

**SUPREME COURT OF NOVA SCOTIA**  
**FAMILY DIVISION**

**Citation:** *Bradley v. White*, 2020 NSSC 15

**Date:** 2020-01-20

**Docket:** SFH-MCA 39450

**Registry:** Halifax

**Between:**

Amy Elizabeth Bradley

Applicant

v.

Philip Kevin White, Jr.

Respondent

**LIBRARY HEADING**

**Judge:** The Honourable Justice Elizabeth Jollimore

**Heard:** November 18-20, 2020

**Summary:** Father applied to vary parenting, custody and child support. 16-year old placed in mother's primary care and sole custody: father's work kept him out of the province for many months each year. Prospective and retroactive child support granted to mother.

**Key words:** Family, Parenting, Custody, Parenting Time, Child support, Table amount, Imputing income, Disclosure, Hybrid parenting, Split parenting, Retroactive Support, Unreasonable delay, Blameworthy conduct, Child's circumstances, Variation, Arrears

**Legislation:** *Parenting and Support Act*, R.S.N.S. 1989, c. 160  
*Child Maintenance Guidelines*, NS Reg. 53/98

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**Heard:** November 18, 19 and 20, 2019.

**Counsel:** Noelle Yhard, counsel with Philip White, Jr.  
Amy Bradley, Self-represented

## By the Court:

### Introduction

[1] Philip White has applied to vary the parenting, custody and child support terms of a 2014 variation order granted under the *Parenting and Support Act*, R.S.N.S. 1989, c. 160.

[2] The issues relate to:

parenting arrangements for 16-year old Tyee;  
Tyee's custody;  
prospective child support for Tyee; and  
historic child support for Tyee and his sister, Jada.

### Parenting 16-year old Tyee

[3] Philip White and Amy Bradley each want their son, Tyee, in his or her primary care and proposes that Tyee determine the time he spends with the other parent.

[4] Martin Whitzman prepared a Voice of the Child Report after meeting with Tyee. Mr. Whitzman reports that Tyee wants a flexible parenting arrangement that lets him move, as he wishes, between his mother's home and the home of his paternal grandmother, Claudette Hector, where Mr. White lives.

[5] In deciding the parenting arrangement that is in Tyee's best interests, I'm alive to considerations listed in subsection 18(6) of *Parenting and Support Act*.

[6] Tyee has spent most of his life in his mother's care. Ms. Bradley has been supported in this by her mother, Christina Underhill. Starting in 2015, Tyee has spent more time with his father than he has in the past.

[7] Tyee's only identified needs are academic. He struggled with math and, more recently, with English as well. His historic difficulties with math have been addressed by Christina Underhill and Amy Bradley. In more recent years, Mr. White has involved himself in Tyee's education. While Mr. White says he has taken steps to address Tyee's academic needs, in his most recent affidavit, Mr. White says that "Tyee's educational struggles persist."

[8] Mr. White and Ms. Bradley don't get along well and their communication is minimal. Tyee is responsible for managing and maintaining his relationship with each of his parents. He's successful in sustaining a positive relationship with his parents and his grandmothers. His longest sibling relationship is with his older sister, Jada. He has two younger half-siblings. Of these, Tyee's closer relationship is with Kane, a maternal half-brother, with whom he has lived. There is no evidence Tyee's ever lived with his paternal half-sister, Naiya.

[9] The parents' lack of communication raises the concern that there may be times when each parent thinks Tyee is at the other's home and Tyee is somewhere else. Ms. Bradley and Ms. Underhill know where Tyee is *dropped off* – but there is no evidence that lets me know where Tyee actually spends his time. This is notable and I'll return to it later in the context of the historic child support claim. The parties have known from the outset that they disagree about Tyee's past parenting arrangements. Regardless, neither parent has kept track of Tyee's whereabouts.

[10] Tyee is a bi-racial child. Neither parent has addressed this in their evidence.

[11] Mr. White works away from Nova Scotia. He says he is "rarely away from home for more than a month or a month and a half". He said that he has worked as little as 1.5 months to as many as 5.5 months each year as a destructive technician. Typically, he works in the fall, from September to December and in the spring from March to June. He says he is rarely away for more than 1 to 1.5 months at a time and that his contracts and work hours are very flexible. During the time he'd be away at work, Mr. White proposes that Tyee stay with his grandmother, Claudette Hector, or his girlfriend.

[12] Ms. Bradley lives and works in Nova Scotia. She works a regular day-time schedule from Monday to Friday. She seldom works evenings or weekends. She has more time available for Tyee.

[13] In terms of family violence, I heard of very ugly conversations between Ms. Bradley and Jada, Tyee's 21-year old sister. Jada isn't working or going to school and she needs financial support. Between the parents, Ms. Bradley, alone, bears the burden of supporting Jada. Ms. Bradley and Jada fight about what Jada is - or isn't - doing with her life and the need for Jada either to go to school or to find a job. The fights, with raised voices, swearing and name-calling, are harmful to Jada.

[14] Mr. White wants me to conclude that Ms. Bradley speaks to Tyee in the same way that she's spoken to Jada. I have no evidence supporting this conclusion. There is no evidence of a connection between the very ugly arguments between Jada and Ms. Bradley, and Ms. Bradley's ability to care for or meet Tyee's needs, or of any impact on Tyee's safety or security.

[15] Mr. White lives with his mother, Ms. Hector. There was no evidence that anyone else lives with them. If Mr. White is absent for work, this means Ms. Hector must attend to Tyee's medical and dental appointments, his sports and the routines (chores and discipline) that Mr. White says he has in place for Tyee.

[16] Mr. White identified Ms. Hector as one of his witnesses, but she did not provide an affidavit or offer evidence so I can't assess her willingness or appropriateness as a surrogate caregiver for Tyee. Mr. White was unaware of certain basic information about his mother's circumstances, such as her income, though he says that she supports him when he is unemployed. This causes me to question the extent of Ms. Hector's involvement in and support for her son's plan. Mr. White's most recent affidavit says that his mother is "very ill", raising the

question of her ability to care for Tyee. Ms. Bradley believes Mr. White depends on Tyee to care for Ms. Hector just as Tyee assisted in caring for his paternal grandfather following his stroke.

[17] Each parent proposes that Tyee will arrange his own parenting time with the parent he isn't living with. This corresponds with Tyee's wishes.

[18] Between the parents, I order that Tyee's primary home be with Amy Bradley. I do this for 3 reasons:

- A. Mr. White is not present to parent Tyee. He is absent for as much as 5.5 months each year, for 1 to 1.5 months at a time, leaving Tyee with someone who has not indicated an interest in taking on this role.
- B. Tyee will maintain a connection with the most significant people in his life through his mother's home.
  - i. Tyee has significant sibling relationships with Jada and Kane, who share his bi-racial background. Jada is Tyee's full sister and Kane is a maternal half-brother. Tyee's relationships with Jada and Kane are furthered in Ms. Bradley's home. As well, Tyee has some, more modest, contact with his former stepfather, Mr. David, through Ms. Bradley's household. Mr. David has been a significant figure in Tyee's life.
  - ii. Tyee has a younger half-sister on his father's side, Naiya. There's no evidence of any relationship between Tyee and Mr. White's former partner and Naiya.
  - iii. It's through Ms. Bradley that Tyee has connections to Christina Underhill who has been a significant support to Tyee throughout his life. Tyee's paternal grandmother, Ms. Hector, has been a support in Tyee's life only more recently.
- C. Historically, and until recently, Tyee's academic needs have been met by his maternal family, not his paternal one. I am not worried that Tyee's academic needs will not be met if he lives with his mother.

[19] Tyee will have his primary home with his mother. Tyee will determine the time he spends with his father.

### **Tyee's custody**

[20] In 2014, the parents agreed they would have joint custody. Each parent now claims joint custody is unworkable because of their lack of communication. Based on the nature and extent of their communication, I agree that only one parent should have custody.

[21] Ms. Bradley will have Tyee's sole custody. It is in Tyee's best interests that custodial decisions be made by someone who is familiar with his day-to-day life and available to consult with and meet with those who figure in any custodial decisions that are required. Ms. Bradley is better suited to this than Mr. White because of his frequent absences from Nova Scotia.

### **Child support from February 2020 onward**

[22] Each party claims child support from this date forward for Tyee. Ms. Bradley withdrew her claim for support for Jada. Because Tyee's primary home will be with his mother, Mr. White will pay child support.

[23] Ms. Bradley claimed Mr. White studied engineering and is underemployed. Mr. White has proven that he has no education or training as an engineer. He works as a destructive technician, the field in which he was trained. Mr. White does not work full-time throughout the year. Ms. Bradley did not suggest that Mr. White was underemployed doing contract-based work.

[24] Mr. White's October 2019 Statement of Income estimated his annual income at \$35,747. This is the most he has earned in any year since the 2014 variation order.

[25] Ms. Bradley did not challenge the income that Mr. White earned working as a destructive technician and so I base his child support on \$35,747. Mr. White will pay monthly child support of \$305 using the simplified tables under section 3 of the *Child Maintenance Guidelines*, NS Reg 53/98. There is no claim for a contribution to any special or extraordinary expenses. Monthly payments of \$305 will begin on February 1, 2020 and be due on the first day of each month. Payment will be through the Maintenance Enforcement Program.

### **Child support from March 27, 2018 until February 2020**

[26] Determining child support for the period from March 27, 2018 (when Mr. White began his variation application) until February 2020 requires knowing Tyee's parenting arrangement during this time. Jada was not a dependent child during this time: *Parenting and Support Act*, R.S.N.S. 1989, c. 160, subsection 2(c).

[27] Mr. White says Tyee lived with him from March 27, 2018 until July 2018 and from October 2018 until the time of the trial. From July 2018 – September 2018, Mr. White says that Tyee lived with his mother. Ms. Bradley says Tyee has been in her primary care throughout his life, though the amount of time he's spent with his father has increased.

[28] Ms. Bradley's evidence is supported by evidence from Christina Underhill. Tyee's student registration at Caledonia Junior High School for the 2017-2018 school year showed that Tyee lived at his mother's address.

[29] Mr. White had no witnesses or other evidence to confirm his claims about Tyee's parenting arrangement. As I mentioned in paragraph 9, this is striking since

the conflict in the parents' views of Tyee's parenting arrangements was known well before this case came to trial.

[30] Parenting arrangements are central to determining child support, so I must decide whose description of Tyee's parenting arrangements is credible.

[31] An accurate statement of the law relating to credibility is found in *Baker-Warren v. Denault*, 2009 NSSC 59. I may accept some, all or none of a witness's evidence. I am to assess the totality of the evidence. In my reasons, I give examples of the testimony which have led me to my conclusion. I have considered all the evidence, but it isn't necessary for me to recite all the evidence I heard.

[32] Justice Forgeron identified 9 factors which she balanced when assessing credibility at paragraph 19 in *Baker-Warren v. Denault*, 2009 NSSC 59. Of the factors she listed, most are relevant to my assessment of credibility. I focus on Mr. White's credibility because he alone testified in support of his claim and his evidence conflicted with that of Amy Bradley, Christina Underhill and Quentin David. For Mr. White's claim to succeed, I must accept his evidence and reject the evidence of Ms. Bradley, Ms. Underhill and Mr. David where the evidence conflicted.

[33] I attach little importance to Mr. White's demeanor. Demeanor is seldom a good indicator of credibility: a confident liar may seem more credible than a nervous person who is telling the truth.

[34] Both Mr. White and Ms. Bradley have an interest in the outcome which could motivate them to deceive and Christina Underhill might be motivated to deceive to support her daughter. However, no similar motive exists for Ms. Bradley's former partner, Mr. David. Mr. White's evidence was not credible when contrasted with Mr. David's.

[35] Mr. White did not offer his evidence in a candid and straightforward way.

- a. He did not answer questions directly.
- b. He simply did not tell the truth. In paragraph 15 of his March 2018 affidavit, he swore: "Throughout this time [2015] I continued to pay my child support obligations." The Maintenance Enforcement Program Record of Payments shows that Mr. White paid only one-half the amount of his child support payments from January 2015 to July 2015.
- c. When a yes or no answer was called for, Mr. White wouldn't restrict himself to yes or no, but would add self-serving information, or information that would minimize the impact of an admission.

- d. Mr. White's evidence depended on the circumstances. When he was challenged because he was only working part-time, he said that he was able to support himself with "employment insurance and savings" when he wasn't working. When asked about paying retroactive child support, he claimed he'd experience undue hardship because he'd had to borrow money from friends and family and to sell personal items to support himself.

[36] Mr. White's evidence was not always "in harmony with the preponderance of probabilities which a practical and informed person would find reasonable given the particular place and conditions": *Faryna v. Chorny*, 1951 CanLII 252 (BC CA) at page 357.

- a. Mr. White says Tyee began a gradual process of spending more time with him in 2015, so that Tyee was in a shared parenting arrangement from January – September 2015 and, after October, in Mr. White's primary care. Mr. White didn't apply to vary the 2014 variation order until March 27, 2018 because he wanted to be sure that the change in Tyee's parenting arrangement was long-term. I don't accept that someone would wait almost 3 years to bring an application to terminate his child support obligation and to obtain child support, particularly where – as with Mr. White – he was in arrears of his child support payments in 2015 and 2016 and his income was reduced by more than 50% in 2017.
- b. Mr. White said Tyee began spending increasing time with him until, around Christmas 2015, Tyee was in Mr. White's primary care and that in 2018 Tyee had seen his mother only a handful of times. Still, he said that Ms. Bradley and her mother continued to make all Tyee's medical appointments and Mr. White didn't "know anything" about Tyee's family doctor. It seems unreasonable that Mr. White would "not know anything" about his son's doctor if he and his son were living together, and equally unreasonable that Ms. Bradley and Ms. Underhill would be making Tyee's medical appointments though Tyee seldom saw his mother and was living with his father.

[37] In contrast, Ms. Bradley answered questions directly. She and her witnesses candidly admitted the limitations of their evidence. Ms. Bradley did not editorialize or try to diminish negative answers. She made admissions against her own interest, describing the arguments she had with Jada.

[38] I reject Mr. White's evidence that Tyee was in his primary care or in a shared parenting arrangement at any point from 2015 to date. As a result, I dismiss Mr. White's claim for child support for Tyee from March 2018 to date.



[39] Accepting that Tyee was in his mother's care, I must consider her claim for child support from March 2018 to date.

[40] Mr. White's 2018 tax return disclosed an annual income of \$32,041. From March 2018 until December 2018, Mr. White will pay monthly child support of \$275 under the table. Based on his annual income of \$35,747 for 2019, he will pay monthly child support of \$305 from January 2019 to and including January 2020. These amounts will be offset against any child support payments he made.

### **Retroactive child support claims**

[41] The 2014 variation order was based on Ms. Bradley having primary care of both children and Mr. White having an annual income of \$11,000. The parents agreed that child support wouldn't be adjusted unless Mr. White's annual income exceeded \$25,000. The order required Mr. White to disclose his tax return to Ms. Bradley annually. Ms. Bradley wasn't required to provide her tax returns to Mr. White.

[42] Retroactive claims are those that pre-date the application. Each party wants to change the 2014 variation order. Because I have rejected Mr. White's evidence about Tyee's parenting arrangements, I dismiss his claim for retroactive child support.

[43] Ms. Bradley asks for changes to the 2014 variation order to take effect in January 2015.

[44] Awarding retroactive child support requires me to balance flexibility and certainty, focusing on four factors: the reasonableness of the delay in making the claim; any blameworthy conduct by the person who should have been paying support; the child's circumstances when the support should have been paid; and any undue hardship that would result from paying a retroactive support award: *DBS v. SRG, TAR v. LJW, Henry v. Henry, Hiemstra v. Hiemstra*, 2006 SCC 37.

[45] Ms. Bradley raised her claim for retroactive child support after Mr. White applied to vary the 2014 variation order. She offered no explanation for her delay. Her failure to request increased support may result from her ignorance about Mr. White's income. There was no evidence that Mr. White made Ms. Bradley aware of his increased income.

[46] In terms of blameworthy conduct, the Record of Payments from the Maintenance Enforcement Program shows that Mr. White routinely underpaid child support after January 2015.

[47] Mr. White's child support payments could not be varied unless his annual income exceeded \$25,000. In both 2015 and 2016, Mr. White earned more than \$29,000. There is no evidence he provided Ms. Bradley with his tax returns for 2015 and 2016 as he was ordered to do. Mr. White didn't adjust his child support

despite his increased income. Mr. White's blameworthy conduct favours making a retroactive award.

[48] In terms of Tyee's circumstances, Ms. Bradley said her mother helped her pay expenses. There were times when the family lived with Ms. Underhill. As well, Mr. David lived with the family until 2017. Mr. David was employed and assisted with parenting responsibilities by caring for Tyee when Ms. Bradley was at work and by driving Tyee to his activities.

[49] For most of the retroactive period, Jada stayed with her aunt and uncle in Alberta, with Ms. Underhill, or with her boyfriend. It isn't clear that Ms. Bradley was alone in paying Jada's costs or that she was even primarily responsible for Jada's costs. Jada turned 19 and was living on her own as of September 2017.

[50] Mr. White says he would experience undue hardship if he was ordered to make a retroactive award. He lives with his mother who subsidizes his costs when he's unemployed. Mr. White has a long history of working as a bartender. He gave no evidence of ill health. He is capable of minimum wage work. Short term minimum wage employment or "on call" work at special events could improve his financial circumstances. Mr. White chooses to work contracts: he seems to accept that the result of this is that he must rely on his mother's generosity, loans from family and friends, and the sale of his possessions. The hardship he claims is of his own making and unreasonable. While Mr. White may be unable to afford a retroactive award on his current income, he has the ability to earn additional income by working locally, as well as at his regular job. This mitigates in favour of a retroactive award.

[51] Based on the 2014 variation order, Mr. White would pay child support of \$50 each month from December 2014 until March 2018 except for 2015 and 2016 when Mr. White's income exceeded \$25,000 and his payments could have been adjusted.

[52] It is appropriate to award retroactive support to Ms. Bradley for the period from 2014 to March 2018. Most of the relevant considerations (Mr. White's conduct, the children's circumstances, and Mr. White's financial situation) support a flexible approach to the 2014 variation order. Ms. Bradley's delay promotes certainty, but her delay might be attributable to Mr. White's failure to disclose his increased income. Because Jada lived elsewhere for most of this time and was supported by others, I calculate child support based on one child.

[53] The 2014 variation order shielded Mr. White from any obligation to increase his support payments until his annual income increased by at least \$14,000. This allowed his income to more than double before his child support obligation would increase at all.

[54] Because Mr. White failed to increase his child support payments when his income increased beyond \$25,000, I find it is appropriate to date the retroactive variation to January 2015. Based on his 2015 income of \$29,705, I order him to pay retroactive child support of \$249 each month for that year. Based on his 2016

income of \$29,459, I order him to pay retroactive child support of \$238 each month for that year. These amounts now due are to be offset against the child support Mr. White did pay. Where Mr. White's income fell below \$25,000 in 2017 (it was \$14,342), I order he pay \$50 each month as the parties agreed in the 2014 variation order.

### **Arrears**

[55] In 2014, the parties agreed that Mr. White's child support arrears would be forgiven. Ms. Bradley asks to set aside this aspect of the variation order. She has offered no evidence or legal reason why this should be done so I dismiss this request.

[56] I calculate that Mr. White owes Ms. Bradley \$13,709 in child support. This is more than 1/3 of his gross annual earnings. However, Mr. White works less than half each year. He must pay her this amount before July 31, 2021.

### **Order**

[57] The variation order is forwarded with my decision.

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

Halifax, Nova Scotia