SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION
Citation: *Boutilier v. Snook*, 2021 NSSC 271

Date: 20210924
Docket: *Sydney* No. 1206-6310
Registry: Sydney

Between:

Cindy Boutilier

Applicant

v.

Sheldon Snook

Respondent

Judge:	The Honourable Justice Lee Anne MacLeod-Archer
Heard:	June 18, 2021, in Sydney, Nova Scotia
Written Submissions:	Alan Stanwick – July 8, 2021 Darlene MacRury – July 15, 2021
Written Release:	September 24, 2021
Counsel:	Alan Stanwick for the Applicant Darlene MacRury for the Respondent

By the Court:

[1] The parties were divorced on May 15, 2013. Their Corollary Relief Order incorporated a Separation Agreement, which provides for shared parenting of the parties' daughter K.A.S. Ms. Boutilier was granted primary care.

[2] The C.R.O. requires Mr. Snook to pay monthly child support of $240.00, plus 50% of s.7 expenses. He must also maintain a medical plan for K.A.S.

[3] At the time, Mr. Snook had an income of $49,000.00, while Ms. Boutilier had an income of $17,000.00. The child support payable doesn't appear to be a true set-off amount, but the Agreement provides that Ms. Boutilier will collect 100% of the Child Tax Credit. The Agreement does not require the parties to exchange income information annually.

[4] Ms. Boutilier filed a Notice of Variation Application on October 1, 2019. She seeks a retroactive adjustment of child support to January 1, 2013, as well as a proportionate sharing of section 7 expenses.

[5] The parties agree that there's been a change in circumstances. At a settlement conference in October, 2020, Mr. Snook agreed to adjust his child support payment to reflect his increased income. He agreed to pay $541.00 monthly, effective November 1, 2020. An order hasn't been issued to reflect that agreement yet.

ISSUES

1. What is the income of both parties? Should income be imputed to either?
2. What child support is payable by Mr. Snook?
3. Should retroactive adjustment of child support be ordered? And if so, to what date?
4. Should Mr. Snook receive credit for payments he made on behalf of (or to) the child?

ISSUE 1: What is the income of both parties? Should income be imputed to either?

[6] Ms. Boutilier has worked as a server in a bar for thirty years. In 2020, she collected emergency benefits due to the Covid pandemic. In prior years, her income was significantly less than what she earned in 2020. She argues that her "Covid year" is an aberration, and that the Court should look to her 2017, 2018, and 2019 tax returns to determine her income. In those years, she had an average income of $16,688.01.

[7] Ms. Boutilier acknowledges that she receives tips which are not reported for tax purposes. She testified that she receives about $100.00 per week, after paying a 30% share to the bartenders. She concedes that these monies must be added to her income. She calculates the additional income at $5,200.00 (52 X $100). However, that figure does not include a gross up, which would add an additional $1,300.00 to her gross income at a marginal rate of 20.6%. Her total income would therefore be $23,188.01

[8] Mr. Snook argues that Ms. Boutilier earns more in tips than $100.00 weekly, and he points to her lifestyle as evidence of that. He suggests that her ability to pay $3,000.00 in cash for a car for K.A.S., as well as her ability to contribute $40,000.00 to an R.E.S.P. means that she enjoys a higher income than reported.

[9] Ms. Boutilier's tax returns show that she has made regular contributions to a T.F.S.A. since 2016, and she has an R.R.S.P., from which she's withdrawn funds on two occasions since 2016. Despite her evidence that she and K.A.S. contributed jointly to the R.E.S.P., her tax returns show $0 income for her dependent. So Ms. Boutilier must have paid that amount herself.

[10] Ms. Boutilier lives in subsidized housing, so her living expenses are low. However, combined with her lifestyle and ability to pay the above amounts, I accept that Ms. Boutilier has access to more money than what she reports in wages and tips. Mr. Snook says that she's either underreporting her income, or she's underemployed. He asks that income of at least $25,000.00 be imputed to Ms. Boutilier. He points out that minimum wage would pay at least that much.

[11] I'm satisfied that Ms. Boutilier's income in 2020 is an aberration. I've considered her average income between 2017 -2019 as suggested, but I'm not satisfied that it accurately reflects her total income. Rather, I find, on a balance of

probabilities, that Ms. Boutilier earns at least $25,000.00 with unreported (and grossed up) tips. I am prepared to impute income to her at that level for purposes of child support from 2016 onward.

[12] Mr. Snook is a propane service technician. His employment income in 2020 was $80,050.09 plus profit sharing, the amount of which was unknown at the hearing. In 2019, it was $1,755.18 so I have projected in 2020 that it was around $1,800.00. Mr. Snook recently started a new job, where he earns a higher hourly rate, but he is no longer eligible for profit sharing.

[13] He concedes that he occasionally performs work for family and friends without reporting the income. He says that he earns around $2,000.00 annually through this work. Grossed up at 40%, this amounts to an extra $3,333.00 in income annually. I therefore calculate Mr. Snook's 2020 income for purposes of child support at $85,183.09.

[14] In 2019, Mr. Snook reported Line 150 income of $73,792.32 including bonus (profit sharing). Including grossed up unreported income, I calculate his total income for that year at $79,125.23.

[15] In 2018 and 2017, his unreported income of $2,000.00 is grossed up at 35%. In 2016, his unreported income is grossed up at 30%.

[16] Mr. Snook's income for child support purposes is therefore calculated as follows:

YEAR	LINE 150 INCOME	UNREPORTED INCOME	TOTAL INCOME
2016	$67,928.85	$2,857.14	$70,785.99
2017	$66,735.94	$3,076.92	$69,812.86
2018	$73,792.32	$5,332.91	$79,125.23
2019	$72,976.55	$3,076.92	$76,053.47
2020	$81,850.90	$3,333.00	$85,183.90

ISSUE 2: What child support is payable by Mr. Snook?

[17] K.A.S. is attending university locally, and both parties accept that the set-off table amount is appropriate, without a comparison of household standards of living. The amount of child support payable by Mr. Snook prospectively, commencing

August 1, 2021 is therefore the set-off amount of $541.68 per month ($731.68 - $190.00).

[18] In addition, Mr. Snook's share of section 7 expenses payable for the child will increase to 77.3% to reflect proportionate sharing, effective August 1, 2021. This means that he will pay $54.00 monthly as a contribution to K.A.S.'s medical expenses.

[19] Ms. Boutilier asks the court to order proportionate sharing of K.A.S.'s university expenses, after the R.E.S.P. has been exhausted. This is more than reasonable, where she alone contributed to the R.E.S.P.

[20] The C.R.O. does not define s.7 expenses, but post-secondary expenses fit the definition in the *Guidelines.* It's appropriate to direct Mr. Snook to pay 77.3% of tuition, lab fees, student union dues, and other levies imposed by the university for K.A.S.'s undergraduate program, after the R.E.S.P. has been depleted. Had I not found that a proportionate sharing is appropriate, I would have directed that he pay 50% of these costs under the C.R.O. annually, with Ms. Boutilier's share being paid from the R.E.S.P.

[21] This obligation will be in addition to the off-set table amount Mr. Snook will pay as long as the child is living at home while attending Cape Breton University.

ISSUE 3: Should retroactive adjustment of child support be ordered? And if so, to what date?

[22] Ms. Boutilier seeks a retroactive adjustment of child support to January 1, 2013. Ms. Boutilier relies on the Supreme Court of Canada's decisions in **Michel v. Graydon**, 2020 SCC 24 and **Colucci v. Colucci**, 2021 SCC 24 in support of her claims. The latter case involved a payor father who applied to retroactively forgive accumulated arrears, unlike the present case.

[23] The **D.B.S.** test is still applicable to retroactive claims, as expanded upon by **Michel** and **Colucci**. In order for Ms. Boutilier to successfully advance a retroactive claim as far back as January 1, 2013, she must provide a reasonable explanation for her delay in advancing her claim. The list of acceptable reasons for delay has been expanded by the Supreme Court to include socio-economic factors, none of which are present here.

[24] I've considered whether Ms. Boutilier may have been unwilling to jeopardize the cooperative parenting arrangement she enjoyed with Mr. Snook by filing sooner. However, I'm satisfied that didn't play a part in her decision. In fact, she testified that she "threatened" Mr. Snook with a variation application several times in the past. The problem is that she never took active steps to file until October, 2019 when Maintenance Enforcement staff "asked" her to do so.

[25] Even considering the expanded list of reasons for failure to file a timely application, I find there's no reasonable excuse for failing to bring this application sooner. In reaching that conclusion, I've also considered Mr. Snook's evidence that he was unable to locate all of the receipts for payments he made on behalf of the child prior to 2017. This highlights why a timely application is important.

[26] Next, I must consider whether there's blameworthy conduct on the part of Mr. Snook. The C.R.O. doesn't contain a requirement to disclose income annually and neither party asked the other for income disclosure after 2013. But that's not the end of the inquiry, as the Supreme Court has clarified that payor parents are expected to pay according to their means, irrespective of whether their court order requires ongoing income disclosure. Mr. Snook failed to adjust his child support payments over the years as his income increased.

[27] His affidavit indicates that, to compensate for the increases, he paid the "majority" of costs for K.A.S.'s medical supplies, as well as half of her personal expenses, such as hair, clothing, and nails. The problem with that logic is that he was required to pay 50% of the child's s.7 expenses under the C.R.O. in any event. So his payment of those expenses doesn't necessarily make up for a lack of increased table support. I find there's blameworthy conduct as defined by the Supreme Court, though certainly not of the egregious nature displayed in **Colucci**.

[28] I next turn to whether the child was disadvantaged by the lack of increased child support payments. Mr. Snook argues that she suffered no disadvantage because she has a car (which her mother bought) and he contributed to her insurance costs, as well as extras such as music apps and manicures. But K.A.S. required other extras, towards which Mr. Snook did not contribute. For example, she paid $720.00 for tutoring without contribution from Mr. Snook.

[29] Even now, a retroactive award would still benefit the child. K.A.S. is only in her first year of university. She's pursuing a B.Sc. (mathematics) degree. The R.E.S.P. will help defray her costs this year and next, but she will likely pursue at least two more years of undergraduate studies.

[30] Further, a retroactive award would compensate Ms. Boutilier for the extras she paid alone, while receiving an inadequate amount of child support.

[31] There's no evidence that Mr. Snook would suffer hardship if a retroactive award is made. He's earning good income, and I have no evidence of high debt levels or other dependants, for example. I will restructure repayment over time, to alleviate any short-term "crunch" he may face.

[32] The balance favours a retroactive adjustment. However, considering the lengthy delay in pursuing adjustment, as well as the nature of the blameworthy conduct, I find it's appropriate to limit the adjustment to three years prior to the date of application. This brings it back to October 1, 2016.

[33] The amount of child support which should have been paid since October 1, 2016 will be calculated on a set-off basis, using the incomes I've calculated above. M.E.P. must calculate the arrears and add any balance owing (or credit) to Mr. Snook's account.

[34] Ms. Boutilier initially asked for a retroactive award of s.7 expenses, but she withdrew that claim at the hearing. She acknowledged that Mr. Snook continues to carry a medical plan under which K.A.S. is covered, and he often paid for K.A.S.'s medications and supplies over the years.

[35] She also asks for a contribution towards tutoring expenses. Mr. Snook says that because she presented no receipts to support her claim, it should be rejected. However, I accept her evidence that she hired a teacher who wouldn't provide receipts. At the rate of 50% under the C.R.O., Mr. Snook should have paid Ms. Boutilier the sum of $360.00 towards tutoring expenses. I direct him to pay that sum forthwith.

Issue 4: Should Mr. Snook receive credit for payments he made on behalf of (or to) the child?

[36] Mr. Snook provided evidence of payments made to Ms. Boutilier, to K.A.S., and for some expenses directly. The money sent to Ms. Boutilier covered his share of expenses for K.A.S.'s cell phone, car insurance, medical supplies, graduation, and other discretionary items.

[37] Ms. Boutilier suggests that because these payments were for discretionary items, they should not count towards Mr. Snook's retroactive adjustment of table

support. The fact that Mr. Snook made these voluntary payments should not be discounted. In fact, that kind of cooperation between parents should be encouraged. When Ms. Boutilier asked for money for extras, Mr. Snook sent it.

[38] Section 7 expenses were not enumerated or defined in the C.R.O. or Agreement. Some of the types of expenses paid by Mr. Snook (hair, nails, clothing) do not constitute special or extraordinary expenses. Those items would normally be paid by the recipient from the table amount of child support. I'm prepared to give Mr. Snook credit for amounts paid to Ms. Boutilier, and for discretionary items paid directly after October 1, 2016.

[39] I have not credited Mr. Snook for monies paid to K.A.S. or for medical expenses. However, I am satisfied that Mr. Snook should get credit for monies paid for discretionary items totaling $3,323.69.

CONCLUSION

[40] M.E.P. must calculate Mr. Snook's arrears based on the above figures and apply a credit of $3,323.69. If there's a balance owing by Mr. Snook, he must pay that amount in monthly increments of $300.00 until it's paid in full. If there's a credit, it will be applied to future child support payments as they become due.

[41] Mr. Stanwick will prepare the order. If there's no agreement on costs, counsel may file written submissions (not exceeding 5 pages) within 30 days.

MacLeod-Archer, J.