SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION
Citation: *Wright v. Nunn*, 2017 NSSC 209

Date: 2017-08-15
Docket: SFHMCA-080949
Registry: Halifax

Between:

Christopher Paul Wright

Applicant

v.

Susan Jacquelene Nunn

Respondent

Judge:	The Honourable Justice R. Lester Jesudason
Heard:	March 23 and April 27, 2017 in Halifax, Nova Scotia
Final Written Submission:	May 1, 2017
Written Release:	August 15, 2017
Counsel:	Shawna Hoyte, Q.C., and Mary Ann MacDonald, Senior Law Student, for Christopher Wright Susan Nunn, Self-Represented

By the Court:

1. Introduction

[1] This variation application requires me to determine three main issues in relation to the *Child Maintenance Guidelines*, NS Reg. 53/98 (*Guidelines*):

(i) prospective child maintenance;

(ii) retroactive reduction of child maintenance;

(iii) retroactive award of special or extraordinary (s. 7) expenses.

[2] Christopher Wright and Susan Nunn are the parents of Megan who turns nineteen later this month.

[3] They entered into a Consent Order issued on October 31, 2012 where they agreed

- Mr. Wright was self-employed and earned his income from doing "odd jobs";

- Mr. Wright's annual income was approximately $26,500.00 for determining his table amount of child maintenance;

- Mr. Wright would pay Ms. Nunn $217.00 per month for child maintenance (paid in two bi-weekly payments of $100.00 beginning on July 6, 2012); and

- No later than June 1st of each year, Mr. Wright would provide Ms. Nunn with a copy of his income tax return, completed with all attachments, even if the return was not filed with the Canada Revenue Agency. He would also provide her with all notices of assessments immediately after they were received.

[4] On October 27, 2015, Mr. Wright applied to vary this order, seeking a retroactive reduction to his child maintenance obligation going back to July 6, 2012, and to set his prospective child maintenance obligation based on his new income.

[5] In February 1, 2016, Ms. Nunn filed a Response to Variation Application seeking a retroactive contribution to special or extraordinary expenses for Megan going back to January 1, 2004 – i.e. when Megan was five.

[6] By the time of the hearing, Ms. Nunn had abandoned almost all her retroactive claims and I was faced with six issues:

1. Whether Mr. Wright's table amount of child maintenance should be varied prospectively from October 27, 2015, onward?

2. Whether Mr. Wright's table amount of child maintenance should be varied retroactively from July 6, 2012 to October 27, 2015?
3. Whether Ms. Nunn is entitled to a retroactive contribution to the net costs of Megan's braces incurred in 2013 and 2014?
4. What amount, if any, should Mr. Wright contribute to Megan's university costs and health-related expenses that exceed insurance reimbursement from 2016 onward?
5. Whether Mr. Wright should be required to cover Megan under any medical plan available to him through his employment? and
6. Whether the parties should be enrolled in the Administrative Recalculation of Child Support Program for prospective child maintenance?

[7] During the hearing, the parties agreed that Mr. Wright would maintain Megan on any medical coverage available to him through his employment (Issue 5), and that, if eligible, they will enroll in the Administrative Recalculation of Child Support Program for prospective child maintenance (Issue 6).

[8] With respect to the remaining issues, I will start by analyzing the prospective claim for child maintenance and then the retroactive claims: *Staples v. Callender*, 2010 NSCA 49.

[9] Mr. Wright asserts that, due to a sequence of injuries he sustained which have impaired his ability to work, his child maintenance obligations should be varied both prospectively and retroactively. Ms. Nunn disagrees that Mr. Wright's injuries prevented him from working before December 2015. She also seeks prospective and retroactive contributions from Mr. Wright for s. 7 expenses.

[10] Before analyzing these remaining issues, I will confirm various agreements of the parties outlined during the hearing and review some of the key factual background which impacts on their respective claims.

2. The parties' agreements

[11] The parties agreed:

1. All materials entered as exhibits during the hearing would be admitted as evidence subject to each side being given the opportunity to conduct cross-examination on those materials and being able to make submissions as to what weight, if any, I should attach to them.
2. A consent order would issue prohibiting the Maintenance Enforcement Program from suspending Mr. Wright's driver's license due to any arrears of child maintenance he owed to Ms. Nunn. A consent order was issued to this effect on June 13, 2017.

3. If Mr. Wright receives any funds for loss of income through a civil suit he has commenced against his LTD insurer, he will immediately notify Ms. Nunn. The receipt of these funds will constitute a material change of circumstances allowing the parties to review Mr. Wright's child maintenance obligation retroactively.

4. Megan's braces and university expenses are proper s. 7 expenses under the *Guidelines*.

3. The Evidence

[12] Mr. Wright filed affidavits from himself and his common-law partner. Materials were filed from his family physician, Dr. Seetharamdoo, who also gave oral evidence. Ms. Nunn filed affidavits from herself, her parents and her sister. All witnesses were cross-examined.

[13] Some of the evidence was not relevant to the issues (e.g. evidence of personal difficulties between the parties before they separated). I have disregarded evidence that is not relevant. The disputed issues largely do not turn on the credibility of either party. They primarily turn on largely uncontested facts and the application of the law to those facts.

3.1 Family History

[14] The parties were in an on again/off again common law relationship for several years which ended when Mr. Wright moved to Toronto in 2002 or 2003. From that time until she entered Acadia University in September 2016, Megan has lived with Ms. Nunn. Megan returns to Ms. Nunn's home most weekends and during university breaks.

[15] Megan has had limited contact with Mr. Wright since her parents separated. Ms. Nunn says Megan has not spoken to Mr. Wright at all since 2014.

3.2 Mr. Wright's child maintenance payments before 2012

[16] The parties had no formal child maintenance arrangements until 2012. Ms. Nunn says Mr. Wright paid little to no child maintenance in the years between their separation and 2012. She referred to a letter Mr. Wright signed on September 7, 2008, which stated, "Currently there are no maintenance payments being made, nor has there been any maintenance payments made." (Exhibit 17, Affidavit of Susan Nunn sworn to on December 8, 2016, Exhibit "N").

3.3 2012 Proceeding

[17] In March 2011, Ms. Nunn lost her full-time job of twenty years. She received twelve months' severance which ran out in March 2012. She claims she then asked Mr. Wright for financial assistance, but he refused.

[18] In May 2012, Ms. Nunn filed an application under the *Maintenance and Custody Act* R.S.N.S., c. 160, seeking child maintenance from Mr. Wright.

[19] The parties attended a Conciliation Meeting on June 21, 2012, at which they agreed that Mr. Wright's annual income was approximately $26,500.00, earned doing "odd jobs". They also agreed he would pay child maintenance of $217.00 each month starting on July 6, 2012. The Conciliator drafted a Consent Order based on this agreement.

[20] Ms. Nunn signed the draft order on July 19, 2012.

[21] The draft order was sent with a letter to Mr. Wright for his signature on July 26, 2012. Mr. Wright did not respond. A second letter was sent to him on October 5, 2012 which said:

> As of today's date, the […] draft order has not been returned to the Court. If you are in agreement with the said order sign, date and return to my attention. If you are not in agreement please advise accordingly.
>
> Mr. Wright, you are required to respond to this letter on or before October 26, 2012.
>
> Please note, as a Conciliator/Court Office I do not represent any party nor do I provide legal advice to the party. **It is recommended you seek independent legal advice in this matter** [Underlining is mine but bolding is in original] (Exhibit 26).

[22] Mr. Wright signed the Consent Order on October 17, 2012, without objection. It was issued on October 31, 2012.

3.4 Mr. Wright's child maintenance payments since 2012

[23] Before starting this variation application, Mr. Wright never provided Ms. Nunn with his annual income tax information as required under paragraph 8 of the October 2012 Consent Order. The total amount of child maintenance payments he made from 2012 to 2017 appears to be as follows:

Year	Payments	Amount paid
2012	Two direct payments of $100.00 each to Ms. Nunn in July	$200.00
2013	Nothing	$0.00
2014	Four payments in 2014 through Maintenance Enforcement	$299.56
2015	One payment in March of $65.44 and then seven payments of $100.00 each during the period from September 21, 2015, to December 14, 2015, through Maintenance Enforcement	$765.44
2016	Payments totalling $812.62 in January, April, June, September and December from Maintenance Enforcement	$812.62
2017	Payment of $104.80 in March from a portion of his GST/HST credit and another payment of $1,186.64 resulting from Maintenance Enforcement taking his 2015 and 2016 income tax	$1,291.44

	refunds and dividing them between Ms. Nunn and another person to whom he owes substantial child maintenance arrears.	
Total paid		**$3,369.06**

[24] The Maintenance Enforcement Program Record of Payment shows Mr. Wright's arrears at $9,230.94 as of April 21, 2017 (Exhibit 27).

3.5 Mr. Wright's employment and medical history

[25] Mr. Wright operated his own drywall business from 2007 to 2012. He believes he filed for bankruptcy in 2011 and was discharged in October 2013.

[26] He describes drywalling as heavy and physical work. He did not always report his income from his drywalling business: he did some cash jobs under the table. For example, he admitted that while he reported no income on his 2011 income tax return, he likely earned slightly less than $30,000.00 doing cash jobs for which he did not charge taxes. He therefore thought agreeing to an annual income of $26,500.00 in the 2012 Consent Order was a fair estimate of his prospective income.

[27] On December 24, 2011, Mr. Wright suffered a right knee (quadriceps) injury. He had surgery in December 2011. Mr. Wright said he was unable to continue running his own business for several months due to the pain, treatment, and recovery from this injury.

[28] Mr. Wright's right knee injury healed to the point that, by the Summer of 2012, he resumed running his drywall business and doing activities such as playing softball. However, on September 20, 2012, approximately three days after returning to work, he injured his left knee and tore his quadriceps tendon. He had surgery to repair this on September 26, 2012.

[29] Mr. Wright said that from September 2012 to April 2015, he remained unemployed and only received Income Assistance benefits.

[30] In September 2014, Mr. Wright started to see his current family physician, Dr. Seetharamdoo, because his former family physician, Dr. Cheah, retired.

[31] In March 2015, Mr. Wright complained to Dr. Seetharamdoo about having a "lot of pain" in his back. He was noted as having severe degenerative disc disease at L5-S1, in addition to having weak quadriceps/leg muscles due to his knee surgeries.

[32] Mr. Wright said that by late 2014/early 2015, he had concluded that he would not be able to return to doing drywalling work due to his injuries. He began volunteering at a mechanical shop which led to him securing a full-time position at the Canadian Tire Corporation's PartSource Sackville retail store (PartSource) in April 2015. His rate of pay was $12.55 per hour. On October 27, 2015 (i.e. the date he filed his variation application), he filed a Sworn Statement of Income indicating that his annual gross income from PartSource was $26,104 (Exhibit 3). Mr.

Wright testified that the physical demands of his job at PartSource were considerably less than those of drywalling so he was able to do this job despite his physical limitations.

[33] In December 2015, Mr. Wright claimed that his back pain became too great for him to continue working. He stopped working at PartSource around December 14, 2015 and then applied for and received short-term disability benefits. When these benefits ended in March 2016, he applied for long-term disability benefits through his insurer, Manulife Financial. His application was denied and he started a lawsuit against Manulife seeking payment of LTD benefits. This lawsuit is ongoing.

[34] Mr. Wright acknowledged that Manulife's position is that he has failed to demonstrate that he is currently disabled as required under its insurance policy to be entitled to receive LTD benefits. Mr. Wright did not introduce any independent materials from the lawsuit during the hearing. He did produce various materials from Dr. Seetharamdoo's medical file including a medical assessment form Dr. Seetharamdoo completed for Manulife in January 2016 (Exhibit 12, Tab 11).

[35] In 2016, Mr. Wright was diagnosed with a spermatic cord lesion. He had surgery for this on September 19, 2016.

[36] Mr. Wright believes that he remains an employee at PartSource even though his last day of work was December 14, 2015. According to him, he has been given a personal leave of absence.

3.6 Mr. Wright's reported income

[37] Mr. Wright's Notices of Assessment for 2008 to 2015 disclose the following Line 150 incomes:

Year	**Line 150 Income**
2008	$45,315.00
2009	$29,954.00
2010	$40,000.00
2011	$0.00
2012	$1,439.00
2013	$1,388.00
2014	$9,480.00
2015	$18,159.00
2016	$5,293.00 (stipulated by Mr. Wright)

3.7 Ms. Nunn's work history and income

[38] In March 2011, Ms. Nunn lost her job of twenty years. She received severance which ran out in March 2012. She testified she then had to get financial assistance from her parents to help with her living expenses and Megan's care.

[39] In December 2012, Ms. Nunn received an offer from ACS, a Xerox Company, which paid $40,000.00 annually. She held that job for more than four years and, by the time of the hearing, was earning $44,000.00 annually. Unfortunately, on the second day of the hearing (April 27, 2017), she advised that her employer laid her off the previous day with severance. She did not have any paperwork but believed she would receive 15 weeks' severance at her regular salary.

[40] Ms. Nunn's Notices of Assessment disclose the following Line 150 incomes:

Year	**Line 150 Income**
2011	$70,109.00
2012	$34,471.00
2013	$44,378.00
2014	$42,803.00
2015	$43,242.00

[41] In her Sworn Statement of Income dated November 23, 2016 (Exhibit 18), she indicated her total annual income is $43,999.92. Again, however, this was before she was laid-off in April 2017.

4.0 Should Mr. Wright's table amount of child maintenance be varied prospectively from October 27, 2015 onward?

4.1 Mr. Wright's position

[42] Mr. Wright seeks to vary his prospective child maintenance obligation from October 27, 2015, forward by basing it on his "actual income" as reported in his income tax returns. He argues that this would mean:

- paying child maintenance of $1357.92 for 2015 based on his Line 150 income of $18,159.00; and

- not paying any child maintenance for 2016 and 2017 because his Line 150 incomes for those years do not meet the minimum threshold for paying child maintenance under the *Guidelines*.

[43] Mr. Wright claims that in 2015, he began suffering from chronic and severe pain in his back and it was revealed that he had a severe spinal degenerative disc disease, located at L5-S1.

He says he later developed further physical deterioration and disabilities which led to his leaving his position at PartSource in December 2015 (Supplemental Affidavit of Mr. Wright sworn to on November 25, 2016, Exhibit 5, Paragraphs 31-33 and 41).

4.2 Medical Evidence

[44] Dr. Seetharamdoo's evidence supports Mr. Wright's claim that he had to leave PartSource in December 2015 because of his multiple injuries, particularly his issues with his back. As noted earlier, materials from Dr. Seetharamdoo's file were introduced and Dr. Seetharamdoo gave oral evidence. I have considered all that evidence and highlight the following:

i) Dr. Seetharamdoo's report dated August 26, 2016

> "Christopher Wright suffers from chronic severe muscular skeletal problems where he requires several appointments.
>
> He also suffers from unremitting back pain. In my opinion he is unemployable at this time and in the foreseeable future." [Exhibit 5, Supplemental Affidavit of Mr. Wright sworn to on November 25, 2016, Exhibit "L", Page 1].

ii) Dr. Seetharamdoo's report dated November 2, 2016

> "Christopher Wright suffers from chronic muscular skeletal problems, unremitting back pain, as well as a spermatic cord lesion where he requires several appointments.
>
> In my opinion he is unemployable at this time and in the foreseeable future." [Exhibit 5, Supplemental Affidavit of Mr. Wright sworn to on November 25, 2016, Exhibit "L", Page 2].

iii) Dr. Seetharamdoo's oral evidence

[45] Dr. Seetharamdoo testified that Mr. Wright has generalized mechanical and neuropathic pain which is difficult to treat. He described neuropathic pain as being pain in the nerves which does not recover and can be permanent even though it cannot be seen on physical tests.

[46] Dr. Seetharamdoo further testified that, in addition to the problems with his back and weak quadriceps, Mr. Wright currently suffers from foot pain and arthritis in his hands. However, Mr. Wright's main problem is with his back. Dr. Seetharamdoo indicated that physiotherapy would likely not help Mr. Wright and could make him worse. He recommended that Mr. Wright wear a back brace and referred him to a pain specialist. The pain specialist gave Mr. Wright a license for cannabinoid medication.

[47] Overall, Dr. Seetharamdoo indicated that Mr. Wright's ability to do physical work is significantly diminished; however, he did not opine that Mr. Wright could not work in any

capacity whatsoever. Rather, he suggested that Mr. Wright could possibly do sedentary work if he could get up and stretch. However, only a functional assessment could determine what sort of sedentary work, if any, Mr. Wright could do.

4.3 Ms. Nunn's position

[48] I asked Ms. Nunn whether she was asking me to impute any income to Mr. Wright after he left PartSource in December 2015 or if she was taking the position that he has been underemployed since then. Ms. Nunn confirmed that she was not asking me to impute any income to Mr. Wright since he left PartSource in December 2015 and was not taking the position that he has been underemployed since then. She did not challenge that Mr. Wright's medical conditions/limitations prevented him from working since December 2015. She also confirmed that she was not seeking child maintenance from December 2015 subject to Mr. Wright taking steps to find new employment which he was physically able to do and then paying the table amount of child maintenance based on his new income.

4.4 Conclusion on Mr. Wright's prospective child maintenance obligation

[49] I am satisfied that Mr. Wright's combination of injuries resulting in severe muscular skeletal problems and neuropathic pain largely in relation to his back justifies his not working after December 14, 2015 (his last day he worked at PartSource). Consequently, I conclude that there has been a material change of circumstances since December 14, 2015 which warrants varying Mr. Wright's child maintenance obligation since then.

[50] I am not convinced, however, that Mr. Wright is permanently precluded from finding some employment in the future which he physically is able to do. Indeed, part of the reason why Mr. Wright requested a prohibition on any suspension of his driver's license was because he said that he needed his license to be able to find new employment. Thus, I order that the 2012 Consent Order be varied as follows:

- Mr. Wright child maintenance payments from December 15, 2015, onward are set at $0.00;
- Mr. Wright must reasonably seek employment which he is physically able to do in light of his limitations and must pay the table amount of child maintenance based on any new income he receives;
- Should Mr. Wright receive LTD benefits from his insurer on a retroactive basis, he must immediately disclose this information to Ms. Nunn who can have the matter of child maintenance reviewed;
- Mr. Wright must continue to provide the annual financial disclosure as required under paragraph 8 of the October 2012 Consent Order.
- Any arrears of child maintenance accumulated from December 15, 2015, under the October 2012 Consent Order are forgiven.

5.0 Should I vary Mr. Wright's table amount of child maintenance retroactively from July 6, 2012 to October 27, 2015?

[51] As an opening comment, I see no basis in law for Mr. Wright to seek a retroactive variation of his child maintenance obligations going back to July 6, 2012, given that he signed the existing Consent Order approximately three months later on October 17, 2012, and the Consent Order was issued on October 31, 2012.

[52] Mr. Wright's counsel did not provide me with any authority supporting Mr. Wright's request that I grant a variation application going back to a date which precedes the October 2012 Consent Order. I reject his request for a retroactive variation to July 6, 2012 and focus my analysis on whether the existing Consent Order should be varied from the date when it was issued (October 31, 2012).

5.1 The law

[53] For Mr. Wright's retroactive variation to succeed, he must prove two things. First, he must prove that since the October 2012 Consent Order, there has been a material change of circumstances. This means proving that a change has occurred which is significant, long-lasting and not one of his choice. Second, he must prove that but for his delayed application, a reduction in child maintenance would have been granted. If Mr. Wright fails to prove both these things, his claim for retroactive relief must fail: *Smith v. Helppi*, 2011 NSCA 65.

5.2 Has Mr. Wright proved that there has been a material change of circumstances since the October 31, 2012, Consent Order?

[54] Mr. Wright argues that there has been a material change of circumstances since the October 2012 Consent Order. In his Supplemental Affidavit sworn to on November 25, 2016 (Exhibit 5), he asserts the following in paragraphs 18-22 under the heading, "Change of Circumstances":

- At the time the October 2012 Consent Order was issued, his estimated annual income of $26,500.00 was based on his occupation, his annual income and his continued physical ability to work;

- Due to his right knee injury in December 2011, and several unexpected injuries that followed, he has suffered a marked physical deterioration in his ability to work and maintain employment.

- At the time the October 2012 Consent Order was issued, he did not anticipate that his right knee injury would have lasting and detrimental effects on his ability to continue working. He also did not anticipate he would endure subsequent injuries further inhibiting his ability to work.

- Notwithstanding his attempts to return to work, he remains unable to maintain consistent employment.

[55] Similar arguments were advanced in his pre-hearing brief and during closing oral submissions. Emphasis was also placed on the fact that Mr. Wright's reported income from 2012 onwards was always below the imputed income of $26,500.00 agreed to in the October 2012 Consent Order. Mr. Wright argued that this constitutes a change in circumstances since it would result in a different child maintenance order: s. 14(a) of the *Guidelines*.

[56] I reject Mr. Wright's arguments that there has been a material change of circumstances for the following three reasons:

i) Mr. Wright knee injuries were known when he signed the October 2012 Consent Order

[57] Mr. Wright agreed to the terms of the Consent Order at the Conciliation Meeting in June 2012. He then signed the Consent Order without objection on October 17, 2012. This was almost ten months after sustaining his right knee injury and was also after he sustained his left knee injury and underwent surgery for it. Mr. Wright therefore knew about both knee injuries when he signed the Consent Order. These injuries were not something new which arose after the Consent Order was issued. Indeed, at the time he signed the Consent Order, Mr. Wright indicated that he was working, as opposed to being unable to work, temporarily or otherwise, because of his injuries.

[58] While Mr. Wright may not have known exactly how his recovery process would unfold, it is clear that he was given multiple opportunities to raise the issue of how either of his knee injuries potentially prevented him from working, to suggest that his agreed upon income was subject to his ability to return to drywalling work, or even to back out of the tentative agreement. Specifically, he could have raised any of these points: at the Conciliation Meeting of June 21, 2012; after he received the Court Officer's/Conciliator's letter of July 26, 2012; or after receiving the Court Officer's/Conciliator's letter of October 5, 2012. Mr. Wright nevertheless signed the Consent Order without raising any objection.

ii) Mr. Wright expressly agreed to imputing income at $26,500.00 based on doing "odd jobs". Thus, simply retroactively adjusting his child maintenance obligation now based on his reported income is not appropriate

[59] In the October 2012 Consent Order, Mr. Wright expressly agreed that he was working and that his annual income was approximately $26,500.00. The order does not say how Mr. Wright earned that income (e.g. through drywalling or otherwise) but simply indicated that he was "self-employed" and earned his income from doing "odd jobs". Notably, the $26,500.00 figure was considerably less than the incomes he reported in 2008 and 2010. In each of these years, his reported income exceeded $40,000.00. The imputed income of $26,500.00 was also less than his reported income in 2009.

[60] While Mr. Wright asks me to vary his child maintenance payments retroactively based on his reported income, I conclude that doing so would not be appropriate given the basis on which income was imputed to him in the first place. Indeed, Mr. Wright candidly acknowledged that he historically did not always report all his income. For example, while his reported income for 2011 was zero, he acknowledged that he earned slightly less than $30,000.00 that year doing "cash jobs". Mr. Wright testified that this was partly why he felt agreeing to the $26,500.00 income figure in the 2012 Consent Order was a fair estimate of his prospective income.

[61] When a child maintenance obligation is based on an imputed income, as is the case here, this is a determination of a fact that requires a more comprehensive analysis on a subsequent variation application that goes beyond simply looking at the payor's Line 150 of his or her tax return. For example, in ***Power v. Power,*** 2015 NSSC 234, Justice Jollimore stated:

> [13] In *Trang*, 2013 ONSC 1980, Justice Pazaratz addressed the question of whether a payor could simply rely on his or her current income (shown on line 150 of his or her tax return) in a variation application where the order sought to be varied was based on imputed income. He said, at paragraph 51:
>
> > When the court imputes income, that's a determination of a fact. It's not an estimate. It's not a guess. It's not a provisional order awaiting better disclosure, or a further review. It's a determination that the court had to calculate a number, because it didn't feel it was appropriate to rely on - or wait for - - representations from the payor.
>
> [14] …According to the Court of Appeal in *Gaetz v. Jakeman*, 2005 NSCA 77, a variation application is neither an appeal nor an opportunity to re-litigate the prevailing order. A variation application proceeds on the basis that the prevailing order was correct when it was made, and that it has been superseded by later events.
>
> [15] At paragraphs 43 to 60 in *Trang*…Justice Pazaratz considered whether all variation applications involve the same analysis. At paragraph 46, he concluded that where support is based on imputed income, "a more comprehensive analysis is required" in variation applications. This analysis compels me to consider:
>
> > *Why* did income have to be imputed in the first instance? Have those circumstances changed? Is it still appropriate or necessary to impute income to achieve a fair result?
> >
> > *How* exactly did the court quantify the imputed income? What were the calculations, and are they still applicable?
>
> [16] Justice Pazaratz said, at paragraph 52 in *Trang*, 2013 ONSC 1980, when a payor argues that an imputed income level is no longer appropriate, the payor must "go beyond establishing [his or her] subsequent "declared" income". The payor must offer evidence of changed circumstances that establishes either:

> It's no longer necessary or appropriate to impute income and the payor's representations as to income should now be accepted, even if they weren't before; or
>
> Even if income should still be imputed, a different amount is more appropriate, given changed circumstances.
>
> [17] …As Justice Pazaratz said, at paragraphs 53 to 60 in *Trang*…allowing a payor to vary child support based on declared income, after income has been imputed, defeats the purpose of imputing income. The burden is on the party seeking the variation to prove that circumstances have changed, not for the support recipient to prove that income should still be imputed to the payor. [Emphasis added].

[62] I conclude that to establish a material change of circumstances, Mr. Wright must go further than simply point to his line 150 reported income number on his tax returns and now ask me to retroactively vary his child maintenance obligation based on same. Indeed, at no time before filing his variation application in October 2015 did Mr. Wright suggest the October 2012 Consent Order did not reflect his circumstances or even provide Ms. Nunn with the income tax information on which he now relies. This is despite being under an obligation to produce that information annually to her under paragraph 8 of the Order.

iii) Mr. Wright has failed to establish that his medical conditions prevented him from reasonably working in any capacity

[63] Mr. Wright claims that his knee injuries prevented him from working prior to his accepting the position at PartSource in April 2015. To the extent that he relies on this to justify a retroactive reduction in his child maintenance obligation, he bears the burden of persuading me that, from October 2012 onwards, those injuries reasonably prevented him from working: *MacDonald v. MacDonald*, 2010 NSCA 34; *MacGillivary v. Ross*, 2008 NSSC 339.

[64] Mr. Wright has failed to discharge that burden. In coming to this conclusion, I point out the following:

- By September 2012, he had recovered from his right knee injury to the point he had resumed his heavy physical work of drywalling and was playing softball with a knee brace.

- Even after sustaining his second knee injury in September 2012, Mr. Wright has not provided sufficient evidence that he was unable to work in any capacity because of his knee injuries. Specifically, Mr. Wright did not introduce any medical records which existed prior to him first seeing Dr. Seetharamdoo in September 2014 for his back pain except for two records from October and November 2012 which relate to his surgery and post-operative recovery from his left knee injury (Exhibit 12, Tabs 1 and 2). Those records do not provide any opinion on Mr. Wright's ability to work.

During cross-examination, Mr. Wright conceded that he has not provided any medical evidence which indicated he needed to be put off work from July 2012 to September 2014. This lack of medical documentation comes despite him testifying in re-examination that he had obtained his prior medical records on a disk from his former family physician, Dr. Cheah, going all the way back to when he was approximately 15 years old. Mr. Wright indicated that he still has that disk and has looked at it. Thus, presumably he could have produced medical documentation which existed prior to September 2014.

- Dr. Seetharamdoo never opined that Mr. Wright was unable to work prior to September 2014 because of his knee injuries. To the contrary, Dr. Seetharamdoo testified that he never specifically treated Mr. Wright for his knee injuries. Furthermore, while he started treating Mr. Wright in September 2014, Dr. Seetharamdoo agreed that it was not until January 2016, that he opined Mr. Wright should be put off work largely due to his degenerative back condition and associated pain. By Mr. Wright's own evidence, his back pain did not become disabling until December 2015 - i.e. after Mr. Wright filed his variation application.

- During cross-examination, Ms. Nunn asked Mr. Wright why, if his knee injuries prevented him from doing the heavy physical work of drywalling, he didn't seek employment which he physically could do from 2012 onwards. In response, Mr. Wright referenced his pain but also largely justified his failure to seek alternative employment until late 2014/early 2015 by suggesting that as a 40+ year old Black male with a high school diploma, he believed it would be difficult for him to find employment.

Certainly, I can accept that Mr. Wright may face certain challenges when seeking employment. However, this does not relieve him of his responsibility to seek employment that he can do in order to try to meet his child maintenance obligation to Megan. Indeed, like all parents, he is expected to reasonably seek employment given his age, education, experience, skills and overall health. This includes an obligation to seek employment which does not require significant skills or employment in which the necessary skills can be learned on the job even where, as Mr. Wright asserts, he has limited work experience and skills.

Mr. Wright has failed to provide any evidence of specific employment opportunities he pursued before late 2014/early 2015. Furthermore, the medical evidence falls far short of establishing that he was reasonably unable to do any form of employment. For example, according to the November 9, 2015, Progress Notes of Dr. Seetharamdoo, Mr. Wright was asked by the Workers' Compensation Board to "find a lighter job" (Exhibit 12, Tab 3**).** It appears that it was only in late 2014/2015 that he decided to focus on pursuing "lighter work" and, within months after doing so, was able to secure the job at PartSource which, by his own evidence, was not a physically demanding job and one that he was able to do until December 14, 2015.

Again, to find that a change has been material, I must be satisfied that the change is significant, long-lasting, and not one of choice. Even if I accept that Mr. Wright's knee

> injuries impacted on his ability to do drywalling work, he has failed to outline any efforts he made to earn income which would replace any lost income from drywalling or to provide medical evidence as to how his knee injuries prevented him from doing any form of employment for which he was reasonably suited. While it may have been his choice not to seek "lighter work", Megan should not suffer because of that choice.

[65] Thus, for the three reasons above, I conclude that Mr. Wright has failed to prove there has been a material change of circumstances which is significant, long-lasting and not one of choice.

[66] Only if there is a material change do I need to consider the second question of whether Mr. Wright's application for a retroactive variation to his child maintenance obligation would have been granted if it had been made on a timely basis. Given that I have concluded that he has failed to demonstrate a material change, it is not necessary for me to address the question of whether a reduction would have been granted but for his untimely application.

[67] I will say, however, even had I done that full analysis and concluded that Mr. Wright possibly met both requirements, I would be very hesitant to exercise my discretion to grant Mr. Wright's claim for retroactive relief. Megan has a fundamental right to financial maintenance from both her parents. Plainly, however, since the parties separated in 2002 or 2003, Ms. Nunn has done almost all the heavy lifting when it comes to financially supporting Megan. Indeed, while Ms. Nunn was gainfully employed, she never formally sought child maintenance from Mr. Wright until 2012 after she lost her job of twenty years. It was only then that she commenced a legal proceeding after she claims he refused to voluntarily provide her with any child maintenance for Megan.

[68] While it appears that Megan has done well under Ms. Nunn's care over the last several years, and that Ms. Nunn has ensured that Megan has not gone without, the evidence suggests that Mr. Wright has contributed very little to the cost of Megan's care. Again, he signed a letter on September 7, 2008, stating that he was not paying maintenance payments for Meghan nor had there been any maintenance payments made. Furthermore, even after agreeing to the terms of the October 2012 Consent Order, he made very limited voluntary payments of child maintenance which has resulted in a significant amount of arrears of over $9,000.00. He also acknowledged in cross-examination that he received funds from a settlement arising out of his first knee injury sustained in December 2011 but did not use any of those funds to pay off any of his existing arrears of child maintenance. Thus, in my view, it would be inequitable to essentially "wipe the slate clean" as Mr. Wright now requests.

[69] Thus, while I find that Mr. Wright's variation application is clearly deficient on the evidence, even had I found otherwise, I would not be inclined to exercise my discretion to grant his retroactive relief given the unique circumstances of this case.

6.0 Whether Ms. Nunn is entitled to a retroactive contribution to the net costs of Megan's braces incurred in 2013 and 2014?

[70] Ms. Nunn seeks a 50% retroactive contribution to the net cost of Megan's braces. This expense arose in 2013 and 2014. The total cost of the braces was $5,900.00 and the net cost to Ms. Nunn was $3959.02 (Exhibit 22, Supplemental Affidavit #1 of Jacquelene Nunn sworn to on January 27, 2017, Exhibit "C"). Ms. Nunn seeks a retroactive contribution from Mr. Wright of $1,979.51.

[71] Mr. Wright agrees that the cost of braces constitute a proper s. 7 expense under s. 7(1)(e) of the *Guidelines*. During his counsel's closing argument, it was suggested that the cost should be shared proportionately based on the parties' reported incomes from 2013 and 2014. His counsel provided a chart and stated that, based on a proportionate calculation, Mr. Wright should pay $438.40 toward the cost of Megan's braces. This chart used Mr. Wright's reported line 150 incomes as opposed to the $26,500.00 income he agreed to in the 2012 Consent Order.

6.1 The law

[72] Retroactive awards, like retroactive reductions, are discretionary. However, they are treated differently: *Smith v. Helppi,* 2011 NSCA 65 governs retroactive reductions while *D.B.S. v. S.R.G.*, 2006 SCC 37 governs retroactive awards.

[73] When deciding whether to make a retroactive award, a judge must balance the competing principles of certainty and flexibility, while respecting the core principles of child support. Those core principles are: child support is the right of child; the child's right to support survives the breakdown of the relationship between the child's parents; child support should, as much as possible, perpetuate the standard of living the child experienced before the parents' relationship ended; and the amount of child support varies, based upon the parent's income: *D.B.S. v. S.R.G.*, 2006 SCC 37, para. 38.

[74] In deciding if a retroactive award is appropriate, I am to consider: the reason for Ms. Nunn's delay in seeking a contribution to the cost of Megan's braces; Mr. Wright's conduct; Megan's past and present circumstances; and whether a retroactive award would result in hardship to Mr. Wright. All of these factors must be considered and none, on its own, dictates what I should do: *D.B.S. v. S.R.G.*, 2006 SCC 37, para. 99.

[75] Retroactive claims for s. 7 expenses are also different from retroactive claims for basic child maintenance. Julien D. Payne and Marilyn A. Payne, in *Child Support Guidelines in Canada, 2015* (Toronto: Irwin Law Inc., 2015), make this point as follows:

> Many of the policy issues and factors that are addressed in relation to retroactive basic child support are also applicable to claims for a contribution to section 7 expenses […] However, there is one fundamental difference. Basic child support reflects the right of the child to have his essential needs met. Extraordinary expenses […] are not a basic right of the child and there is no inherent obligation in the parents to pay for such activities. An order for a retroactive contribution to

> such expenses may be deemed unfair where the [payor] had no knowledge of these expenses and had no idea that he might ultimately be called to contribute towards them […] Limits may be judicially imposed on the retroactivity of an order for a contribution to section 7 expenses so as to promote fairness in light of the attendant circumstances…(p. 462)

[76] Megan's costs for braces were incurred in August 2013 and 2014. It appears that Mr. Wright had no notice of this until Ms. Nunn filed her Response to Variation Application in February 2016.

[77] The parties agree that Megan's costs constitute a special expense under clause 7(1)(e) of the *Guidelines*. The guiding principle is that the expense should be shared in proportion to the parties' incomes given that Megan did not contribute to the costs of her braces: subsection 7(2) of the *Guidelines*.

[78] When I consider all the principles involved in retroactive awards and special expenses, and the evidence in relation to them, I accept Mr. Wright's position that he should be required to contribute $438.40 towards the retroactive cost of Megan's braces (i.e. the figure his counsel proposed in closing argument as representing a proportionate sharing of the expenses based on the parties' reported incomes for 2013 and 2014). I order that he must make this payment by no later than February 16, 2018.

[79] I realize that such a figure is significantly less than a proportionate contribution using the $26,500.00 annual income imputed to Mr. Wright in the October 2012 Consent Order. However, to the extent that retroactive s. 7 claims are discretionary, I find this figure to be an appropriate contribution by Mr. Wright when I balance and weigh all the factors. I come to this conclusion largely because, as noted earlier, I am satisfied that Mr. Wright's present medical conditions and circumstances render him unemployed without any income. Thus, I conclude that requiring Mr. Wright to now make a proportionate sharing of the costs based on an income of $26,500, or an even higher 50/50 contribution as Ms. Nunn seeks, would result in too great of a hardship to him.

8.0 What amount, if any, should Mr. Wright contribute to Megan's university costs and health-related expenses that exceed insurance reimbursement from 2016 onward?

8.1 University expenses

[80] Megan started attending Acadia University in September 2016. She is enrolled in a four-year program and has completed her first year.

[81] Clearly, Megan is a bright young woman. She was awarded various scholarships, bursaries and grants worth several thousand dollars (Exhibit 23, Supplemental Affidavit #2 of Ms. Nunn sworn to on February 24, 2017, Paragraph 4). Ms. Nunn indicated that Megan could lose some of that funding if she does not maintain a certain grade point average.

[82] Megan has also received the benefit of an RESP fund which was created by Ms. Nunn's parents. She has also earned some income working a part-time job on campus and has taken out a student loan.

[83] Ms. Nunn seeks a $476.28 contribution from Mr. Wright towards Megan's 2016-2017 university costs and asks that each parent be ordered to contribute equally to Megan's university costs in future years.

[84] Given that I have concluded that Mr. Wright's combination of injuries justified his being off work since December 2015, and that Ms. Nunn is not seeking to impute income to him since that time, I decline to order that Mr. Wright contribute to Megan's university expenses for the 2016/2017 academic year. Again, however, Mr. Wright remains obligated to seek out employment which he physically is able to do. Thus my decision does not impede Ms. Nunn from seeking a contribution to Megan's university costs in subsequent years.

8.2 Health-related Expenses which Exceed Insurance Reimbursement

[85] Ms. Nunn also claims a 50% contribution from Mr. Wright for health-related costs for Megan not covered by insurance incurred in 2016. The total contribution sought is $108.25.

[86] For the same reasons I have given with respect to the claimed university costs, I decline to order any contribution from Mr. Wright to Megan's health-related costs not covered by insurance in 2016. Again, this does not preclude Ms. Nunn from seeking a contribution for health-related expenses which exceed insurance reimbursement in future years.

9.0 Should the parties be enrolled in the Administrative Recalculation of Child Support Program?

[87] The parties agree to be enrolled in the Administrative Recalculation of Child Support Program. I therefore order same without making any finding as to whether or not the parties are actually eligible to enroll in that Program. I note that the requirements for the Program are outlined in NS Reg 16/2014, s. 9.

10.0 Conclusion:

[88] In summary:

- Mr. Wright's child maintenance payments from December 15, 2015, forward are set at $0.00, subject to the terms and conditions outlined in paragraph 50;
- I dismiss Mr. Wright's application to retroactively vary his child maintenance payments from July 6, 2012, to October 27, 2015;
- Mr. Wright must pay $438.40 to Ms. Nunn as a contribution to the cost of Megan's braces by no later than February 16, 2018;

- I dismiss Ms. Nunn's request for a contribution from Mr. Wright to Megan's 2016/2017 university costs;

- I dismiss Ms. Nunn's request for a contribution from Mr. Wright to Megan's 2016 health-related costs that exceeded insurance reimbursement;

- Mr. Wright will maintain Megan under any medical plan available to him through his employment; and

- To the extent the parties are eligible, they will be enrolled in the Administrative Recalculation of Child Support Program for prospective child maintenance.

[89] New counsel has taken carriage of the file for Mr. Wright. I therefore direct that his new counsel prepare the Order arising from my decision which should be consented to as to form by both parties.

[90] My decision results in mixed success to the parties. If either party wishes to seek costs and the parties cannot reach agreement on this, each party should file a submission on costs no later than three weeks from today's date.

Jesudason, J.