

SUPREME COURT OF NOVA SCOTIA (FAMILY DIVISION)

Citation: *Bennett v. Bennett*, 2015 NSSC 395

ENDORSEMENT

Peter Bennett v. Brenda-Leigh Bennett;
Prothonotary No. 1201-061129; SFH-D 049236

August 18, 2015

- Brenda-Leigh Bennett on her own behalf
- Marsha Curry for Peter Bennett

Ms. Bennett applied to vary child support retroactively and prospectively. The couple's daughter, Alice, will turn nineteen next month. Mr. Bennett asked that I authorize recalculation of child support pursuant to the Administrative Recalculation Program.

As the application approached hearing, Ms. Bennett determined that she wanted to argue that retroactive child support should be calculated having regard to all of section 9 of the *Federal Child Support Guidelines*, SOR/97-175. Since Mr. Bennett believed any retroactive claim would be calculated based only on subsection 9(a), I first consider whether I will exercise my discretion to make a retroactive award.

Decision:

1. Peter Bennett owes Brenda-Leigh Bennett no child support for the period from November 2014 to April 2015.
2. Peter Bennett shall immediately pay Brenda-Leigh Bennett child support of \$3,550.00 for the period from May 2015 to and including September 2015.
3. Subject to her resuming the status of child of the marriage, child support payments for Alice Bennett shall end on the payment of \$3,550.00.
4. The claim for retroactive child support is dismissed.
5. The order shall not be registered for administrative recalculation.

Reasons:

1. Where prospective and retroactive variations are claimed, prospective child support must be addressed first because it may influence whether there is undue hardship to be considered in the context of the retroactive support claim.
2. There are two different periods to be considered in determining child support since November 2014. First, from November 2014 until May 2015, Alice was in a shared parenting arrangement. Second, according to both Alice and Ms. Bennett, from May 2015 to date, Alice has had her primary home with her mother. While Mr. Bennett did not agree with this, his evidence on this point was not within his personal

knowledge.

November 2014 to April 2015

3. While in a shared parenting arrangement, Alice's child support is determined by section 9 of the *Federal Child Support Guidelines*. Based on line 150 of their 2014 tax returns, Mr. Bennett's 2014 income was \$80,394.00 and Ms. Bennett's 2014 income was \$51,965.00.
4. Mr. Bennett argued that \$450.00 should be added to Ms. Bennett's income each month because Del Clarke lived with her and paid this amount to her. I reject this argument as it relates to 2014 when Mr. Clarke shared expenses with Ms. Bennett and his contribution to the household was offset by the expenses which resulted from his presence there.
5. Throughout the first six months of 2015, Del Clarke paid \$450.00 each month to store items at Ms. Bennett's home while he did not live there and was not sharing expenses with her. I am prepared to add \$2,700.00 to Ms. Bennett's 2015 income to recognize these funds.
6. Ms. Bennett argued that some unstated amount should be added to Mr. Bennett's income each month because he provided housing, at no cost, to Janice Shrum.
7. Janice Shrum was, until 2010, Mr. Bennett's common law spouse. Their relationship ended and she moved to her parents'. In one week's time, Ms. Shrum returned to Mr. Bennett's home where she has lived since.
8. Mr. Bennett said Janice Shrum attends to household tasks that he cannot manage because of a back injury. He said that following his back injury he was unable to access the lower half of the fridge or dishwasher, lift any groceries, do any yard work, or lift 20kg bags of water softener salt. He said the difficulties with his back continue and Ms. Shrum "continues to do the housework that requires lifting and bending as well as most of the yard work when required." He said "I can do all of the chores most of the time but sometimes I can't do any chores at all." He offered no evidence of how often he needs assistance with the chores.
9. Both Mr. Bennett and Ms. Shrum describe their relationship as "roommates". It is reasonable to expect that, as a roommate, Ms. Shrum would contribute to household chores.
10. Mr. Bennett's injury does not prevent him from living an active life. He said that he enjoys "outdoor activities including hiking and camping, fishing, rowing, bike riding, skating, swimming and gardening and sledding." He said that he and Alice indulge in these activities as well as "croquet, horseshoes and Frisbee." Annually, he is able to take a car trip to Newfoundland and Labrador. He taught Alice "to row a boat, drive a dirt bike and to drive a car." As well, he's been able to perform maintenance on

Alice's car and other cars.

11. Mr. Bennett's work schedule does not mesh with Ms. Shrum's, so there are times when he is without her assistance. He works shifts which mean that he may frequently be at home on weekdays, while Ms. Shrum works day-time hours, from Monday to Friday.
12. Ms. Shrum pays for her own groceries and for a portion of the cable package. She pays bills associated with dogs at the home. She does not pay any rent.
13. Mr. Bennett did not provide any evidence about what it would cost to hire someone to perform the tasks that Ms. Shrum performs. He did not explain why these tasks could not be performed by Alice, who lived with him at least forty percent of the time, or with the assistance of his older daughters.
14. No evidence was offered about the amount Mr. Bennett might reasonably expect a tenant to pay for occupying his home.
15. Pursuant to subsection 19(1) of the *Federal Child Support Guidelines*, I find it is appropriate in the circumstances to impute an additional \$3,600.00 in annual income to Mr. Bennett. This equates to a modest monthly payment of \$300.00. Mr. Bennett's Statement of Expenses shows he pays \$1,529.50 each month to operate the home.
16. For 2014, I find Mr. Bennett's income is \$83,994.00 (for which he would pay monthly child support of \$710.00). I find Ms. Bennett's income for 2014 is \$51,965.19 (for which she would pay monthly child support of \$437.00). The set off amount is \$273.00.
17. Having regard to subsection 9(b) of the *Guidelines*, Mr. Bennett says that shared parenting results in some duplication of expenses: Alice has wardrobes in each home, a bicycle in each home and toiletries in each home.
18. Alice buys many of her own clothes, so this expense is somewhat mitigated. The bicycles are a non-recurring cost.
19. I was not told how much more costly it is for toiletries because Alice is in a shared parenting arrangement. Mr. Bennett's monthly expense for toiletries and household supplies is \$40.00. He has not isolated his costs from Alice's. In no circumstances would I expect Alice to carry her toiletries back and forth between her parents' homes, so the issue is one of consumption: how much greater is Alice's consumption of toiletries because she spends at least forty percent of her time at her father's than it would be if she spent less than forty percent of her time there? Given that some of the expense is for her father and some of the expense would exist if she was spending less than forty percent of her time with her father, I estimate that at most, the

additional toiletries cost resulting from her shared parenting was \$10.00.

20. Ms. Bennett did not identify any additional costs because of the shared parenting arrangement. She itemized expenses she had as a result of providing a home for Alice, but none existed solely because of the shared parenting arrangement.
21. Subsection 9(c) of the *Guidelines* requires me to consider “the condition, means, needs and other circumstances of each spouse and of any child for whom support is sought.” Ms. Bennett has clearly identified a number of Alice’s direct costs which only she incurred or which she incurred in a greater amount than Mr. Bennett: hair grooming (\$62.29 for Alice) and clothing (\$125.00 budgeted for the household). Mr. Bennett’s budget for these items was \$30.00 and \$50.00, respectively. Ms. Bennett calculated the direct costs relating to Alice at \$548.26 each month. This amount is exclusive of any costs to, for lack of a better phrase, equalize the households’ standards of living.
22. During this period, Alice was working part-time and contributing to her own costs for clothing, recreation and entertainment.
23. The set-off payment of \$273.00, in addition to Ms. Bennett’s own contribution to Alice’s costs (estimated at the table amount of \$437.00), easily allows Ms. Bennett to meet all the costs she has itemized for Alice and allows additional funds of \$161.00 each month.
24. In these circumstances, I find that Mr. Bennett’s monthly payment of \$250.00 remained appropriate from November 2014 until May 2015.

May – September 2015

25. Alice has had her primary home with her mother since May 2015, according to Ms. Bennett. Mr. Bennett provides a more detailed record of Alice’s residence but it was not within his personal knowledge, rather it was based on hearsay. I find that Alice has not been in a shared parenting arrangement since May 2015 and has had – between her parents – her primary residence with her mother.
26. According to subsection 3(1) of the *Guidelines*, a child under the age of majority is presumptively entitled to child support calculated having regard to sections 3 and 7 of the *Federal Child Support Guidelines*.
27. Alice has had no special or extraordinary expenses from May to date. For the months of May, June, July, August and September 2015, Mr. Bennett shall pay Ms. Bennett monthly child support of \$710.00. This amount (\$3,550.00) is due immediately.

October 2015 and beyond

28. Alice turns nineteen on September 14, 2015.
29. Alice is currently working almost full-time hours at McDonald's where she earns between \$400.00 and \$500.00 bi-weekly, according to Ms. Bennett.
30. According to her paystubs, Alice earns \$10.83 per hour. To earn between \$400.00 and \$500.00 bi-weekly, Alice would need to be working between thirty-six and forty-six hours during each bi-weekly pay period: this is far less than full-time hours. If she is working almost full-time hours, I would expect this to be between twenty-five and thirty-five hours each week and earning between \$540.00 and \$750.00 bi-weekly.
31. Alice hopes to attend flight school in Moncton in May 2016. Pending results of medical tests, she has not applied to the flight school. Her alternate plan is to attend the Nova Scotia Community College, starting in January 2016, to take a culinary arts course. She has not applied for admission into this program, either.
32. In either event, Alice has not applied for enrolment in any educational institution for the coming year.
33. Even when Alice applies to the Community College or the flight school, her admission isn't certain.
34. In essence, Ms. Bennett wants me to find that a young person who is planning on furthering her education remains a child of the marriage. I was not offered any judicial authority to support this proposition. In contrast, there is the decision of Justice Dellapinna in *Mason-Cramm v. Cramm*, 2008 NSSC 308 where Ms. Mason-Cramm argued that since her daughter planned to return to university in the next year, she should be found to be a child of the marriage. Justice Dellapinna held that the daughter might regain that status but that she did not, at the time of the application, have that status. Similar reasoning and results are found in *A.W.H. v. C.G.S.*, 2007 NSSC 181.
35. While Alice is over the age of nineteen and not pursuing an education, she is not a child of the marriage and no longer entitled to receive child support from her father.
36. Alice's status may change if and when she returns to school. At this point, she is disentitled to receive child support when she turns nineteen. Mr. Bennett's child support payments for her shall cease when he has paid the \$3,550.00 I have ordered.

Entitlement to retroactive support

37. In deciding whether to make a retroactive award, I am to balance the competing principles of certainty and flexibility, while respecting the core principles of child support. Certainty means protecting the interest of someone who abides by the terms of a court order. Flexibility means adjusting an order, even retroactively, when appropriate. The core principles of child support 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.
38. At paragraphs 99 to 116 in *D.B.S. v. S.R.G.; L.J.W. v. T.A.R.; Henry v. Henry; Hiemstra v. Hiemstra*, 2006 SCC 37, Justice Bastarache, writing for the majority of the Supreme Court of Canada, discussed the factors I should consider before awarding support retroactively. The analysis requires each parent making a claim to offer evidence of the reason for the delay in advancing his or her retroactive claim, any blameworthy conduct on the other parent's part, the child's past and current circumstances and whether a retroactive award would cause the paying parent undue hardship. I am to balance these factors in the context of certainty and fairness.
 39. Justice Bastarache wrote at paragraph 96 in *D.B.S. v. S.R.G.; L.J.W. v. T.A.R.; Henry v. Henry; Hiemstra v. Hiemstra*, 2006 SCC 37, "As situations evolve, fairness demands that obligations change to meet them. Yet, when obligations appear to be settled, fairness also demands that they not be gratuitously disrupted."
 40. In her Affidavit of June 15, 2015, Ms. Bennett gave her reasons for delaying: "I did not have faith that Mr. Bennett would not pass along his anger to Alice if I asked the court to update the child support amounts."
 41. Alice said that her father makes her feel like a financial burden. Ms. Bennett identified circumstances where Mr. Bennett sought reimbursement for insignificant expenses: \$7.00 per visit to a therapist; \$12.50 for an annual insurance deductible; \$1.75 per visit to a chiropractor.
 42. As best can be determined, the chiropractor and therapist expenses arose in 2014, so they could not have caused Ms. Bennett to delay making her claim in 2011, 2012 or 2013.
 43. Ms. Bennett said she wanted retroactive support "because the only reason I did not apply in a timely manner was Mr. Bennett's behaviour toward Alice and the damage it could potentially inflict on her emotional state."
 44. Ms. Bennett did not explain why she ceased to have concerns for Alice's emotional state or why these concerns had abated sufficiently for her to make her variation application last year.
 45. Ms. Bennett said she would not discuss her financial situation with Mr. Bennett: "It was a matter of particular pride to not need help, especially from my ex husband." In doing so, she promoted – in Mr. Bennett – a sense that it was acceptable that he continue to pay exactly what the Corollary Relief Judgment demanded.
 46. According to the majority reasons at paragraph 103 in *D.B.S. v. S.R.G.; L.J.W. v. T.A.R.; Henry v. Henry; Hiemstra v. Hiemstra*, 2006 SCC 37, recipient parents must

- act promptly and responsibly in monitoring the amount of support paid. Ms. Bennett hasn't offered a reasonable explanation of her delay in seeking to adjust child support payments from the time of the divorce until late 2014.
47. I conclude that Ms. Bennett's delay is not reasonable.
 48. I am to consider whether Mr. Bennett's conduct has been blameworthy.
 49. Following the 2007 divorce, Ms. Bennett told Mr. Bennett that she wasn't going to provide him with her financial disclosure. Of course, this didn't absolve Mr. Bennett of his obligation to provide his disclosure. Each parent's disclosure obligation isn't dependent on the other parent. Mr. Bennett had counsel in 2007. The Supreme Court of Canada's decision on retroactive support was released in July 2006, so Mr. Bennett's counsel would be aware of importance of ongoing disclosure and it was Mr. Bennett's counsel who prepared the Corollary Relief Judgment requiring disclosure.
 50. Mr. Bennett says that Ms. Bennett "never asked me for my financial information and she never asked for an increase in child support." However, he also says "Brenda-Leigh Bennett would regularly complain to me about not having enough money." He attributes this to her "overspending on non-essential items for Alice" rather than his inadequate child support.
 51. Mr. Bennett says he responded to Ms. Bennett's complaints by contributing to items which were not "section 7 expenses" such as "clothes, gifts, parties, and electronics." I would expect Mr. Bennett to contribute to these costs. His daughter lived with him at least forty percent of the time and these costs ought not to have been borne exclusively by her mother. A shared parenting arrangement presumes that each parent contributes to the child's living expenses and to costs (clothing, gifts, parties and electronics) that exceed the mundane.
 52. Mr. Bennett contributed to costs for Alice's prom, her sixteenth birthday party, her car and various gifts. He also contributed to the cost of her first year at Saint Mary's University.
 53. Even though his annual income always exceeded the amount stated in the Corollary Relief Judgment, Mr. Bennett did not adjust his child support payments. The majority reasons in *D.B.S. v. S.R.G.*; *L.J.W. v. T.A.R.*; *Henry v. Henry*; *Hiemstra v. Hiemstra*, 2006 SCC 37 make clear, at paragraph 124, that "Not disclosing a material change in circumstances – including an increase in income that one would expect to alter the amount of child support payable – is itself blameworthy conduct."
 54. According to the Corollary Relief Judgment, Mr. Bennett's 2006 income was projected to be \$59,864.88.
 55. Mr. Bennett did not disclose his income in 2007, 2008, 2009 or 2010. In this proceeding he disclosed his income from 2011 to the present. In 2011, his total

income was \$72,959.00. His total income in 2012 was \$74,678.59 and in 2013, it was \$76,755.39. In 2014, his income was \$80,394.00. These amounts are exclusive of the \$3,600.00 contribution from Janice Shrum that I have imputed.

56. Ms. Bennett's income in 2011 was \$41,748.00. In 2012, it was \$45,909.00. In 2013, it was \$45,165.00. Her income in 2014 was \$51,962.00.
57. Mr. Bennett said that the Corollary Relief Judgment ordered child support which was calculated solely on the basis of subsection 9(a) of the *Guidelines*. Ms. Bennett seems to have believed this as well.
58. This is not so, having regard to the parents' incomes in 2006 and the then-applicable tables. The set-off amount from the tables which applied in 2007 is \$147.00 per month. For whatever reason, the parties agreed that Mr. Bennett would pay child support that was seventy percent more than the set-off amount.
59. The set off amount for the years from 2011 to 2014 is shown in the table below. This includes amounts I've imputed to Mr. Bennett. If the parties believed that the appropriate amount of child support was the set off amount, the table below shows how close (or far) Mr. Bennett's monthly payment of \$250.00 was from that mark.

Year	Mr. Bennett's income	Table amount	Ms. Bennett's income	Table amount	Set-off
2011	76,559.00	660.00	41,748.00	363.00	297.00
2012	78,278.59	663.00	45,909.00	384.00	279.00
2013	80,355.39	680.00	45,165.00	379.00	301.00
2014	83,994.00	710.00	51,962.00	437.00	273.00

60. At best, Mr. Bennett's payments were ninety percent of the set-off amount. At worst, they were eighty-three percent of that. In every event, they were far less generous than the baseline amount ordered in 2007, which exceeded the set-off amount at that time by approximately seventy percent.
61. The Corollary Relief Judgment also ordered that Mr. Bennett contribute equally to any extraordinary expense or extra-curricular activity for Alice on which he and Ms. Bennett had earlier mutually agreed.
62. The parties agreed to equally share these expenses. Ms. Bennett's income was lower than Mr. Bennett's. The guiding principle of sharing special or extraordinary expenses is that they be shared in proportion to parents' incomes, after deducting any contribution by the child, according to subsection 7(2) of the *Guidelines*. So, this provision seems to favour Mr. Bennett. However, section 7 of the *Guidelines* only requires parents to contribute to extraordinary extra-curricular activities, so Mr. Bennett's agreement to contribute to extra-curricular activities, even if not extraordinary, is notable.

63. The *Guidelines* anticipate a contribution by the child. Since Alice has been working, her earnings could reduce the amount both her parents would contribute to her costs.
64. Since 2011, Alice has participated in no extra-curricular activities that have been identified to me.
65. Mr. Bennett has contributed to some expenses that would not be governed by section 7. I have noted the gifts, parties, car and prom earlier.
66. Mr. Bennett met – but did not exceed – his financial obligations under the Corollary Relief Judgment. He did not meet his disclosure obligation. Mr. Bennett’s view that he was contributing adequately would have been bolstered by Ms. Bennett’s adamant view that she did not require help.
67. Mr. Bennett’s conduct was blameworthy. His income increased by approximately \$20,000.00 (roughly one-third) since the divorce (exclusive of what I have imputed to him from Ms. Shrum) and he failed to adjust his child support.
68. I am to consider Alice’s circumstances in deciding whether to exercise my discretion to award retroactive child support.
69. Neither parent indicates any debt has been incurred to meet Alice’s past needs. Of the two, Ms. Bennett has sacrificed more to provide Alice with a standard of living which approximates the lifestyle Alice enjoys at her father’s home.
70. Alice has not yet applied to any post-secondary program. If she does, she will need financial support to pursue her education. Her own earnings (\$7,651.00 in 2014 and an estimated \$8,144.00 in 2015) are insufficient to finance post-secondary education fully. Her RESP may be insufficient, depending on the educational program she pursues. It’s expected her 2015 earnings will be greater than she had earlier projected.
71. I conclude that Alice could benefit from a retroactive award if she pursues post-further secondary education. If she does not, a retroactive payment is a windfall which doesn’t serve any of the purposes of child support.
72. Whether a retroactive award would create undue hardship for Mr. Bennett depends on the amount ordered.
73. According to Mr. Bennett’s Statement of Property, he has three vehicles collectively worth \$25,000.00. His home has a mortgage which will be retired by the end of 2015, relieving him of a monthly payment of \$865.00. He has RRSP contributions worth approximately almost \$12,000.00, and stocks valued at approximately \$12,000.00, in addition to an employment pension.

74. Having regard to these factors I conclude that I will not exercise my discretion to make a retroactive award for the period before November 2014. Until that time, Ms. Bennett was aware of the discrepancy between the households' lifestyles. She did nothing, though she told Mr. Bennett her finances were strained. Her comments, combined with her inaction, encouraged Mr. Bennett to rely on the *status quo*. If Alice decides to pursue her education, she may have recourse to future child support. In these circumstances, it is more appropriate to respect the certainty that the parties relied upon and I decline to exercise my discretion to award retroactive child support.

Recalculation authorization

75. Mr. Bennett has asked for a recalculation authorization provision in my order.
76. Recalculation authorization is outlined in NS Reg. 161/2014. Section 9 of the Regulations makes clear that I "must not" authorize recalculation in certain circumstances. While none of the circumstances enumerated in section 9 apply to the Bennetts, subsection 11(b) of the Regulations notes that a recalculation authorization order expires on the date that any child to whom the order applies reaches the age of majority.
77. Presumably this expiry is imposed because once the age of majority is reached, it is possible that child support may be calculation pursuant to clause 3(2)(b) of the *Guidelines*, rather than through the mechanical application of the tables.
78. Alice will reach the age of majority on September 14, 2015.
79. I see no benefit to registering the order for a period of days and decline to authorize recalculation.

Directions:

Ms. Curry shall prepare the order.

Elizabeth Jollimore, J.S.C.(F.D.)