

SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION

Citation: *Tobin v. Tobin*, 2019 NSSC 314

Date: 2019-10-21
Docket: 1201-061396
Registry: Halifax

Between:

Kevin Mark Tobin

Petitioner

v.

Anne Claire Tobin

Respondent

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Judge: The Honourable Justice Elizabeth Jollimore

Summary: Child support adjusted from August 2017 to date where parenting changed from a primary care to split care arrangement. Tax-free disability payments grossed-up. Annual RRSP withdrawals included in income for the purpose of determining child support.

Key words: Family, Split parenting, imputing income, special or extraordinary expenses

Legislation: *Federal Child Support Guidelines*, SOR-97/175, section 8, subsection 7(1.1), subsection 14(a), clause 19(1)(b)

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IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: *Tobin v. Tobin*, 2019 NSSC 314
ENDORSEMENT

October 21, 2019

Kevin Mark Tobin v. Anne Claire Tobin
1201-061396

- Kenzie MacKinnon, Q.C. for Kevin Tobin
- Judith Schoen for Claire Tobin

Heard: September 25 – 27, 2019

Reasons:

[1] As part of a variation application, Kevin Tobin asked to vary child support prospectively, and during the period from July 27, 2017 to date.

[2] Until July 27, 2017, the Tobins' two sons had their primary home with their mother. On July 27, 2017, the older son moved to his father's home where he remains. The younger son continues to have his primary home with his mother.

[3] The children are in a split parenting arrangement governed by section 8 of the *Federal Child Support Guidelines*, SOR-97/175.

[4] Where the parenting arrangements have changed from primary care to split custody, it is appropriate that I vary child support: subsection 14(a) of the *Guidelines*.

[5] The first step in determining the appropriate amount of child support is calculating each parent's income.

Determining Mr. Tobin's income

Mr. Tobin's disability insurance payments

[6] In each of 2017, 2018 and 2019 Mr. Tobin's main source of income was tax-free disability insurance payments of \$69,672.00. Mr. Tobin asks that these payments not be grossed up to their pre-tax value or that the rate at which they are grossed up be reduced because:

- Mr. Tobin has two children in addition to those involved in this variation application;
- Mr. Tobin's only income is his disability insurance benefits;
- Mr. Tobin's wife is unemployed;
- Mr. Tobin doesn't receive child support;
- Mr. Tobin is not receiving the Canada Child Benefit;
- The Tobins' younger son spends substantial time with Mr. Tobin, while the older son spends no time with Ms. Tobin; and
- Ms. Tobin owns her own home while Mr. Tobin does not.

[7] These considerations relate to the overall financial circumstances in Mr. Tobin's household and in Ms. Tobin's household. They do not relate to how I should determine Mr. Tobin's income.

[8] If Mr. Tobin wants me to consider the overall financial circumstances in his household to reduce his child support payments, the proper approach is an application for a finding of undue hardship under section 10 of the *Guidelines*. He hasn't made that application.

[9] The child support tables (Schedule I of the *Guidelines*) are based on taxable income.

[10] Under subsection 19(1) if I impute income, I am to impute an amount that I consider appropriate in the circumstances. Among the circumstances listed is where a party is "exempt from paying federal or provincial income tax" as Mr. Tobin is: clause 19(1)(b).

[11] Untaxed benefits must be grossed up to recognize what the benefits would be, if taxed: *Dahlgren v., Hodgson*, 1999 ABCA 23 at paragraph 5. This is justified by the need to ensure the same approach is applied to all parents when quantifying their child support obligations.

[12] Ms. Tobin asks me to gross up Mr. Tobin's income by 35% to approximate the taxes paid by a Nova Scotian whose after tax income was \$69,672.00. Grossed up by 35%, Mr. Tobin's annual income from disability payments would be \$94,057.20.

[13] I accept Ms. Tobin's submission and impute income to Mr. Tobin by grossing up his disability insurance payments by 35%. For each of 2017, 2018 and 2019, his income from his disability payments is \$94,057.20.

Mr. Tobin's RRSP withdrawals

[14] In each of 2017, 2018 and 2019 Mr. Tobin has withdrawn funds from his RRSP. In 2017, he withdrew \$11,111.00. In 2018, he withdrew \$6,388.00. This year he believes he withdrew between \$4,000.00 and \$5,000.00.

[15] Mr. Tobin asks that I not consider his RRSP withdrawals, saying that he's not living off his RRSPs and that while he has some remaining RRSP deposits, he is not looking to use them. He argued that some withdrawals were used to repay an order for retroactive child support.

[16] The variation order imposing the retroactive child support award said that if Mr. Tobin was required to withdraw funds from his RRSP to pay the retroactive award, those withdrawals would be excluded when determining his income for future child support payments. Mr. Tobin was ordered to pay the retroactive amount by May 30, 2017. I have no evidence that he failed to meet that deadline. This means that only his RRSP withdrawals in 2017 may be excluded.

[17] I have no evidence how Mr. Tobin used the funds he withdrew in 2018 and 2019. I conclude these funds should be considered in determining his income in 2018 and 2019.

[18] I find Mr. Tobin's 2017 income is \$94,057.20 (comprised only of disability benefit payments), his 2018 income is \$100,445.20 (disability benefit payments and RRSP withdrawals) and his 2019 income is \$98,557.20 (disability benefit payments and RRSP withdrawals). I have used \$4,500.00 as the RRSP withdrawal amount for 2019.

Determining Ms. Tobin's income

[19] Based on her tax returns, Ms. Tobin's 2017 income is \$31,617.00 and her 2018 income is \$43,112.00.

[20] Ms. Tobin described working at contract positions or as an instructor. Since the children were born it seems most of her employment has been at Dalhousie University. Her employment has not been continuous: she has been unemployed between contracts and received Employment Insurance benefits. Her current contract ends on November 15, 2019. She is unsure whether she will qualify for employment insurance benefits but offered no clear explanation why she would not qualify. If she qualifies, she anticipates the benefits will be approximately \$2,000.00 after tax.

[21] I find Ms. Tobin's 2019 earnings are \$47,544.00 (comprised of her earnings and \$2,400.00 in EI benefits – I have grossed up her after-tax figure of \$2,000.00 by 20%).

Historic child support: August 2017 to October 2019

[22] Using these income amounts, I have determined child support for August 2017 to the end of October 2019 as shown in the table which follows.

	Mr. Tobin's income and child support amount for 1 child	Ms. Tobin's income and child support amount for 1 child	Amount payable by Mr. Tobin to Ms. Tobin
August – November 2017	94,057.20 / 791	31,617 / 266	525 x 4 = 2,100
December 2017	94,057.20 / 807	31,617 / 271	536
2018	100,445 / 856	43,112 / 367	489 x 12 = 5,868
January – October 2019	98,557.20 / 842	47,544 / 404	438 x 10 = 4,380
Total owed			12,884

[23] The table shows that from August 2017 to the end of October 2019, Mr. Tobin should have paid Ms. Tobin a total of \$12,884.00. Mr. Tobin has made child support payments during this time: I don't know how much he has paid. The parties will need to determine whether he has paid more or less than \$12,884.00.

[24] The parties have tried to adjust child support on their own since their older son moved to Mr. Tobin's home at the end of July 2017. They formalized these adjustments in at least one order. The terms of orders relating to child support since July 2017 are replaced by the terms contained in this endorsement.

2020 child support

[25] Looking to 2020, Ms. Tobin accedes that Mr. Tobin's remaining RRSPs should not be considered in determining prospective child support in this application.

[26] Anticipating no RRSP withdrawal in 2020, I find Mr. Tobin's income is \$94,057.20. Though Ms. Tobin has no contract or position after November 14, 2019, she suggests her income be fixed at her 2018 income level. This is her highest level of earnings from 2017 to 2019 and I accept this.

[27] Based on these income levels if the parenting arrangement continues to be split parenting, beginning in January 2020 Mr. Tobin will pay Ms. Tobin monthly child support of \$440.00: at \$94,057.20, Mr. Tobin would pay Ms. Tobin \$807.00 each month and at \$43,112.00, she would pay him \$367.00.

Special or extraordinary expenses

[28] Ms. Tobin filed a Statement of Special or Extraordinary Expenses indicating costs for:

- health and dental insurance premiums for the children;
- health-related expenses exceeding insurance reimbursement;
- extraordinary educational costs; and
- extraordinary extra-curricular activity costs.

[29] Ms. Tobin provided no evidence of any costs for insurance and no receipt to show the cost of dental care (the pre- or post-insurance amount). She did provide a single receipt for a counselling session, with the couple's older son, in November 2017. Again, I have no evidence of the pre- or post-insurance amount, though Ms. Tobin's Statement of Special or Extraordinary Expenses suggests there is health insurance. I don't know whether this might be covered by health insurance. For the sake of my decision, I assume this is an uninsured expense.

[30] Based on the parties' 2017 income levels, I order the counselling cost be proportionately shared, with Mr. Tobin paying 75% or \$105.00.

[31] Ms. Tobin offered no evidence – in testimony or her affidavit – to show that the education and extra-curricular activity costs were extraordinary: clause 7(4), 7(1.1) of the *Guidelines*. I do not order Mr. Tobin contribute to them.

[32] Because I do not know what amounts Mr. Tobin has already paid, I do not know what he will owe as a result of my decision and I am unable to place a deadline on payment.

[33] I continue the term of the 2017 variation order: if Mr. Tobin is required to withdraw funds from his RRSP to pay the retroactive award, those funds will be excluded from determining his income for future child support payments.

Directions:

[34] Mr. MacKinnon shall prepare the order dealing with child support. I recommend that parties have a discrete child support order so this issue may be resolved promptly with the Maintenance Enforcement Program.

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

Halifax, Nova Scotia