IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Kelly v. Anthis, 2012 NSSC 88

Date: 20120119
Docket: 48664
Registry: Sydney

Between:

Maureen Kelly (Bernardi)

Applicant

v.

George Leo Lawrence Anthis

Respondent

Decision
Provisional/ Confirmation Hearing

Revised Decision: This decision was originally released as 2011 NSSC 496. It has been corrected to 2012 NSSC 88. Some inadvertent underlining has also been removed. **This decision released on March 21, 2012 replaces the previously released decision.**

Judge: The Honourable Justice Kenneth C. Haley

Heard: March 23, 2010, May 17, 2010, October 13, 2010 and November 18, 2011, in Sydney, Nova Scotia

Counsel: Mr. Mark Petty, for the Applicant, Ms. Kelly (Bernardi)
Mr. Anthis, Self represented

By the Court:

[1] This is the Application of Maureen Kelly (Bernardi) of Kingston, Ontario pursuant to Section 18 and 19 of the *Divorce Act*. The Applicant seeks the following:

1. Imputation of Respondent's income;

2. Child support for the child, Nicholas, born March 17, 1990 as per the Respondent's imputed income;

3. Past special and extraordinary expenses for the child Samanthalee, born October 31, 1988 in the amount of $20,649.55;

4. Past special and extraordinary expenses for the child, Nicholas, above mentioned in the amount of $23, 801.48;

5. One third of Nicholas' current school expenses totalling $5,000.00 a year;

6. Arrears of child support confirmed by Order of The Queen's Bench of New Brunswick dated November 29, 1991;

7. Costs in the amount of $3,500.00.

[2] Section 18(2) of the *Divorce Act* reads as follows:

18 "provisional order" means an order made pursuant to subsection (2).

(2) Notwithstanding paragraph 5(1)(*a*) and subsection 17(1), where an

application is made to a court in a province for a variation order in respect of a support order.

[3] The Ontario Superior Court of Justice, Family Court Branch, conducted the first part of this application, namely the "Provisional Hearing" on September 30, 2009.

[4] As required by Section 18(3) & (4) of the *Divorce Act* the matter was transferred to the Supreme Court of Nova Scotia to conduct a "Confirmation Hearing". This Court received copies of the Provisional Order dated December 3, 2009 including the transcript of the evidence, affidavits and exhibits tendered by the Applicant at the above noted hearing.

[5] Section 19(2) of the *Divorce Act* states:

> 19 (2) Subject to subsection (3), where documents have been sent to a court pursuant to subsection (1), the court shall serve on the respondent a copy of the documents and a notice of a hearing respecting confirmation of the provisional order and shall proceed with the hearing, in the absence of the applicant, taking into consideration the certified or sworn document setting out or summarizing the evidence given to the court that made the provisional order.

Section 19(7) of the *Divorce Act* states:

> 19(7) Subject to subsection (7.1), at the conclusion of a proceeding under this section, the court shall make an order
>
> (*a*) confirming the provisional order without variation;
>
> (*b*) confirming the provisional order with variation; or
>
> (*c*) refusing confirmation of the provisional order.

[6] This Court commenced the second stage of the Application namely, "the Confirmation Hearing" on March 23, 2010. Due to medical reasons which this Court deemed compelling the matter was adjourned to May 17, 2010 again to October 23, 2010, with the conclusion of evidence being heard on November 18, 2011.

EVIDENCE

[7] The evidence of the Applicant has been provided by Affidavit dated September 17, 2009 and provides the basis of her application as follows:

> - The parties were married June 21, 1989 and separated April 24, 1990. The parties had lived together since 1987.
>
> - Upon separation the Respondent, Mr. Anthis, was ordered to pay $125.00 a month for child support commencing on January 1992 with the amount being increased to $200.00 a month in January 1993 by Court Order dated November 29, 1991.

- The parties have lost contact over the years and the Applicant had no knowledge of the Respondent's where abouts or financial circumstances.

- During their marriage the Respondent served in the military, attaining the Rank of Master Corporal.

- The parties have two children, namely Samanthalee and Nicholas, aforementioned.

- The Applicant seeks reimbursement for special and extraordinary expenses for her daughter in the amount of $20,649.55. This consists of and is limited to (a) $5,400.00 orthodontic bill incurred July 1, 2007 and paid off at the rate of $160.00 a month with final payment being made October 2009 as per Exhibit No. D and (b) Trent University fees of $15,249.55 for the academic year 2006-2007 as per Exhibit No. C.

- The Applicant states her daughter, Samanthalee is no longer a dependent child of the marriage as she removed herself from the Applicant's care and control with no specifics provided as to when this occurred except the date of the university invoice for the academic year 2006-2007.

- The Applicant seeks reimbursement for special and extraordinary expenses for her son, Nicholas, in the amount of $23, 801.45 which consists of (a) $2,775.00 for sporting activities between 2000 and 2007, as per Exhibits No. E; F; G and H; and (b) $5,620.00 for orthodontic expenses as per Exhibit No. I and (c) post secondary expenses for University of Waterloo totaling $15,406.48.

- The Applicant submits the Respondent is thus responsible for 73.6 % of $44,451.00 ($20,649.55 and $23,801.45) or $32,715.95 in terms of past special and extraordinary expenses.

- The Applicant is not seeking a retroactive adjustment to child support.

- The Applicant seeks full payment of any outstanding arrears which are reported to be $30,918.65 as per Exhibit No. J but confirmed by the Court to be $26,978.02 as of December 12, 2011.

- The Applicant states she attempted to file this application in July 2007, however was advised by the Minister of Community and Social Services by letter dated August 17, 2007 to obtain legal advise and file an application pursuant to Section 18 and 19 of the *Divorce Act*, as per Exhibit No. K.

- The Applicant states she did not locate the residence of the Respondent until July, 2009.

- The Applicant states she is re-married, but has not provided any evidence regarding household income, other than her annual salary of $23,500.00.

- The Applicant states that Nicholas was the recipient of Waterloo Merit Scholarships and was gainfully employed during the summer months earning $1,978.00 a month.

[8] Justice C. J. Robertson states as follows at page 8 of the transcript:

> ....it would be my view that a reasonable amount to impute income for him is $50,000.00, bearing in mind the scale of his pension at Canadian Blood Services and some military services.
>
> ...the appropriate award would be on the basis of the table amount for Nova Scotia for an income of $50,000.00 plus some sharing of the ongoing expenses for Nicholas, nothing ongoing for Samantha.

Regarding special and extraordinary expenses Justice Robertson stated at

Page 9:

> ....I find the extraordinary expenses for these children are both reasonable and necessary, and I note that this mother has been burdened with 100 percent of the financial responsibility because the father, in essence, abandoned the children financially as evidenced by the fact that an order of $100.00 per month per child has accumulated $30,000.00 in arrears.

At Page 10 counsel for the Applicant Mr. Petty stated:

> ....my client is also willing to take your suggestion of a split of 2/3 / 1/3 as a fair and equitable distribution of the expense.

[9] Justice Robertson pointed out in her decision at Page 17:

> ....Since the order in 1991, the federal government has brought forward Child Support Guidelines and Ms. Kelly was prevented really from bringing her matter forward because she did not know where he was and he had not provided disclosure.

[10] Justice Robertson thus ordered on a provisional basis as follows:

1. The Respondent shall have an imputed income of $50,000.00 on the basis of his skills and his pension at Canadian Blood Services and some military services.

2. The Applicant's income for 2009 is $24,900.00.

3. The Respondent, George Leo Lawrence Anthis, shall pay to the Applicant, Maureen Kelly (Bernardi), 2/3 of the past special and extraordinary expenses on an ongoing basis.

4. Past special and extraordinary expenses for the child, Samanthalee Mary Bernadi, born October 1988, are: braces/orthodontics $5,400.00; and education $15,200.00 for a total of $20,600.00.

5. Past special and extraordinary expenses for the child, Nicolas George Ted Kelly, born 17 March 1990, are: Minor hockey registration between the years 2000- 2005totalling $1,985.00; Night school sports teams at Holy Cross Secondary School for the years 2004-2006 totalling $370.00; Kingston Minor Ball Hockey for 2006 and 2007 totalling $220.00; Cataroqui Clippers Soccer for 2006 and 2007 totalling $200.00; Orthodontic expenses from Nick total $5,620.00; and Post secondary university tuition and other fees from the University of Waterloo for the 2008/2009 academic year totalling $15,406.48. Total past special and extraordinary expenses for Nicholas are $23,801.48.

6. The Respondent, George Leo Lawrence Anthis, is to pay ongoing child support for one child, Nicholas George Ted Kelly born 17 March 1990, in the amount of $435.00 on an imputed income of $50,000.00 commencing 1 September 2009 payable on the 1st day of every month thereafter.

7. Nicolas George Ted Kelly's current school expenses are $15,000.00. The Respondent, in addition to the table amount for ongoing child support, shall pay 1/3 of post secondary expenses being $416.00 per month, bearing in mind Nicolas George Ted Kelly's summer employment of 7 weeks at $11.00 an hour and 2 scholarships totalling $2,750.00 for academic excellence.

8. Arrears of child support from the Order of Justice Michael dated April 19, 1991 are set in the amount of $30,918.69 as of 1 September 2009. These arrears for unpaid child support from the Order of 18 April 1991 are separate and in addition to the above award for past special and extraordinary expenses.

9. Costs to the Applicant fixed in the sum of $3,500.00 shall be attributed to support.

> 10. This is a Provisional Order and has no force or effect until confirmed by Court in the reciprocating province.
>
> 11. This Order bears interest at the rate of 2 % per annum on any unpaid outstanding balance.

[11] Pursuant to Paragraph 3, it is to be noted that the 2/3 calculation results in an order of $29,634.00 for past special and extraordinary expenses as opposed to $32,715.95 claimed by the Applicant.

[12] The Respondent, Mr. Anthis, has not filed a reply to this Application. On March 23, 2010 the Respondent appeared and submitted he does not have the financial means to comply with Provisional Order and to do so would constitute an undue hardship on him, as a single parent with children aged ten and five. His current wife left him about five months ago.

[13] The Respondent has been paying what he can on the arrears (i.e. $100.00 a pay,) and according to Ontario records the outstanding balance for the arrears as of the date of this decision is $26,978.02.

[14] He states:

> "I can't afford this massive bill that's being presented by Ms. Maureen"

[15] The Court reminded the Respondent as follows on March 23, 2010:

> The Court: "Well, perhaps, Mr. Anthis, but the obligation remains. There was a Court order in place and not complied with for many, many years."
>
> Mr. Anthis: "Yes , Sir.
>
> The Court: ....Okay, I understand the background, I understand the situation, and unfortunately you know your relationship with Ms. Kelly is long gone, but there are two children of that relationship which the Court has to focus on and assure that you are meeting your legal obligations to those two children regardless of what you believe the reasons why the application was made, they are still your biological children and you have potentially an obligation to those children. And that is something the Court has to assess and weigh in terms of your present circumstances."

[16] The Court requested the Respondent to file past and present financial information with the Court and to obtain legal counsel, if possible. The matter was thus adjourned to May 17, 2010 to further allow the Respondent to cope with his father, aged 74, who was battling cancer at the time.

[17] On May 17, 2010 health circumstances had not changed regarding Mr. Anthis' father and the Court granted a further adjournment to October 13, 2010. Due to the Respondent's re-location to Halifax, Nova Scotia and the added responsibilities of his children who were left in his care by his estranged wife, the

Court then arranged for the hearing to be continued via video conference on November 18, 2011.

[18] Mr. Anthis stated he currently works with Automatic Motion Logistics (AMC Communications) at the rate of $18.00 per hour. Due to his parenting responsibilities he has structured his work hours to be between 9:00 a.m. and 5:00 p.m.. He stated due to his parenting responsibilities he is unable to work any additional overtime. Based upon this information the Court calculated Mr. Anthis' potential current income for the calendar year 2011 to be $34,830.00. The Court calculated this amount as follows:

- $18.00 per hour at 37.5 hours per week = $675.00 per week
- $675.00 per week at 4.3 weeks per month = $2,902.50 per month
- $2,902.50 per month at 12 months = $34,830.00 per year

[19] By letter dated April 11, 2011 and confirmed by his November 18, 2011 testimony Mr. Anthis' present monthly expenses are as follows:

Electric	$125.00	
Water	$60.00	
Cable/phone/internet	$100.00	
Cell	$120.00	

Mortgage	$844.00	
Insurance	$200.00	
Bridge Pass	$40.00	
Oil	$125.00	
Car	$156.00	
Wells Fargo	$40.00	($1500.00 balance)
Future Shop	$30.00	($2100.00 balance)
Line of Credit	$200.00	($9600.00 balance)
Scotia Visa	$50.00	($1800.00 balance)
Car Insurance	$150.00	
Day Care	$400.00	
Groceries	$450.00	
Gas	$50.00	
Total Monthly Expenses	$3140.00	

[20] Mr. Anthis has no reported savings and has assets inclusive of a 2007 Ford Escort which the Court values at $7,000.00, and home furnishings totalling $1000.00. Mr. Anthis has a locked in pension with Canadian Blood Services which has since been moved to Scotia Bank valued at $27,000.00.

[21] In relation to the pension, Mr. Anthis requested the Court to take it and utilize the funds, if possible, to off set some or all of the arrears. He stated:

> "Please, I am begging you. Just take it, because I want this over with...."
>
> - I have nothing else
>
> - As God as my witness, I don't have anymore.

[22] The Respondent reported annual income in previous years in as follows pursuant to Revenue Canada Information:

2006 - $30,000.00

2007 - $41,169.00

2008 - $$40,796.00

2009 - $47,132.00

2010 - $42,032.00

LAW AND ANALYSIS

CHILD SUPPORT

[23] I have scrutinized the evidence with care. It is apparent to the Court that the Respondent, Mr. Anthis, is operating in a deficit position on a monthly basis. He reports his gross monthly earnings as $2,902.50 with reported expenses of $3,140.00, resulting in a monthly deficit of $238.00.

[24] Although Mr. Anthis has not specifically plead "undue hardship", that is, in essence, the position he has put forward to the Court.

[25] Section 10 of the *Federal Child Support Guideline* states as follows:

> Undue hardship 10(1) On either spouse's application, a court may award an amount of child support that is different from the amount determined under any of sections 3 to 5, 8 or 9 if the court finds that the spouse making the request , or a child in respect of whom the request is made, would otherwise suffer undue hardship.
>
> Circumstances that may cause undue hardship (2) Circumstances that may cause a spouse or child to suffer undue hardship include the following:
> (a) the spouse has responsibility for an unusually high level of debts reasonably incurred to support the spouses and their children prior to the separation or to earn a living;
>
> (b) the spouse has unusually high expenses in relation to exercising access to a child;
>
> (c) the spouse has a legal duty under a judgment , order or written separation agreement to support any person;
>
> (d) the spouse has a legal duty to support a child, other than a child of the marriage, who is
> (I) under the age of majority, or
> (ii) the age of majority or over but is unable, by reason of illness, disability or other cause, to obtain the necessaries of life; and
>
> (e) the spouse has a legal duty to support any person who is unable to obtain the necessaries of life due to an illness or disability
>
> .
>
> Standards of living must be considered
> (3) Despite a determination of undue hardship under subsection (1), an application under that subsection

> must be denied by the Court if it is of the opinion that the household of the spouse who claims undue hardship would, after determining the amount of child support under any of sections 3 to 5, 8 or 9, have a higher standard of living than the household of the other spouse.
>
> Standards of living test
>
> (4) In comparing standards of living for the purpose of subsection (3), the Court may use the comparison of household standards of living test set out in Schedule II.
>
> Reasonable time
>
> (5) Where the Court awards a different amount of child support under subsection (1), it may specify, in the child support order, a reasonable time for the satisfaction of any obligation arising from circumstances that cause undue hardship and the amount payable at the end of that time.
>
> Reasons
>
> (6) Where the Court makes a child support order in a different amount under this section, it must record its reasons for doing so.

[26] An analysis of undue hardship was done in **Gaetz v Gaetz,** 2001 NSCA 7 by Freeman J A where he stated at paragraph 15 as follows:

> "The Guidelines authorize the Court to depart from awarding child support as calculated in the tables only when the payor spouse or a child, on whose behalf request is made, would suffer **undue hardship**. This is determined by a two-step test. First, section 10(2)(a) to (e) of the Guidelines, lists circumstances which must be considered: there must be a determination that the spouse has an

> unusually high level of debts incurred in the family context, high access expenses, or several instances of legal duties of support to a child or other person other than a child of the marriage. Only when circumstances capable of creating **undue hardship** are found does the second step become relevant – the comparison of the standards of living or the households of the payor spouse and the custodial spouse."

[27] In **Wainman v Clairmont**, 2004 NSSC 39, at paragraph 25, Hall J. considered what is meant by the term "unusually high":

> " Whether access expenses are "unusually high", in my view, must be determined based on the relative financial means of the parent responsible for the access expenses. For an affluent person, a few hundred dollars a month for access would be a pittance, while for a person dependent on social assistance for his or her living expenses, it would be an impossibility."

[28] Justice Forgeron stated as follows in **Tutty v Tutty,** 239 NSR (2d) 112 NSCA at paragraph 23 as follows:

> 23 "The discretionary authority stated in section 10 of the Guidelines is not unfettered. Courts must be cautious in granting undue hardship applications. Cogent and specific evidence must be advanced if the table amount of child support is to be displaced. In Child Support Guidelines in Canada 2004, Julien and Marilyn Payne state at pp. 281 to 282 the undue hardship provisions of section 10 of the *Federal Child Support Guidelines* create a fairly narrow judicial discretion to deviate from the Guidelines."
>
> "Undue hardship is a tough threshold to meet. Furthermore, the use of the word "may" in section 10 (1) of the Guidelines clearly demonstrates that any deviation from the Guidelines amount is discretionary, even if the Court finds undue hardship and a lower standard of living in the obligor's household. Although there is little judicial

> guidance on when this residual discretion will be exercised, it is inappropriate to exercise it where the parent alleging undue hardship has wilfully refused to pay child support. The Court should not readily deviate from the presumptive rules set out in section 3 of the Guidelines in the absence of compelling reasons for doing so. The presumptive rule under section 3 of the Federal Child Guidelines should not be displaced in the absence of specific and cogent evidence why the applicable table amount would cause an "undue hardship". Section 10 of the Guidelines is only available where excessively hard living conditions or severe financial consequences would result from the payment of the Guidelines amount. A Court should refuse to find undue hardship where a parent can reasonably reduce his or her expenses and thereby alleviate hardship. In the absence of the circumstances that constitute "undue hardship under section 10 of the *Federal Child Support Guidelines* ", a Court has no residual discretion to lower the applicable table amount of child support under the Guidelines. If a parent has difficulty paying the table amount of child support because of other financial commitments that fall short of constituting "undue hardship" within the meaning of section 10 of the Guidelines, that parent must rearrange his or her financial commitments; the child support obligation takes priority. In most cases wherein the undue hardship provisions of the Guidelines are met by the obligor, there is only a reduction in the amount of support; the child support obligation is rarely extinguished, although circumstances may arise where this is the appropriate disposition. Where the obligor has a low income, a Court may order a modest amount of child support as a "symbolic" gesture to reinforce the parental role, but such an order may be deemed unnecessary in light of the attendant circumstances of the particular cases."

[29] In **Poirier v Poirier**, (2004), 220 N.S.R. (2d) 388 (S.C.) Hood J. refused the father's application for **undue hardship** based upon the costs of access and the fact that he had another child to support. In so doing, Hood J. discussed the

meaning of **undue hardship** and the difficult test which must be met in order to succeed with such a claim at para. 21:

> 21 Mr. Poirier must satisfy the Court not only that there would be a hardship but that the hardship is undue. In Mayo v O'Connell, Justice Cook said at para. 17:
>
> "**Undue hardship** is a tough threshold to meet. Synonyms for undue include: excessive, extreme, improper, unreasonable, unjustified. It is more than awkward or inconvenient...In other words, the fact that any of the provisions of s. 10(2) of the Guidelines may apply to the Applicant is not, of itself, determinative of the **undue hardship** issue. The hardship must be undue to satisfy the requirements of the s. 10(1)."

[30] The Applicant seeks child support for the child Nicholas on a go forward basis. The applicant has very generously elected not to seek a retroactive adjustment to child support and claims only accumulated arrears by the Respondent to date.

[31] Although Mr. Anthis is in a difficult financial situation I do not find he has proven an undue hardship claim on the evidence in terms of his obligation to pay child support for his son Nicholas. He has not established his claim on a balance of probabilities. His evidence is not sufficiently clear, convincing and cogent to satisfy the balance of probabilities test as defined by the Supreme Court of Canada in **C.(R) v McDougall** 2008SCC 53 at paragraph 46:

> "Similarly, evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. But again, there is no objective standard to measure sufficiency. In serious **cases**, like the present, judges may be faced with evidence of events that are alleged to have occurred many years before, where there is little other evidence than that of the plaintiff and defendant. As difficult as the task may be, the judge must make a decision. If a responsible judge finds for the plaintiff, it must be accepted that the evidence was sufficiently clear, convincing and cogent to that judge that the plaintiff satisfied the balance of probabilities test."

[32] And as stated by Justice Forgeron in **Tutty V Tutty**, supra at paragraph 23:

> "Cogent and specific evidence must be advanced if the table amount of child support is to be displaced."

[33] I accept that the Respondent is in difficult financial circumstances, but I am of the opinion that some of his expenses could be re-arranged to allow him to meet his obligation to his son Nicholas, which must be given priority.

INCOME/ TABLE AMOUNT

[34] Having dismissed the Respondent's claim for undue hardship I will now consider what the appropriate level of income should be imputed to Mr. Anthis.

[35] Justice Forgeron in **Susan "Nicole" MacDonald v David Pink**, 2011 NSSC 421 outlined the principles to consider when imputing income at paragraph 24 as follows:

> [24] Section 19 of the Guidelines provides the court with the discretion to impute income in specified circumstances. The following principles are distilled from case law:
>
> a. The discretionary authority found in sec. 19 must be exercised judicially, and in accordance with rules of reasons and justice, not arbitrarily. A rational and solid evidentiary foundation, grounded in fairness and reasonableness, must be shown before a court can impute income: **Coadic v. Coadic** 2005 NSSC 291.
>
> b. The goal of imputation is to arrive at a fair estimate of income, not to arbitrarily punish the payor: **Staples v. Callender**, 2010 NSCA 49.
>
> c. The burden of establishing that income should be imputed rests upon the party making the claim, however, the evidentiary burden shifts if the payor asserts that his/her income has been reduced or his/her income earning capacity is compromised by ill health: **MacDonald v. MacDonald**, 2010 NSCA 34; **MacGillivary v. Ross**, 2008 NSSC 339.
>
> [1] d. The court is not restricted to actual income earned, but rather, may look to income earning capacity, having regard to subjective factors such as the payor's age, health, education, skills, employment history, and other relevant factors. The court must also look to objective factors in determining what is reasonable and fair in the circumstances: Smith v. Helppi 2011 NSCA 65; **Van Gool v. Van Gool**, (1998), 113 B.C.A.C. 200; **Hanson v. Hanson**, [1999] B.C.J. No. 2532 (S.C.); **Saunders-Roberts v. Roberts**, 2002 NWTSC 11; and **Duffy v. Duffy**, 2009 NLCA 48.
>
> e. A party's decision to remain in an unremunerative employment situation, may entitle a court to impute income where the party has a greater income earning capacity. A party cannot avoid support obligations by a self-

> induced reduction in income: **Duffy v. Duffy**, supra; and **Marshall v. Marshall**, 2008 NSSC 11.

[36] When considering the above I find that the Respondent is doing the best he can to support himself and his two children. There is no doubt that he is struggling to meet his existing financial commitments. I accept the Respondent's evidence as to his present earning capacity as being a reasonable and honest assessment which can be used as a basis to calculate ongoing child support for Nicholas.

[37] In the result I impute income in the amount of $34,830.00 per annum. The Respondent will therefore be required to pay child support for his son, Nicolas in the amount of $300.00 per month, commencing September 1, 2009 and continuing each and every month there after until otherwise ordered by a court of competent jurisdiction and /or the child, Nicholas, no longer qualifies to be a dependent child of the marriage as defined by the *Divorce Act*.

[38] Although this Order will create additional arrears for the Respondent, the Court is of the opinion that the Respondent's child support obligation should not be reduced by the systemic delay incurred by virtue of the nature of this proceeding

SECTION 7 RETROACTIVE CLAIM

[39] The Leading case on **retroactive child support** is **D.B.S. v S.R.G.**, [2006] 2 S.C.R. 231 (S.C.C.). Bastarache J., writing for himself, McLachlin C.J. LeBel and Deschamps J.J. summarized his thought at paragraphs 131-135 as follows:

> 131 Child support has long been recognised as a crucial obligation that parents owe to their children. Based on this strong foundation, contemporary statutory schemes and jurisprudence have confirmed the legal responsibility of parents to support their children in a way that is commensurate to their income. Combined with an evolving child support paradigm that moves away from a need-based approach, a child's right to increased support payments given a parental rise in income can be deduced.
>
> 132 In the contest of retroactive support, this means that a parent will not have fulfilled his/her obligation to his/her children if (s)he does not increase child support payments when his/her income increases significantly. Thus, previous enunciations of the payor parent's obligations may cease to apply as the circumstances that underlay them continue to change. Once parents are in front of a court with jurisdiction over their dispute, that court will generally have the power to order a retroactive award that enforces the unfulfilled obligations that have accrued over time.
>
> 133 In determining whether to make a retroactive award, a court will need to look at all the relevant circumstances of the case in front of it. The payor parent's interest in certainty must be balanced with the need for fairness and for flexibility. In doing so, a court should consider whether the recipient parent has supplied a reasonable excuse for his/her delay, the conduct of the payor parent, the circumstances of the child, and the hardship the retroactive award might entail.

> 134 Once a court decides to make a retroactive award, it should generally make the award retroactive to the date when effective notice was given to the payor parent. But where the payor parent engaged in blameworthy conduct, the date when circumstances changed materially will be the presumptive start date of the award. It will then remain for the court to determine the quantum of the retroactive award consistent with the statutory scheme under which it is operating.
>
> 135 The question of **retroactive child support** awards is a challenging one because it only arises when at least one parent has paid insufficient attention to the payments his/her child was owed. Courts must strive to resolve such situations in the fairest way possible, with utmost sensitivity to the situation at hand. But there is unfortunately little that can be done to remedy the fact that the child in question did not receive the support payments (s)he was due at the time when (s)he was entitled to them. Thus, while **retroactive child support** awards should be available to help correct these situations when they occur, the true responsibility of parents is to ensure that the situation never reaches a point when a retroactive award is needed.

[40] In assessing the appropriateness of a retroactive order a Judges' discretion is guided by the factors as outlined in (D.B.S. Supra, at paragraphs 94 to 116):

1. The reasons for the custodial parent's delay in seeking child support;
2. Blameworthy conduct by the payor parent;
3. The child's circumstances;
4. Hardship caused to the payor parent by a retroactive award.

[41] Before embarking upon a review of the above factors, the Court must also establish it has jurisdiction to hear the matter. As stated in the Supreme Court of Canada D.B.S. Supra, at paragraph 89:

> 89 In their analysis of the Guidelines, J. D. Payne and M. A. Payne conclude that the “material time” is the time of the application: Child Support Guidelines in Canada (2004), at p. 44. I would agree. While the determination of whether persons stand “in the place of ...parent[s]” is to be examined with regard to a past time, i.e., the time when the family functioned as a unit, this is because a textual and purposive analysis of the Divorce Act leads to this conclusion; but the same cannot be said about the “material time” for child support applications: see Chartier v. Chartier, [1999] 1 S.C.R. 242 (S.C.C.), at paras. 33-37. An adult, i.e., one who is over the age of majority and is not dependent, is not the type of person for whom Parliament envisioned child support orders being made. This is true, whether or not this adult should have received greater amounts of child support earlier in his/her life. Child support is for children of the marriage, not adults who used to have that status.

[42] The Applicant filed her application July, 2009. The Applicant requests a retroactive adjustment to Section 7 expenses for her son Nicholas back to the year 2000. Additionally, the Applicant requests a retroactive adjustment for her child Samathalee’s section 7 expenses incurred in 2006-2007. The Applicant does not seek child support for Samathalee on a go forward basis acknowledging that she is no longer a dependent child of the marriage and has left the charge and control of the Applicant.

SAMANTHALEE

[43] The Applicant has provided no evidence as to when Samantha moved out on her own. Based upon the evidence one could reasonably infer this occurred in

2007, however, the evidence is not clear, convincing and cogent in this regard on a balance of probabilities. The Applicant has not established to the Court's satisfaction that Samathalee was a child of the marriage at the "material time" of filing the application.

[44] Justice O'Neil stated in **Niles v Munro,** 2009 N.S.S.C. 318, at paragraph 9 and 10 as follows:

> 9 It is settled law that the Court cannot entertain an application for retroactive child support and section 7 expenses, if at the time the application is made, the subject child is not "a child of the marriage" within the meaning of section 2 (1) of the *Divorce Act supra.* This conclusion was reached by the Supreme Court of Canada in ***D.B.S. v S. R.G.**, 2006 SCC 37.* In the concluding sentence of paragraph 88 in *D.B.S. supra*, Justice Bastarache stated:
>
>> "The question then arises when the "material time" is for retroactive child support awards. If the "material time" is the time of the application, a retroactive child support award will only be available so long as the child in question is a "child of the marriage" when the application is made. On the other hand , if the "material time" is the time to which the support order would correspond, a Court would be able to make a retroactive award so long as the child in question was a "child of the marriage" when increase support should have been due."
>
> 10 Justice Roscoe in **Smith v Selig**, 2008 NSCA 54 reviewed the law as explained by the Supreme Court of Canada on the issue of retroactive child support. She concluded that the principle regarding retroactive child support also applied equally to section 7 expenses. She stated the following at paragraphs 25-26:
>
>> 25 There is nothing in the S.(D.B.) Decision which restricts the declared principles regarding retroactivity to basic child support. In para. 90 Justice Bastarache indicates that it will not always be possible for a court to enforce an unfulfilled child support obligation. There is no attempt to distinguish between basic table amounts and section 7 expenses.
>>
>> 26 Many cases dealing with this issue have determined that the principles regarding retroactive expressed in S.(D.B.) Apply equally to section 7

> expenses. See for example: **Heatherington v. Tapping**, [2007] B.C.J. No. 302, 2007 BCSC 209 at par. 20, **Suerus-Mills v Mills** [2006] O.J.No. 3839 (Q.L.) (S.C.J.), para. 24 and J.C.R. v. J.J.R., 2006 BCSC 1422, para. 25. I agree with the reasoning expressed in these cases in that respect.

[45] The Court thus cannot entertain the application for retroactive section 7 expenses as it relates to the child, Samanthalee and the claim of $20,649.15 is hereby dismissed. The Provisional Order of Justice Robertson is therefore not confirmed in this regard.

NICHOLAS

[46] The same cannot be said for the child, Nicholas and the Court will entertain this aspect of the application following the four factors as outlined by the Supreme Court of Canada in D.B.S., Supra.

[47] The parties have had little or no contact since 1991 and had essentially gone their separate ways. Mr. Anthis had little or no contact with his children over the past 20 years and was able to avoid regular increases to his child support obligations over the years. He did not provide up to date financial disclosure to the Applicant which the Court finds to be blameworthy conduct on his part.

[48] I find that Mrs. Bernardi's attempts to locate the Respondent were impaired by the Respondent's conduct. Her application with regard to Nicholas may proceed as I find the Applicant has provided a reasonable excuse for the delay in filing the application.

[49] In determining what, if any, hardship, may be incurred by Mr. Anthis I am mindful and accept his financial circumstances are limited. Not only must the Court find that section 7 expenses are both reasonable and necessary, the Court must also consider the payor's ability to pay. The latter requirement was not a function that the Provisional Court was in a position to assess due to the ex-parte nature of the Provisional hearing.

[50] A potential retroactive award is generally calculated as of the date the recipient parent gave the payor parent effective notice of the intention to make the application. A retroactive Order should seek to strike a balance between fairness to the children who are entitled to support and fairness to the payor parent.

[51] In the recent Nova Scotia Court of Appeal case **Staples v Callender**, 2010 NSCA 49 Justice Bateman commented upon the awarding of retroactive child support. At paragraph 34 and 35 Justice Bateman stated:

> 34 In D.B.S., supra, the Supreme Court of Canada addressed the law applicable to a grant of retroactive child support. Jollimore, J. referred to that decision in her reasons for judgment. In D.B.Section the Court considered three circumstances in which a request for retroactive support can arise -- where there is an existing child support order; where there is a previous agreement between the parties; and, as is the case here, where there has never been an order for child support.
>
> 35 There is no restriction in the Maintenance and Custody Act on the date from which a court may order support. It was open to the judge here to make a retroactive award (see D.B.S. at paras 80 to 84) which the judge recognized.

And further at paragraph 36 Justice Bateman stated:

> 36 In **D.B.S**. the Court opined that, while retroactive orders are not "exceptional", circumstances may be such that a retroactive order not be made:
>
>> 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 free-standing obligation to support one's children must be recognized, it will not always be appropriate for a court to enforce this obligation once the relevant time period has passed.

Justice Bateman further comments at paragraph 41 as follows:

> "On the question of hardship, she observes that a Court is less likely to award retroactive maintenance where it believes that such an award would prejudice the non-custodial parent's ability to make ongoing support payments as they become due."

> "Where the defendant's means are limited, it will often be right to not create instant arrears."

[51] The Ontario Court has provisionally ordered retroactive section 7 expenses in the amount of $23,801.45 for Nicholas. This consists of sporting activities dating back to 2000; orthodontic and university expenses.

[52] Considering the lateness of the application I find it is not reasonable and fair to attribute $2,775.00 sporting activity cost to the Respondent given his financial circumstances. As a result I find it is reasonable and fair to deduct same from the Provisional Order which results in an amended amount of $21,026.45.

[53] The Provisional Court ordered the Respondent to pay 2/3 of the section 7 claim. Two-thirds of the amended amount results in an amount owing of $14,024.64, which I find to be excessive in the circumstances.

[54] D.B.S., Supra instructs that the circumstances of the child must be taken into consideration along with hardship caused to the payor parent.

[55] I find that the amount of $14,024.64 is an unreasonable amount for the Respondent to pay and such a liability may affect his ability to pay the go-forward child support of $300.00 per month, which must take priority.

[56] Justice Robertson states at page 18 of the Provisional Hearing transcript as follows:

> "Nicholas is a math student in the second year at the University of Waterloo and is in receipt of two substantial scholarships for merit"

[57] It is reasonable and fair to reduce the section 7 expenses in the Provisional Order from 2/3 to 1/3 when considering the collective circumstances of child and parent.

[58] Thus, it is ordered that the Respondent pay 1/3 of re-calculated section 7 expenses for Nicholas, namely $7,008.80. This strikes a balance of fairness between Nicholas and his father, Mr. Anthis. Monthly payments of $50.00 commencing December 1, 2011 are thus ordered until the debt is satisfied. The Provisional Order is thus varied and not confirmed in this regard.

SECTION 7 PROSPECTIVE EXPENSE

[59] The Provisional Court ordered the Respondent to pay $416.00 per month towards Nicholas' present and future education expenses. I find Mr. Anthis simply does not have the ability to pay same given he has been ordered to pay $300.00 per month for child support. I fear confirming such an order will create "instant arrears" and thus I find it is not reasonable and/or just to order same.

ARREARS

[60] The Court declines to reduce the arrears accumulated to date, namely, $26,978.02. Mr. Anthis had and has an obligation to satisfy this payment. Maintaining the arrears strikes a fair and reasonable balance for the parties to this proceeding. Monthly payments of $50.00 per month will be made effective December 1, 2011.

[61] Thus the Provisional Order with regard to arrears is confirmed. The Respondent is desirous of assigning his Canadian Blood Services Pension to the Applicant which would assist in addressing the arrears issue in a more immediate fashion.

[62] The Court cannot make an order in this regard, but encourages the parties to investigate what, if anything, can be done to transfer, assign, attach or garnishee the pension fund to the benefit of the Applicant in satisfaction of the arrears.

COSTS

[63] The Provisional Justice ordered costs against the Respondent in the amount of $3,500.00**.** The Court stated at page 20 of the transcript:

> The Court: ...Costs are not meant to be a punishment, but they are meant to signify success and encourage people to settle. In this case, this matter has had to jump through hoops over a long period of time and should be entitled to her costs....I find costs should be fixed to the mother in the sum of $3,500.00 all attributed to support.... A support deduction order will follow.

[64] The results of this proceeding have been mixed and I find an order for costs in this instance is not appropriate. Such an order would only serve to punish Mr. Anthis, and, more importantly his two children, aged ten and five.

[65] The Provisional Order for costs is not confirmed. Each party shall bear their own costs.

CONCLUSION

[66] The Court has scrutinized the evidence with care and has relied upon clear, convincing and cogent evidence to satisfy the balance of probabilities test. In so doing the Court has applied the law in an attempt to strike a fair and reasonable balance for and to the benefit of all the parties in varying or confirming the Provisional Order of Justice Robertson dated December 2, 2009.

[67] As stated by Justice Saunders in **Oval v Brinlon** 2010 NSCA 78, at paragraph 58:

> 58 Thus, it was entirely within the discretion of the Nova Scotia court to confirm, vary or refuse confirmation of the provisional order of the New Brunswick court. In my view, Campbell, J. did not err in his consideration of the evidence or in the approach he took to craft an order which would provide a fair and practical resolution to these parents' litigation on a go forward basis.

[68] The following Confirmation Order is fair and practical:

1. Income for the Respondent, George Leo Lawrence Anthis has been imputed in the amount of $34,830.00 per annum.

2. The Respondent shall pay child support for his son Nicholas, born March 17, 1990 in the amount of $300.00 per month commencing the date of September 1, 2009 and payable each and every month thereafter until otherwise ordered by a Court of competent jurisdiction;

3. The claim for retroactive section 7 expenses for the child Samanthalee is dismissed.

4. Section 7 retroactive expenses for the child Nicholas are ordered in the amount of $7,008.80 payable at the rate of $50.00 per month commencing December 1, 2011 and payable each and every month thereafter until otherwise ordered by a Court of competent jurisdiction;

5. Section 7 prospective expenses for the child Nicholas are denied and the application in this regard is dismissed;

6. Arrears of child support from the order of Justice Michael dated April 18, 1991 are set in the amount of$26,978.02 as of December, 2011. These arrears for unpaid child support from the order of April 18, 1991 are separate and in addition to the above award for past special

extraordinary expenses. Payments will commence on December 1, 2011 in the amount of $50.00 per month.

7. Each party shall bear their own respective costs of this proceeding.

Order Accordingly.

____

J.