

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

**Citation:** *Bourgeois v. Bourgeois*, 2020 NSSC 156

**Date:** 2020-05-06  
**Docket:** 1206-7503  
**Registry:** Sydney

**Between:**

Marnie Leigh Bourgeois

Applicant

v.

Daniel Vernon Bourgeois

Respondent

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**LIBRARY HEADING**

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**Judge:** The Honourable Justice Lee Anne MacLeod-Archer

**Heard:** March 9, 2020 in Sydney, Nova Scotia

**Final Written** April 29, 2020

**Submissions:**

**Written Decision:** May 6, 2020

**Issues:**

- (1) Divorce
- (2) Determination of Income
- (3) Child Support (retroactive and prospective)
- (4) Spousal Support (retroactive and prospective)

**Result:** Divorce granted. Income determined for purposes of both child support and spousal support. Retroactive and prospective support ordered.

<p><b><i>THIS INFORMATION SHEET DOES NOT FORM PART OF THE COURT'S DECISION. QUOTES MUST BE FROM THE DECISION, NOT THIS LIBRARY SHEET.</i></b></p>
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Heard: March 9, 2020, in Sydney, Nova Scotia

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Written Release: May 6, 2020

Counsel: Alan Stanwick for the Petitioner  
Courtney Somerton for the Respondent

**By the Court:**

**Facts**

[1] The parties were married on October 5, 1991 and had three children together, one of whom (BB – age 10) has special needs and lives with Ms. Bourgeois. CB (age 17) is still a dependent child as well. She and her older brother MB both live with Mr. Bourgeois.

[2] The parties separated on April 22, 2017. The petitioner filed a Notice of Application for interim child support and other relief on April 18, 2019. An interim order was issued on July 17, 2019.

[3] Ms. Bourgeois filed a Petition of Divorce on September 23, 2019 seeking parenting arrangements, spousal and child support, and a division of assets and debts. Mr. Bourgeois filed an Answer on October 16, 2019.

[4] Prior to trial, the parties agreed as follows:

- custody and parenting of the two dependent children will remain the same, namely one with each parent and reasonable parenting time with the other;
- Mr. Bourgeois will pay the table amount of child support for the dependent child BB based on his income;
- he will pay \$135.00 per month as his contribution toward monthly s.7 expenses for the child BB;
- the matrimonial assets and debt will be divided equally, but there's a dispute over whether the 2017 tax refund should be included;
- Ms. Bourgeois is entitled to spousal support, the amount of which is to be determined by the court.

**Divorce**

[5] The parties have been separated in excess of a year, with no prospect of reconciliation. I find there's been a permanent breakdown in the marriage relationship and that all other legislative requirements have been met. I therefore grant the divorce.

## **Issues**

- 1. What is Mr. Bourgeois' income for purposes of the table amount of child support?**
- 2. What child support (retroactive and prospective) is payable?**
- 3. What is the appropriate treatment of Mr. Bourgeois' 2017 income tax refund?**
- 4. What is Mr. Bourgeois' income for purposes of spousal support?**
- 5. What spousal support (prospective and retroactive) is payable?**

### **Issue #1: What is Mr. Bourgeois' income for purposes of the table amount of child support?**

[6] Mr. Bourgeois works with Nova Scotia Power seasonally, and he collects employment insurance benefits when he's laid off. In 2018 he reported line 150 employment income of \$72,290.00. He paid union dues of \$929.00. He didn't disclose his 2019 tax return, but he did provide copies of his T4 and T4E at trial. They show total income in 2019 of \$83,123.45. In the same year, he paid union dues of \$1,064.44.

[7] Mr. Bourgeois also referees hockey during the winter. He didn't disclose that income, nor does he report it for tax purposes. He testified that he earns about \$1,000.00 annually from this work. Rather than impute income to Mr. Bourgeois from this source, the extra cash that he earns as a referee will be off-set against his union dues. This means that a **FCSG** Schedule III adjustment won't be made to his gross income for purposes of setting child support under the Nova Scotia table. His income from employment and EI benefits for purposes of the **FCSG** in 2019 was therefore \$83,123.45.

### **Issue #2: What child support (retroactive and prospective) is payable?**

- [8] Commencing May 1, 2020, and continuing on the first of each month, Mr. Bourgeois will pay \$713.00 per month to Ms. Bourgeois for the support of their son BB. A recalculation clause will be included in the order, such that annual changes in his income will be reflected in the child support payable.
- [9] Ms. Bourgeois earns less than the threshold income required for payment of child support, so there is no difference to be calculated under s.8 of the **FCSG**.
- [10] Mr. Bourgeois started paying child support of \$500.00 per month in May, 2018. He also made some cash payments to Ms. Bourgeois when she asked for help with BB's expenses. However, he didn't pay regular support after the parties separated, and his payments after May, 2018 fell short of the table amount due.
- [11] In assessing whether Mr. Bourgeois should pay retroactive child support to the date of filing, I must consider the Supreme Court's decision in **DBS v SRG, 2006 SCC 37**. It sets out four factors to be considered: 1) was there a delay in seeking support? 2) was there blameworthy conduct on the part of the payor? 3) what are the child's circumstances? and 4) would a requirement to pay retroactive support cause hardship to the payor?
- [12] The parties separated on April 22, 2017. Ms. Bourgeois filed an Application on April 18, 2019, almost two years later. So, there was some delay by Ms. Bourgeois in advancing a claim for child support.
- [13] Mr. Bourgeois paid the mortgage and his Visa after separation, he contributed \$565.00 towards the child BB's expenses in the year after separation, and he paid monthly child support of \$500.00 after May, 2018. At the same time, he was supporting CB and MB, the latter of whom only turned age 19 in June, 2019. These are mitigating factors in the context of blameworthy conduct.
- [14] Aggravating factors include the fact that BB has expenses which average \$3,000.00 per annum (\$250.00 per month), towards which Mr. Bourgeois only contributed \$565.00 in the year after separation. This constitutes blameworthy conduct, as he knew that Ms. Bourgeois would struggle to make ends meet on her income.

- [15] I have no doubt that Ms. Bourgeois would use a retroactive award for the benefit of BB. He will be dependent on his parents in the long term, and his needs are extensive.
- [16] Mr. Bourgeois says that he would face hardship if required to pay retroactive child support. He plans to remortgage the matrimonial home to buy out Ms. Bourgeois' interest. He's also still supporting the parties' two older children, though MB is not a dependent for purposes of child support.
- [17] MB has been unemployed since leaving his last job, and he's not attending school. It is Mr. Bourgeois' choice to support MB. It is not a choice he discussed with Ms. Bourgeois. Support for MB does not take precedence over Mr. Bourgeois' obligation to support BB.
- [18] Although the **DBS** factors weigh in favour of Ms. Bourgeois, I must consider whether a requirement to pay retroactive child support could jeopardize the payment of ongoing child support. In this case, that's a real concern. However, if the sum is payable over time, it shouldn't be too onerous.
- [19] I therefore order Mr. Bourgeois to pay retroactive child support from the date of separation to the Interim Order, at the rate of \$300.00 per month to reflect his support of two dependent children until June, 2019, and the fact that he had BB in his care for a short time after separation. The total owing is \$8,100.00. Mr. Bourgeois will pay those arrears at the rate of \$50.00 per month, commencing May 1, 2020 and continuing until the full amount is paid.
- [20] Dealing next with the claim for retroactive s.7 expenses, I note that Ms. Bourgeois carried the expenses of caring for BB after separation without much contribution from Mr. Bourgeois. She was forced to take him to Toronto at her own expense, which is a significant cost for someone in her income range.
- [21] Ms. Bourgeois filed a statement of extraordinary expenses outlining the costs she incurs for BB's care. It averages \$250.00 per month, including trips to hospital. BB receives CPP benefits of \$250.00 per month, of which I attribute \$100.00 to his share of these expenses. Mr. Bourgeois has agreed to pay 90% of the balance, or \$135.00 per month, on a prospective basis. He objects to paying any retroactive s.7 expenses, which Ms. Bourgeois calculates at \$2,945.00 (26 months at \$135.00 per month, less \$565.00 paid).

[22] Ms. Bourgeois requested financial assistance from Mr. Bourgeois to help with these costs. He paid some expenses for a trip to the IWK hospital, but this was only a fraction of the expenses she incurred for BB. Mr. Bourgeois knew that BB's expenses far exceeded what he contributed and what Ms. Bourgeois could afford. He should have paid more than \$565.00 to Ms. Bourgeois for BB's expenses in the 26 months after separation.

[23] I'm satisfied that a retroactive award would be used for the benefit of BB. Any hardship a retroactive award might cause Mr. Bourgeois can be mitigated by a low monthly payment, spread over time. I therefore direct that he pay retroactive s.7 expenses totaling \$2,945.00, payable at the rate of \$50.00 per month, commencing May 1, 2020 and continuing until the full amount is paid.

**Issue #3: What is the appropriate treatment of Mr. Bourgeois' 2017 income tax refund?**

[24] Ms. Bourgeois concedes that Mr. Bourgeois' 2016 tax refund was used to pay bills before separation, but his 2017 income tax refund was received post separation. Mr. Bourgeois argues that the refund should be exempt from division. Ms. Bourgeois says that a proportionate amount (1/3 equating to the period of time in 2017 the parties were together) should be included.

[25] The tax refund represents income tax withheld at source, from monies earned by Mr. Bourgeois before separation, and paid by his employer to Canada Revenue. If the correct amount of tax had been withheld, the Bourgeois family would have benefited from extra funds before separation.

[26] In many ways, a tax refund is akin to a savings account (though CRA pays no interest on refunds). A portion of the 2017 tax refund accumulated during the marriage, and as such, that portion falls within s.4 of the *Matrimonial Property Act* R.S.N.S., c. 275. It is a matrimonial asset which must be included in any calculation of equalization monies owing by Mr. Bourgeois.

[27] The chart prepared by Ms. Bourgeois' counsel, which includes \$1,711.56 from the 2017 tax refund, calculates the equalization payment owing by Mr. Bourgeois at \$40,410.49. I accept that figure. That sum is payable to Ms. Bourgeois within 60 days (or such other time frame as the parties may agree, given the current state of emergency in Nova Scotia).

**Issue #4: What is Mr. Bourgeois' income for purposes of spousal support?**

- [28] Mr. Bourgeois concedes that Ms. Bourgeois is entitled to spousal support. She has a strong compensatory and non-compensatory claim.
- [29] Although Mr. Bourgeois initially argued that income should be imputed to Ms. Bourgeois, he abandoned that argument after the nature of her income was clarified at trial. Despite this, the **SSAG** calculations provided by his counsel in post-trial submissions include the child's share of CPP benefits. Ms. Bourgeois' CPP income in 2019 was only \$9,173.40. BB received \$3,003.24 in 2019.
- [30] A recipient spouse's income for purposes of determining spousal support isn't always set at the same level as when determining child support. Under the **FCSG**, income is determined under s.15 and s.16, using the spouse's line 150 income from Canada Revenue tax filings, adjusted under Schedule III if appropriate. Sections 17 – 19 deal with patterns of income, corporate income, and imputed income.
- [31] Under the **SSAG**, the **starting** point is the income determined under the **FCSG**. However, many of the Schedule III deductions do not apply, so the end results differ in some cases.
- [32] A child's share of CPP benefits isn't reported on line 150 of the parent's tax return, so it would be excluded in calculating child support. However, there's debate about whether it should be included in a spouse's income for purposes of calculating spousal support. The consensus seems to be that it should not (see, among others, the decision in **Janzen v. Janzen**, 2014 BCSC 1374).
- [33] In this case, BB's share of CPP benefits equate to  $\frac{1}{4}$  of the income attributed to Ms. Bourgeois in Mr. Bourgeois' **SSAG** calculations, so including it would skew the results considerably.
- [34] Further, Mr. Bourgeois receives CPP benefits for the child CB, arising from Ms. Bourgeois' disability. If that income is to be considered as income for Ms. Bourgeois, it should be included as income for him as well. However, his **SSAG** calculations don't include it. In all of these circumstances, I decline to consider the child's portion of CPP as income for Ms. Bourgeois.



**Issue #5 - What spousal support (prospective and retroactive) is payable?**

[35] The parties were married for 25 years and had three children together.

[36] The parties' youngest son BB has been diagnosed with Prader-Willi syndrome, leaving him with significant mental, physical, behavioural, and emotional special needs. BB requires constant care and supervision, as well as special equipment and medication. He must attend the IWK Children's Hospital semi-annually, and the Toronto Sick Kids Hospital annually. Ms. Bourgeois has been his primary caregiver all of his life, and she will likely provide care for BB into adulthood.

[37] Ms. Bourgeois seeks a spousal support award in the mid-range of the **SSAG**. Mr. Bourgeois suggests that the low range of support is appropriate, because he's supporting two children and paying matrimonial debt.

[38] By supporting MB while he's unemployed and not pursuing his education or training, Mr. Bourgeois is giving priority to his support over support for Ms. Bourgeois. After a long-term marriage with a strong compensatory claim, that's inappropriate. Her claim takes precedence.

[39] Mr. Bourgeois' argument about paying the matrimonial debts falls flat as well. He resides in the matrimonial home, so payment of the mortgage, taxes, insurance and utilities isn't an unreasonable price to pay. As well, while he paid one Visa card, Ms. Bourgeois assumed responsibility for the other. Mr. Bourgeois hasn't shouldered a disproportionate financial burden, given his level of income.

[40] I've considered the objectives set out in s.15.2(6) of the ***Divorce Act*** R.S.C., 1985, c. 3 (2nd Supp.). Ms. Bourgeois is disabled. She was the primary caregiver for the children, and she will likely provide care for BB into adulthood, due to his special needs. This was a long-term marriage. There's no doubt that Ms. Bourgeois has suffered an economic disadvantage due to separation. There's no evidence that she has the ability to pursue self-sufficiency. She can't address the economic hardship she's facing, without support from Mr. Bourgeois.

[41] I recognize that any spousal support award should strive to address any economic hardship arising from the breakdown of the marriage, but not reverse the hardship by making the sum too onerous for Mr. Bourgeois to pay. I've

also considered the fact that Ms. Bourgeois will have access to some funds from the division of assets.

[42] It's appropriate to consider the **SSAG** ranges in determining spousal support, but I am mindful of the fact that the calculations presented by Mr. Bourgeois are incorrect. I am also mindful of the need to review the **SSAG** ranges in the context of the condition, needs and means, and other circumstances of the parties, as demonstrated by their statements of income and expenses, as well as the evidence.

[43] Ms. Bourgeois presented a bare-bones budget, with no discretionary spending, and only \$200.00 per month in board to her parents. However, since filing her statement of expenses, Ms. Bourgeois moved into subsidized housing. She now pays rent of \$223.00 per month, plus utilities. She also buys her own groceries. The shortfall she listed while living with her parents was \$513.00 per month, but it's very likely that her shortfall has increased by at least \$500.00 per month since moving (utilities, phone, groceries, etc.). She clearly needs spousal support to meet her reasonable needs.

[44] I therefore direct that Mr. Bourgeois pay Ms. Bourgeois spousal support of \$800.00 per month, effective May 1, 2020 and continuing monthly thereafter, until further order of the court.

[45] Ms. Bourgeois seeks retroactive spousal support in the mid range of the **SSAG** at \$877.00 per month. She calculates the amount of retroactive spousal support for the period of May 1, 2017 through to June 1, 2019 at \$22,802.00, but I note that her calculations are flawed, because her income was input as employment income, rather than disability income, and Mr. Bourgeois' income is understated. Mr. Bourgeois is opposed to paying any retroactive spousal support.

[46] In the context of the **DBS** factors, Ms. Bourgeois did delay in filing her application, but it should have been clear to Mr. Bourgeois that she required assistance. The child support he paid after May, 2018 was below the table level, and there was no spousal support paid until July, 2019. Ms. Bourgeois was clearly disadvantaged by the breakdown of the marriage relationship. Mr. Bourgeois knew that her income was limited. He knew that she was living with her parents and that BB's expenses continued. His conduct in not paying any spousal support until July, 2019 was blameworthy.

[47] Further, although Mr. Bourgeois had all three children with him after separation for a couple of months. Ms. Bourgeois paid him a portion of Child Tax benefit during those months. When Mr. Bourgeois applied for the CTB and received a retroactive payment, he didn't refund Ms. Bourgeois the monies she'd given him. They disagree on the amount, but either way, it was money out of her pocket that she could ill afford to pay.

[48] The balance of factors weighs in favour of Ms. Bourgeois. However, requiring Mr. Bourgeois to pay retroactive spousal support at this point in time could jeopardize his ongoing child and spousal support payments. I therefore direct that he pay her retroactive spousal support of \$10,400.00 (26 X \$400.00), payable in monthly increments of \$100.00 per month, commencing June 1, **2022**, and each month thereafter until the full amount is paid to Ms. Bourgeois.

[49] Ms. Bourgeois asks that Mr. Bourgeois be directed to designate her as beneficiary of his life insurance, on an irrevocable basis, as security for child and spousal support. This is a reasonable request. I direct that he designate Ms. Bourgeois as irrevocable beneficiary of his group life insurance through NSP as follows: 25% to Ms. Bourgeois and 50% in trust for BB. Written confirmation of the designation must be provided to Ms. Bourgeois within thirty days.

**Costs:**

[50] Counsel may file brief written submissions on costs within thirty days if they are unable to agree on same.

**Conclusion:**

[51] The divorce is granted. The parenting arrangements in the Interim Order are continued. The agreements read into the record regarding the division of matrimonial property and debts will be incorporated in the Corollary Relief Order. Mr. Bourgeois will make an equalization payment to Ms. Bourgeois as calculated in Schedule "A" to this decision (from Ms. Bourgeois' submissions).

[52] Mr. Bourgeois will pay table child support of \$713.00 per month, plus a contribution to BB's s.7 expenses of \$135.00 per month. He will pay retroactive table child support and s.7 expenses of \$50.00 per month each, until the full amounts owing are paid.

[53] He will also pay spousal support of \$800.00 per month on an indeterminate basis. He will pay retroactive spousal support commencing in June, 2022.

[54] Mr. Bourgeois will provide security for support through an irrevocable life insurance beneficiary designation.

[55] Counsel for the Petitioner will draft the orders.

MacLeod-Archer, J.

Division of Assets			
Mr. & Ms.			
	0	Comments	Value
<b>Matrimonial Assets:</b>			
<b>Real Estate:</b>			
1)			128,000.00
Less: Mortgage			57,683.20
Other Debt			
Commission at 4% +hst		0.04	5,888.00
Legal Fees			575.00
Net Proceeds			63,853.80
2)			
Less: Mortgage			
Other Debt			
Commission at 5% +hst		0.05	0.00
Legal Fees			
Net Proceeds			0.00
3)			
Less: Mortgage			
Other Debt			
Commission at 5% +hst		0.05	0.00
Legal Fees			
Net Proceeds			0.00
4)			
Less: Mortgage			
Other Debt			
Commission at 5% +hst		0.05	0.00
Legal Fees			
Net Proceeds			0.00

	O	Comments	Value	Mr.	Ms.
<b>Net Proceeds of Real Estate:</b>					
1)	0	0	63,853.80	63,853.80	
2)	0	0	0.00		
3)	0	0	0.00		
4)	0	0	0.00		
<b>Investments:</b>					
1) CIBC Securities			14,427.14	14,427.14	
2) Manulife			3,531.33	3,531.33	
3)					
<b>Pensions:</b>					
1)					
2)					
<b>RRSP's:</b>					
1)					
2)					
3)					
<b>Life Insurance (CSV):</b>					
1)					
2)					
<b>Bank Accounts:</b>					
1)					
2)					
<b>Vehicles:</b>					
1)					
2)					
<b>Furniture, etc.:</b>					
1)			10,000.00	10,000.00	
2)					
<b>Other:</b>					
1) Income Tax Refund			1,711.56	1,711.56	
<b>Total Matrimonial Assets</b>			<b>93,523.83</b>	<b>93,523.83</b>	<b>0.00</b>
<b>Less: Matrimonial Debts:</b>					
1) CIBC Visa			17,383.20	15,043.03	2,340.17
2)					
3)					
4)					
5)					
6)					
7)					
<b>NET MATRIMONIAL ASSETS:</b>			<b>76,140.63</b>	<b>78,480.80</b>	<b>-2,340.17</b>
<b>Equalization Payment:</b>				-40,410.49	40,410.49
<b>NET MATRIMONIAL ASSETS (AFTER DIVISION)</b>				<b>38,070.32</b>	<b>38,070.32</b>