SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION
Citation: *Garnier v. Garnier*, 2021 NSSC 116

Date: 2021-04-08
Docket: SFH No. 1201-071154
Registry: Halifax

Between:

Jennifer Garnier

Applicant

v.

Jason Garnier

Respondent

Judge:	The Honourable Justice Theresa M. Forgeron
Heard:	September 28 and 29, 2020, in Halifax, Nova Scotia
Post-Trial Submissions:	November 13 and December 18, 2020
Decision:	April 8, 2021
Counsel:	Jennifer Garnier, Applicant, Self-Represented Kelsey Hudson for the Respondent, Jason Garnier

By the Court:

Introduction

[1] Jennifer Garnier and Jason Garnier are former spouses who have two adult children – Morgan and Andrew. During a 2018 settlement conference, the parties resolved outstanding financial matters involving property division, spousal support, and child support. In January 2019, a divorce order, a corollary relief order, and a pension division order issued incorporating their agreement.

[2] Less than a year later, Ms. Garnier applied to enforce and vary the CRO. She outlined four primary concerns. First, Ms. Garnier seeks clarification of the spousal support provisions of the CRO. She is concerned that Mr. Garnier will stop paying spousal support once his pension is divided even though she is not allowed to receive her share until she is at least 55 years old. Ms. Garnier states that she is entitled to ongoing spousal support until she can draw on her share of Mr. Garnier's pension. She seeks an order confirming this interpretation.

[3] Second, Ms. Garnier seeks to increase child support payments for Morgan and Andrew. She states that Mr. Garnier did not disclose all his income in 2018; his income is higher than previously stated. As a result, maintenance should be adjusted. In addition, she states that Morgan did not graduate as early as anticipated. She therefore seeks support to cover a portion of Morgan's unexpected tuition fees. Further, Ms. Garnier states that after Covid became an issue, she incurred extra expenses because Andrew lived at home while attending university. Ms. Garnier seeks additional periodic support because of this change in circumstances. Ms. Garnier also seeks contribution for the cost of Andrew's gym membership and university expenses.

[4] Third, Ms. Garnier states that Mr. Garnier did not designate the children to be the beneficiaries of his life insurance as required in the CRO. Ms. Garnier seeks proof of compliance. In post-trial submissions, she states that she also wants to be named beneficiary as security for the spousal support obligation.

[5] Fourth, Ms. Garnier states that Mr. Garnier did not fulfill his health insurance obligations when he wrongly terminated coverage for Morgan. As a result, she incurred medical expenses and Morgan was deprived of much needed mental health services. She further states that Mr. Garnier did not reimburse her for other health related expenses. She seeks monetary relief for his failure.

[6] In contrast, Mr. Garnier disputes almost every aspect of Ms. Garnier's application. Mr. Garnier counters by saying that the variation application is nothing more than an attempt to relitigate issues conclusively determined by the

CRO. For example, Mr. Garnier states that the CRO confirms that spousal support terminates as soon as his pension is divided. From his perspective, the court has no jurisdiction to extend spousal support even if Ms. Garnier's share of the pension is locked-in. He states that Ms. Garnier's application cannot succeed.

[7] In addition, Mr. Garnier states that his income sources have not changed since the settlement was reached. Further, he states that all sources of his income were known prior to the settlement. He vehemently disputes Ms. Garnier's allegations to the contrary.

[8] Further, Mr. Garnier states that no independent evidence was led to substantiate Morgan's continued dependency. Similarly, Mr. Garnier states that there are no overall changes to Andrew's expenses or income. Without proof of a material change in circumstances, he states that Ms. Garnier's variation application must fail.

[9] Moreover, Mr. Garnier states that he terminated Morgan's health coverage because of the provisions of the CRO. He was not told that Morgan's graduation was delayed until after he cancelled the coverage. Despite not being under a legal obligation, Mr. Garnier notes that he offered to pay for the health expenses, but Ms. Garnier refused to accept his offer.

[10] Finally, Mr. Garnier recognizes that Ms. Garnier, and not the children, is listed as the designated beneficiary of his life insurance contrary to the CRO. He has since applied to designate the children.

Issues

[11] To resolve the parties' dispute, I will answer the following questions:

- What is the meaning of clauses 5 to 8 of the CRO?
- What is the appropriate spousal support order?
- Did Ms. Garnier prove a material change in circumstances?
- If so, what is the appropriate child support order?
- What is the appropriate order for the life insurance designation?

Background Information

[12] After a year of cohabitation, the parties were married on October 16, 1993. Two children were born of the relationship – Morgan in March 1996 and Andrew in January 1999. Mr. Garnier was employed with the Canadian Armed Forces throughout much of the marriage. He retired before the parties separated.

[13] The marriage was not a happy one; separation occurred in June 2017. By that time, Morgan and Andrew were enrolled in university studies. It was anticipated that Morgan would graduate in May 2019 from Dalhousie University while Andrew was attending Memorial University in Newfoundland with an expected graduation date of May 2021.

[14] In June 2018, Ms. Garnier initiated divorce proceedings. In November 2018, the parties participated in a settlement conference before Justice Jollimore and ultimately reached agreement on all the outstanding issues. Counsel for Mr. Garnier drafted the three consent orders. The divorce, corollary relief, and pension division orders issued on January 30, 2019.

[15] Unfortunately, the consent orders did not resolve the issues. On June 12, 2019, Ms. Garnier, self-represented, applied to vary and enforce the provisions of the CRO. Mr. Garnier filed a response on February 28, 2020. Settlement efforts were not successful likely because of the bitterness, animosity, and mistrust which permeated these proceedings.

[16] The contested hearing was held in-person on September 28 and 29, 2020. Each of the parties testified. No other witnesses gave evidence. Submissions were written and oral. Post-trial submissions on the interpretation issue were filed by Ms. Garnier on November 13, 2020 and Mr. Garnier on December 18, 2020.

Analysis

[17] **What is the meaning of clauses 5 to 8 of the CRO?**

CRO Spousal Support Provisions

[18] Clauses 5 to 8 of the CRO outline the parties' spousal support obligations as follows:

> Spousal Support
>
> 5. Commencing December 1, 2018, Jennifer Garnier is entitled to half of Jason Garnier's accrued pension for the period of October 16, 1993, to June 17, 2017, resulting from his employment with the Department of National Defence. Recognizing that there may be a delay from the date of this Order to the division of Mr. Garnier's pension, Jason Garnier will pay spousal support in the amount of $1,221.00 to Jennifer Garnier commencing December 1, 2018 and continuing on the first day of each month until such time as Jennifer Garnier begins receiving payment directly from Jason Garnier's pension provider.
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> 6. In the event that in the first month Jennifer Garnier receives a division of Jason Garnier's pension in the same month Jason Garnier also paid spousal support, Jennifer Garnier will repay Jason Garnier the full amount of spousal support paid during that month.

> 7. In the event that the pension administrator adjusts the division of Jason Garnier's pension such that payment are made to Jennifer Garnier for a period prior to December 1, 2018, any such payments, whether made in a lump sum or as an additional monthly payment or as a pay rise, shall be reimbursed by Jennifer Garnier to Jason Garnier up to any amount of claw back from the pension administrator to Jason Garnier or reduction in future monthly payments to Jason Garnier.
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> 8. Once Jennifer Garnier begins receiving payment for the division of Jason Garnier's pension, neither party will have any obligation to provide spousal support to the other party for any reason thereafter**,** except that if Jennifer Garnier refuses to repay Jason Garnier for overpayments made to her under clauses 6 and 7 of this Order, then Jason Garnier will have a claim for spousal support against Jennifer Garnier in the amount of such overpayment and he may apply to a court to specify the amount of spousal support owing.

Position of Ms. Garnier

[19] Ms. Garnier states that she is entitled to spousal support until her share of the pension becomes a pension in pay. In support of her position, Ms. Garnier states as follows:

- Mr. Garnier earned a pension with the Department of National Defence between June 21, 1990 to January 5, 2012. After he was released from the Department of National Defence in January 2012, Mr. Garnier started to receive monthly pension payments.
- According to their settlement, Ms. Garnier is entitled to one-half of the pension earned during the marriage from October 16, 1993 until June 17, 2017.
- At the time the settlement was reached, both parties believed that Mr. Garnier's pension "was going to pay out immediately since Mr. Garnier was receiving monthly pension payments."[1]
- Mr. Garnier applied to divide his pension according to the pension division order. The government calculated Ms. Garnier's transferrable share to be a lump sum in the approximate amount of $343,415.
- In August 2020, Ms. Garnier received notice that Mr. Garnier applied to divide his pension. Ms. Garnier then learned that she was not eligible to receive a monthly pension, rather, the lump sum payout had to be

[1] Page 2, Post-trial Submissions of Ms. Garnier, November 13, 2020.

transferred to a locked-in retirement account. Ms. Garnier had 90 days to launch an objection.

- In October 2020, Ms. Garnier filed an objection according to the stipulated process. The ground for objection was the present proceeding. This objection was deemed valid.
- The CRO states that Mr. Garnier must pay Ms. Garnier $1,221 in monthly spousal support until Ms. Garnier begins to receive monthly pension payments. The parties did not realize that Ms. Garnier would have to transfer the lump sum into a locked-in account which Ms. Garnier cannot access until she turns at least 55 years old in 2028.
- Ms. Garnier would not have agreed to stop spousal support unless she had a pension in pay. Ms. Garnier's budget is premised on the additional income. Ms. Garnier bought a car and the matrimonial home because of this belief.
- Mr. Garnier is not truthful when he states that at the time of settlement, he knew Ms. Garnier would not be able to access her share of the pension. If this were true, Ms. Garnier questions why Mr. Garnier waited almost two years to apply to divide his pension. Why would Mr. Garnier pay about $30,000 in spousal support if he could avoid the obligation by simply applying to divide his pension?
- Mr. Garnier did not provide full disclosure thus eliminating "the ability to ensure an equitable division of property among the parties and to determine fair support awards."[2]
- The CRO agreement was intended to provide Ms. Garnier with bridge income until she had another income stream - until she began to receive her pension in pay.

[20] In the alternative, Ms. Garnier offered a second option which would see Mr. Garnier continuing to pay the spousal support order until she received her monthly pension at which time Mr. Garnier would receive credit for the amount that he paid in spousal support. Ms. Garnier used the following calculation to illustrate her point: $1,221 x 92 months = $112,332 which would be deducted from the lump sum transfer of $343,415, which leaves $231,083 to be transferred to Ms. Garnier. Ms. Garnier did not consider income tax consequences related to the spousal support payment in her calculations.

[2] Page 5, Post-trial Submissions of Ms. Garnier, November 13, 2020.

Position of Mr. Garnier

[21] Mr. Garnier states that there is no ambiguity or confusion surrounding the interpretation of the CRO. He states that when the pension is divided, his spousal support obligation ceases for the following reasons:

- Both parties were represented at the time of the settlement conference and subsequent negotiations. The CRO was drafted based on the agreement reached. The court lacks jurisdiction to resile from the agreement.
- Ms. Garnier's support is grounded in contract. It is not based on compensatory or non-compensatory factors. Further, at no time during the trial did Ms. Garnier establish proof of actual entitlement to compensatory or non-compensatory support. Evidence of spousal support entitlement and the amount of support that could be calculated were likewise not before the court.
- According to the pension division order and the federal *Pension Division Act*, S.C. 1992. c.46, Sch II, Ms. Garnier's entitlement to Mr. Garnier's pension will be approximately $343,415. This amount was calculated by the Plan Administrator and was not disputed. The amount represents 50% of the present actuarial value of the benefits accrued between October 16, 1993 and June 17, 2017. Mr. Garnier's pension has matured because he has received pension payments since he was 40 years old.
- In the summer of 2020, Mr. Garnier completed the paperwork to divide the pension. Ms. Garnier filed an objection which halted the process.
- It is untenable for Mr. Garnier to pay $141,636 in spousal support from December 1, 2018 until July 2028 when Ms. Garnier turns 55 years old.
- The CRO provides for a spousal support obligation until the pension is divided. The CRO does not state that spousal support is payable until Ms. Garnier receives a monthly pension income.
- Pursuant to s. 8(1)(a) of the *PBDA,* Ms. Garnier can purchase a life annuity and have immediate access to her share of the pension.[3]

[22] In summary, Mr. Garnier states that a contextual interpretation of the CRO confirms his position. The CRO was intended to provide Ms. Garnier with temporary support until the pension was divided. It was never agreed that Mr.

[3] Page 3, Post-trial Submissions of Mr. Garnier, December 18, 2020, as authored by Mr. Conrad during Ms. Hudson's leave.

Garnier would have a spousal support obligation until 2028. Such an interpretation cannot be now imposed. Such an interpretation would result in a windfall not contemplated at the time of the CRO.

Law

[23] Orders must be interpreted contextually. Words are to be "read in their entire context in their grammatical and ordinary sense harmoniously with the scheme of the [order], the object of the ... [order] and the intention of the ... [court]"; and a "judicious meaning consistent with the text (read in context) is preferred over an unreasonable result: ***Mastin v. Mastin***, 2019 NSSC 248, para 43, quoting from ***Royal Bank v. Robertson***, 2016 NSSC 176, paras. 20 – 21 and ***Djuric v. Dellorusso***, 2019 NSSC 95, paras 38 and 39.

[24] The Saskatchewan Court of Appeal emphasized the importance of contextual interpretation principles in ***Campbell v Campbell***, 2016 SKCA 39. Ottenbreit JA held that a contextual interpretation is based on an examination of the pleadings, the language of the order, and the circumstances under which the order was granted at paras. 15 - 17, wherein the following is stated:

> 15 These principles have been set forth in a number of cases. In ***Sutherland v Reeves***, 2014 BCCA 222, 61 BCLR (5th) 308, Bauman C.J.B.C. stated:
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> > [31] First, court orders are not interpreted in a vacuum. This Court has recently described the correct approach to the interpretation of court orders (***Yu v. Jordan***, 2012 BCCA 367 at para. 53, Smith J.A.):
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> > > [53] In my view, the interpretation of a court order is not governed by the subjective views of one or more of the parties as to its meaning after the order is made. Rather an order, whether by consent or awarded in an adjudicated disposition, is a decision of the court. As such, it is the court, not the parties, that determines the meaning of its order. In my view, the correct approach to interpreting the provisions of a court order is to examine the pleadings of the action in which it is made, the language of the order itself, and the circumstances in which the order was granted. [Emphasis by Ottebreit JA.]
>
> As a result, in addition to examining the language of the Order, it is necessary to review the pleadings and surrounding circumstances. It would be an error to have regard to those factors but to then interpret a generic Model Order instead of the specific order Mr. Justice Willcock made in response to the pleadings and the surrounding circumstances before him.
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> 16 In ***Sans Souci Limited v VRL Services Limited***, [2012] UKPC 6, Lord Sumption reached the same conclusion:

> [13] ... The Board is unable to accept these propositions, because the construction of a judicial order, like that of any other legal instrument, is a single coherent process. It depends on what the language of the order would convey, in the circumstances in which the Court made it, so far as these circumstances were before the Court and patent to the parties. The reasons for making the order which are given by the Court in its judgment are an overt and authoritative statement of the circumstances which it regarded as relevant. They are therefore always admissible to construe the order. In particular, the interpretation of an order may be critically affected by knowing what the Court considered to be the issue which its order was supposed to resolve.

17 In Re: ***Sharpe***, [1992] FCA 616 (Aust), the Court stated:

> [20] ... even if a judgment is not ambiguous, it is nevertheless proper (if not essential) in construing it to have regard to the factual context in which the judgment was given and that this context includes the pleadings, the reasons for the judgment and the course of evidence at the trial.

[25] I therefore must apply a contextual analysis to the CRO, paying heed to the words of the order and the circumstances under which the order issued while applying principles of statutory and contractual interpretation with necessary modification.

[26] In addition, courts confirm that a version of the *contra proferentem* rule is also available when interpreting an order in the event of ambiguity: ***Djuric v Dellorusso***, *supra*, at paras 41 to 44, citing ***Campbell v Campbell***, *supra*, para 15; ***Royal Bank of Canada v Robertson***, 2016 NSSC 176, para 14; ***MEO v SRM***, 2003 ABQB 362, affirmed, 2004 ABCA 90; para 7; and ***KCM v BTM***, 2015 ABQB 317.

My Decision

[27] I agree with Ms. Garnier's interpretation of the spousal support provisions of the CRO. I find that the CRO requires Mr. Garnier to pay Ms. Garnier monthly spousal support as a bridging payment until Ms. Garnier begins to receive monthly pension payments. In explaining my ruling, I will first review contextual findings before exploring interpretation issues.

[28] The following represents my factual findings on the contextual circumstances at the time the consent CRO was resolved:

- The parties were married for about 24 years and have two children. A long-term marriage is often viewed as a joint endeavour producing a greater "presumptive claim to equal standards of living upon its dissolution": ***Moge v. Moge***, [1992] 3 SCR 813, per L'Heureux-Dubé, referencing Rogerson,

"Judicial Interpretation of the Spousal and Child Support Provisions of the *Divorce Act, 1985* (Part I)".

- After 24 years of marriage, Ms. Garnier held a reasonable expectation that she would maintain a standard of living roughly equal to that of Mr. Garnier. This would be accomplished by Ms. Garnier receiving $1,221 in additional monthly income, an amount which represented about one-half of the known monthly pension income received by Mr. Garnier.
- At the time of the settlement conference, Ms. Garnier understood that she would receive monthly pension payments once Mr. Garnier's pension was divided. Ms. Garnier prepared her budget accordingly. She bought the matrimonial home and a vehicle based on the additional income that she would receive either from spousal support or monthly pension payments once the pension was divided.
- Ms. Garnier recently learned that she could not draw from her share of the pension, but rather, was required to deposit the lump sum payment into a locked-in retirement account until age 55.[4]
- If in 2018, Mr. Garnier knew that Ms. Garnier was not eligible to receive her share of the pension until age 55, then Mr. Garnier inappropriately withheld material facts about his pension during the negotiation process.

[29] These contextual findings assist in my examination and interpretation of the spousal support provisions of the CRO. I find that the CRO specifically distinguishes between two separate triggering events. The first triggering event is the actual division of Mr. Garnier's pension as noted by the following words in clause 5 of the CRO:

> … Jennifer Garnier is entitled to half of Jason Garnier's accrued pension …, resulting from his employment with the Department of National Defence. Recognizing that there may be a delay from the date of this Order to the division of Mr. Garnier's pension, …

[30] The second triggering event occurs when Ms. Garnier begins receiving payment of the pension after the pension is divided, as noted in clause 5 of the CRO as follows:

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[4] Contrary to what is suggested in Mr. Garnier's post-trial submissions, I do not have evidence that Ms. Garnier can access her share of the pension before age 55. Indeed, both parties testified that she could not. Further, the letter from Public Works found in Exhibit 9 confirms lock-in requirements also apply to life insurance investments.

> … Jason Garnier will pay spousal support … until such time as Jennifer Garnier begins receiving payment directly from Jason Garnier's pension provider.

And similarly in clause 8 of the CRO which provides in part as follows:

> Once Jennifer Garnier begins receiving payment for the division of Jason Garnier's pension, neither party will have any obligation to provide spousal support to the other party ….

[31] Based on the above, I find that Mr. Garnier must pay Ms. Garnier spousal support until she begins receiving payment of the divided pension. As a transitive verb, one of the definitions of "begin" in the Merriam Webster on-line dictionary is "to set about the activity of: START". Therefore, "begins receiving" means to start to receive payment. This wording suggests more than one payment. This wording suggests a pension in pay. This wording supports Ms. Garnier's interpretation.

[32] In contrast, the wording of the CRO does not support Mr. Garnier's interpretation. If the order intended that the division of the pension was sufficient to terminate spousal support, the order would have read differently. For example, the order could have simply said, "Once Jason Garnier's pension is divided, neither party will have any obligation to provide spousal support to the other party for any reason".

[33] I therefore confirm Ms. Garnier's interpretation because it is consistent with the text of the CRO together with the contextual circumstances existing at the time the terms of the CRO were resolved.

[34] If I am wrong in reaching this conclusion, then I find that the selected words create an ambiguity. If there is an ambiguity, my analysis produces the same conclusion based on the *contra proferentem* rule because Mr. Garnier's then counsel drafted the orders.

[35] Finally, as a practice suggestion and to avoid similar issues arising in the future, counsel are urged to contact pension administrators to confirm all relevant particulars of their clients' pensions and to determine details of the pension division process.

[36] **What is the appropriate spousal support order?**

[37] The quantum of spousal support outlined in the CRO will continue to be paid until Mr. Garnier's pension is divided and a further support order is determined. Thus, once Mr. Garnier's pension is divided, the quantum of spousal support will be reviewed at a hearing during which all relevant factors will be considered, including the following :

- The income of Ms. Garnier.
- The income of Mr. Garnier, including imputing an amount for the monthly tax-free Veterans Affairs Pension.
- The amount of Mr. Garnier's pension income which was earned between June 21, 1990 and October 16, 1993.[5]
- Confirmation of the earliest date when Ms. Garnier can begin to access her share of Mr. Garnier's pension from its locked-in account.
- The expenses and circumstances of Ms. Garnier.
- The expenses and circumstances of Mr. Garnier.
- The presence of compensatory and non-compensatory factors in the circumstances of the parties.
- All other facts related to the spousal support factors and objectives stated in the *Divorce Act.*

[38] The parties are encouraged to participate in a settlement conference to determine the spousal support quantum after disclosure is complete. The parties are also encouraged to review ***Boston v Boston***, 2001 SCC 43 on the issue of double recovery and spousal support.[6] Counsel are to contact scheduling to arrange the necessary court dates.

[39] **Did Ms. Garnier prove a material change in circumstances?**

[40] The parties disagree about the presence of a material change in circumstances as it relates to child support. Mr. Garnier is adamant that no change was proven, while Ms. Garnier states the opposite. Mr. Garnier states that Morgan and Andrew continue to have the same incomes and resources available that they had in 2018. In addition, Mr. Garnier states that there were no changes in his income sources since 2018. As a result, Mr. Garnier states that there is no proof of a material change in circumstances.

[41] Despite Mr. Garnier's protestations, I nonetheless find that Ms. Garnier proved a material change in circumstances for three reasons.

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[5] The parties did not divide the portion of Mr. Garnier's pension which was accrued before their marriage. Accessing this portion for spousal support purposes does not create double recovery: ***Boston v Boston***, 2001 SCC 43.

[6] It is not appropriate for me to comment on Ms. Garnier's settlement proposal in the context of this contested hearing and given that disclosure of important details has yet to occur, including pension division details and tax calculations.

Morgan's Graduation Delay

[42] First, the CRO was premised on Morgan graduating in the spring of 2019. He did not. Morgan did not graduate until the fall. Morgan's delayed graduation was not foreseen when the CRO was negotiated.

Impact of Covid on Andrew's University Attendance

[43] Second, the CRO was premised on Andrew attending university at Memorial University and living in Newfoundland during the school year. Although attending Memorial, Andrew no longer does so from Newfoundland. About one year ago, Andrew returned home to live after Covid became a national health crisis. The Covid pandemic was not foreseen when the CRO was negotiated.

Mr. Garnier's Undisclosed Income

[44] Third, Mr. Garnier did not disclose his non-taxable Veterans Affairs Pension at the time the CRO was negotiated. In reaching this conclusion, I dismiss Mr. Garnier's evidence to the contrary for the following reasons:

- There is nothing in the evidence which shows that the non-taxable VAP was disclosed in 2018[7]. I recognize that in his September 2020 Affidavit, exhibit 20, Mr. Garnier states that his VAP was disclosed and attaches two emails from Ms. Garnier's then counsel as proof. These emails are dated September 12 and 25, 2018. These emails, however, are not proof of disclosure, but rather proof of a request for further information. For example, in the September 12 email, counsel states: "I also understand that Mr. Garnier is receiving a spousal amount ($191) and a children's amount ($229.27) from Veteran's Affairs. Could you please clarify." In the September 25 email, counsel states as follows:

  > I have also attached an older statement from the Veteran's Affairs payment [a 2012 paystub]. This question was addressed in my last letter requesting updated information about the children and spousal amount Mr. Garnier receives.

- Mr. Garnier failed to produce any documentation to show that he disclosed his non-taxable VAP in 2018, such as a response email, or an amended accurate Statement of Income, or an amended accurate Affidavit, or even a recent VAP paystub.
- To the contrary, Mr. Garnier filed a sworn Statement of Income on August 16, 2018, as found in exhibit14. In this sworn document, Mr. Garnier states that

[7] The hearsay statements contained in Mr. Garnier's Affidavit are not evidence.

"[t]he following is a statement of my current monthly income from all sources." In his Statement, Mr. Garnier lists his Commissionaires' salary and his DND pension income which when combined produce an annual income of $58,242. Nowhere does he mention his non-taxable VAP.

- Mr. Garnier's continued misrepresentation of his income is likewise noted in his August 2018 Affidavit. In his Affidavit, Mr. Garnier identified his sources of income as being derived from his employment as a commissionaire and "a pension from the government for my military service."[8] He then states that his "total income for tax purposes is roughly $58,000.00."[9] A strategic choice of words. Mr. Garnier does not reference the amount of his non-taxable income.
- Mr. Garnier did not file an amended or supplemental Statement of Income or Affidavit to correct the erroneous Statements previously filed. Mr. Garnier had a positive duty to disclose and report accurate income information. The court and Ms. Garnier reasonably relied on his false Statements. Mr. Garnier is accountable for providing false, misleading, and incomplete income information. Ms. Garnier is not responsible for Mr. Garnier's conduct.
- The CRO also does not reference Mr. Garnier's VAP income. In the CRO, Mr. Garnier's annual income is stated to be $43,586.16. This number appears to be the approximate amount produced by deducting Mr. Garnier's annual spousal support/pension payment of $14,652 from his reported annual income of $58,242. If the non-taxable VAP was disclosed, Mr. Garnier's income would be stated to be at least $56,188.32 based on the following calculation: Commissionaire income $2,410.85 + DND Pension ($2,442.65 - $1,221.00) + (VAP)[10] $1,049.86 x 12 months.

Summary of Material Change in Circumstances

[45] Ms. Garnier proved a material change in the circumstances given that Morgan graduated later than expected, given that Andrew did not live in Newfoundland because of the Covid pandemic, and given that Mr. Garnier did not disclose his income from his VAP.

[46] **What is the appropriate child support order?**

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[8] Exhibit 14; para 9: Mr. Garnier's August 2018 Affidavit.
[9] Exhibit 14; para 9; Mr. Garnier's August 2018 Affidavit.
[10] This is the amount that was deposited as late as November 28, 2019 as shown in exhibit 13. Tax-free income is ordinarily grossed-up.

[47] I will now address each of the sub-issues flowing from this question.

Morgan's University Expenses

[48] Ms. Garnier seeks child support to cover a portion of Morgan's tuition and book expenses which total $2,800.39. Mr. Garnier disagrees noting that he continued to pay child support for Morgan until September 1, 2019.

[49] I am unable to award this claim because Ms. Garnier did not produce the necessary documents. Because post-secondary expenses are classified as s.7 expenses, I must not only examine the income of the parties, but also the income and resources of Morgan. Morgan's 2019 income tax return and income information were not disclosed. I am thus unable to determine if Morgan could cover the cost of the tuition and book expenses without parental input.

[50] I therefore make no order for contribution from Mr. Garnier other than if Mr. Garnier received money from his VAP for Morgan after September 1, 2019, Mr. Garnier must provide Morgan with the money he so received. Mr. Garnier must provide confirmation from Veterans Affairs for the period between September and December 2019.

Child Support for Andrew

[51] Ms. Garnier seeks retroactive support for Andrew because of Mr. Garnier's unreported income and because Andrew now lives with her while attending university virtually. She also seeks contribution for Andrew's s.7 expenses. She states that Andrew requires a gym membership because he no longer has access to the university gym. She also asks for contribution towards Andrew's university expenses.

[52] Mr. Garnier disagrees. He states that there are no overall changes to Andrew's expenses or income. Andrew earned significant income in 2019 and 2020 to cover his own expenses. Further Andrew's resources from student loans and bursaries remain unchanged. Without proof of a material change in circumstances, he states that Ms. Garnier's variation application must fail.

Decision on Child Support for Andrew

[53] Clause 2 of the CRO outlines Mr. Garnier's child support obligations for Andrew which are summarized as follows:

- Mr. Garnier is required to pay Andrew $200 per month from September to April while Andrew attends university.

- From May 1, 2019 until August 2019, Mr. Garnier was required to pay $635 per month to Ms. Garnier based on the table amount for two children and provided both Morgan and Andrew lived with Ms. Garnier.
- Commencing 2020, during the months of May to August, Mr. Garnier was required to pay $375 per month to Ms. Garnier provided Andrew was living with Ms. Garnier.

[54] Andrew owes a significant amount in student loans. Loans are not income. Loans are debt that must eventually be repaid. Andrew is an excellent student; he has contributed much to the cost of his own education. He does however remain dependent and child support is appropriately paid.

[55] Because Mr. Garnier did not disclose all of his income in 2018, I am retroactively increasing the amount of child support payable directly to Andrew for the months of January to April 2019 and from September 2019 to February 2020. Mr. Garnier is to pay Andrew an additional $50 per month for these months, which equates to a lump sum payment of $500 payable directly to Andrew.

[56] I also grant a retroactive variation of the table amount of child support payable to Ms. Garnier for Andrew. From May to August 2019, Mr. Garnier will pay Ms. Garnier an additional $100 per month which equates to a lump sum payment of $400.

[57] Further, Andrew has been living with Ms. Garnier since March 2020 and attending Memorial University virtually. Mr. Garnier will thus pay Ms. Garnier the table amount of child support effective March 1, 2020 and continuing monthly thereafter while Andrew remains dependent. The table amount for one child is based on Mr. Garnier's income of about $56,188 together with a gross-up because of the tax-free status of the VAP.

[58] Mr. Garnier must immediately provide proof of his current income and the income he earned in 2020 so that the retroactive calculation can be completed. In the event of a calculation dispute, I retain jurisdiction. Mr. Garnier will receive credit for all payments made, including those payments made directly to Andrew.

[59] In the circumstances, I do not award the cost of the gym membership as a s.7 expense. The gym membership is appropriately paid out of the table amount. Further, I am not awarding child support to cover Andrew's university expenses for three reasons. First, Andrew earned a healthy income in 2019 and 2020. Second, he received student loans and bursaries. Third, Mr. Garnier has no ability to pay given his income and the fact that he also must pay the table amount of child support and spousal support.

[60] Should child support continue after Andrew completes his first degree? Andrew plans to continue his education after he graduates from Memorial University. He has an excellent academic record.

[61] Child support does not necessarily cease with the first degree. In ***Martell v. Height***, 1994 NSCA 65, Freeman, J.A., stated as follows at para 8:

> It is clear from the various authorities cited by counsel that courts recognize jurisdiction under s. 2(1) of the Divorce Act to hold parents responsible for children over sixteen during their period of dependency. How long that period continues is a question of fact for the trial judge in each case. There is no arbitrary cut-off point based either on age or scholastic attainment, although as these increase the onus of proving dependency grows heavier. As a general rule parents of a bona fide student will remain responsible until the child has reached a level of education, commensurate with the abilities he or she has demonstrated, which fit the child for entry-level employment in an appropriate field. In making this determination the trial judge cannot be blind to prevailing social and economic conditions: a bachelor's degree no longer assures self-sufficiency.

[62] Child support should continue to be payable while Andrew pursues his education after his first degree provided he is a *bona fide* student. The amount payable will depend on the circumstances. Ms. Garnier suggests that Mr. Garnier should pay the amount that he receives from his VAP on Andrew's behalf. That is a practical resolution of the issue provided Mr. Garnier consents, otherwise a court application will have to be filed to determine the issue.

[63] Finally, while there is an obligation on Mr. Garnier to pay child support for Andrew, Ms. Garnier must provide ongoing disclosure of Andrew's circumstances. By June 1 of each year, Ms. Garnier must provide Mr. Garnier with a copy of Andrew's marks for the prior academic year, a copy of Andrew's prior year's income tax return and assessment, and confirmation of all scholarships and bursaries received for the prior academic year. By September 1 of each year, Ms. Garnier must supply Mr. Garnier with proof of Andrew's enrollment in a post-secondary educational program. Finally, Ms. Garnier must immediately notify Mr. Garnier, in writing, if Andrew quits attending the post-secondary educational program.

Health Expenses

[64] Ms. Garnier states that Mr. Garnier wrongly terminated health coverage for Morgan. As a result, she incurred medical expenses and Morgan was deprived of much needed mental health services. She further states that Mr. Garnier did not

reimburse her for other health related expenses. She seeks monetary relief for his failure. She also seeks reimbursement for other unpaid health expenses.

[65] For his part, Mr. Garnier states that he terminated Morgan's health coverage because of the provisions of the CRO. He was not told that Morgan's graduation was delayed until after he cancelled the coverage. Despite not being under a legal obligation, Mr. Garnier notes that he offered to pay for the health expenses, but Ms. Garnier refused to accept his offer.

[66] I find that Mr. Garnier should have reinstated Morgan's health coverage. Ms. Garnier notified him very early in May that Morgan would not be graduating until the fall. Because of his lack of coverage, Morgan was unable to access all of the private mental health treatment that was otherwise available.

[67] Morgan is employed in another country. He is no longer a dependent child. Morgan is no longer eligible for health coverage under Mr. Garnier's plan.

[68] In the circumstances, I order Mr. Garnier to reimburse Ms. Garnier $789 for the health expenses. Further, if Mr. Garnier's purchase of his sons' glasses was not a gift, and provided Mr. Garnier supplies proof of payment and proof of insurance re-imbursement, the net expense is likewise ordered to be equally shared between the parties.

[69] **What is the appropriate order for the life insurance designation?**

[70] Ms. Garnier wants Mr. Garnier to comply with the CRO by designating the children as beneficiaries of his life insurance. In post-trial submissions, she states that she also wants to be named a beneficiary.

[71] Mr. Garnier agrees to designate the children as beneficiaries.

[72] Mr. Garnier must comply with the CRO and supply proof of compliance. At this time, I do not, however, order that the life insurance be used to secure the spousal support obligation. That issue is best addressed at the time of the review hearing on spousal support.

Conclusion

[73] Ms. Garnier's application is granted to the extent stated in this decision and as summarized as follows:

- Confirmation that the CRO orders Mr. Garnier to pay Ms. Garnier monthly spousal support as a bridging payment until Ms. Garnier begins to receive monthly payments from her share of the pension. The quantum of spousal

support will be determined at a hearing to be scheduled after Mr. Garnier's pension is divided and further disclosure is filed and exchanged.

- A retroactive variation of child support such that Mr. Garnier will pay a lump sum of $500 directly to Andrew; a lump sum of $400 to Ms. Garnier; and the table amount of child support to Ms. Garnier commencing March 1, 2020 and continuing monthly thereafter while Andrew lives with Ms. Garnier and is enrolled in a post-secondary educational program.
- An order requiring Mr. Garnier to pay $789 to Ms. Garnier for health expenses and confirmation that the uninsured cost of the glasses will be equally shared provided the glasses were not acquired as a gift.
- Confirmation that Mr. Garnier must designate the child(ren) as beneficiary of his life insurance as security for his child support obligation.

[74] Costs submissions should be filed by Ms. Garnier by April 30, 2021 and by Mr. Garnier by May 14, 2021.

Forgeron, J.