SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION
Citation: *Bradley v. White*, 2022 NSSC 391

Date: 20221031
Docket: SFH-MCA 39450
Registry: Halifax

Between:

Amy Elizabeth Bradley

Applicant

v.

Philip Kevin White, Jr.

Respondent

LIBRARY HEADING

Judge:	The Honourable Justice Elizabeth Jollimore
Heard:	October 13 – 14, 2022
Summary:	Father applied to vary parenting, custody and child support. Mother applied to find father in contempt and seeking an order to the Canada Revenue Agency.
Key words:	Family, Parenting, Custody, Contempt, Parenting Time, Child support, Table amount, Imputing income, Disclosure, Retroactive Support, Unreasonable delay, Blameworthy conduct, Child's circumstances, Variation, Arrears
Legislation:	*Parenting and Support Act*, R.S.N.S. 1989, c. 160 *Child Maintenance Guidelines*, NS Reg. 53/98, clause 19(1)(a)

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Counsel:	Philip White, Jr., Self-represented Amy Bradley, Self-represented

By the Court:

Introduction

[1] This is a decision in the application to vary and the response, filed by Philip White and Amy Bradley, respectively under the *Parenting and Support Act*, R.S.N.S. 1989, c. 160.

[2] I can deal with some claims very quickly.

First – Ms. Bradley wants me to find Mr. White in contempt of a court order

[3] For me to find Mr. White in contempt of a court order, Ms. Bradley must prove 3 things beyond a reasonable doubt. Each of the 3 things must be proven. If any 1 is not proven, I cannot make a contempt finding.

[4] The first thing she must prove is that the order alleged to have been breached must state clearly and unequivocally what should and should not be done.

[5] The second thing is that the party alleged to have breached the order must have had actual knowledge of the order.

[6] The third thing is the person allegedly in breach must have intentionally done the act that the order prohibits or intentionally failed to do the act that the order compels.

[7] Ms. Bradley says Mr. White is in contempt of the court order because he picked up Tyee from school and took him overnight without communicating with Ms. Bradley first, or at all. She also said, at pre-trial conference, that he was in contempt because he failed to return Tyee to her.

[8] The Order from 2020 said, at paragraph 2, that Tyee would determine the time he spent with Philip White.

[9] The Order did not require Mr. White to communicate with Ms. Bradley when he was picking Tyee up from school or if Tyee was staying overnight. The order didn't require Mr. White to return Tyee to Ms. Bradley at any time.

[10] Because there was no clear and unequivocal requirement on Mr. White to do these things, he cannot be found guilty of contempt when he didn't do them. Since this element is missing, I cannot find Mr. White is in contempt of the order.

[11] I dismiss Ms. Bradley's motion to find Mr. White in contempt.

Second – I'm asked to write letter to Canada Revenue Agency about entitlement to tax benefits

[12] Whether someone is eligible for tax deductions or tax credits is based on the rules in the *Income Tax Act*. The only court which can decide how those rules apply to a particular family's situation is the Tax Court of Canada.

[13] In *Calogeracos v. The Queen*, 2008 TCC 389, Justice Webb of the Tax Court of Canada made clear that I do not have the power to decide who is entitled to tax benefits. The Canada Revenue Agency or – if their decision is challenged – the Tax Court of Canada will determine who is entitlement to tax benefits such as the Canada Child Benefit and credits like the eligible dependent credit.

Third issue – Ms. Bradley wants me to retroactively vary the terms of the 2020 order relating to child support

[14] Ms. Bradley says that Mr. White earned more from 2015 to 2019 and I should change the order. Mr. White, too, has trouble with my decision, saying that I should have found that Tyee was living with him from 2015 onward.

[15] The variation application I heard in November 2019 was an application to retroactively vary child support dating back to 2015. I've already decided that claim and made my findings about where Tyee was living. If Ms. Bradley or Mr. White thought my decision was wrong, they should have appealed my decision to the Nova Scotia Court of Appeal or made a fresh evidence motion. In the 2 years since I rendered that decision, those steps were not taken. They cannot be taken now. The issues were litigated. They were decided. Parties cannot re-litigate cases which have already been decided.

[16] This leaves me with the main issues: deciding what Tyee's parenting arrangement is, and determining child support.

Parenting

[17] Tyee turns 19 today – on October 31, 2022. He is not attending school and is working full-time. He is an adult under the *Age of Majority Act*, R.S.N.S. 1989, c. 4. As an adult, I find it is inappropriate to make an order requiring him to live in any particular place or for his parents to make decisions on his behalf.

[18] So this means I move to the issues about child support. The Court of Appeal in *Staples v. Callender*, 2010 NSCA 49 says I'm to start with prospective child

support or support following the date when Mr. White filed his variation application. This means child support after August 20, 2021. After that is done, I look to the historic period Mr. White claims, from January 2020 until August 2021.

[19] To know what child support should be paid, and by whom, I need to decide what Tyee's parenting arrangement was at the relevant time.

Prospective child support

[20] Starting in August 2021, at this point Tyee is still under the age of majority. I have evidence from Philip White, Tyee Bradley and Claudette Hector about Tyee's residence after January 2020. Ms. Bradley did not challenge the evidence of Dr. Fung or Selena Doner about Tyee's residence. She did not challenge the evidence o f Mr. Bradley's landlord.

[21] I accept that Tyee's primary residence has been with his father since August 2021. Ms. Bradley has offered no evidence challenging this. At that time, Tyee had finished high school. He continued in his upgrading program at BFEC (Bedford and Forsythe Education Centres) until early 2022. He has been working full-time since February 2022. He has worked on a series of contracts which may be extended until the end of November 2022.

[22] As a result of these findings, I conclude that:

> (a) Mr. White should not have been paying child support to Mr. White as of August 2021, and
>
> (b) Mr. White is entitled to child support from Ms. Bradley.

[23] Tyee is presumed to be entitled to child support while he is under the age of 19 - still a minor, not yet an adult - unless Ms. Bradley proves she has a lawful excuse for not paying child support. Tyee has been working full-time and not attending school since February 2022.

[24] Lawful excuse exists in those very few cases where the child's conduct is extreme. Where this is so, judges have tried to fashion support awards that will serve the child's best interests. This approach is consistent with Judge Levy's view that the only possible lawful excuse for the non-support of a child is one which is in the child's best interests. This reasoning is reinforced by the core principles of child maintenance identified in the Supreme Court of Canada's decisions in *Richardson*, 1987 CanLII 58 (S.C.C.) and *Willick*, 1994 CanLII 28

(S.C.C.). These principles are, among others, that child support is the child's right and this right survives the breakdown of the parents' relationship. According to Justice Bastarache at paragraph 38 of *D.B.S. v. S.R.G.; L.J.W. v. T.A.R.; Henry v. Henry; Hiemstra v. Hiemstra*, 2006 SCC 37, the core principles "animate" child maintenance.

[25] Typically, lawful excuse is that a child has withdrawn from parent *not* as a result of the parent's expulsive conduct. Here, there's no evidence about why Tyee left his mother's home and moved to his father's. While he's under 19, I find that he remained entitled to child support while he pursued his educational upgrading at BFEC. However, once this was done and he began work in February 2022, Tyee ceased being entitled and Ms. Bradley's child support for Tyee should stop.

How much child support does Ms. Bradley owe?

[26] In 2021, Ms. Bradley's annual income was $49,086 which equates to a monthly child support payment of $418. For the 5 months from August – December 2021, she owes child maintenance of $2,090.

[27] In 2022, Ms. Bradley says her income has dropped dramatically to approximately $16,000 which she's supplemented with money from refinancing her home. She says she received approximately $35,000 - $25,000 of which she used to retire debt and she received $10,000.

[28] Ms. Bradley has chosen to leave her job at the Nova Scotia Health Authority and to pursue a new employment opportunity because she believes the new opportunity may be more profitable in the future. It certainly has not been profitable to date.

[29] Ms. Bradley estimates her total income for 2022 will be between $16,000 and $20,000. She's paid $35 per hour. Earning between $16,000 - $20,000 means she'd be working between 457 and 571 hours each year.

[30] Where full-time employment is 40 hours per week, so Ms. Bradley is estimating she'll work between 11.5 and 14.5 weeks annually.

[31] Alternately, if I look at this from the perspective of someone working 48 weeks each year (which allows 2 weeks for vacation, and 2 weeks for statutory holidays each year), Ms. Bradley's working at most 12 hours each week, if she is working 571 hours during the year. If she earns $16,000 annually, that means

she's working 457 hours or 9.5 hours per week – this is slightly more than 1 day each week.

[32] According to her paystubs from the Nova Scotia Health Authority (Ms. Bradley's previous employer), she worked between 35 and 63 hours biweekly.

[33] It's difficult to understand – given Ms. Bradley's variable hours at the Nova Scotia Health Authority – why she didn't keep that job and work the new job on the side until it began to provide her with a reliable and sufficient income.

[34] Relying on the Court of Appeal's decision in *Montgomery*, 2000 NSCA 2, I find that Ms. Bradley is intentionally under-employed. Her employment in her new position is not required by the needs of any child (anyone under the age of majority or anyone who she has a legal obligation to support), her own educational needs, or her own health needs. Accordingly, I impute to her an annual income $49,086. This is the same amount she earned in her last year at the Nova Scotia Health Authority. The equates to a monthly payment of $418 for January and February 2022.

[35] Ms. Bradley owes prospective child support of $2,926.

Retroactive child support

[36] Mr. White claims retroactive support for the period between January 2020 and July 2021, before he began his variation application in August 2021.

[37] I can only order retroactive child support to Mr. White if Tyee had his primary home with him during the retroactive period.

[38] Mr. White says Tyee has lived with him since January 2020. Ms. Bradley cross-examined Tyee, Mr. White and Ms. Hector (Tyee's paternal grandmother) about where Tyee spent his time as of January 2020.

[39] The evidence of Mr. White and Tyee agrees that Tyee was with his father (at Tyee's grandmother's home) from January 20 – 31. They provided no evidence and didn't dispute Ms. Bradley's evidence about where Tyee was until January 20, 2020. I find that for most of January 2020, Tyee was with his mother. Mr. White's child support payments to Ms. Bradley should continue in January 2020.

[40] In terms of February, Ms. Bradley offers evidence about Tyee's whereabouts for the first 9-10 days. After that, she doesn't say where he was. Mr. White and

Tyee say that Tyee was with his father. I find that Tyee did not live with his mother after January 2020 so Mr. White should not pay child support to Ms. Bradley for any month after January 2020.

Should I order retroactive child support?

[41] A retroactive award of child support isn't automatic. It isn't exceptional, either. I'm to consider 4 factors in deciding whether to award child support retroactively:

- Mr. White's delay in seeking it
- Any blameworthy conduct by Ms. Bradley that contributed to Mr. White's delay
- Tyee's circumstances during this period and
- Whether a retroactive award would cause Ms. Bradley undue hardship.

[42] Mr. White didn't explain why he delayed 20 months in claiming child support which supports not granting his claim for retroactive support.

[43] There was no evidence that Ms. Bradley did anything to cause Mr. White to delay. This also supports not granting his claim.

[44] There was little evidence of Tyee's circumstances during this period: I know that for some period (between February and May 15, 2020), Tyee wasn't living with his father. There's no explicit evidence about how long this period lasted. I know Tyee lived at his girlfriend's family's home. Mr. White acknowledged that Tyee stayed with his girlfriend's family. Over the course of his testimony, Mr. White minimized the amount of time Tyee lived with his girlfriend's family.

[45] Selena Doner swore that Tyee was always living with her and Mr. White from January to May 2020. Even Tyee swore this in his affidavit but on cross-examination, Tyee admitted that he stayed at his girlfriend's family's home during the first COVID lockdown. Because of this direct contradiction in Tyee's evidence, I do not accept his evidence and look elsewhere to determine the time he spent with his girlfriend's family.

[46] I find that Tyee was not living with his father during part of March and April 2020 during the first COVID lockdown which started in mid-March 2020.

[47] I accept that Tyee has lived with his father since May 2020 and until July 2021. So, Tyee's circumstances are that he has not been entirely dependent on his father during the period from January 2020 to July 2021, but he has been dependent since May 2020. This factor supports a retroactive child support award.

[48] Lastly, would a retroactive award create undue hardship for Ms. Bradley? She argues that she has another child to support (the couple's 24-year-old daughter, Jada) and that she has a new job where she earns less income. I've already described Ms. Bradley's new financial situation and how her new job is one where she is barely working. Any undue hardship that would result from a retroactive award is of Ms. Bradley's own choice. This factor suggests I should make a retroactive award.

[49] Ms. Bradley's financial circumstances during the retroactive period (May 2020 to July 2021) were good. She hadn't yet started her new job where her income has dropped so much. She would have been able to pay child support when it was due – and when she knew Tyee was not living with her.

[50] I find it is appropriate to make a retroactive child support award.

- In 2020, Ms. Bradley's income was $49,689. She owes monthly child support of $423 for 8 months, or $3,384.

- In 2021, Ms. Bradley's income was $49,086. She owes monthly child support of $418 for 7 months, or $2,926.

[51] I find that it is appropriate to award retroactive child support from the point when Tyee was clearly in Mr. White's care, and I order Ms. Bradley to pay support for the period from May 2020 to July 2021 of $6,310.

[52] In addition, I've calculated that Ms. Bradley owes child support of $2,926 for the period following the filing of the variation application.

[53] I am permitted to structure this child support award and I do so. Ms. Bradley will have until July 31, 2024, to pay $9,236 to Mr. White. If he owes her any child support from my last order, these will be set off against Ms. Bradley's support, and the net amount she owes him will be due no later than July 31, 2024.

If the set off shows that Mr. White still owes Ms. Bradley, he must pay her by July 31, 2024.

[54] I have prepared the order which will be sent to each of you and to the Maintenance Enforcement Program.

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

Halifax, Nova Scotia