IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Korol v. O'Dwyer, 2013 NSSC 48

Date: 2013-02-05
Docket: 1206-5622
Registry: Sydney

Between:

Susan Korol

Applicant

v.

Michael O'Dwyer

Respondent

Judge:	The Honourable Justice Kenneth C. Haley
Heard:	November 5, 2012 and December 19, 2012 at Sydney, Nova Scotia
Counsel:	Elizabeth Cusack, Q.C. for the Applicant Candee McCarthy, for the Respondent

By the Court:

[1] This is a Variation Application filed on October 27, 2011 by Susan Korol, hereinafter referred to as the Applicant. The Variation Application is in relation to a Corollary Relief Judgment issued by Justice M.C. MacLellan on September 28, 2010.

[2] With regard to "parenting" the Corollary Relief Judgment states as follows:

> "1. The parties shall have joint custody of the children of the marriage, namely, Katja Emmanuelle Korol-O'Dwyer, born November 10th, 1998, and Finlay James Korol-O'Dwyer born November 22nd, 2001.
>
> 2. The children shall spend ten days out of every thirty day period with their father, and 20 out of the thirty days with their mother, effective September 2st, 2010, and they shall agree in writing on a fixed schedule.
>
> 3. The parties shall equally share the school summer vacation period in 2010.
>
> 4. The parties agree that the children shall spend twelve out of every thirty day period with their father and eighteen with their mother after March 1st, 2011, provided that the parents are satisfied at that time that the children are benefiting from the 10 day and 20 day schedule and they shall agree in writing on a fixed schedule.
>
> 5. If the parties are not satisfied that the children are benefitting from the ten day to twenty day schedule and one of them opposes a move to a twelve day to eighteen day schedule, they shall confer with Dr. Julie MacDonald, a child psychologist.
>
> 6. Dr. MacDonald shall meet at least once with each parent and with each parent and the children or alone with the children as often and in such company she determines to be appropriate and if she is unable to assist the parties to agree whether to proceed with the increase to a twelve day to eighteen day schedule, she shall determine whether such a change will be beneficial for the children and the parties shall abide by her determination.

7. The parties shall equally share the fees of Dr. Julie MacDonald as invoiced and shall pay within thirty days of invoicing.

8. Should Julie MacDonald be unable to fulfill her role the parties shall endeavour to agree upon an alternate child psychologist failing which their solicitors Elizabeth Cusack, Q.C. and Candee McCarthy shall choose the child psychologist or child therapist independently of the parties' direction after considering their views.

[3] The issue of child support was agreed to as follows:

"51. The Husband shall pay to the Wife two thirds of the table amount of child support regardless of whether the parenting arrangement is 10/30 or 12/30 for the Husband.

52. Child support shall be paid on time on the 15th day of each calendar month beginning on the 15th day of August, 2010.

53. The parties shall share extraordinary expenses on a 50/50 basis. The party who makes the expenditure shall provide copies of the receipts to the other party who shall have 15 days to reimburse the payor party.

54. Each party shall have a credit toward university expenses for R.E.S.P. contributions made after the date of this Corollary Relief Judgment and the appropriate support for the period when the children are in the post-secondary education phase shall be determined at that time.

55. If the parties are unable to agree on a future activity of the children, a party who enrolls the child in the activity, despite the disagreement shall pay one hundred percent of activity expenses for any such activity aside from the activities in which the children have participated in prior to the date of this judgment. The parties shall continue with the children in their current extra-curricular activities until such time as they both agree to a change.

56.(a) The activity expenses shall include incidental costs, such as equipment, uniforms, entrance fees, in addition to regular fees, but shall not include local transportation costs or hotel costs borne by the parent

who accompanies the child to the event.

(b) Orthodontic expenses over and above any benefit available through medical plans shall be shared 50/50 and orthodontic treatment will proceed for the children based on the recommendations of the orthodontist.

57. The lump sum settlement between the parties settles all claims of the parties in respect of arrears of child support including periodic support and extraordinary expenses.

58. The Husband shall provide his income tax returns and notice of assessment to the Wife on or before May 1st in each calendar year. The maintenance for the coming year shall be adjusted as of June 1st, of each year based on the previous year's income.

59. The Husband shall immediately notify the Wife of any change in his employment status and of any increase to his income over and above five percent.

60. Any 5% or greater increase in the Husband's guideline income shall warrant an immediate increase in child support.

61. Any increase in the Wife's guideline income for a total amount of $10,000.00 or more shall be disclosed to the Husband and shall be disclosed on an annual basis from that year onward in the same manner as the Husband's disclosure obligation under paragraph 58.

62. The Husband may continue to make payments directly to the Wife who shall have the option at any time to request that payments be made through the Director of Maintenance Enforcement, in which case both parties shall immediately cooperate to be fully enrolled in the Maintenance Enforcement Program and all further periodic child support payments shall be made through the Director of Maintenance Enforcement located at P.O. Box 803, Halifax, Nova Scotia, B3J 2V2.

> 63. In the event that payments are made through the Director of Maintenance Enforcement the parties shall fully cooperate during the first 15 days of May in each calendar year to do whatever is necessary to ensure that there is an adjustment in maintenance payments for the following 12 months and shall cooperate to effect such an adjustment forthwith at any time upon the husband receiving a pay increase of more than 5% of his salary. They shall do so in the least time and most cost-effective manner possible."

[4] At the time of issuance of the Corollary Relief Order the Respondent, Michael C. O'Dwyer, had an annual gross income of $82,809.00. The Applicant's reported income at that time was $67,000.00.

[5] The Applicant claims that the Respondent has not been compliant with child support payments since January 1, 2011 due to the loss or change in his employment. The Applicant requests the Court to impute income to the Respondent for those periods based upon his Federal Government salary when his income was reduced. The Applicant seeks prospective child support based upon an imputed income to the Respondent. She also claims retroactive child support arrears calculated on the basis of imputed income to the Respondent, who is alleged to have been intentionally under-employed.

[6] The Respondent contests the Applicant, and states he has been compliant with the current Court Order, in accordance with his means. The Respondent submits that he has not been intentionally under-employed, and requests the Court to acknowledge that his income earned from January 2011 to date is an appropriate basis upon which to calculate his child support obligations.

[7] The parties agreed to have the Court hear this matter by way of Affidavit and oral submissions, which the Court received on December 19, 2012. The Court reserved its decision.

APPLICANT'S POSITION

[8] The Applicant submits that the Respondent has intentionally taken action or actions to under-employ himself, having elected to quit his job in Ottawa with the Federal Government in 2011, at which time he was earning $93,000.00 per year.

[9] The Applicant submits that the Respondent's employment was inconsistent since the Corollary Relief Judgment, as he had a parental leave, a sick leave, a change of employment, and when his new business did not work out, he moved to Australia in December 2011 to seek employment.

[10] The child support paid by the Respondent was unilaterally adjusted by the Respondent to be in accordance with his current earnings. He paid two-thirds of the guideline amount based upon his current means, without court authorization.

[11] It is submitted that the shared custody arrangement is now discontinued with the Respondent now resident in Australia.

[12] It is the Applicant's position that the Respondent should pay the full guideline payment based upon an imputation of income for the periods of time the Respondent had either reduced or zero earnings, including Section 7 expenses retroactive to January 1, 2011.

[13] The Applicant submits that the Respondent has not provided full and complete financial and medical disclosure to support his position.

[14] The Applicant outlines her claim in her Affidavit dated December 14, 2012 as follows:

> "7. Based on the Nova Scotia Table at $93,000.00, per annum (the salary in 2009) and $1,264.00 per month for two children, the shortfall for 2012 to the end of December 2012 is $9,186.00.
>
> 8. Based on the Nova Scotia table at $98,400.00 (the stated amount for 3 months in 2012 as per paragraph 35 of the Respondent's affidavit) and $1,330.00 per month, the shortfall to the end of December 2012 is $9,978.00.
>
> 9. Based on the Nova Scotia Table amount of $107,000, (assuming Canadian and Australian dollars to be equivalent, although the exchange rate favours the Australian dollar) and $1,435.00 per month for two children the deficit would be $11,238.00.
>
> 10. Mr. O'Dwyer paid no support from April 1st to December 31st of 2011.

11. After calculating that he owed two thirds of Guideline Table Support until December 1st, 2011 and full support thereafter based on his move to Australia in December of 2011, I calculated the following arrears for 2011.

a. Based on a yearly salary of $98,400.00 at $1,326.00 per month for December (using the 2006 table) and .6666 per cent of that monthly amount for eight months, I calculate the arrears for 2011 at $8,397.03; and

b. Based on a yearly income of $93,000.00, which appears to be less than the base salary in 2011, I calculate the arrears for December is $1,262.00 and .6666 x $1,262.00 x 8 for a total arrears for 2011 of $7,991.99.

12. Mr. O'Dwyer provided a statement of income at $107,000 in October of 2012."

RESPONDENT'S POSITION

[15] According to the evidence, the Respondent has reportedly paid the following in child support.

	2010 $77,475.00 - 2/3 Guidelines Amount	2011 2/3 Payment	2012 2/3 Payment
January	N/A	$759.33	NIL
February	N/A	$759.33	NIL
March	N/A	$759.33	NIL
April	N/A	NIL	NIL
May	N/A	NIL	$ 890.00
June	N/A	NIL	$ 490.00
July	N/A	NIL	$ 780.00
	Date of Order		
August	$759.33	NIL	NIL
September	$759.33	NIL	NIL
October	$759.33	NIL	$2,274.00
November	$759.33	NIL	$1,548.00
December	$759.33	NIL - moved to Australia	
TOTAL PAID	**$3,796.65**	**$2,277.99**	**$5,982.00**

[16] The Respondent submits that he has been compliant with the terms of the Corollary Relief Judgment in that he has adjusted payments according to his means and ability to pay.

[17] The Respondent submits the thirteen month period wherein no child support payments were made was reflective of his impecunious and medical state at that time.

[18] The Respondent further submits that he has also incurred significant expense in travelling to and from Australia to implement access with his two children ($7,240.48), not including lost wages.

[19] He submits that he has not shirked his child support responsibilities, and once he obtained employment in Australia he recommenced making child support

payments at the rate of $958.00 per month which is two-thirds of the guideline amount for a yearly salary of $107,000.00.

ISSUES

[20] 1. Has the Applicant proven a material change of circumstance to warrant a variation of the current Order?

2(a) If yes, should income be imputed to the Respondent and if so,

2(b) In what amount?

3(a) What is the appropriate quantum for go-forward child maintenance?

3(b) Has the Respondent established a claim for undue hardship?

4(a) Are retroactive child support expenses payable?

4(b) Are retroactive Section 7 expenses payable?

LAW AND ANALYSIS

1. CHANGE OF CIRCUMSTANCES

[21] The applicable provisions of the **Divorce Act** are as follows:

> "17(1) A court of competent jurisdiction may make an order varying, rescinding or suspending, prospectively or retroactively,
>
> (a) a support order or any provision thereof on application by either or both former spouses; or
>
> (b) a custody order or any provision thereof on application by either or both former spouses or by any other person.

> 17(4) Before the court makes a variation order in respect of a child support order, the court shall satisfy itself that a change of circumstances as provided for in the applicable guidelines has occurred since the making of the child support order or the last variation order made in respect of that order.
>
> 17 (6.1) A court making a variation order in respect of a child support order shall do so in accordance with the applicable guidelines.
>
> 17 (6.2) Notwithstanding sub-section (6.1), in making a variation order in respect of a child support order, a court may award an amount that is different from the amount that would be determined in accordance with the applicable guidelines, if the court is satisfied
>
> (a) that special provisions in an order, a judgment or a written agreement respecting the financial obligations of the spouses, or the division or transfer of their property, directly or indirectly benefit a child, or that special provisions have otherwise been made for the benefit of a child; and
>
> (b) that the application of the applicable guidelines would result in an amount of child support that is inequitable given these special provisions.
>
> 17(6.3) Where the court awards, pursuant to subsection (6.2), an amount that is different from the amount that would be determined in accordance with the applicable guidelines, the court shall record its reasons for having done so."

[22] In the case of **Hart v. Talbot** [2010] NSSC 311, at paragraph 11, this Court stated as follows:

> "A material change in circumstance has been defined as one where, had the facts existed at the time of the prior order, the judge would likely have crafted a different order. A material change in circumstance can include a situation where something unexpected happens which fundamentally alters the foundation upon which the current order is based. Alternatively, a material change in circumstance can include a situation where something that was expected to happen does not. Further a minor or temporary change in circumstance is insufficient to justify the court invoking its jurisdiction to vary. The alleged change in circumstance must be significant and long lasting."

[23] The burden of proof is upon the Applicant. It is proof on a balance of probabilities as defined by the Supreme Court of Canada in **C.(R.) v. McDougall**

[2008] SCC 53 at paragraph 46:

> "...evidence must always be sufficiently clear, convincing, and cogent to satisfy the balance of probabilities test.....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 of test."

And at paragraph 49:

> ...I would reaffirm that in all civil cases there is only one standard of proof and that is proof on a balance of probabilities . In all civil cases, the Trial Judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred."

[24] I have carefully scrutinized the evidence in this instance, and find that there is clear, convincing, and cogent evidence to establish that there has been a change of circumstance, as contemplated by Section 17(4) of the **Divorce Act**. The Court therefore has jurisdiction to proceed with this Application.

2. IMPUTATION OF INCOME

[25] Section 19 of the Child Support Guidelines states as follows:

> "The court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following:
>
> (a) the spouse is intentionally under-employed or unemployed other than where the under-employment or unemployment is required by the needs of a child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the spouse.
>
> (b) the spouse is exempt from paying federal or provincial income tax;
>
> © the spouse lives in a country that has effective rates of income tax that are significantly lower than those in Canada;
>
> (d) it appears that income has been diverted which would affect the level of child support to be determined under these Guidelines;
>
> (e) the spouse's property is not reasonably utilized to generate income;

(f) the spouse has failed to provide income information when under a legal obligation to do so;

(g) the spouse unreasonably deducts expenses from income;

(h) the spouse derives a significant portion of income from dividends, capital gains or other sources that are taxed at a lower rate than employment or business income or that are exempt from tax; and

(I) the spouse is a beneficiary under a trust and is or will be in receipt of income or other benefits from the trust."

[26] Justice D. Wilson imputed income in the case of **Gould v. Julien** [2010] Carswell 190, and stated as follows at paragraph 15:

"Factors which should be considered when assessing a parent's capacity to earn an income were succinctly stated by Madam Justice Martinson of the British Columbia Supreme Court, in Hanson v. Hanson [1999] B.C.J. No. 2532 (B.C.S.C.) as follows:

1. There is a duty to seek employment in a case where a parent is healthy and there is no reason why the parent cannot work. It is "no answer for a person liable to support a child to say he is unemployed and does not intend to seek work or that his potential to earn income is an irrelevant factor". (Van Gool at para. 30).

1.2 When imputing income on the basis of intentional under employment, a court may consider what is reasonable under the circumstances. The age, education, experience, skills and health of the parent are factors to be considered in addition to such matters as availability to work, freedom to relocate and other obligations.

3. A parent's limited work experience and job skills do not justify a failure to pursue employment that does not require significant skills, or employment in which the necessary skills can learned on the job. While this may mean that job availability will be at a lower end of the wage scale, courts have never sanctioned the refusal of a parent to take reasonable steps to support his or her children simply because the parent cannot obtain interesting or highly paid employment.

4. Persistence in unremunerative employment may entitle the court to impute income.

5. A parent cannot be excused from his or her child support obligations in

furtherance of unrealistic or unproductive career aspirations.

[27] The above factors were confirmed by Justice L. Oland in **Smith v. Helppi** [2011], NSCA 65 at paragraph 16.

[28] Justice T. Forgeron also commented on imputation of income in **MacDonald v. Pink**, [2011], NSSC 421 at paragraph 24, as follows:

> "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.
>
> 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*, [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*, supra; and *Marshall v. Marshall*, 2008 NSSC 11."

[29] In addressing the issue of under-employment, Justice T. Forgeron stated in **Parsons v. Parsons**, 2012 NSSC,239 at paragraph 35 as follows:

> "In reviewing the under-employment issue, this Court will follow the three-pronged analysis suggested in *Deggalo v. Pauli*, [2002] O.J. No. 3731. First, I will determine whether the Mr. Parsons is under-employed. Second, I will canvass whether this is caused by the health needs of Mr. Parsons. Third, is not, I will decide what quantum of income should be imputed."

[30] In following this approach I find that the Applicant has proven, on a balance of probabilities, that the Respondent has been intentionally under-employed. His earnings were drastically reduced in 2011 from $98,905.47 to $21,159.00. The Respondent explains his income reduction in his Affidavit dated December 14, 2012 as follows:

> "5. My doctor advised I take sick leave for three months after returning to work following my parental leave. Following sick leave, I filed for and received a leave of absence to care for my family in Cape Breton.
>
> 6. The recommendation came from my psychiatrist Dr. Joachim Navarro. His letter to my employer indicates the anxiety and depression I was experiencing as a result of the situation. Attached as Exhibit A is a copy of the letter from Dr. Navarro.
>
> 7. The extended sick leave wasn't paid because I had exhausted my EI allowance during the parental leave.
>
> 8. The leave I took following the stress leave was unpaid leave for up to five years to care for family and seek a more sustainable and healthier work option.
>
> 9. My decision to start a magazine publishing business in Cape Breton was not frivolous. My curriculum vita, which is attached hereto as Exhibit B, will indicate a mere portion of my experience since entering the field of print media in 1988. The only publishing business in which I wasn't successful was the one I shared with Sue Korol. This business ran from 1994 to 1997. I have successfully managed many publications and government services since that time.
>
> 10. Following the un-lucrative work with the magazine, I was unable to find gainful work in Cape Breton. An application and interview with Parks Canada in Louisburg did not result in a job. Attached hereto as Exhibit C is a copy of a letter confirming I had an employment interview with them.

> 11. I was also actively working with Cape Breton County Economic Development Authority to explore work options.
>
> 12. I was also exploring work opportunities in Canada outside Cape Breton, and was unsuccessful.
>
> 22. On moving to Australia, and securing employment, I leased a four-bedroom house to accommodate Katja and Finn, as well as their sister Charlotte.
>
> 23. My employment prospect on moving from Cape Breton was with W3 Networks, an internet service provided in Sydney Australia, owned by my brother in law. The company's business conditions did not allow for the employment when I arrived, but thankfully Mr. Wilson did provide us with free room and board while I sought employment.
>
> 24. I was working from January to March 2011, and I was paying child support during this time. It was after this that my doctor recommended a period of stress leave for at least three months. I did not leave my employment to be voluntarily under-employed."

[31] I do not accept the Respondent's evidence as an appropriate basis to excuse him from his child support obligations.

[32] In the Court's view, the Respondent did not prove that his health needs prevented him from working to his capacity. There is no evidentiary nexus to support the Respondent's claim to the contrary. He has not provided any credible evidence linking his health difficulties to an inability to work. The limited evidence which was produced came from the Respondent's psychiatrist, Dr. Joaquin R. Navarro, who provided a brief report dated February 16, 2011. The doctor was neither called as a witness , nor subject to cross-examination. This evidence was far from clear, convincing, and cogent. The Respondent did not lead credible evidence to displace the burden upon him. The courts have consistently imputed income in circumstances where credible medical evidence was not provided, as is the case in this instance. (See **Parsons v. Parsons**, supra, para. 40 to 46).

2(b) - IMPUTED AMOUNT

[33] The burden once again falls upon the Applicant to prove the quantum of the Respondent's earning capacity. The evidence is clear that the Respondent earned $93,000.00 as a base salary in 2010. Due to parental leave and sick leave absence, this figure was adjusted to $77,475.00 for child support calculation purposes for the year 2010.

[34] His lack of success in business in 2011 cannot be used as a means to avoid child support obligations due to a self-induced reduction of income. I find the Respondent's income reduction was the result of his unrealistic or unproductive career aspirations. As a result, I impute income to the Respondent for 2011 in the amount of $77,475.00. For similar reasons I will impute income to the Respondent for the years 2012 and 2013. Based upon the evidence it is reasonable and fair to impute income to the Respondent in the amount of $93,000.00 per year, which is the salary he vacated to pursue other unrealistic opportunities.

3(a) - CHILD SUPPORT - QUANTUM

[35] Paragraphs 51 and 52 of the Corollary Relief Judgment state as follows:

> "51. The Husband shall pay to the wife two-thirds of the table amount of child support regardless of whether the parenting arrangement is 10/30 or 12/30 for the Husband.
>
> 52. Child support shall be paid on time on the 15th day of each calendar month beginning on the 15th day of August 2010."

[36] Current income has been imputed to the Respondent in the amount of $93,000.00. The parties are no longer in a defacto shared custody arrangement, as a result. Pursuant to Section 17 (6.1), I decline to follow the two-thirds formula follow as outlined in the present Order. Therefore, effective January 15, 2013, the Respondent shall pay child support in the amount of $1,264.00 each and every month until otherwise ordered by a court of competent jurisdiction.

3(b) - UNDUE HARDSHIP

[37] Although the Respondent has not formally filed an application for undue hardship, the Court nonetheless finds that fairness dictates that the Court should consider the argument raised by the Respondent in this regard.

[38] This Court addressed the issue of undue hardship in **Hart v. Talbot**, 2010 NSSC 311, at paragraphs 15, 16, 17, 18 and 19 as follows:

> 15. "Section 10 of the *Federal Child Support Guidelines* 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;
>
> © 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 completed
>
> (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 end of that time.

Reasons

(6) Where the Court makes a child support order in a different amount under the section, it must record its reasons for doing so.

16. 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 (c) of the Guidelines, lists circumstances which must be considered there must be a determination that the spouse has an usually high level 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"

17. 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 pittance, while for a person dependent on social assistance for his or her living expenses, it would be an impossibility."

18. 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 Guide 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 were 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 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 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 attendance circumstances of the particular cases."

19. In **Poirier v. Poirer** (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 hardship include excessive, extreme, improper, unreasonable, unjustified. It is more than awkward for 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):

[39] I adopt the above reasons in dismissing the Respondent's submission on undue hardship, albeit no formal Application was filed. As noted in the above commentary, courts are cautious in granting undue hardship applications. Cogent and specific evidence must be advanced if the table amount of child support is to be displaced. The Respondent will have to rearrange his financial commitments to meet his child support obligations, which must be given priority.

[40] The Respondent has, up to this point, unilaterally, without court variation, adjusted his child support payments according to his means, on his own terms. In addition to his change in income he incurs additional expenses to exercise access due to his relocation to Australia. Access and transition costs have been favourably considered to the benefit of the Respondent as a result of the Court imputing income at $93,000.00, and not his current income of $107,000.00.

[41] The Respondent has not met the threshold test to establish hardship. As a result the Order of the Court in terms of monthly child support payment of $1,264.00, commencing January 15, 2013, is confirmed.

4(a) - RETROACTIVE SUPPORT

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

> 131. Child support has long been recognized 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 paryor 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 payment 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."

[43] Generally, the potential award can be made retroactive to the date when the recipient parent gave the payor effective notice of her intention to seek an increase in support payments, however a retroactive support order should seek to strike a

balance between fairness to the children who are entitled to support and fairness to the payor parent.

[44] In assessing the propriety of a retroactive order a judge's discretion is guided by the following factors:

> 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.

[45] The Applicant filed her application in a timely manner on October 27, 2011, and as a result there has been no delay in filing of her application. The Applicant requests a retroactive adjustment to child support effective January 1, 2011.

[46] I find that the Respondent engaged in blameworthy conduct in that he has underpaid, as a result of his own personal assessment of his ability, or lack thereof, to pay support. This conduct cannot be condoned. A retroactive award will be made effective January 1, 2011, as opposed to the date of the application.

[47] The Court has denied the Respondent's "undue hardship" submission. It is apparent to the Court that the Respondent will be required to make some adjustments in order to make his new child support obligations a priority. Hardship must again be reconsidered in this context.

[48] In **Staples v. Callender**, 2010 NSCA 49, Justice Bateman commented upon hardship in the awarding of retroactive child support, at paragraph 36 as follows:

> 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.

[49] Justice Bateman's comments at paragraph 41 are relevant to deciding this matter.

> 41. In L.S. v. E.P., cited in D.B.S., above, Rowles J.A. writing for the Court, undertakes an insightful and thorough discussion of the analysis relevant to a retroactive award of child support. 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.
>
> At para. 76, Rowles, J.A. quoted with approval the reasons of Esson, J.A/ in
>
> E.T. v. K.H.T., [1996] B.C.J. No. 2208 (Q.L.) (C.A.), the full court concurring on this issue, where she said:
>
> > 22. In deciding whether to exercise the discretion to order payment of maintenance for a period prior to the hearing, a judge should consider whether such an order will have an impact on the defendant which will make it less likely that the order for future payments can or will be complied with. Where the defendant's means are limited, it will often be right to not create "instant arrears". Other considerations no doubt could justify the refusal to make a retroactive order.

[50] To assist the Court in applying the principles cited above, a calculation of the potential arrears is necessary. The Applicant has been in primary care of the children since December 2011 when the Respondent moved to Australia. The calculations will reflect such.

Amount Due	2011 - $77,475.00 $1,076 per month @ 2/3 $717.33 month x 12 = $8,607.96	2012 - $93,000.00 $1,264 x 12 = $15,168.00
Amount Paid	$2,277.99	$5,982.00
Arrears Due	$6,329.97	$9,186.00

[51] According to the Court's calculation the Respondent overpaid child support in 2010 by $213.00, which must be taken into account.

[52] The arrears up to December 31, 2012 are therefore calculated as follows:

$6,329.97 + $9,186.00 - $213.30, which totals $15,302.67.

[53] The issue of hardship resulting from a retroactive award, is one which the Court must consider in order to ensure the priority of the go forward child support Order.

[54] I find that the amount of $15,302.67 is an unrealistic amount to expect the Respondent to pay, without affecting his ability to pay the go forward child support payment of $1,264.00 per month.

[55] The Court is mindful that the Respondent is transitioning to a new career in a new country, which will require him to rearrange his financial priorities.

[56] The Court will, thus, adjust the arrears owing to address the above-noted concerns, by forgiving fifty percent (50%) of the arrears for an adjusted balance owing of $7,651.34. This strikes a balance of fairness between the payee and the payor, and ensures that future child support payments will be complied with.

[57] This amount of $7,651.34 shall be paid at the rate of $200.00 per month, commencing January 15, 2013, and payable each and every month thereafter until the arrears so ordered are paid in full.

[58] The Respondent is thus ordered to pay the total amount of $1,464.00 per month to meet his child support payment of $1,264.00, plus an additional $200.00 per month towards the arrears.

4(b) - RETROACTIVE SECTION 7 EXPENSES

[59] The Applicant submits that the Respondent is in arrears with respect to orthodontic expenses for the child, Katja. Finlay is about to start orthodontic treatment. Counsel for the Applicant states:

> "He has paid most but not all Section 7's."

[60] Paragraph 53 of the Corollary Relief Judgment states as follows:

> "The parties shall share extraordinary expenses on a 50/50 basis. The party who makes the expenditures shall provide copies to the other party who shall have 15 days to reimburse the payor party.
>
> and Paragraph 56 states as follows:
>
> (a) The activity expenses shall include incidental costs, such as equipment, uniforms, entrance fees, in addition to regular fees...
>
> (b) Orthodontic expenses over and above any benefit available through medical plans shall be shared 50/50 and orthodontic treatment will proceed for the children based upon the recommendations of the orthodontist."

[61] Upon review of the evidence I find no reason to vary from the agreed upon terms, and therefore will order that the above Section 7 expenses agreements shall continue to be in full force and effect without variation. I have considered a pro rata division of these expenses, based upon the respective incomes of the parties. According to the Applicant's Statement of Income dated December 14, 2012, her 2012 annual income is $82,024.80. The Respondent has an imputed income of $93,000.00. It is fair and reasonable to continue the 50/50 cost share for Section 7 expenses in these circumstances.

[62] Associate Chief Justice l. O'Neil stated in **Niles v. Munro**, 2007 NSSC 318 at paragraph 10 as follows:

> "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 be 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. , 2006 BCSC 1422, para 25. I agree with the reasoning expressed in these cases in that respect.

[63] When considering Section 7 expenses , not only must the Court find that the expenses are both reasonable and necessary, but the Court must also consider the payor's ability to pay.

[64] The Applicant states in her Affidavit dated December 14, 2012 as follows:

> 14. "He has also failed to pay his full 50% share of Katja's orthodontic expenses and I am owed $1,128.95.
>
> 15. I am constantly requested to pay for his overdue payments for half of the fiddle teacher's fees and orthodontics, both of which are the Respondent's responsibility.
>
> 16. $49.60 is outstanding to Debbie O'Dwyer the children's step-grandmother as she paid the dentist.
>
> 17. I have received a 50% contribution for some expenses, but am owed $250.00 for sailing lessons for the children.
>
> 18. Katja's orthodontic treatments are concluded and Finn's are about to begin.
>
> 37. Katja has had orthodontia, and Mr. O'Dwyer's dental coverage was terminated by Great West Life, under his former federal benefit plan and his step-mother paid his outstanding bill in November to help me out.

[65] According to the Respondent's written submissions dated January 8, 2013, he paid the following Section 7 expenses:

	2010	2011	2012
Orthodontics	$1,209.67	$1,178.04	$1,178.04
Other	$ 490.85	$ 937.00	$1,345.92
TOTAL	**$1,700.59**	**$2,115.04**	**$2,523.96**

[66] The evidence is not clear as to whether or not the above amounts paid by the Respondent include reimbursement to the Applicant for the amounts claimed in paragraphs 14, 16, and 17 of her Affidavit.

[67] If these amounts have not been paid by the Respondent, then he is ordered to do so forthwith. He has the ability to do so. If the amounts in question have been paid, then the matter of a retroactive adjustment for Section 7 expenses should be considered finalized.

CONCLUSION

[68] I have scrutinized the evidence with care. I have relied upon clear, convincing, and cogent evidence in reaching this decision. In this regard, I have considered the totality of the evidence.

[69] The Court thus orders as follows:

(1) Income for the year 2013 is imputed to the Respondent in the amount of $93,000.00 per annum.

(2) The Respondent is therefore required to pay $1,264.00 per month for the support of his two children, Katja and Finlay, payable on January 15, 2013, and each and every month thereafter until ordered otherwise by a court of competent jurisdiction.

Note: The Respondent has submitted that he has paid $958.00 for the month of January, 2013. If so, the Respondent shall receive credit for same.

(3)(a) For the year 2011, income is imputed to the Respondent in the amount of $77,475.00 per annum.

(b) For the year 2012, income is imputed to the Respondent in the amount of $93,000.00 per annum.

(c)Total arrears for the 2011-2012 period are set at $7,651.34, which will be payable at a rate of $200.00 per month, commencing on January 15, 2013, until the arrears' debt is satisfied in full.

(4) Section 7 expenses shall be shared on a 50/50 basis as contemplated by the Corollary Relief Judgment dated September 28, 2010. Any extraordinary amounts owed by the Respondent up to December 31, 2012 shall be paid forthwith upon provision of receipts by the Applicant.

[70] All child support payments are to be made payable to the Applicant, and forwarded to the Director of Maintenance Enforcement, P.O. Box 803, Halifax, Nova Scotia, B3J 2V2. Both parties must notify the Office of the Director of Maintenance Enforcement of any change in their address, within ten (10) days of the date of this change.

[71] No later than June 30th of each year, both parties must provide each other, and the Director of Maintenance Enforcement, with a true copy of his or her income tax return, completed and with all attachments, even if the return is not filed with the Canada Revenue Agency or applicable agency, as well as all Notices of Assessment.

Order Accordingly,

J.