SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: *Richard v. Russell,* 2020 NSSC 152

Date: 2020-04-30
Docket: SFH1201-065522
Registry: Halifax

Between:

Megan Rae Richard

Applicant

v.

David Russell

Respondent

Library Heading

Judge:	The Honourable Justice Cindy L. Murray
Heard:	September 25, 2019 in Halifax, Nova Scotia
Written Submissions:	October 28, 2019 and November 1, 2019
Written Decision:	April 30, 2020
Subject:	Child support, over the age of majority, determination of the income, section 7 expenses, post secondary education, retroactive support
Summary:	The parties have two biological children who were 20 and 18 years of age at the time of the hearing. Both children were attending university. The Mother applied to vary custody (which was uncontested) and child support (table and section 7's) back to January 1, 2017. The Father sought a determination that the oldest child was not a dependent child for child support purposes as of April 1, 2019 but took the position that the parties ought to proportionately share the cost of post secondary education in accordance with the Order.

The Father also sought a determination of the amount of arrears owing as of July 1, 2017 including the appropriate proportionate sharing of section 7 expenses/post secondary education since September 2017.

Issues: Is the oldest child still a "child of the marriage"? What is the appropriate level of income for the Father for child support purposes? What is the appropriate level of child support for both children since 2017 (prospective and retroactive including section 7's) and to whom is it payable? Should the recalculation of child support be retroactive to January 1, 2017 or July 1, 2017?

Result: The oldest child is still a dependent child of the marriage but table amount is not appropriate from the time she moved from her mother's home. The Father's Income was determined pursuant to section 18 of the *Federal Child Support Guidelines.* A determination was made for child support (including section 7 expenses) retroactive to March 1, 2017 including a proportionate sharing of the children's university expenses after taking into account education plan funding, scholarships, tax credits and contributions from the children.

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Written Release:	April 30, 2020
Counsel:	Jennifer Schofield for Megan Richard
	David Russell, self-represented

By the Court:

Background and hearing:

[1] The parties were married on September 17, 1994 and were divorced by Divorce Order issued February 26, 2013 which became effective on March 29, 2013.

[2] They have two biological children who are the subject to this application, namely Gabrielle Renee Russell (D.O.B. […], 1999), who was 20 years old at time of trial and Connor David Russell (D.O.B. […], 2000) who was 18 years old at time of trial. Ms. Richards had an older child, Simone Russell, who was adopted by Mr. Russell after they got married. Simone reached the age of majority, was employed and living independently prior to the divorce proceedings.

[3] Dr. Russell and his spouse, Cindy, have a son Liam.

[4] The Corollary Relief Order dated February 26, 2013 provided the parties with joint shared custody with set off child support as set out therein. In addition to the table amount, Dr. Russell was ordered to contribute towards section 7 expenses in the manner set out therein. Paragraphs 19, 20, 21 and 22 dealt with the issue of section 7 expenses.

[5] Pursuant to paragraph 26, the parties were to provide each other with Income Tax Returns and Notices of Assessment no later than June 1st of each year. In addition, Dr. Russell was ordered to provide copies of the financial statements for his corporation. An automatic adjustment of maintenance payments was to be made in the following month effective July 1st of each year if applicable.

[6] In or about May 1, 2015, the parenting arrangement for the children changed to primary care in favour of Ms. Richard. Ms. Richard filed a variation application on December 22, 2015 to address the change in parenting arrangements and sought table amount of support retroactive to May 1, 2015. Dr. Russell's response was filed on June 24, 2016. This application was adjourned without day at the request of Ms. Richard and agreed to by Dr. Russell.

[7] Ms. Richard filed her Notice of Variation Application on November 28, 2018 pursuant to section 17 of the *Divorce Act* wherein she sought changes to the Corollary Relief Order dated February 26, 2013 and retroactive to July 1, 2013 relating to custody, access, child support (table and section 7's) and costs.

[8] Dr. Russell filed his Response to Variation Application on February 11, 2019 wherein he sought a retroactive variation and termination of support. Dr. Russell's response listed Gabrielle as being the child affected by the Order sought.

Dr. Russell further sought Ms. Richard to commence repayment of Gabrielle's student loan and to address a dispute between the parties about the amount of arrears.

[9] The Court heard this matter on September 25, 2019. Evidence was provided by Ms. Richard and Dr. Russell in the form of affidavit evidence and the parties were given an opportunity to cross-examine. No other evidence was called. In total, the court heard from the parties in one day of hearing and a total of 22 exhibits were tendered including three affidavits sworn by each of the parties.

[10] While Ms. Richard in her pretrial submissions raised objection to several paragraphs in Dr. Russell's Supplementary Affidavit sworn August 30, 2019 and asked the Court to strike certain paragraphs, Ms. Richard did not seek that relief at trial and left it to the court to be the gate keeper. The Court did strike paragraph 50 of Dr. Russell's Affidavit sworn August 30, 2019 as the statement contained therein was hearsay.

[11] Pretrial submissions were filed by the parties on September 18, 2019. After the hearing was completed, Dr. Russell requested the opportunity to do written post trial submissions. Written submissions were filed by Dr. Russell on October

25, 2019 and identified as "NARROWING OF ISSUES". Ms. Schofield filed post written submissions on behalf of Ms. Richard on November 1, 2019.

Agreements:

[12] The parties have agreed on a number of issues, namely:

a) Ms. Richard has been the primary caregiver of both children as of May 1, 2015 and the parties have joint decision-making authority.

b) There has been a material change in circumstances since the Corollary Relief Order as required by section 17 of the *Divorce Act.* The shared parenting arrangement moved to a primary care arrangement in 2015. In 2017, Gabrielle graduated from high school and enrolled in university. In April 2018, Gabrielle turned 19 years of age. Gabrielle moved to an apartment in February 2019. Conner graduated from high school and is now attending university. Neither child is participating in Irish Dance. Ms. Richard went on short term disability in November 2018 and on long term disability effective May 2019. Dr. Russell's income has also changed.

c) There is no issue with Connor's dependency and no dispute that the table amount of child support shall apply for Connor. Connor graduated high school in June 2019. At the time of trial, Connor was enrolled in his first year of university at Dalhousie University in the computer sciences program commencing in September 2019. This program involves work term placements which start in or following his second year of university. Connor has remained living at home with Ms. Richard.

d) As set out in Dr. Russell's post trial submissions, the parties agree that there needs to be a recalculation of child support retroactive to 2017. Ms. Richard is seeking retroactive child support back to January 1, 2017 not 2013 as set out in her application and section 7's back to 2017. Dr. Russell is seeking

retroactive calculations back to July 1, 2017. In his pretrial submissions, Dr. Russell initially sought a retroactive review back to July 1, 2013.

e) There is agreement on the manner in which to calculate the retroactive arrears. Both parties agree to use the previous years method such that child support for the period January 2017 to June 30, 2017 (if ordered by the Court) is based on 2015 income; for the period July 2017 to June 30 2018 is based on 2016 income; child support for the period July 2018 to June 30, 2019 is based on 2017 income; and child support for the period July 2019 to June 30, 2020 is based on 2018 income. This "previous year method" is consistent with the directive in paragraph 26 of the Corollary Relief Order.

f) Dr. Russell agrees that Ms. Richard had 2016 income of $78,225.00; 2017 income of $77,705.00; 2018 income of $84,399.00 and prospective income of $51,023.00. Ms. Richard's Income Tax Returns and Notices of Assessments for 2013 to 2018 were attached to her sworn Statement of Income filed August 14, 2019 (Exhibit 4). The tax assessment/Notices of Assessment for those years showed line 150 for 2015 of $75,026.00; for 2016 of $78,224.00; for 2017 of $77,704.00 and for 2018 of $84,398.00. Ms. Richard is an occupational health therapist who, at the time of trial, was on long term disability through Manulife. Ms. Richard testified on cross-examination that at some point in time she anticipated a return to work.

Issues:

[13] The following issues need to be determined:

a) Dependency status of Gabrielle – should Gabrielle no longer be considered a child of the marriage? If so, as of what date? (Paragraphs 14 to 26)

b) What is the appropriate level of income for Dr. Russell for child support purposes? (Paragraphs 27 to 57)

c) What is the appropriate level of child support for both children since 2017 (prospective and retroactive including section 7's) and to whom should the arrears/retroactive award be paid: (Commencing at paragraph 58)

    (i) Should the recalculation of child support be retroactive to January 1, 2017 or July 1, 2017? (Paragraphs 72 to 89)

    (ii) In terms of Section 7 expenses: (Commencing at paragraph 101)

        - Has there been an under or over payment of Irish dance costs pursuant to the terms of the Corollary Relief Order? (Paragraphs 102 to 112)

        - Post secondary education costs:
            A. What contribution amount should have been available from the "designated education fund" pursuant to the Corollary Relief Order? (Paragraphs 113 to 132)

            B. Should either party be responsible for interest incurred as a result of student loans? (Paragraphs 133 to 136)

            C. What expenses qualify for consideration and what proportion is each party responsible for in each academic year? (Commencing at paragraph 137)

Dependency status of Gabrielle - should Gabrielle no longer be considered a child of the marriage? If so, as of what date?:

[14] Ms. Richard takes the position that Gabrielle remains a dependent child of the marriage as defined by the *Divorce Act.* Ms. Richard bases this position on Gabrielle's full time enrolment in university and her alleged inability to earn

sufficient income of her own to support herself and to cover the costs of tuition, books and fees.

[15] Dr. Russell takes no issue with Gabrielle's dependency status as of the date Ms. Richard's application was filed. In his post trial submissions, Dr. Russell sets out his belief that the parties agree that Gabrielle is no longer a child of the marriage for child support purposes and that although she moved into her own apartment as of March 1, 2019, he agrees to use April 1, 2019 as the date Gabrielle ceased to be a child of marriage for child support purposes. Dr. Russell acknowledges that the parties ought to proportionately share the cost of Gabrielle's post secondary education in accordance with the terms in their Corollary Relief Order, proportionate to their income.

[16] The Divorce Act defines child of the marriage in section 2 (1):

> *child of the marriage* means a child of two spouses or former spouses who, at the material time,
>
> (a) is under the age of majority and who has not withdrawn from their charge, or
>
> (b) is the age of majority or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessaries of life;

[17] As Gabrielle is over the age of majority, the question to be answered is whether she is under the charge of a parent but unable by reason of illness,

disability or other cause to withdraw from their charge or to obtain the necessaries of life.

[18] In pretrial submissions, Ms. Schofield refers to Justice Lynch's decision in *Lee v. Lee* 2009 NSSC 121 wherein Justice Lynch reviewed the case law wherein "other cause" has been found to include pursuing an education. In *Lee (Supra)* the Court found that the child, who was pursuing her second university degree in medicine and not living with her mother, remained a child of the marriage as defined by the *Divorce Act.*

[19] In *Suen v. Dunn*, 2018 NSSC 17, Mr. Suen sought to terminate child support for the parties' daughter and Ms. Dunn sought to retroactively vary child support back from 2009 through to 2014. Ms. Dunn had primary care of Anna throughout her childhood. During her first year of post-secondary studies, Anna remained living with Ms. Dunn. Mid way through her second year, in January 2015, Anna moved into a rental property owned by Mr. Suen's company. Anna completed her undergraduate degree in May 2017 and moved to Toronto in the summer of 2017. Ms. Dunn confirmed that child support for Anna should terminate as of January 2015. The issue became whether Anna was a child of the marriage at the time of the application in August 2015. Justice Chiasson held commencing at paragraph 17:

> …I have reviewed the evidence provided by the parties. Anna met the definition of a "child of the marriage" pursuant to the *Divorce Act, supra* throughout her undergraduate degree.
>
> At the time of Ms. Dunn's Response Application, Anna was in full time studies at Dalhousie pursuing her undergraduate degree. Although living in rental accommodations closer to her university, she was completely financially dependent on her parents. Without the financial contribution of both parents, Anna would not have been able to continue with her undergraduate studies and pursue her varsity athletics. There is a distinction to be drawn between the recognition that a parent is not entitled to continue to receive child support payments from the other parent versus a finding that a child meets the definition of "child of the marriage" as found in the *Divorce Act, supra*.
>
> Ms. Dunn appropriately recognized that she should no longer receive child support as of January 2015. Does her recognition that she not directly receive support for Anna negate the possibility that Anna still meets the definition of child of the marriage? The short answer is no.

[20] Each case must be examined on its own facts and the evidence from the parties is as follows:

a) Gabrielle graduated from high school in June of 2017.

b) Gabrielle worked from July 2017 to August 2017 at Tim Hortons and earned gross income of $5,419.61. Attached to Dr. Russell's Exhibit 15 was Gabrielle's Notice of Assessment for 2017 showing total income of $40,519.00 and her income tax return for 2017 showing employment income of $5,419.61 and taxable amount of dividends from the taxable Canadian corporations of $35,100.00. Dr. Russell acknowledged that Gabrielle did not receive these dividends.

c) Gabrielle commenced post secondary studies at York University in September 2017 when she was 18 years of age. She did not turn 19 until the end of her first year of studies, namely April 24, 2018.

d) During her first year, Gabrielle returned home to reside with her mother during Christmas and February break and the spring/summer months of 2018, that is from May 2018 to August 2018.

e) Gabrielle contributed approximately $2,000.00 towards her first year of university and she received a $1,500.00 scholarship.

f) After completing one year at York, Gabrielle transferred to Dalhousie University to commence in the fall of 2018.

g) Gabrielle worked from May 2018 to August 2018 at Tim Hortons. She saved $1,500.00 and purchased her books for her second year of university.

h) In the summer of 2018, Ms. Richard made inquires about Gabrielle obtaining a Nova Scotia student loan. As a result of dividend income, Gabrielle did not qualify for the Nova Scotia student loan or any associated grants. Gabrielle qualified for a federal student loan and received the maximum of $7,100.00 and a bursary of approximately $1,200.00.

i) Gabrielle resided with her mom from September of her first full year at Dal until February 2019. Her first rent payment was due on March 2019 in the amount of $795.00 and paid for by Ms. Richard.

j) Gabrielle's 2018 Income Tax Return and GST notice for that year was attached to her Statement of Income sworn August 13, 2019 and showed line 150 of $8,979.00.

k) During the period May to August 2019, Gabrielle worked full time and saved approximately $3,000.00 by the end of the summer.

l) Gabrielle applied for a student loan for the 2019/2020 fall and winter terms and was approved for an amount of $6,855.00 (combined student loan and bursary). Gabrielle's funding details for the period September 2019 to April 2020 were attached to her Statement of Income sworn August 13, 2019 and filed August 14, 2019 (Exhibit 9). Gabrielle is appealing her student loan approval alleging insufficiency.

m) At the time of the hearing in this matter, Gabrielle was in year three at Dalhousie University. Gabrielle was accepted into the two year nursing program with an anticipated graduation date of October 2021. Her program is two full calendar years and she is not able to work full time during the spring and summer months.

n) Gabrielle works approximately 10 hours per week during the academic year and is trying to continue with that part time work.

[21] Gabrielle's Statement of Income sworn August 13, 2019 was tendered as Exhibit 9. It shows an estimated employment income for 2019 of $1,046.34 from two sources, namely from 30 Minute HIT Halifax for the period of January to April 2019 and September to December 2019 of $270.82 per month and monthly income from Waegwoltic of $775.42 (for period May to August 2019). She attached her paystub from Waegwoltic for period ending August 1, 2019 showing gross year-to-date earnings of $5,557.85. She also attached pay stubs from 30 Minute HIT Halifax showing year-to-date earnings as of July 30, 2019 in the amount of $3,313.96. In addition to employment income, Gabrielle identified monthly income of $200.00 from a bursary from Dalhousie ($2,400.00); $103.41 from a federal grant; and $542.50 from a student loan which would give her monthly income of $1,892.25 ($22,707.00 annually) plus GST of $21.32 which would give her total monthly income of $1,913.57.

[22] Gabrielle's Statement of Expense sworn September 13, 2019 and filed August 14, 2019 was tendered as Exhibit 10. This statement showed total monthly expenses of $2,674.12 (inclusive of post secondary expenses) and total income of $1,913.57 (inclusive of student loans) leaving Gabrielle in a monthly deficit of $760.55.

[23] Ms. Richard tendered into evidence a Statement of Special or Extraordinary Expenses sworn November 21, 2018 (Exhibit 7) and an Updated Statement of Special or Extraordinary Expenses sworn August 13, 2019 (Exhibit 6) wherein she claimed expenses for post-secondary education. In these statements, Ms. Richard claimed monthly post-secondary expenses for Gabrielle for year 1 (her York University year) in the amount of $2,057.58, for year 2 of $878.39 and for year 3 of $2,674.12. Ms. Richard noted in her updated statement that Dr. Russell claimed Gabrielle's tuition tax credit for the year 2017 and the benefit he received was apportioned between them. In 2018, Gabrielle did not turn over her tuition tax credit to either parent.

[24] I find, based on the evidence before me, that Gabrielle was a child of the marriage at the time Ms. Richard's application was filed on November 28, 2018 and remains a dependent child of the marriage as defined by section 2(1)(b) of the *Divorce Act*. While Gabrielle is over the age of majority, having turned 19 years

of age on April 24, 2018, I find that she is unable to withdraw from her parents' charge or to obtain the necessaries of life. I make this finding based on fact that Gabrielle is and has been enrolled in full time studies at post secondary institutions since the Fall of 2017 and does not earn sufficient income on her own to support herself and to cover the costs of tuition, books and fees.

[25] Although living in rental accommodations since in or about February/March 2019, Gabrielle remains financially dependent on her parents. Without the financial contribution of both parents, Gabrielle would not be able to continue with her undergraduate studies.

[26] Gabrielle's need for assistance from her parents has increased, in fact, since she commenced her current nursing program in September 2019 as she is not able to work in the spring and summer months.

What is the appropriate level of income for Dr. Russell for child support purposes?:

[27] I must calculate Dr. Russell's income for child support purposes in 2015, 2016, 2017 and 2018 as child support is being sought by Ms. Richard retroactive to January 1, 2017 which would bring 2015 income for Dr. Russell into issue.

[28] Dr. Russell is a licensed physician and has an incorporated company "Dr. David Russell Incorporated." Dr. Russell has been working fulltime at the East

Coast Forensic Psychiatric Hospital since in or about late May 2017 and his corporation, Dr. David Russell Incorporated is paid not him. Dr. Russell testified that he receives a biweekly deposit from the corporation.

[29] Prior to working full time at the East Coast Forensic Hospital, Dr. Russell did some work at clinics and was working with Dalhousie University's Department of Psychiatry as an inpatient hospitalist, 0.6 full time at Abbie J. Lane Hospital as well as working in the Offender Health Clinic run by the Department of Psychiatry. In November 2016, he was informed that the offender health service would be replacing him and the other physician with two different physicians at the beginning of December. Dr. Russell picked up some extra time with the Department through the spring of 2017 until he became full time at the East Coast Forensic Psychiatric Hospital.

[30] Dr. Russell gave evidence that he is the majority shareholder of his incorporated company as required by his professional college. Gabrielle and Dr. Russell's wife, Cindy, are nominal shareholders with no voting rights. The T2 Corporation Income Tax Return for 2016 and the corporate income tax information for 2017 and 2018 showed as shareholders David Russell (100 percentage common share), Cindy Pentecost (50 percentage preferred shares) and Simone Russell (50 percentage preferred shares). He testified to Simone having received dividends in

the past. He confirmed that a dividend was put in the name of Gabrielle for one year but Gabrielle did not work for the corporation and the dividend was not received by her. Dr. Russell acknowledged that in most years, he has issued dividends to his spouse for income splitting and tax benefit. He explained that his wife Cindy does some work. Cindy worked in the office in the clinic over a period of three to four months for two to three hour shifts mostly in 2015.

[31] Dr. Russell's financial information is before the court including Exhibits 14, 15, 17, 18 and his statement of income sworn February 7, 2019 (Exhibit 21).

[32] In Dr. Russell's Statement of Income sworn February 11, 2019, he claimed gross salary/actual dividends before gross up of $13,241.90/month ($158,902.00/year).

[33] For the year 2015, his personal Notice of Assessment and income tax return showed line 150 of $106,114.00 (universal child tax credit of $1,920.00 and dividends of $104,194.00). The T2 Corporation Income Tax Return 2015 showed net income for income tax purposes of $199,627.00 and taxable income (line 360) of $199,608.00. Based on the Statement of Earnings and deficit for year ending December 31, 2016 (which included information for 2015), the corporation had revenue of $232,048.00 less expenses of $39,417.00, earnings before taxes of

$192,631.00 and net earnings of $163,131.00. Dividends paid for that year were $172,600.00.

[34] For the year 2016, Dr. Russell's personal notice of assessment and income tax return showed line 150 of $91,681.00 ($960.00 in universal child tax benefits and dividends of $90,721.80). Based on his corporation's Statement of Earnings and deficit for year ending December 31, 2016, the corporation had revenue of $237,516.00 less expenses of $34,748.00, earnings before taxes of $202,768.00 and net earnings of $174,868.00. The T2 Corporation Income tax return for 2016 showed net income for income tax purposes and taxable income of $209,402.00. Dividends paid for that year were $175,540.00.

[35] For the year 2017, Dr. Russell's personal Notice of Assessment and Income Tax Return showed line 150 of $76,530.00 (comprised of taxable amount of dividends of $69,030.00 and $7,500.00 RRSP). The financial statements for Dr. David Russell Incorporated for year ending December 31, 2017 showed revenue of $170,609.00 less expenses of $25,855.00, earnings before taxes of $144,754.00 and net earnings of $124,354.00. Dividends paid for that year were $146,000.00. The corporate tax return showed net income for tax purposes and taxable income of $150,660.00.

[36] For the year 2018, Dr. Russell's personal Notice of Assessment and Income Tax Return showed line 150 of $135,720.00 (comprised of dividends for that year). The financial statements for year ending December 31, 2018 for the corporation (Exhibit 18) showed revenue of $219,609.00 less expenses of $58,561.00 (including salaries and wages of $31,312.00), earnings before taxes of $161,048.00, net earnings of $136,048.00 and dividends paid of $117,000.00. The T2 Corporation Income Tax Return showed taxable income (line 360) of $168,156.00. Dr. Russell was cross examined about the salary paid to his wife in the amount of $31,312.00 and he testified that his wife was not actually working for him in the office but she helped with continuing education.

[37] In pretrial submissions (and as evidenced by the chart attached to those submissions), Ms. Richard was asking the Court to use Dr. Russell's pre-tax corporate income for 2015 of $199,508.00 ($199,608.00 according to the financial information), for 2016 of $209,402.00, for 2017 of $150,660.00 and for 2018 of $168,156.00. For 2019, Ms. Richard was asking that the Court use income of $184,326.32 which is grossed up dividend amount from Dr. Russell's sworn statement of income wherein he reported dividends of $158,902.00 before gross up. Ms. Schofield argued in her pretrial submissions that by utilizing the corporation's pre-tax corporate income, this would capture any dividends Dr.

Russell has issued to his spouse and/or daughter. Ms. Schofield submitted that this is the fairest determination of Dr. Russell's income for child support purposes.

[38] Dr. Russell stated in his pretrial submissions that in the years following the divorce, he would adjust his child support payment every July to reflect his previous year's corporate net earnings and would inflate this number by 2.63% to account for any benefits he may have realized by having a registered corporation (i.e. deductions for mileage, bank fees, cell phone). He included a chart providing for his professional corporation's net earnings every year and the table amount for year 2012 to and including 2018. He used income for 2015 of $163,131.00, for 2016 of $174,868.00 and for 2017 of $124,354.00. For the year 2018, he used income of $166,048.00 (this proposed income reflected his corporate net earnings plus those dividends to his wife in the amount of $30,000.00).

[39] At the commencement of trial and in cross-examination, Dr. Russell acknowledged that his pretrial calculations were based on net corporate tax income and the advice he received was that it was unusual to use after tax net income for this purpose. Dr. Russell recalculated and used pre-tax income grossed up by 2.3% similar to what he used before.

[40] In his post-trial brief, Dr. Russell stated his belief that the parties agreed that it is appropriate to use, as his income for determining child support payable, his professional corporation's net income increased by a percentage to reflect benefits personally realized. More specifically, he stated his belief that both parties agree that his income for child support purposes should be calculated by inflating his corporate pre-tax earnings by a percentage to account for benefits realized by way of business expenses. Dr. Russell submitted that 2.63% is the appropriate percentage to apply. He further argued that the evidence shows that his corporation's expenses are not substantial.

[41] Dr. Russell is asking the court to determine his income for 2016 to 2018 as follows:

a) For the year 2016, he inflates his professional corporation's pre-tax earnings of $202,768.00 by 2.63% resulting in an income amount of $208,100.00;

b) For the year 2017, at page 3, he inflated his professional income by 2.63% resulting in an income of $208,100.00. That was a typo. In his chart at page 4, Dr. Russell says that his pre-tax net earnings were $144,754.00 plus 2.63% results in an income of $148,561.00. This is consistent with his chart at page 6 setting out income and percentage sharing for section 7 expenses;

c) For 2018, Dr. Russell agreed that his professional corporation's pre-tax earnings ($162,624.00) has to be adjusted to reflect $30,000.00 dividends to his wife resulting in pre-tax earnings of $192,624.00. Adding this dividend back and inflating earnings by 2.63%, results in an income of $197,690.00.

[42] In post trial submissions, Ms. Richard did not agree with Dr. Russell that his income for child support purposes should be his net corporate income. Ms. Richard takes the position that Dr. Russell's income should be his pre-tax corporate income as set out in their trial brief. Ms. Schofield believes when Dr. Russell refers to his net corporate income in his closing submissions, he meant to say pre-tax corporate income as this was discussed and agreed upon at trial. Ms. Richard further accepts Dr. Russell's 2.63% increase to account for benefits personally realized by him and has taken his pre-tax corporate income and then added 2.63% for 2015, 2016 and 2017. As set out in the table attached to Ms. Richard's post trial brief, she wants the court to determine income to Dr. Russell as follows:

(i) For the year 2015, income of $204,755.06, which inflated Dr. Russell's pre-tax corporate income by 2.63% (as opposed to pre-tax corporate income of $199,508.00 as per her pretrial submissions);

(ii) For the year 2016, income of $214,902.27 which inflated Dr. Russell's pre-tax corporate income by 2.63% (as opposed to his pre-tax corporate income of $209,402.00 as per her pretrial submissions);

(iii) For the year 2017, income of $154,622.35 which inflated his pre-tax corporate income by 2.63% (as opposed to his pre-tax corporate income $150,660.00 as per her pretrial submissions); and

(iv) For the year 2018, income of $204,714.00 (as opposed to pre-tax corporate income of $168,156.00 and proposed income of $184,326.32 as set out in Ms. Richard's pretrial submissions). In coming to the proposed figure of $204,714,00, Ms. Richard added the salaries/wages paid to Dr. Russell's wife in 2018 in the amount of $31,312.00 to Dr. Russell's pre-tax corporate income of $168,156.00 which would equal $199,468.00 and then applied the 2.63% increase.

[43] Guidance to the court in determining income for child support is found sections 15, 16, 17, 18 and 19 of the *Federal Child Support Guidelines*:

> **Income**
>
> **Determination of annual income**
>
> 15 (1) Subject to subsection (2), a spouse's annual income is determined by the court in accordance with sections 16 to 20.
> …
>
> **Calculation of annual income**
>
> 16 Subject to sections 17 to 20, a spouse's annual income is determined using the sources of income set out under the heading "Total income" in the T1 General form issued by the Canada Revenue Agency and is adjusted in accordance with Schedule III.
>
> **Pattern of income**
>
> 17 (1) If the court is of the opinion that the determination of a spouse's annual income under section 16 would not be the fairest determination of that income, the court may have regard to the spouse's income over the last three years and determine an amount that is fair and reasonable in light of any pattern of income, fluctuation in income or receipt of a non-recurring amount during those years.
>
> **Non-recurring losses**
>
> (2) Where a spouse has incurred a non-recurring capital or business investment loss, the court may, if it is of the opinion that the determination of the spouse's annual income under section 16 would not provide the fairest determination of the annual income, choose not to apply sections 6 and 7 of Schedule III, and adjust the amount of the loss,

including related expenses and carrying charges and interest expenses, to arrive at such amount as the court considers appropriate.

Shareholder, director or officer

18 (1) Where a spouse is a shareholder, director or officer of a corporation and the court is of the opinion that the amount of the spouse's annual income as determined under section 16 does not fairly reflect all the money available to the spouse for the payment of child support, the court may consider the situations described in section 17 and determine the spouse's annual income to include:

> (a) all or part of the pre-tax income of the corporation, and of any corporation that is related to that corporation, for the most recent taxation year; or
> (b) an amount commensurate with the services that the spouse provides to the corporation, provided that the amount does not exceed the corporation's pre-tax income.

Adjustment to corporation's pre-tax income

(2) In determining the pre-tax income of a corporation for the purposes of subsection (1), all amounts paid by the corporation as salaries, wages or management fees, or other payments or benefits, to or on behalf of persons with whom the corporation does not deal at arm's length must be added to the pre-tax income, unless the spouse establishes that the payments were reasonable in the circumstances.

Imputing income

19 (1) The court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following:

> …
> (d) it appears that income has been diverted which would affect the level of child support to be determined under these Guidelines;
> …
> (f) the spouse has failed to provide income information when under a legal obligation to do so;
> (g) the spouse unreasonably deducts expenses from income;
> (h) the spouse derives a significant portion of income from dividends, capital gains or other sources that are taxed at a lower rate than employment or business income or that are exempt from tax; and
> …

Reasonableness of expenses

> (2) For the purpose of paragraph (1)(g), the reasonableness of an expense deduction is not solely governed by whether the deduction is permitted under the Income Tax Act.

[44] These sections permit wide discretion to the Court in determining income.

[45] Pursuant to section 18(1) of the *Federal Child Support Guidelines*, I may attribute some or all of the pre-tax income of a corporation if I am satisfied that the payor's line 150 reported income "does not fairly reflect all the money available to the spouse for the payment of child support".

[46] Based on the evidence before me, I do not find that the determination of Dr. Russell's annual income under Section 16 is the fairest determination of that income. I find that Dr. Russell's line 150 as determined under Section 16 does not fairly reflect all the money available to him for the payment of child support.

[47] Dr. Russell accepts that a determination of his income must go beyond merely looking at his line 150 income to determine table amount of child support which was $106,114.00 for 2015; $91,681.00 for 2016; $76,530.00 for 2017, and $135,720.00 for 2018. Dr. Russell also accepts that income to his spouse in 2018 should be added back to the corporation.

[48] Neither party led expert evidence concerning the question of what, if any, amount of pre-tax corporate income should be included in Dr. Russell's income. Moreover, I have not been provided with evidence of the corporate share structure,

including any obligations imposed by shareholders agreements (other than what was included in the corporation's income tax information).

[49] This court is left to do its best to resolve the issue with the evidence that is available. The Court cannot impute income on an arbitrary basis, rather there must be a rational and a solid evidentiary foundation in order to do so. Imputation of income must be governed by principles of reasonableness and fairness in keeping with the case law which has developed.

[50] Given the type of Dr. Russell's business and the control Dr. Russell exercises over the business as majority shareholder, I am satisfied that there is sufficient evidence before me to persuade me that Dr. Russell has corporate monies available to him which should be included in income for the purpose of calculating support. The court is satisfied that, for all intents and purposes, the corporation is the "alter ego" of Dr. Russell and the bank account of the corporation is effectively also the bank account of Dr. Russell.

[51] The court has not been provided with a detailed analysis from either party relating to the specific expenses for the corporation.

[52] Some expenses qualify as being exempt under the Canada Revenue Agency but because Dr. Russell is able to utilize these funds in a corporate setting, they

result in additional money being available to him personally and should therefore be considered for child support purposes. Dr. Russell acknowledges this in his proposal before the court that the corporations' gross earnings should be inflated by 2.63% to account for any benefits he may have realized by having a registered corporation.

[53] The court has reviewed the expenses claimed by the corporation in the financial statements for the years 2015, 2016, 2017 and 2018. I agree with Dr. Russell that they are not substantial By adding back to the corporations' earnings a number of expenses or a proportion of those expenses (ie. expenses relating to communications, meals and entertainment, office expenses, donations, amortization), it brings the court very close to Dr. Russell's proposed income for those years after he inflated 2.63% to the corporation's gross earnings.

[54] Moreover, Dr. Russell's proposed income for years 2016, 2017 in particular is approximately 97% to 99% of the corporation's pretax corporate income for those years which was the income relied upon by Ms. Richard in her pretrial submissions.

[55] I have fully considered the analysis of both Ms. Richard and Dr. Russell. Based on the evidence, I find it is appropriate to determine Dr. Russell's income

based on his pretax corporate income for those years (which was Ms. Richard's position in her pretrial submissions) with the addition of the salary to Dr. Russell's spouse for the year 2018.

[56] I am not prepared to find, based on the evidence before me, that Dr. Russell had income as proposed by Ms. Richard in her post trial submissions which would result in a further inflation of 2.63% on top of pretax corporate income.

[57] As such, I find that Dr. Russell had income for child support purposes in 2015 of $199,608.00, in 2016 of $209,402.00, in 2017 of $150,660.00 and in 2018 of $199,468.00 (that is pretax income of $168,156.00 plus salaries and wages to his spouse of $31,312.00).

What is the appropriate level of child support for both children since 2017 (prospective and retroactive including section 7's) and to whom should it be paid?:

[58] Having determined the first two issues and with the parties' agreement relating to Ms. Richard's income and their agreement that this is an appropriate case to award retroactive child support back to 2017, the issue becomes what amount of support (prospective and retroactive including section 7's) is payable for both children and whether the review on table support should go back to January 1, 2017 (as sought by Ms. Richard) or July 1, 2017 (as sought by Dr. Russell).

[59] Prospective claims should be dealt with before retroactive ones: *Staples v. Callendar* 2010 NSCA 49. In this case, we have agreement to the appropriateness of a retroactive order back to 2017.

[60] The *Federal Child Support Guidelines* prescribe the method of determining the amount of child support a payor parent must pay. Those sections read:

> **Presumptive rule**
>
> 3 (1) Unless otherwise provided under these Guidelines, the amount of a child support order for children under the age of majority is
>
> (a) the amount set out in the applicable table, according to the number of children under the age of majority to whom the order relates and the income of the spouse against whom the order is sought; and
>
> (b) the amount, if any, determined under section 7.
>
> **Child the age of majority or over**
>
> (2) Unless otherwise provided under these Guidelines, where a child to whom a child support order relates is the age of majority or over, the amount of the child support order is
>
> (a) the amount determined by applying these Guidelines as if the child were under the age of majority; or
>
> (b) if the court considers that approach to be inappropriate, the amount that it considers appropriate, having regard to the condition, means, needs and other circumstances of the child and the financial ability of each spouse to contribute to the support of the child.
>
> …
>
> **Incomes over $150,000**
>
> 4 Where the income of the spouse against whom a child support order is sought is over $150,000, the amount of a child support order is
>
> (a) the amount determined under section 3; or
>
> (b) if the court considers that amount to be inappropriate,

> (i) in respect of the first $150,000 of the spouse's income, the amount set out in the applicable table for the number of children under the age of majority to whom the order relates;
>
> (ii) in respect of the balance of the spouse's income, the amount that the court considers appropriate, having regard to the condition, means, needs and other circumstances of the children who are entitled to support and the financial ability of each spouse to contribute to the support of the children; and
>
> (iii) the amount, if any, determined under section 7.

[61] It has been determined by this Court that Dr. Russell had income in excess of $150,000.00 for the years 2015, 2016, 2017 and 2018. In their respective positions, each party proposed income levels to Dr. Russell in excess of $150,000.00 in many, if not all, of those years. No challenge was made by either party relating to the appropriateness of an amount determined under section 3 of the *Federal Child Support Guidelines* such that an analysis under section 4 of the *Federal Child Support Guidelines* and *Francis v. Baker* [1999] 3 SCR 250 would be required. As such, I restrict my analysis to the amounts determined under section 3 and consider the section 3 analysis to be appropriate.

[62] The Court is also authorized to order an amount of support to cover what are termed "special or extraordinary expenses." Section 7 reads:

> **Special or extraordinary expenses**
>
> **7** (1) In a child support order the court may, on either spouse's request, provide for an amount to cover all or any portion of the following expenses, which expenses may be estimated, taking into account the necessity of the expense in relation to the child's best

interests and the reasonableness of the expense in relation to the means of the spouses and those of the child and to the family's spending pattern prior to the separation:

> …
>
> **(e)** expenses for post-secondary education; and
>
> **(f)** extraordinary expenses for extracurricular activities.

…

Sharing of expense

(2) The guiding principle in determining the amount of an expense referred to in subsection (1) is that the expense is shared by the spouses in proportion to their respective incomes after deducting from the expense, the contribution, if any, from the child.

Subsidies, tax deductions, etc.

(3) Subject to subsection (4), in determining the amount of an expense referred to in subsection (1), the court must take into account any subsidies, benefits or income tax deductions or credits relating to the expense, and any eligibility to claim a subsidy, benefit or income tax deduction or credit relating to the expense.

….

[63] As held by Associate Chief Justice O'Neil in *Provost v. Marsden,* 2009 NSSC 365 at paragraphs 47 and 48:

> 47. The language of s. 7 of the guidelines is very different from the requirements of s. 3 and s.4 when the amount of child support is to be determined.
>
> 48. The amount is (1) discretionary, the word "may" is used. The amount may be (2) for all or a portion of the expense and the court (3) may assess the necessity of the expense and its reasonableness, given the means of the parents. The amount arrived at is also to be (4) shared on a proportionate basis by the parent after (5) deducting any contribution from the child.

Section 3 analysis:

[64] I will complete the section 3 analysis including the issue of retroactivity before dealing with the issue of section 7's back to 2017.

[65] For the time period Gabrielle lived with her mother, Dr. Russell does not challenge the application of the guidelines for Gabrielle as if Gabrielle were under the age of majority ("the usual Guidelines approach"). Dr. Russell is prepared to pay the table amount for two children up to and including March 2019 and takes no issue with continued payment of table support for Connor.

[66] Ms. Richard appropriately recognized that table amount of child support for Gabrielle is no longer appropriate once Gabrielle moved out of Ms. Richard's home. That being said, Ms. Richard takes the position that Gabrielle still requires financial assistance.

[67] The evidence from both parties is that prior to Gabrielle moving out of Ms. Richard's home in February 2019, Dr. Russell was paying what he considered to be table guideline support for two children and that he continued to pay what he considered to be table amount for two children up to and including March 2019. For the month of April 2019, Dr. Russell cut the payment in half and effective May 1, 2019 he started paying what he considered to be the table amount for one child,

Connor. Since that time, Dr. Russell has not been paying regular monthly support for Gabrielle.

[68] The issue becomes what support is owing for Gabrielle after she moved from her mother's home in February 2019. As the usual guidelines/table approach for support for Gabrielle is inappropriate once she moved out of Ms. Richard's home, I have to decide what amount is appropriate, having regard to the condition, means, needs and other circumstances of the child and the financial ability of each spouse to contribute to the support of the child.

[69] Ms. Richard addresses in her submissions the issue of Gabrielle's support since moving out of Ms. Richard's home together with the section 7 expenses for post secondary expenses. I agree with this approach. As noted by Justice Lynch in *Lee* (Supra), where the child is, as in this case, over the age of majority, child support is governed by sections 3(2) and 7 of the *Federal Child Support Guidelines*.

[70] Based on an annual income for 2018 of $199,468.00, Dr. Russell owes ongoing table child support for Connor from September 1, 2019 to and including June 1, 2020 in the monthly amount of $1,607.00. Commencing July 1, 2020, the

table amount of support shall be based on Dr. Russell's pretax corporate income for 2019.

[71] The Court will now determine the table amount for two children up to and including the end of February, 2019 and for one child from March 1, 2019 up to and including August 2019. I do so commencing March 1, 2019 notwithstanding Dr. Russell's agreement to pay table amount for Gabrielle for March 1, 2019 given that Ms. Richard paid for Gabrielle's first month of rent. Ms. Richard will be credited for that rent payment in my section 7 analysis.

[72] Before completing this analysis, I must determine whether the retroactive award should go back to January 1, 2017 (as sought by Ms. Richard) or July 1, 2017 (as sought by Dr. Russell).

[73] *D.B.S v. S.R.G.*, 2006 SCC 37 is the leading case on retroactive child support. Justice Bourgeois writing in *Boone v. Luedee* 2018 NSCA 55 states as follows commencing at paragraph 44:

> [41] With respect to the legal principles governing retroactive awards, the trial judge said he was required to undertake a "*DBS* analysis", referring to the Supreme Court of Canada's decision in *D.B.S. v. S.R.G.*, 2006 SCC 37.
>
> [42] In *D.B.S.* the Supreme Court identified the factors a court is to consider when asked to award retroactive child support. The Court stressed however, that a holistic view ought to be taken, with each case decided on the "basis of its particular factual matrix" (para. 99). The Court set out the following factors:

- Whether there is a reasonable excuse for why support was not sought earlier;
- The conduct of the payor parent;
- The circumstances of the child, and
- The hardship occasioned by a retroactive award.

…

[44] Once a court has determined that a retroactive award is warranted, the amount is to be determined by considering the past date to which the award should be calculated, and also the amount that would "adequately quantify the payor parent's deficient obligations during that time" (para. 117).

[74] Again, there is no issue relating to the dependent status of Gabrielle at the time the application was filed on November 28, 2018.

[75] Both parties agree that this is an appropriate case to award retroactive child support back to 2017 and further agree to the method in which to calculate the retroactive arrears by using the previous years method. The parties disagree on the effective date of retroactivity, the amount of retroactive child support owing and to whom it should be paid.

[76] By agreeing to a retroactive award back to July 1, 2017, Dr. Russell has not taken issue with the appropriateness of a retroactive award. As such a detailed analysis and balancing of the four factors in *D.B.S. (Supra)* is not necessary in the present case. I will address these factors in a limited way.

[77] By his agreement to go back to July 2017, Dr. Russell has not taken significant issue with Ms. Richard's delay in filing her variation application in November 2018. Ms. Richard set out at paragraphs 20-42 of her affidavit sworn November 21, 2018 why she did not commence her application earlier.

[78] In terms of the second factor, Ms. Richard takes the position that Dr. Russell engaged in blameworthy conduct by failing to provide his income information to support his adjustments to child support as required under the Corollary Relief Order. Dr. Russell disputes these allegations in his Affidavit sworn February 11, 2019. He attached to his affidavit his email to Ms. Richard on August 9, 2017 wherein he stated that his documents were ready for exchange and wherein he provided an explanation of the monies in the education account and that he was waiting on the exchange. Dr. Russell argues that Ms. Richard did not make another request to exchange documents in 2017 and no Irish dance receipts were provided. Dr. Russell argues that Ms. Richard only provided financial information relating to the expenses for York University in June 2017 in order to prospectively determine proportionate sharing of the university expenses and future child support payments.

[79] I find that there was some failure by Dr. Russell to provide his income information as required under the Corollary Relief Order.

[80] By his agreement to go back to July 2017, Dr. Russell has not contested that given the circumstances of the children, they would benefit from a retroactive variation.

[81] With regards to the fourth factor, the Court finds based on the evidence that a retroactive award back to January 1, 2017 would not result in much more of a hardship to Dr. Russell than an award back to July 1, 2017 would cause. Any additional hardship can be minimized by the payment terms. I find that given Dr. Russell's income, Dr. Russell has ability to meet a substantial retroactive award. While Dr. Russell has a wife and a son to support (which are factors to consider), Dr. Russell, his wife and their son live in a mortgage-free home. Dr. Russell has been financially able to pay for private schooling for his son (of his second marriage) and to travel. According to the evidence, Dr. Russell travelled to Mexico in 2019, 2018 and 2017. In the late summer of 2017, Dr. Russell, his wife and their child travelled to British Columbia. They also travelled to New Hampshire during the summer of 2019.

[82] In considering the factors in *D.B.S.* (Supra), and in balancing same, I find that a retroactive award is appropriate in this case. The retroactive award is for Gabrielle and Connor who continue to be dependent children of marriage and who are entitled to receive appropriate table amount of child support.

[83] Now that I have determined that a retroactive award is warranted, the retroactive amount is to be determined by considering the past date to which the award should be calculated, and also the amount that would "adequately quantify the payor parent's deficient obligations during that time" (para. 117).

[84] In *D.B.S. (Supra)*, the Supreme Court summarized the four possible choices for a date to which an award should be retroactive as follows:

> 5.4.1 Date of Retroactivity
>
> 118 Having established that a retroactive award is due, a court will have four choices for the date to which the award should be retroactive: the date when an application was made to a court; the date when formal notice was given to the payor parent; the date when effective notice was given to the payor parent; and the date when the amount of child support should have increased. For the reasons that follow, I would adopt the date of effective notice as a general rule.
>
> …
> 121 Choosing the date of effective notice as a default option avoids this pitfall. By "effective notice", I am referring to any indication by the recipient parent that child support should be paid, or if it already is, that the current amount of child support needs to be re-negotiated. Thus, effective notice does not require the recipient parent to take any legal action; all that is required is that the topic be broached. Once that has occurred, the payor parent can no longer assume that the *status quo* is fair, and his/her interest in certainty becomes less compelling.

[85] Ms. Richard argues that she started providing effective notice to Dr. Russell of her intentions to address child support and education costs as early as February 2017 when she sent Dr. Russell an email requesting information about the education savings plan and to make arrangements for payment of Gabrielle's

university costs. Dr. Russell replied advising that money was in two accounts and he requested an itemization of the costs and fees. Ms. Richard stated that she provided this information to Dr. Russell.

[86] It was further Ms. Richard's evidence that in June 2017 she sent Dr. Russell a further email requesting they exchange their financial disclosure to determine child support and proportionate sharing of university and also a requested a statement for the education fund. Ms. Richard states that Dr. Russell did not provide this information and she followed up again in July 2017.

[87] Dr. Russell presented to Ms. Richard in cross-examination a copy of his email to her dated August 9, 2017 (addressed herein in paragraph 78). In that email, he also indicated that he would like to have the university statement of costs as well as Gabrielle's scholarship letter. Dr. Russell also presented to Ms. Richard in cross examination, as Exhibit 13, his email communication to her on June 15, 2018 wherein he calculated his income for child support and stated that he had his financial statements and tax return copies ready to exchange.

[88] While the Court ordered annual adjustment of support on July 1st would support Dr. Russell's claim to commence the retroactive review back to July 1,

2017, Dr. Russell also sought reimbursement for payment of the monthly Irish dance expenses prior to July 1, 2017.

[89] I find that the past date to which the award should be calculated is March 1, 2017 which was the first full month after the effective notice by Ms. Richard in February 2017 that the current obligations needed to be addressed. The effective notice in February 2017 does not support a review back to January 2017 as proposed by Ms. Richard.

[90] As for the amount owing by Dr. Russell in table child support, the Court has had the benefit of various charts submitted by the parties in their pretrial and post trial submissions depicting the amounts owing. In the post trial submissions filed on behalf of both parties, they each revised their charts up to and including September 2019 wherein Ms. Richards proposed arrears owing of $9,243.53 ($10,143.53 less an amount credited of $900.00) and Dr. Russell proposed arrears at $6,588.07.

[91] As set out in the following chart, I have determined the amounts owing up to and including August 2019. I did not include September 2019 as my decision is based on the evidence before me on September 25, 2019 of payments made up to and including the end of August 2019. As can also be seen from this chart, I have

not included in this table the amount of section 7's including the monthly payment of $450.00 for Irish dance.

March 1, 2017 to and including June 30, 2017 (based on 2015 income)				
Income	# children	Table amount	# months	Total due
$199,608.00	2	$2,511.00	4	$10,044.00
July 1, 2017 to Nov. 21, 2017 (based on 2016 income and 2011 tables)				
Income	# children	Table amount	# months	Total due
$209,402.00	2	$2,622.00	5	$13,110.00
December 1, 2017 to June 30, 2018 (based on 2016 income)				
Income	# children	Table amount	# months	Total due
$209,402.00	2	$2,701.00	7	$18,907.00
July 1, 2018 to and including February 1, 2019 (based on 2017 income)				
Income	# children	Table amount	# months	Total due
$150,660.00	2	$1,996.00	8	$15,968.00
March 1, 2019 to June 30, 2019 (based on 2017 income)				
Income	# children	Table amount	# months	Total due
$150,660.00	1	$1,246.00	4	$4,984.00

July 1, 2019 to and including August 1, 2019 (based on 2018 income)				
Income	# children	Table amount	# months	Total due
$199,468.00	1	$1,607.00	2	$3,214.00

[92] The total table support owing by Dr. Russell for the period March 1, 2017 to and including August 2019 amounts to $66,227.00 less payments made during this period.

[93] Dr. Russell's child support payments are set out in his two Affidavits. Ms. Richard attaches to her pretrial submissions an online printout obtained from the Maintenance Enforcement Program showing payments by Dr. Russell for the period January 1, 2017 to August 31, 2019. This printout shows a total paid for that period of $64,440.55 (not $64,444.48 as set out in Ms. Richard's chart) which is consistent with the record of payments attached to Dr. Russell's pretrial submissions. For the period March 1, 2017 to and including August 31, 2019, Dr. Russell paid $59,253.43 through to Maintenance Enforcement.

[94] The evidence is not clear whether the total payments made by Dr. Russell to the Maintenance Enforcement program included his monthly payment of $450.00 towards Irish dance. In his pretrial submissions, Dr. Russell stated that the

amount paid to the Maintenance Enforcement Program does not include the monthly contribution of $450.00 for Irish dance. If the total payments of $59,253.43 included any payments for $450.00 per month, the calculations will have to be amended to reflect the $450.00 owing and paid per month in addition to the table amount.

[95] Based on the payments made to date, and subject to the caveat relating to the Irish dance monthly contribution, I calculate that Dr. Russell is in arrears of child support up to and including August 2019 in the amount of $6,973.57.

[96] In post trial submissions, Dr. Russell seeks to have the arrears payment made directly to the children (he later states in his submissions "towards the children's university expenses.") Dr. Russell bases this submission on alleged mismanagement by Ms. Richard of money provided for purposes of the children in the past and takes issue with monies e-transferred from Gabrielle to Ms. Richard in the amount of $2,919.00. Dr. Russell argues that while the court determined that the requirement for Ms. Richard to contribute $5,000.00 to an RESP under the 2011 Consent Order did not survive the Corollary Relief Order, the evidence before the Court is that Ms. Richard did not budget any amount for the children's education and has not saved any funds to contribute towards this expense. Dr. Russell points to the authorization by Ms. Richard for Irish dance expenses

totalling $19,000.00 in one particular year while she had not set anything aside for the children's post-secondary education. He also makes reference to expenses submitted for an Irish dance trip to Ireland which included the costs for three people. While Dr. Russell has not sought a recalculation of Irish dance expenses, he argues that there is sufficient evidence before the court to conclude that Ms. Richard enjoyed financial benefits personally under the guise of section 7 expenses. He stated that after years of significant section 7 spending, Ms. Richard has abandoned Gabrielle financially to student loans while accepting monies from her.

[97] Ms. Richard does not agree with the allegations of financial mismanagement and argues that it would be highly irregular to have child support arrears paid directly to a child. She takes the position that any retroactive amount received by Ms. Richard will ultimately benefit Connor who lives with her as well as Gabrielle whom she continues to assist where she can.

[98] In *Miller v. Miller*, 2019 NSSC 28, Justice Gregan held that payments for two children in university should not be made directly to them as that would not be in their best interests. Justice Gregan found that to have the children decide what, if any portion of child support monies, should be provided to their mother while staying with her, would place them squarely in the middle of the affairs of their

parents and could exacerbate the current dysfunction that is occurring. Justice Gregan determined that simply put, this is not in the children's best interest and that there was nothing from the evidence to persuade the court that Ms. Miller would do anything but act in the children's best interests regarding child support.

[99] In this case, I find that the arrears of table support are owed to Ms. Richard who had primary care of both children up until February 2019 and primary care of Connor to this day. I do not find any financial mismanagement by Ms. Richard and accept that the e-transfers from Gabrielle to Ms. Richard, as evidenced by the banking records entered into evidence as Exhibit 5, were to reimburse Ms. Richard for expenses incurred by Gabrielle but billed to Ms. Richard's credit card. Simply put, it would not be in the children's best interests to have payment to them of the outstanding arrears.

[100] I direct that in addition to Dr. Russell's regularly monthly payment of table support, Dr. Russell shall pay an additional $300.00 per month to Ms. Richard commencing June 2, 2020 until the arrears of table support are paid in full. These payments shall be payable to Ms. Richard and paid through and enforced by the Maintenance Enforcement Program.

Section 7's prospective and retroactive (i.e. Irish dance and post-secondary education):

[101] As identified earlier, there are issues relating to the Irish dance costs as well as post-secondary education costs. I will address these issues in the order in which they appear at paragraph 13.

Has there been an under or over payment of Irish dance costs pursuant to the terms of the Corollary Relief Order?:

[102] Paragraph 19 of the Corollary Relief Order ordered that in addition to the table amount of child support, Dr. Russell was ordered to contribute towards section 7 expenses in the following manner:

> i. The maximum of $450.00 per month towards Irish dance costs for the children premised on the annual costs being approximately $10,000.00. In the event the annual cost for Irish dance is less than $10,000, David Russell's monthly contribution towards this expense shall be revisited…
>
> ii. Megan Richard shall provide to David Russell by no by no (sic) later than September 1st of each year an estimate of the Irish dance expenses anticipated for the coming year.
>
> iii. In the event either child ceases to take part in Irish dance then David Russell's monthly contribution towards this expense shall be revisited.
>
> iv. Megan Richard shall provide receipts to David Russell with respect to all of the Irish dance expenses on an annual basis on or before December 31st.

[103] Ms. Richard tendered as Exhibit 11 Irish Dance receipts for periods 2013, 2014, 2015, 2016 and 2017. In her Reply Affidavit sworn September 9, 2019 and tendered as Exhibit 3, she stated that the contribution of $450.00 per month from

Dr. Russell was predicated on the costs associated with the children's participation in Irish dance being a minimum of $10,000.00 per year and in all years, the costs either met and/or exceeded the minimum. In cross-examination, Ms. Richard acknowledged that from a review of the Order, the Order provided for " approximately $10,000.00."

[104] Ms. Richard gave evidence in her Affidavit sworn November 21, 2018 (Exhibit 1) that Gaby retired in December 2016 from Irish Dance and Connor retired in June 2017. In pretrial submissions filed on behalf of Ms. Richard, she argued that neither child was in dance by May 2017.

[105] Dr. Russell argues that Gabrielle retired from Irish Dance in September 2016 (Ms. Richard's Affidavit says December 2016) but he was not informed until the following March.

[106] Both parties agree that Dr. Russell continued to make the $450.00 payment per month beyond May/June 2017 and ceased making this contribution to Irish dance in August 2017.

[107] In pretrial submissions, Dr. Russell argued that he should have only been subject to half of the Irish dance monthly payment as of October 2016 (Dr. Russell wrote 2017 which appears to be a typo) given the wording of the Corollary Relief

Order and that May 2017 should have been the last month that required a contribution towards this expense. He submitted that he overpaid Ms. Richard by $3,150.00 for the 3 months that Connor was not dancing (June, July, August) as well as overpaid for the 6 months prior to that where Gabrielle was no longer dancing (October 2016 to March 2017). In his conclusion summary he stated that the total owing for Irish dance was $20,925.00 and the total paid was $24,300.00 with an overpayment of $3,375.00.

[108] While in post trial submissions Dr. Russell repeated his earlier position for the deduction of the sum of $3,150.00 from the arrears owed, he later stated at page four of his written submissions that although he has not sought a recalculation of Irish dance expenses, there is sufficient evidence before the court to conclude that Ms. Richard enjoyed financial benefits personally under the guise of section 7 expenses. It was for this reason that he requested that any required retroactive payment be made directly towards the children's university expenses.

[109] I agree with Ms. Richard that the Corollary Relief Order simply gives the parties the right to revisit the amount of the contribution once one child was no longer involved in Irish dance. The Order does not indicate whether or not revisiting the amount being paid would have resulted in any reduction in the payments.

[110] Ms. Richard acknowledges that she received two months worth of Irish dance payments from Dr. Russell after Connor was finished dance and that Dr. Russell should be credited $900.00 for the two months he paid when neither was involved in Irish dance.

[111] It would appear from Dr. Russell's post trial submissions that he abandoned the recalculation claim which, in any event, predated the period of retroactivity he was seeking.

[112] Given Ms. Richard's argument in pretrial submissions that neither children were dancing "by May 2017", I find that Dr. Russell should get credit for the $450.00 paid for June, July and August in the total amount of $1,350.00. This sum should be deducted from the total arrears owing by Dr. Russell in table support. As noted earlier, the evidence is not clear whether the total payments made by Dr. Russell to Maintenance Enforcement up to the end of August 2019 included his monthly payment of $450.00 towards Irish dance. If those total payments included the $450.00 per month, the calculations will have to be amended.

What contribution amount should have been available from the "designated education fund" pursuant to the Corollary Relief Order?:

[113] Ms. Richard asks this Court to make a finding as to the amount that should have been in the education fund when Gabrielle commenced University and subsequently.

[114] Associate Chief Justice O'Neil in *Provost v. Marsden 2009 NSSC 365* was satisfied that funds set aside for the purpose of funding the children's education needs should be first accessed before the needs of the children are determined.

[115] Pursuant to paragraph 21 of the Corollary Relief Order, Dr. Russell was ordered to provide and pay into a monthly designated education fund for the children in the amount of $207.00 per month until the last child completes high school. He was further ordered to provide proof that the fund exists by providing a copy of the annual fund statement in January of each year to Megan Richard.

[116] This was the only education fund ordered in the divorce proceedings. The Court determined that a prior requirement for Ms. Richard to contribute $5,000.00 to an RESP under the Consent Order issued September 7, 2011 did not survive the Corollary Relief Order.

[117] Ms. Richard argues that Dr. Russell did not consistently make payments to an education fund, he comingled it with his corporate account, he withdrew monies from the funds for his own purposes and the education fund was not set up as an

RESP or some other equivalent long term savings plan that would have yielded a better return. They argue that had Dr. Russell placed funds into an RESP in addition to accrued interest, the government would have contributed 25% of contributions made up to a maximum of $500.00 annually . By failing to establish a RESP, this has resulted in a loss of approximately $3,250.00 in government contributions. They argue that had he consistently made payments and had put payments into a RESP the education plan from combined interest and government contributions should have grown in excess of $20,000.00.

[118] In assessing the amount of money available to the children in the education fund, Ms. Richard is asking the Court to find that the educational funds available to the children are no less than $20,000.00 and that each child is entitled to receive one half of this amount towards his/her educational costs.

[119] In pretrial submissions, Dr. Russell argued that the total payments pursuant to the Corollary Relief Order would have been $15,732.00 (March 2013 to June 2019 = 76 months at $207.00). He stated that due to the unexpected costs of contributing the majority of Gabrielle's second term fees during her first year at York University, he used the remaining monies in the education account and the education account has remained empty since.

[120] According to Dr. Russell's pretrial submissions, $11,178.00 should have been available for Gabrielle's first year of University (contributions from March 2013 to August 2017 = 54 months x $207.00). For Gabrielle's second year of university, an additional $2,484.00 should have been available based on contributions from September 2017 to August 2018 (12 x $207.00). For Gabrielle's third year and Connor's first year, an additional $2,070.00 should have been available (contributions September 2018 to June 2019 – 10 x $207.00).

[121] Dr. Russell argues that the Corollary Relief Order did not specifically require him to open an RESP. Dr. Russell further argues that, as such, he should not be responsible for government contributions that could have been accumulated had either Dr. Russell or Ms. Richard invested in RESP's.

[122] Dr. Russell gave evidence that it would have cost him significantly more in taxes to contribute $207.00 every month into an RESP. Given his top tax bracket, at a 45% tax rate, his corporation would have had to take out $376.00/month in order to invest $207.00 into an RESP. According to this model, $2,484.00 would have been contributed to the RESP each year (12 x $207.00) at a total cost of $4,512.00 (12 x $376.00). He argued that contributing $207.00/month into an RESP would have cost his corporation $2,028.00 in taxes per year and that the government contribution at 20% would have been $496.80/year.

[123] Dr. Russell testified that given that the Corollary Relief Order did not specifically require him to contribute monthly into an RESP, he ensured the required payments were made to a dedicated investment account. In cross-examination, he explained that he had investments in Scotiabank and then with Edward Jones. The investment started at Scotiabank with automatic payments of $207.00 per month. When the investment reached over $4,000.00, he thought it was reasonable to look for an investment vehicle with Edwards Jones. He invested $4,000.00 of this money into a higher interest yielding vehicle which provided only modest returns due to the short time line.

[124] In Exhibit 14, Dr. Russell attached statements of monies in the education accounts for the years 2016, 2017, 2018. The statements related to a non registered savings account ending …44021147, money master for business account ending …0271381, a current account ending …046515, a Scotia One account, and statements from Edward Jones Advisor for account 203-81321. At the second page of the exhibit there was a handwritten notation "Total Value of Education Monies Agreement: March 2013 to June 2019 x $207.00/month = 76 months x $207.00 = $15,732.00 plus interest".

[125] Dr. Russell acknowledged that he only contributed to the plan up to December 2017 and not to the date when Connor graduated. He also

acknowledged that he borrowed from this account at times and this did reduce the amount of interest accrued, though no more than a few hundred dollars at most.

[126] I find that Dr. Russell failed to comply with the Corollary Relief Order when he stopped making payments to an education fund in or about December 2017. He was obligated under the Order to make monthly payments of $207.00 to an education fund until Connor completed high school in June 2019.

[127] I agree with Dr. Russell that the Corollary Relief Order does not specifically require him to open an RESP. As such, Dr. Russell is not responsible for government contributions of approximately $3,250.00 that could have been accumulated had he invested these funds in an RESP.

[128] No evidence was provided by either party as to the interest that should have been earned on these investments. Dr. Russell testified that he did not calculate interest. He testified that it earned interest and that the savings vehicle turned out not great and it gained a minimal amount.

[129] The Court is not prepared to speculate on the interest earned on investments without an evidentiary basis for doing so.

[130] There was no commencement date set out in the Corollary Relief Order issued February 26, 2013. Given that the commencement date for child support

was March 1, 2013, I find it appropriate to determine Dr. Russell's obligation to contribute towards this plan from March 1, 2013 to and including June 2019 when Connor graduated from high school. As such, Dr. Russell should have made 76 monthly payments of $207.00 commencing for a total amount, not including interest, of $15,732.00 as opposed to $15,939.00 as argued by Ms. Richard.

[131] I agree with Dr. Russell's pretrial submissions that $11,178.00 should have been available for Gabrielle's first year of University (contributions from March 2013 to August 2017 = 54 months x $207.00). For Gabrielle's second year of university, an additional $2,484.00 should have been available based on contributions from September 2017 to August 2018 (12 x $207.00). For Gabrielle's third year and Connor's first year, an additional $2,070.00 should have been available (contributions September 2018 to June 2019 – 10 x $207.00) which makes a contribution to each of them in the amount of $1,035.00.

[132] On the basis of the evidence before me, I am not able to find that the educational funds available to the children are no less than $20,000.00 and that each child is entitled to receive one half of this amount towards his/her educational costs.

Should either party be responsible for interest incurred as a result of student loans?:

[133] The parties agree that they never intended the children to have to rely upon student loans. Dr. Russell stated in his post trial submissions that it should not have been necessary for the children to obtain student loans. As such, I will not be including any student loan amounts in my calculations set out below.

[134] Dr. Russell argues that there was no discussion in advance of the decision for Gabrielle to obtain a student loan and that he was simply advised by Ms. Richard that Gabrielle would have to obtain a student loan. He argues that Ms. Richard's approach relating to the student loan was designed to threaten him into covering her contribution.

[135] In post trial submissions, he argues that if any party is found to be responsible for the additional costs associated with the loan, that Ms. Richard be found responsible. Alternatively, he submits that Gabrielle being 19 years old at the time that she applied and having completed her first year of university, did so in her capacity as an adult and is therefore responsible for the associated costs.

[136] I am not making either party responsible for the additional costs associated with the student loans. A determination will be made as it relates to the parties' required contribution to the children's post secondary education. Any associated

costs associated with the loans, after contribution by the respective parents, shall be the responsibility of the child.

What expenses qualify for consideration and what proportion is each party responsible for in each academic year?:

[137] The parties agree that they must split post-secondary education costs proportionate to their income and back to Gabrielle's first year commencing September 2017.

[138] The parties have already reached an agreement as to how post secondary expenses are to be shared and this was clearly set out in the Corollary Relief Order at paragraph 22 which reads as follows:

> Upon either child attending post-secondary education, the child's post secondary education expenses shall be paid through any scholarships, bursaries, summer savings of the children and the use of the Designated Education Fund prior to the parties' proportionate sharing of the children's post secondary expenses.

[139] The parties take issue with the contributions made by the other to the children's education.

[140] Ms. Richard argues that Dr. Russell has not contributed anything towards Connors tuition/books and has not contributed towards Gabrielle's education in any significant way since September 18, 2018 outside of providing child support.

[141] Dr. Russell argues that Ms. Richard has not proportionately contributed to agreed upon university costs and a significant portion of her money has been spent on non-agreed upon costs.

[142] As will be seen from the calculations below, contributions to the children's post secondary education were not made in accordance with paragraph 22 of the Corollary Relief Order. Alleged non compliance by one parent does not excuse non compliance by the other parent.

Proportionate sharing:

[143] In terms of the financial ability of each spouse to contribute, Dr. Russell has already agreed to line 150 income for Ms. Richard for the years 2015, 2016, 2017 and 2018. Based on line 105 in her Notices of Assessment, Ms. Richard had income for 2016 of $78,224.00, for 2017 of $77,704.00 and for 2018 of $84,398.00.

[144] I found Dr. Russell's income for child support purposes to be $209,402.00 for 2016; $150,660.00 for 2017, and $199,468.00 for 2018.

[145] The parties had combined income in 2016 of $287,626.00, in 2017 of $228,364.00, and in 2018 of $283,866.00.

[146] The Court finds that the following proportionate sharing is in order:

Academic Year	Ms. Richard's (previous year)	Dr. Russell's (previous year)	Split
2017 – 2018	$78,224.00 (2016)	$209,402.00 (2016)	27%-73%
2018 – 2019	$77,704.00 (2017)	$150,660.00 (2017)	34%-66%
2019 – 2020	$84,398.00 (2018)	$199,468.00 (2018)	30%-70%

[147] In terms of their expenses, no Statement of Expense was tendered as an exhibit by Dr. Russell. Ms. Richard tendered as Exhibit 8, her Statement of Expense sworn August 13, 2019. Ms. Richard showed total monthly expenses of $5,291.76 including pension deductions leaving her with a monthly deficit of $1,739.97 based on prospective income of $51,023.00. Included in Ms. Richard's monthly expenses was $76.76 for Gabrielle's phone.

Gabrielle's first year of university 2017/2018 Academic year relating to York university:

[148] In the Statement of Special or Extraordinary Expenses sworn November 21, 2018, Ms. Russell claimed monthly post-secondary expenses for Gabrielle for year 1 (her York University year) in the amount of $2,057.58.

[149] Ms. Richard argues that Gabrielle's expenses relating to her attendance at York University for the 2017/2018 academic year were $21,840.00 (referencing in

support Exhibit B of her Affidavit sworn November 21, 2018 which showed total costs of $21,841.00). In her pretrial submissions, Ms. Richard typed $21,820.00 in her table as opposed to $21,840.00. In addition, Ms. Richard added costs of $1,554.42 associated with registering Gabrielle for the next year at York (non refundable deposit, storage fee and move expenses back to Nova Scotia). In her pretrial submissions, Ms. Richard claims a total cost of $23,374.42 (which should actually be $23,394.42 given the typo).

[150] In his pretrial submissions, Dr. Russell states that Gabrielle's first year of university cost $20,270.38 overall. In coming to this figure, he relied on an email sent to him on December 23rd from Ms. Richard (and attached as an Exhibit E to his Affidavit sworn February 11, 2019). In that email, Ms. Richard noted that she reviewed the costs she calculated in the spreadsheet and now stated that the total cost was $20,270.38.

[151] In his affidavit of February 11, 2019, he added to the cost of $20,270.38 an additional cost of $1,662.85 relating to the reported cost to get Gaby's belongings to storage. This additional cost was not reflected in Dr. Russell's pretrial submissions.

[152] In post trial submissions, Dr. Russell states that the parties agree on formal university costs, the scholarship Gabrielle received, tuition refund and the amount contributed from the education fund. He disagrees on whether additional expenses incurred by Ms. Richard should be included as they were not mutually agreed upon (as per paragraph 20 of the Corollary Relief Order) and do not accurately reflect the true cost of setting Gabrielle up at York University. The expenses include all the associated costs for four people to travel to Ontario and the return trip and an additional trip in October 2017 to York to visit Gabrielle. He further argues that the many of receipts submitted by Ms. Richard are not actually hers and that there was at least one e-transfer from Gabrielle to Ms. Richard reimbursing costs for a submitted receipt.

[153] I am satisfied on a balance of probabilities that the total costs of Gabrielle's first year total $21,933.23, that is the cost of $20,270.38 as set out in Ms. Richard's email to Dr. Russell and the additional amount of $1,662.85 as set out in Dr. Russell's Affidavit sworn February 11, 2019.

[154] The Court subtracts from this amount of the course refund of $778.00 and the scholarship of $1,500.00 making Gabrielle's net need $19,655.23.

[155] As noted by Ms. Richard, she did not allow the tuition tax credit in the calculations as Dr. Russell claimed the tax credit and proportionately shared it with her.

[156] Before determining the budgetary deficits to be proportionately shared by the parties, I deduct the amount of $11,178.00 which is the amount I determined which should have been available in the education plan (Par 131). This reduces the net cost down to $8,477.23. I appreciate Dr. Russell withdrew funds from the education fund in the amount of $10,250.00 towards this education year.

[157] I must now consider Gabrielle's contribution. As deposed in Ms. Richard's Affidavit sworn November 21, 2018, Gabrielle worked from July 2017 to August 2017 at Tim Hortons and made $5,419.61. Gabrielle contributed approximately $2,000.00 towards her first year of university. Dr. Russell argues that Gabrielle had $2,250.00 to contribute. Gabrielle only turned 19 the end of her first year of studies, namely April 24, 2018. I find that a contribution of $2,000.00 is appropriate. This leaves a budgetary deficit of $6,477.23 which should be shared on a proportionate basis.

[158] Using the parties' 2016 income for Ms. Richard of $78,224.00 and $209,402.00 for Dr. Russell, this makes Ms. Richard responsible for 27% of the

budgetary deficit (namely $1,748.85) and Dr. Russell responsible for 73% (namely $4,728.38). Dr. Russell would also be responsible for the payment of $11,178.00 which should have been available in the education plan for a total cost to Dr. Russell of $15,906.38.

[159] In his affidavit sworn February 11, 2019, Dr. Russell stated that he contributed to Gabrielle's first year at York the total amount $18,184.52 and he acknowledged on cross-examination that out of those monies, some was from the designated education fund (more specifically $10,250.00 via two cheques). In post trial submissions, he doesn't believe there is any dispute that he paid a total of $7,934.22 directly to York University (that is $10,000.00 and $250.00 = $18,184.52). Ms. Richard in her pretrial submissions references a total payment by Dr. Russell of $8,814.52 which the court accepts as a typo given that the amount of $18,184.52 was referenced in Ms. Richard's submissions as well as the education fund amount of $10,250.00.

[160] Ms. Richard attached as Exhibit C to her Supplementary Affidavit sworn August 13, 2019 an updated summary of her contributions to Gabrielle's education showing a total amount of $8,319.01 for the period September 2017 to August 2019. Ms. Richard claimed in her pretrial submissions that she paid $8319.01 for Gabrielle's first year. The statement actually sets out that Ms. Richard contributed

a total of $6958.56 for that year, namely $4,482.66 from September to December 2017 and $2,475.90 from January to June, 2018.

[161] In summary, Dr. Russell overpaid by $2,278.14 and Ms. Richard overpaid by $5,209.71.

Gabrielle's second year of university 2018/2019 academic year - Dalhousie (year 1):

[162] There is agreement by the parties to university costs of $10,540.68 excluding living costs as set out in Ms. Richard's Statement of Special or Extraordinary Expenses sworn November 21, 2018 wherein she claimed monthly post-secondary expenses for Gabrielle for year 2 of $878.39/month.

[163] The parties disagree on the additional costs sought by Ms. Richard for Gabrielle's living expenses in the amount of $10,815.00 to take into account monthly expenses since Gabrielle moved out for the period February 2019 to August 2019 (as set out in her sworn Statement of Expenses sworn August 14, 2019). After making an adjustment for the rent increase that did not occur until September 2019 and backing out lines 16e and 17 to avoid double dipping, Ms. Richard claimed total monthly expenses for Gabrielle of $1,545.00 (total for February 2019 to August 2019 – $10,815.00). On the basis of same, Ms. Richard calculated Gabrielle's total cost for this year of $21,355.68.

[164] In his post trial submissions, Dr. Russell argues that Gabby was not required to incur additional living expenses while attending school in Halifax. He alleges that there is no evidence as to why Gabrielle could not continue living with Ms. Richard or have lived with him.

[165] Dr. Russell refers to this move in his Supplementary Affidavit sworn August 30, 2019 (Exhibit 16) as a "disruptive move to her apartment in the latter half of second term, on February 28/March 1."

[166] It was clear from his Affidavit evidence that Dr. Russell had previously spoken with Gabrielle about a potential move. In his Affidavit sworn February 11, 2019 he stated that "again this week" Gabrielle told him that she wants to move out from her mothers' apartment in the summertime or closer to the next school year to be closer to the school. In his Supplementary Affidavit sworn August 30, 2019, he states that Gabrielle now has a full year lease signed for an apartment in downtown Halifax close to Dalhousie and the hospitals.

[167] In his Affidavit sworn February 11, 2019 (Exhibit 20), he stated at paragraph 30 that he and Gabrielle talked in August 2018 about university costs and Gabrielle stated she would like to go away to school if possible. Dr. Russell told her that was not possible without a contribution from Ms. Richard at the present time, but

possible if she moved out and declared herself independent. Dr. Russell was cross examined about his statement and explained that it was his understanding that a student had to declare independent status if qualifying for a student loan. Dr. Russell further testified that moving would allow him to pay Gabrielle monies but not to Ms. Richard and he described this as easier.

[168] In cross examination, Dr. Russell was then questioned as to why, when Gabrielle had moved out and he was not paying table amount to Ms. Richard, he had not taken that surplus to give to Gabrielle. Dr. Russell testified that he will pay if the court determines what is his proportionate share is. Dr. Russell also testified that he would pay before that if Gabrielle runs into any need.

[169] I find it is not excessive for Gabrielle to have moved to an apartment close to her university and close to the hospital given that she is now in the nursing program. The evidence as it related to the location of Gabrielle's apartment came from Dr. Russell himself in his affidavits. Had Gabrielle remained home with Ms. Richard, there would have been additional costs to Ms. Richard (and to Dr. Russell) for Gabrielle's living expenses in Ms. Richard's home.

[170] The Court must take into account Gabrielle's living costs once she moved out of her mother's home given that Gabrielle is a dependent child and would not

be able to afford to pay all of her expenses on her own. With regards to the additional costs, excluding the costs for gifts, holidays and entertainment, I calculate total monthly living costs of $1,421.78 for 6 months (March to and including August and not commencing February as her first months' rent was in March). This makes a total living expense of $8,530.68.

[171] I am satisfied on a balance of probabilities that the total costs of Gabrielle's second year total is $19,071.36 including her living costs.

[172] The Court subtracts from this amount of the tuition tax credit of $1,264.88 making her net need $17,806.48.

[173] Before determining the budgetary deficits to be proportionately shared by the parties, I deduct the amount of $2,484.00 should have been available based on contributions from September 2017 to August 2018 (12 x $207.00)(Paragraph 131). This leaves a budgetary deficit of $15,322.48.

[174] I now must determine the contribution by Gabrielle to the cost of her education. Gabrielle worked from May 2018 to August 2018 at Tim Hortons. She saved $1,500.00 and purchased her books for her second year of university and book costs were not included in the total cost. The evidence before the court was that in August 2018, Dr. Russell told Gabrielle she only needed to save enough for

her books. In September, Dr. Russell changed his mind and told her she should have saved $3,000.00. Dr. Russell acknowledges that he recalled discussing with Gabrielle that if the parents were contributing to tuition proportionately, she would have to only cover books. When he determined that Ms. Richard was not contributing, he then told Gabrielle she should contribute $3,000.00.

[175] In post trial submissions, Dr. Russell agrees that Gabrielle saved a total of $1,500.00 to put towards her expenses.

[176] Gabrielle's 2018 Income Tax Return and GST notice for that year was attached to her Statement of Income sworn August 13, 2019 and showed line 150 of $8,979.00. In determining how much of these funds are available to fund her university expenses over this year I reduce this amount to reflect reasonable expenditures of Gabrielle while working. I set $6,000.00 as her contribution to her university budget for this year. This amount serves to reduce the unfulfilled financial need to $9,322.48.

[177] Using the parties 2016 income for Ms. Richard of $77,704.00 and $150,660.00 for Dr. Russell, this makes Ms. Richard responsible for 34% of the budgetary deficit (namely $3,169.64) and Dr. Russell responsible for 66% (namely $6,152.84). Dr. Russell was also responsible for the amount of $2,484.00 which

should have available in the education plan for a total cost to Dr. Russell of $8,636.84.

[178] Dr. Russell claims as his contribution for this year his payment to Dalhousie in the amount of $4,199.13. Another payment for $800.00 was made in August 2019 and this was credited by Ms. Richard for this year making a total payment by Dr. Russell of $4,999.13 giving Dr. Russell a shortfall of $3,637.71. Not included by either party in Dr. Russell's total payments for this year was the payment at Ikea in the approximate amount of $200.00 which Dr. Russell described in his affidavit of August 30, 2019 was for the purchase of a dresser and a few small items as gifts. He also stated that Gabrielle was housesitting for approximately three 3 weeks since April 13, 2019 and was paid $200.00 for house and cat sitting for 9 days. I have not included these additional payments and was not asked to include same as the first was a gift and the second was payment for house and cat sitting.

[179] In the updated statement at Exhibit C of her Supplementary Affidavit sworn August 13, 2020, Ms. Richard calculates a total contribution for the period January to August 2019 of $1,360.56 (CPR of 90.00, Twinrix of $15.00, Rent of $795.00 and Cell phone of $460.56 – 76.76 x 6 months). In pretrial submissions, Ms. Richard argued that Ms. Richard paid a total of $1,332.39 for this year,

including a rent payment of $795.00 for March 2019 and cell phone bills totaling $537.39 cell phone bills for the period February to August 2019. Ms. Richard continues to pay Gabrielle's cell phone in the amount of $76.76.

[180] I find that Ms. Richard paid a total contribution for this year of $1360.56.

[181] In summary, for the 2018/2019 academic year, the parties underpaid their proportionate share. Dr. Russell underpaid by $3637.71 and Ms. Richard underpaid by $1809.08.

Gabrielle's third year of university 2019/2020 academic year - Dalhousie (year 2):

[182] In the Updated Statement of Special or Extraordinary Expenses sworn and tendered as Exhibit 6, Ms. Richard claimed post-secondary education costs (for year 3) of $2,674.12 per month and attached the 2019/2020 Fall Term Detail showing the balance for the Fall Term 2019/2020 to be $5,392.00 less payments of $200.00 via visa and $250.00 via Dalhousie in-course scholarship leaving a balance of $4,952.50.

[183] In her Supplementary Affidavit sworn August 13, 2019, Ms. Richard stated that Gabrielle's total university costs for the fall and winter semester will be approximately $11,000.00 not including her living costs.

[184] According to Ms. Richard's pretrial submissions the cost of tuition and fees was $10,785.00 and books was $1,100.00. In post trial submissions Ms. Richard advises that missing from these figures is the cost of books for second term.

[185] Dr. Russell argues in his pretrial submissions, that the total university cost for tuition and books for fall and winter semester will be $11,000.00.

[186] I am satisfied on a balance of probabilities that the total costs of Gabrielle's tuition and books for the year 2019/2020 is $11,885.00.

[187] In addition, Ms. Richard is asking the court to take into consideration Gabrielle's living expenses as set out in her sworn Statement of Expenses. Dr. Russell does not include these costs in his calculations.

[188] Again, the Court must take into account these living costs in the calculations given that Gabrielle is a dependent child and would not be able to afford to pay all of her expenses on her own. This is especially so given that Gabrielle is not able to work in the spring and summer months given the requirements of her program.

[189] In her pretrial submissions, Ms. Richard uses additional costs of $15,636.60 after deducting her contribution from her Statement of Expenses and adding back in $542.50 per month from her Statement of Income for a student loan she

received. This is a reasonable calculation of costs based on a review of Gabrielle's expenses which could amount to costs in excess of that amount.

[190] As such, I calculate Gabrielle's total university and living costs of $27,521.60.

[191] The Court subtracts from this amount of $3,904.00 which Gabrielle received since the hearing as a grant as set out in Ms. Richard's post trial submissions (and not contested to by Dr. Russell) and $1,294.20 as an estimate of the tuition tax credit.

[192] This leaves a net cost of $22,323.40.

[193] Before determining the budgetary deficits to be proportionately shared by the parties, I deduct the amount of $1,035.00 which is the amount I determined which should have been available in the education plan (Paragraph 131). This brings the net cost down to $21,288.40.

[194] In terms of Gabrielle's contribution, both parties were satisfied in their post trial briefs with savings by Gabrielle in the amount of $3,000.00 from the spring/summer of 2019. In post submissions, Ms. Richard advises that Gabrielle had additional $1,000.00 more in savings than was stated in trial brief. While both are satisfied with $4,000.00 towards savings, and while we don't have Gabriele's

2019 return showing what she had made for the summer, the Court is not satisfied that this is sufficient contribution by Gabrielle to her costs. Gabrielle's Statement of Income sworn August 13, 2019 and filed August 14, 2019 showed an estimated employment income for 2019 of $1,046.34 from two sources, namely from 30 Minute HIT Halifax for the period of January to April 2019 and September to December 2019 of $270.82 and monthly income from Waegwoltic of $775.42 (for period May to August 2019). She attached paystubs from both employers showing gross year to date earnings ending August 1, 2019 of $5,557.85 and year-to-date earnings as of July 30, 2019 in the amount of $3,313.96 for the other employer. By the Court's calculation, Gabrielle had gross employment income of no less than $8,871.81. In determining how much of these funds are available to fund her university and living expenses over the year I reduce this amount to reflect reasonable expenditures of the daughter while working. As such, I set her contribution in the amount of $6,000.00.

[195] This leaves a budgetary deficit of $15,288.40 which should be shared on a proportionate basis.

[196] Using the parties 2018 income of $84,398.00 for Ms. Richards and $199,468.00 for Dr. Russell, this makes Ms. Richard responsible for 30% of the budgetary deficit (namely $4,586.52) and Dr. Russell responsible for 70% (namely

$10,701.88) plus the amount of $1,035.00 which he should have available in the education plan for a total cost to Dr. Russell of $11,736.88.

[197] The amount owing by each of the parties for the recent school year 2019/2020 cannot yet be determined as the court is not aware what further payments were made by the parties towards this school year.

[198] In his supplementary affidavit sworn August 30, 2019, Dr. Russell stated that he etransferred $800.00 to Gabrielle on August 27, 2019. This payment was already included in the previous year. According to Dr. Russell's post trial submission, in addition to the payment of $800.00 made on August 27, 2019, he made payments of $995.00 each for September 26, 2019 and October 25, 2019.

[199] In terms of payments by Ms. Richard for this term, Ms. Richard stated in her affidavit filed August 14, 2019 that she pays Gabrielle's monthly cell phone of $76.77 per month. Ms. Richard argues in pretrial submissions, that her actual contribution was $153.54 (cell phone September to October 2019).

Connor's post second expenses 2019/2020 academic year - Dalhousie (year 1):

[200] Ms. Richard argues that Connor's costs for the 2019/2020 academic year are $12,938.40 (tuition and fees of $10,438.40 and $2,500.00 (estimate for laptop and

books). This is consistent with the Updated Statement of Special or Extraordinary Expenses sworn and tendered as Exhibit 6 wherein Ms. Richard claimed post-secondary education costs for Connor of $1,078.20/month ($12,938.40 per annum) Ms. Richard attached the 2019-2020 Undergraduate Fee Schedule – estimates showing Fall term costs of $5,531.38 and winter term of $4,907.08 = $10,438.46. In post trial submissions, Ms. Richard advises that the figures do not include books for the winter term.

[201] In Dr. Russell's pretrial submissions, he states that Connor's total university costs for his first year of computer science are estimated to be $11,332.06 by the Dalhousie University online fee calculator.

[202] I am satisfied on a balance of probabilities that the total costs of Connor's tuition and books for the year 2019/2020 is $12,938.40. The Court subtracts from this the amount of $4,230.00 which Connor received since the hearing as a grant as set out in Ms. Richard's post trial submissions (and not contested to by Dr. Russell) and $1,252.60 as an estimate of the tuition tax credit. This leaves a net cost of $7,455.80 (which does not take into account any other bursaries which Connor will have obtained for this year).

[203] Before determining the budgetary deficits to be proportionately shared by the parties, I deduct the amount of $1,035.00 which is the amount I determined which should have been available in the education plan (Paragraph 131). This brings the cost down to $6,420.80.

[204] In pretrial submissions, they both used the figure of $2,000.00 as Connor's savings to be applied toward the year. According to Ms. Richard's post trial submissions, Connor has received $1,000.00 more in savings than what was indicated their trial brief and this was not contested by Dr. Russell. Deducting a contribution by Connor of $3,000.00, this leaves a shortfall for $3,420.80 to be proportionately shared by the parties.

[205] Using the parties' 2018 income, Ms. Richard would be responsible for $30% of that cost (namely $1,026.24). Dr. Russell would be responsible for 70% of that cost (namely $2,394.56). Dr. Russell would also be responsible for the amount of $1,035.00 which he should have available in the education plan for a total cost to Dr. Russell of $3,429.56.

[206] In summary:

a) For the most recent academic year 2019/2020 for Gabrielle, Dr. Russell is responsible for post secondary costs including living costs in the amount of $11,736.88 less payments he has made. Ms. Richard is responsible for post

secondary costs including living costs in the amount of $4586.52 less payments she has made.

b) For the most recent academic year 2019/2020 for Connor, Dr. Russell is responsible for post secondary costs in the amount of $3,429.56 less payments he has made. Ms. Richard is responsible for costs in the amount of $1,026.24 less payments she has made.

c) For the 2017/2018 academic year for Gabrielle, Dr. Russell overpaid his proportionate share by $2,278.14 and Ms. Richard overpaid her proportionate share by $5,209.71.

d) For the year 2018/2019 academic year for Gabrielle, Dr. Russell underpaid his proportionate share by $3,637.71 and Ms. Richard underpaid her proportionate share by $1,809.08.

e) If we apply the overpayments made in the 2017/2018 academic year as credits towards the underpayments made in the year 2018/2019, for Gabrielle's first two years of university, Dr. Russell owes in total for those two years the amount of $1,359.57 and Ms. Richard has a credit of $3,400.63. This credit can be applied to her obligations for the 2019/2020 post secondary year for both children.

[207] The parties are to notify each other of any other bursaries received by the children and make the necessary adjustments. Ms. Richard stated in her post trial submissions that Gabrielle will likely receive a Dalhousie bursary with the amount to be determined.

[208] I direct that the parties apply their outstanding contributions towards post secondary costs directly to the children's university accounts. If there are monies

remaining, the parties shall make the contributions directly into an account for the children which can then be applied to the children's living expenses and their respective student loans when they come due.

[209] The parents are to satisfy their outstanding contributions to the costs of post secondary education costs up to and including August 2020 in full by August 1, 2021 with half of said contribution to be paid by January 1, 2021. They are also to provide evidence of payment to the other party.

Academic years 2020/2021 for Gabrielle and Connor and forward

[210] For the 2020/2021 academic years for Gabrielle and Connor, the parties shall proportionately share (based on their 2019 income), the net cost of tuition, fees and living expenses after deducting the tuition tax credit, scholarships, bursaries and a reasonable contribution from the children in keeping with paragraph 22 of the Corollary Relief Order. Half of their respective contributions is due by September 15, 2020 and the other half is due by January 15, 2021.

[211] For subsequent years, the parties shall proportionately contribute in accordance with paragraph 22 of the Corollary Relief Order and using the analysis as applied in this decision.

Conclusion:

[212] The Corollary Relief Order shall be varied as follows:

a) Paragraph 5 shall be varied to reflect that the children have no longer been living in a shared parenting arrangement since in or about May 2015; that the parties have joint decision making and that Gabrielle remains a child of the marriage and lives in an apartment since in or about March 1, 2019.

b) Paragraph 18 and 23 shall be replaced with the following, "Commencing September 1, 2019 and continuing to and including June 1, 2020, Dr. Russell shall pay the table amount of child support for Connor in the amount of $1,607.00 based on an annual income for 2018 of $199,468.00. Commencing July 1, 2020, the table amount of support shall be based on Dr. Russell's pre-tax corporate income for 2019.

c) Dr. Russell owes arrears to Ms. Richard of support from March 1, 2017 to and including August 1, 2019 in the amount of $6973.57 (this is subject to the caveat as provided herein relating to the monthly Irish dance contributions). In addition to his regular monthly table support, Dr. Russell shall pay an additional $300.00 per month to Ms. Richard commencing June 2, 2020 until the arrears of table support are paid in full. These payments shall be payable to Ms. Richard and paid through and enforced by the Maintenance Enforcement Program.

d) Dr. Russell shall receive a credit to the arrears in the amount of $1,350.00 for his overpayment for Irish dance.

e) Contributions by both parties to the children's post secondary education expenses are as set out herein at paragraphs 148 to 211.

f) In addition to the ongoing disclosure requirements set out at paragraph 26 of the Corollary Relief Order:

- The parties will exchange by June 1st of each year the status of the children's enrolment at a post secondary institution and the children's income tax returns and notices of assessment (including any work term income).

- Ms. Richard shall also advise Dr. Russell in writing as soon as she secures employment.

g) In all other respects the terms of the Corollary Relief Order issued February 26, 2013 remains in full force and effect.

Costs:

[213] If costs are an issue, the parties must file with the court and copy to the other party their respective written submissions about costs within 15 days from today's date. If either party has made a submission on costs not contemplated by the other party in his or her submissions, he or she may file additional submissions with the court and copied to the other party within 5 days from receipt of those submissions.

[214] I would ask Ms. Schofield to draft the order.

Murray, J.