

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: *Friesen v. Friesen*, 2023 NSSC 168

Date: 20230530

Docket: 1201-72851; SFH-D 119510

Registry: Halifax

Between:

Susan Elizabeth Friesen

Petitioner

v.

David Bradley Friesen

Respondent

LIBRARY HEADING

Judge: The Honourable Justice Elizabeth Jollimore

Heard: March 13-14 and May 18, 2023 in Halifax, Nova Scotia

Subject: Family, Divorce, Child Support, Spousal Support, Retroactive (Historic) Support, Special or Extraordinary Expenses

Summary: Mother sought calculation of historic and prospective child support where support amounts last based on 2016 Separation Agreement. Historic child support awarded and calculated. Prospective support determined. Father's request to end spousal support dismissed. Mother still entitled to compensatory and non-compensatory spousal support, despite significant efforts to become self-sufficient since 2015 separation. Parties cohabited for first 15 years of 23 year marriage.

Legislation *Divorce Act*, RSC 1985, c. 3 (2nd Supp.)
Federal Child Support Guidelines, SOR-97/175, clause 3(2)(a), clause 7(1)(c)

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Counsel: Kelsey E. Hudson for Susan Friesen
David Friesen, self-represented

By the Court:

Introduction

[1] The outstanding issues in Susan and David Friesen's divorce are all related to support: prospective and retroactive child support for their son, and Mr. Friesen's request to end Ms. Friesen's spousal support. They resolved all other issues relating to their marriage in a separation agreement.

Divorce

[2] I'm satisfied the parties' marriage has permanently broken down. They have been separated for more than 6 years and there is no prospect of reconciliation. I grant their divorce.

General considerations

[3] I must resolve prospective support issues before historic ones: *Staples v. Callendar* 2010 NSCA 49 at para 41. Because child support is a priority, I address it before spousal support.

[4] One question relates to all the issues and so I address it first: should I impute income to Ms. Friesen? Mr. Friesen said she is underemployed and could earn more money so I should impute income to her.

[5] I reject this argument. Ms. Friesen is not underemployed.

[6] Ms. Friesen completed training as an acupuncturist in 2020 and opened an acupuncture clinic. Pandemic lockdowns and social distancing requirements had a severe impact on her ability to work as an acupuncturist. While running her clinic, she re-certified as a registered nurse and is now *both* employed as a nurse, and self-employed as an acupuncturist. Her employment efforts are reasonable.

[7] As a result of this decision, I accept Ms. Friesen's evidence about her annual income.

Prospective child support

[8] The prospective period begins in September 2020 when the petition was filed and continues into the future.

2020

[9] The parents agreed that their son, Matthew, lived primarily with his mother from September 2020 until the end of that year. Applying the tables of the *Federal*

*Child Support Guidelines*¹ to Mr. Friesen's annual income of \$67,626, he owes \$2,312: 4 monthly payments of \$578.

[10] Ms. Friesen provided receipts for her payment of Matthew's special or extraordinary expenses.

[11] Matthew had counselling during the final 4 months of 2020. After the insurance contribution, counselling cost \$238. Health-related expenses that exceed insurance reimbursement by at least \$100 each year are a special expense: *Guidelines*, clause 7(1)(c). So, the relevant health-related expense is \$138.

[12] Matthew had extraordinary expenses for education (tutoring in French) and extra-curricular activities (karate and violin). His tutoring cost \$325, his karate cost \$353, and his violin lessons cost \$130.

[13] The total cost of Matthew's special or extraordinary expenses was \$946.

[14] Ms. Friesen's 2020 income was \$20,211.22. A proportionate sharing of Matthew's special and extraordinary expenses means that Mr. Friesen would pay 77%, adding \$728.42 to his child support payable under the table. Mr. Friesen's total child support debt for 2020 is \$3,040.42.

¹ SOR/97-175

2021

[15] The parents agree that Matthew lived with his mother for the first 3 months of 2021 and with his father for the rest of the year.

[16] At an annual income of \$90,009, Mr. Friesen owes child support of \$2,319 (monthly child support of \$773 for January - March). At her annual income of \$16,996.75, Ms. Friesen owes Mr. Friesen \$927 (monthly child support of \$103 for April - December).

[17] Friesen provided receipts for her payment of the following special or extraordinary expenses in 2021:

- Counselling costs (after insurance reimbursement): 153
- Health insurance premiums: 843.08
- French tutoring: 200

[18] Reducing the counselling cost by the \$100 threshold means the total cost of special or extraordinary expenses was \$1,096.08.

[19] Based on each parent's 2021 income, Mr. Friesen's proportionate share of special and extraordinary expenses was 84%. He owes Ms. Friesen \$920.72.

2022

[20] Matthew lived with his father from January until August 2022 when he left for Sheridan College in Ontario. He returned to his father's home when he left university in the late fall.

[21] Ms. Friesen's 2022 income was \$19,154. Based on this, she owes child support of \$1,620: 12 months x \$135.

[22] Matthew's special expenses for post-secondary education were:

- tuition 3,299.88
- College of Ontario fees 110.75

[23] Mr. Friesen paid Matthew's tuition and Ms. Friesen paid the fees. While living with his father, Matthew's RESPs of \$5,195.56 were paid out. The RESP funds would more than pay Matthew's tuition, so Ms. Friesen owes nothing for this.

[24] Ms. Friesen received nothing from the RESPs. Mr. Friesen's 2022 income was \$90,009. Based on each parent's income, he owes Ms. Friesen \$93.03 (82% of the college fees).

2023

[25] Matthew remains in Mr. Friesen's home. He's 18. Ms. Friesen hasn't disputed his entitlement to child support, though he isn't working or going to school right now.

[26] Based on her anticipated annual income of \$30,000, Ms. Friesen owes child support of \$1,548 for the first 6 months of 2023. She'll pay \$258 for each following month. Matthew will turn 19 in October, but neither parent opposed the application of clause 3(2)(a) of the *Guidelines*.

[27] Problems with support payments lessened when the Maintenance Enforcement Program became involved, so I require Ms. Friesen to make the support payments to Mr. Friesen through MEP. The Program has no capacity to deal with support payments made to children because they are not parties to a support order.

[28] Matthew's future plans are uncertain. If he returns to school, his parents will proportionately share his educational costs, discounted by the applicable tax credits, and the remaining RESP funds of \$1,895.68.

[29] For so long as child support is sought from Ms. Friesen, Mr. Friesen or Matthew must provide her with proof of:

- Matthew's enrolment, once per term in September and January,
- Matthew's tuition and education costs, once per term in September and January, and
- Matthew's own income (including his tax return) and his expenses once each year in May after his tax return has been filed.

Historic child support

[30] Ms. Friesen wants child support from January 2017 until March 1, 2020, to reflect Mr. Friesen's actual income in those years.

[31] The parties have agreed that there is no issue about the sharing of Matthew's past special or extraordinary expenses, so I don't need to make any calculation about them. Each parent remains responsible for the costs they've already paid without any contribution from the other.

Should Mr. Friesen pay historic child support?

[32] Retroactive child support awards are neither automatic nor exceptional. In deciding whether to make a retroactive award, I need to consider the factors the Supreme Court of Canada outlined in *DBS v. SRG* 2006, SCC 37.

[33] First, I find Ms. Friesen's delay in seeking historic child support is reasonable.

[34] The parties' Separation Agreement said that Mr. Friesen must annually provide a copy of his tax return, including all attachments, to Ms. Friesen, no later than June 1. He was to provide a copy of his Notice of Assessment to her immediately when he received it.

[35] Not only did Mr. Friesen's income change from 2016 to 2020 (when the divorce petition was filed), but the tables which determine child support were changed in 2017.

[36] Mr. Friesen didn't provide his tax returns or assessments so Ms. Friesen couldn't know whether she should be taking steps to adjust the child support payments. Her delay was entirely reasonable.

[37] Second, I find Mr. Friesen's conduct was blameworthy.

[38] The parties separated in November 2015 and signed a Separation Agreement in August 2016. Because Matthew's primary home was with his mother, Mr. Friesen was to pay Ms. Friesen the table amount of child support based on his annual income of \$70,600. Payments of \$597.28 were due in 2 equal monthly instalments, payable through bank transfer on the 1st and 15th of each month.

[39] Since 2016, Mr. Friesen's annual income has increased by \$19,400 to approximately \$90,000. His failure to provide disclosure and to change his child support payments to reflect his income is blameworthy. He prejudiced Matthew by keeping – for himself – money that should have been paid as child support.

[40] I have evidence that Ms. Friesen was required to ask Mr. Friesen to help pay for basic expenses, like Matthew's clothing, during the period when Mr. Friesen was underpaying child support.

[41] Lastly, Mr. Friesen offered no evidence of the impact of a retroactive child support award.

[42] It's appropriate for Mr. Friesen to pay historic child support.

For what period is historic child support due?

[43] Matthew's parenting arrangement determines child support. Mr. Friesen said that between January 2017 and March 2020 Matthew lived with him for 2 different periods:

- from September 2017 until December 2017, and
- from September 2019 until March 2020.

[44] Ms. Friesen disagreed, and said Matthew lived primarily with her.

Where did Matthew live from September 2017 – December 2017?

[45] Mr. Friesen said Matthew lived with him from September through December 2017. His evidence was:

- a letter he wrote to the Canada Revenue Agency in June 2018 stating ‘David had custody of our son Matthew from September to December’ which Ms. Friesen also signed, and
- an affidavit from his landlord.

[46] Ms. Friesen said she signed the letter (and other similar letters) because Mr. Friesen was aggressive and would not accept signed receipts from her. She said he refused to leave her home unless she signed the letters, and she felt threatened by him. Mr. Friesen didn’t deny this. As well, Mr. Friesen said he and Ms. Friesen lived together, attempting to reconcile, in December 2017. If the parties were together in December 2017, Matthew was not living primarily with Mr. Friesen.

[47] The affidavit from Mr. Friesen’s landlord provided no specific evidence about Matthew’s whereabouts in 2017.

[48] I reject Mr. Friesen's claim that Matthew lived with him from September through December 2017.

Where did Matthew live from September 2019 to March 2020?

[49] Mr. Freisen provided more detailed evidence in support of his claim that Matthew lived with him from September 2019 to March 2020.

[50] Mr. Friesen said Matthew spent:

- every weekend with him, from Friday until Sunday (or Monday on long weekends)
- Monday, after school until 9 or 10 p.m.
- alternate Tuesday nights, after work until 10 p.m.

[51] Mr. Friesen identified no arrangements for additional parenting time during holidays or school breaks.

[52] The youth pastor at Mr. Friesen's church said Matthew regularly attended a program at the church on Monday nights from 7 – 9 p.m., and Matthew and his father attended about 75% of the Sunday services. When Mr. Friesen was an usher (once each month) and there was a "double service," Matthew and his father would

be at church for 5 hours on Sunday. When Mr. Friesen was not an usher, even if there was a visit after the service, they could spend 3 hours at church on Sunday.

[53] Another church volunteer said Matthew attended a weekly church program that ran on Mondays from September – December 2019 approximately 90% of the time and his father was with him. As well, there were 2 or 3 other occasions when Mr. Friesen dropped Matthew off at a different youth group on Tuesdays.

[54] Both the youth pastor and church volunteer admitted they didn't see Matthew and Mr. Friesen outside of the church. Their evidence doesn't establish that Matthew was living with Mr. Friesen.

[55] Characterizing parenting arrangements is better done by assessing days or weeks than hours according to the Manitoba Court of Appeal in *Mehling* 2008 MBCA 66 at para 41. In any event, the method is in my discretion.

[56] I find that Matthew was in Ms. Friesen's primary care from September 1, 2019, to March 13, 2020.

[57] Ms. Friesen disputed Mr. Friesen's testimony about how much time Matthew spent with him. I don't need to decide who to believe. Even maximizing Mr. Friesen's claim (counting Matthew's Monday evenings with his father as a full day, assuming the maximum number of Tuesday visits each month, and

considering the weekends) Mr. Friesen still didn't have care of Matthew for more than 60% of the time.

[58] Based on the hours that Mr. Friesen says he spent with Matthew, Mr. Friesen spent less than 40% of the time during these months with Matthew.

[59] Aside from the time calculations, Ms. Friesen offered detailed evidence that she was primarily responsible for meeting Matthew's needs: maintaining contact with Matthew's teachers, hiring his tutor, coordinating his activities, and taking him to Cadets, violin lessons, counselling, tutoring and karate, and providing for his needs.

How much child support should Mr. Friesen pay for the historic period?

[60] Mr. Friesen's calculation of historic child support assumed his child support continued to be based on his income as stated in the Separation Agreement. This is wrong. The "specific amounts of child support owed will vary, based upon the income of the payor parent": *DBS v. SRG* 2006 SCC 37 at para 38. As the payor's income varies, so does the specific amount of child support. This is why we compel annual income disclosure.

[61] The table below shows Mr. Friesen's income based on his tax returns and notices of assessment. I've been able to use his actual income amounts to calculate his child support because I have his tax returns.

Time period	Mr. Friesen's annual income	Monthly table amount	Amount owed for the time period
January – November 2017	70,600	597	6,567
December 2017 ²	70,600	604	604
2018	59,292	506	6,072
2019	72,499	620	7,440
January – August 2020	67,262	575	4,600
Total			25,283

[62] It is difficult to determine how much support Mr. Friesen actually paid. I have already declined to rely on the letters he prepared for the Canada Revenue Agency. His other evidence of payments came from bank statements for a joint account. The debits do not always match the amount of support due (particularly since he varied his support payments throughout the years to reflect his at-the-moment income, rather than his annual income). Also, there is nothing about the

² The monthly amount of child support payable in December 2017 differs from the monthly amount owed for every other month in 2017 because the table amounts changed in November 2017.

bank statements which suggests the debits are support or were withdrawn by Ms. Friesen. Ms. Friesen disagrees that all the identified debits were support payments.

[63] I have attached a table to my decision which repeats the amounts of child support I have calculated for each year. It accepts Ms. Friesen's evidence about the child support she received. The table shows the final amount I have calculated that Mr. Friesen owes for prospective and historic child support.

Has Ms. Friesen become self-sufficient or disentitled to spousal support?

[64] In their Separation Agreement, Mr. Friesen agreed to pay monthly spousal support of \$878 for 4 years "at which shall be reviewable (June 2020)."

[65] Review orders have a "very limited role", according to the Supreme Court of Canada: *Leskun* 2006 SCC 25 at para 36. Review orders allow parties to ask for a change to a support order without proving a material change in circumstances and are justified by "genuine and material uncertainty" at the time of the original trial: *Leskun* 2006 SCC 25 at para 37. The review order in *Leskun* was justified by the "serious doubt" about the wife's "true financial situation and prospects" and the support she would actually need.

[66] With no review, no agreement, and no order, Mr. Friesen stopped paying spousal support in June 2020. He explained he did this because he believed:

1. Ms. Friesen intended spousal support to be temporary when she “drafted the separation agreement”
2. Ms. Friesen’s registration of a numbered company in February 2020, showed “her capability and intent to be self-sufficient before” the review date
3. Ms. Friesen’s ability to buy a \$406,000 home was “further testament to her affluence and means”
4. Ms. Friesen’s re-registration as a Registered Nurse, and employment at a medical clinic added “yet another income stream to her portfolio”
5. Ms. Friesen was a landlord, and qualified as a nutritional consultant and acupuncturist, and
6. his payment of spousal support would pose an undue burden on him and compromise Matthew’s standard of living.

[67] The first 5 factors are relevant to whether Ms. Friesen should receive spousal support, while the last is relevant to the amount of spousal support.

[68] There was no evidence about the negotiation and drafting of the Separation Agreement, so I cannot conclude that the review clause evidenced any particular intention on Ms. Friesen’s behalf.

[69] The Friesen's married in 2001. Until Matthew was born in 2004, Ms. Friesen worked as a registered nurse. While Mr. Friesen was completing his studies, Ms. Friesen worked extra hours to support the couple and to pay Mr. Friesen's tuition.

[70] Ms. Friesen left her nursing job to home-school Matthew and didn't return to work until after the parties separated in late 2015. Without work, she wasn't able to prepare for her old age by contributing to the Canada Pension Plan.

[71] Mr. Friesen's university studies and early career in Ontario required Ms. Friesen to relocate 3 times, leaving a job opportunity at Toronto Public Health, a nursing position in Thunder Bay, and a Community Health Nurse position in Guelph. She also had health problems that limited her. When Mr. Friesen found work at Dalhousie, she left her job and moved to Halifax. Ms. Friesen said that the family moved 8 times in the first 8 years of their marriage.

[72] The Separation Agreement reflected the parties' 2016 incomes as \$12,000 for Ms. Friesen and \$70,600 for Mr. Friesen.

[73] Completing his studies and pursuing a career has increased Mr. Friesen's annual income from \$26,000 to \$90,000.

[74] Ms. Friesen's economic self-sufficiency was sacrificed for family purposes: to permit Mr. Friesen to study, work, and improve his earning capacity; and to educate Matthew.

[75] Since separating, Ms. Friesen's income has come from spousal and child support, interest, the withdrawal of RRSP funds, employment, and the business she started. Only this year does she expect to earn \$30,000. In 4 of the past 6 years, while Ms. Friesen has tried to establish a business and re-qualify as a nurse, she has earned less than \$20,000 - less than minimum wage.

[76] Ms. Friesen's education, incorporation, and re-certification as an RN all demonstrate her significant efforts to become self-sufficient.

[77] Ms. Friesen's home was purchased with help from her father because she couldn't buy the home alone. She bought it, planning to rent out a part of it. She is not a qualified nutritionist, though she tried to obtain those qualifications. She was clear, when asked, that even with employment and rent she is not yet self-sufficient. She said she is "not there yet."

[78] When the parties separated in 2016, Ms. Friesen had been out of the workforce for many years and had a spotty employment record, moving from job to job. Mr. Friesen's education and career progressed, and his income increased.

The parties' roles during the marriage give Ms. Friesen a clear entitlement to compensatory spousal support.

[79] I find Ms. Friesen also has an entitlement to non-compensatory support. Non-compensatory support reflects the reality that marriage can create interdependencies, expectations, and obligations between spouses. Non-compensatory support recognizes that a mutual obligation of support can arise after a separation, and it places the primary burden for supporting a needy spouse on their former partner, rather than the state: *Bracklow* 1999 CanLII 715 (SCC) at paras 23, 27, 30 and 31.

[80] This marriage involved 15 years of cohabitation and a further 5 years of parenting responsibilities. There's a good prospect that Ms. Friesen will become self-sufficient because she has professional qualifications which are in demand, and she no longer has family responsibilities. But she isn't self-sufficient yet.

[81] I consider the impact of spousal support on Mr. Friesen and Matthew in deciding how much spousal support Mr. Friesen should pay.

[82] Mr. Friesen's annual income is \$90,009. In his Statement of Expenses, he overstated his Canada Pension Plan and Employment Insurance premiums. He overstated his income taxes, and failed to consider the tax credits he might claim

for Matthew's education and the deduction of Ms. Friesen's spousal support payments. He also budgeted for \$9,600 in annual charitable donations. His disposable income (after the notional payment of child support, CPP and EI premiums, and income tax) is 86% higher Ms. Friesen's after I make the same deductions for her (\$38,717 versus \$20,753).

[83] I dismiss Mr. Friesen's request to end Ms. Friesen's spousal support. She remains entitled and he can afford to pay at the ongoing rate of \$878 provided for in the Separation Agreement.

[84] Because Mr. Friesen stopped paying spousal support in June 2020, he owes spousal support arrears of \$31,608 for the 3 years since then (36 months x \$878).

Conclusion

[85] The parties are divorced.

[86] Mr. Friesen owes Ms. Friesen prospective and historic child support of \$14,862.67.

[87] Starting in July 2023, Ms. Friesen will pay Mr. Friesen monthly child support of \$258.

[88] If Matthew returns to school, Ms. Friesen and Mr. Friesen will proportionately share his educational costs, discounted by the applicable tax credits, and the remaining RESP funds of \$1,895.68.

[89] For so long as child support is sought, Mr. Friesen or Matthew must provide Ms. Friesen with proof of:

- (a) Matthew's enrolment, once per term in September and January
- (b) Matthew's tuition and education costs, once per term in September and January, and
- (c) Matthew's own income (including his tax return) and expenses, once each year in May.

[90] Mr. Friesen's request to end spousal support is dismissed. He must continue to pay \$878 each month.

[91] Mr. Friesen owes spousal support arrears of \$31,608.

[92] I will hear Ms. Friesen on costs.

Elizabeth Jollimore, JSC(FD)

Time period	Child support that should have been paid	Child support paid	Child support due
2017	7,171	1,736	5,435
2018	6,018	1,099.86	4,918.14
2019	7,440	1,040	6,400
2020	7,640.42	6,226.80	1,413.62
Jan – March 2021	3,239.72	2,541.84	697.88
April – Dec 2021	927	0	927
2022 (s. 3)	1,620	0	1,620
2022 (s. 7)	93.03	0	93.03
2023	1,548	0	1,548
Final child support due from Mr. Friesen to Ms. Friesen, calculated by subtracting the \$4,095 that Ms. Friesen owes to Mr. Friesen from the \$18,957.67 that he owes her			14,862.67

Amounts shown in bold-faced type are amounts owed to Mr. Friesen.