. If the noncustodial parent engages in blameworthy conduct, then the issuance of a retroactive award is usually appropriate. The determination of blameworthy conduct is a subjective one based on 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 [paras 106 and 107].
- The third factor to be balanced focuses on the circumstances, past and present [para 110] of the child, and not of the parent [para 113], and include an examination of the child's standard of living [para 111].
- 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].

*Decision*

[101] I am granting a lump sum order for retroactive child support based on my findings of fact that are stated as follows:

- Ms. Desrosiers was the primary care provider of Ashten in 2014, 2015 and 2016, even though she worked for periods out west. I do not accept the evidence to the contrary. In particular, Mrs. Pastuck manufactured the 2014 calendar. Her evidence is not credible.
- Mr. Pastuck paid child support of \$6,000 between July 2014 and March 2016.
- Mr. Pastuck paid activity expenses for Ashten of about \$1,100.
- Ms. Desrosiers did not inordinately delay the filing of her application. Ms. Desrosiers attempted to resolve the matter without going to court and soon thereafter filed an application for support in December 2014.
- Mr. Pastuck acted in a blameworthy fashion when he unilaterally stopped paying support. He did so because he was angry and frustrated with Ms. Desrosiers.
- Ashten has a right to support and Ms. Desrosiers will use the retroactive payment for Ashten's needs.
- Any hardship which may be experienced by Mr. Pastuck was self-induced. Mr. Pastuck has the means to pay a retroactive award. He owns his home and several vehicles. He typically earns a significant income. Ms. Desrosiers is willing to accept payment over time.

[102] The retroactive award will be based on what Mr. Pastuck should have paid together with a credit for the payments made, including 50% of the activity expenses. The award is calculated as follows:

**2014 Retroactive Calculation**

Income	\$145,000
Monthly Payment	\$1,183
Amount Due September to December	<b>\$4,732</b>

**2015 Retroactive Calculation**

Income	\$75,000
Monthly Payment	\$635
Amount Due January – December	<b>\$7,620</b>

**2016 Retroactive Calculation**

Income	\$145,000
Monthly Payment	\$1,183
Amount Due January to October	<b>\$11,830</b>

[103] The total amount due is \$24,182 less credit for the \$6,000 paid, and ½ of the activity expenses paid of \$550 for a total retroactive payment due of **\$17,632** less further credit for all maintenance paid from April 2016 to date, including 50% of all activity expenses. In the event there is a dispute as to the amount that was paid during this intervening period, the court retains jurisdiction to set the amount on a chambers motion with affidavit evidence. The retroactive award is to be paid at a rate of \$300 per month until paid in full.

**Conclusion**

[104] Ashten needs to be able to love his parents, brother and extended family without the stress and anxiety that arises from being a pawn in a highly charged parenting dispute. Ashten deserves more.

[105] I am hopeful Mr. Pastuck and Ms. Desrosiers will immediately change their destructive approaches so that Ashten will not be negatively affected by the fractious parenting dispute. I am hopeful that this decision will bring closure to the dispute.

[106] The parenting plan is based on Ashten's best interests. The plan will ensure stability by designating Ms. Desrosiers as the primary care parent, but subject to Mr. Pastuck exercising liberal parenting time. Joint custody will ensure continued input from both parents. The designation of a final decision maker will avoid potential conflict when the parties are unable to reach agreement after meaningful and timely consultation.

[107] Child support of \$1,183 per month will be paid by Mr. Pastuck. Ms. Desrosiers will pay 50% of Ashten's activity expenses to a maximum of \$1,200 per year. Retroactive child support will be paid by Mr. Pastuck at a rate of \$300 per month.

[108] Mr. McKeough is to draft and circulate the order.

Forgeron, J.