SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: *Hilchey v. Speight*, 2023 NSSC 165

Date: 20230526
Docket: *Hfx.* No. 1201071124
Registry: Halifax

Between:

Daniel Hilchey

Applicant

v.

Raechelle Speight

Respondent

LIBRARY HEADING

Judge:	The Honourable Justice Ingersoll
Heard:	February 22, 2023, in Halifax, Nova Scotia
Written Decision:	May 26, 2023
Subject:	Review of shared parenting arrangement, best interests of children, change in circumstances, variation of child support, Contino analysis.
Summary:	Father applied to vary child support in respect of a shared parenting retroactively and prospectively. Mother commenced a review of the shared parenting arrangement seeking an order granting her primary care.
Issues:	(1) On the review application what parenting arrangement is in the childrens' best interests? (2) Should the mother be granted primary care of the children? (3) Has there been a change in circumstances since the Consent Corollary Relief Order was issued?

(4) If so, what child support is appropriate prospectively and retroactively given the shared parenting arrangement?

Result: The mother's request that she be granted primary care was denied. Shared parenting continued to be in the childrens' best interests. The father's application to vary child support was granted. After a thorough Contino analysis the father was ordered to pay child support in the set-off amount prospectively. The father's request for a retroactive variation of child support was rejected.

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Written Release: May 26, 2023

Counsel: Jennifer Reid, counsel for the Applicant
Sarah Harris, counsel for the Respondent

By the Court:

Introduction

[1] Daniel Hilchey and Raechelle Speight have two sons, Dawson who is 11 and Jace who is 7. Dawson and Jace spend equal time with each parent pursuant to a week about shared parenting arrangement. Mr. Hilchey pays Ms. Speight the full table amount of child support.

[2] Mr. Hilchey seeks to vary the child support he pays pursuant to the Consent Corollary Relief Order issued on December 13, 2021.

[3] Ms. Speight seeks to have the court review the shared parenting arrangement. Ms. Speight asserts that the court should terminate the shared parenting model and grant her primary care of Dawson and Jace.

[4] Although Mr. Hilchey's variation application was filed before Ms. Speight's review request, I will first address the review sought by Ms. Speight as any change in the regular parenting plan could in turn affect the analysis of Mr. Hilchey's request for retrospective and prospective variation of child support.

[5] Pretrial Objections

[6] At the commencement of the trial, I heard submissions and struck paragraph 5 of Ronalda Speight's affidavit sworn on February 12, 2023, on the basis that the paragraph advanced unsubstantiated opinion evidence and was prejudicial and inflammatory.

[7] Following that ruling, Ms. Speight's lawyer advanced objections to the following paragraphs in Mr. Hilchey's affidavit sworn on February 13, 2023: 9, 11-15, 63, 65, 69, 70, 71, 73, 80, 81, 82, 84, 85, 87, 88, 91, 92, 102,145, and as well objected to paragraph 17 and 18 in Ms. Sibley's affidavit sworn on February 14, 2023.

[8] Ms. Harris advised that she wished me to address the comments attributed to the Assessor in paragraph 14 and the hearsay in the affidavits and that all other objections could be considered post trial and assigned the appropriate weight.

[9] Following submissions, the parties agreed that any email sent by a teacher to Mr. Hilchey and not copied to Ms. Speight should be struck. All emails sent by any teacher and copied to both parents were permitted to remain. Ms. Reid conceded that paragraph 17 of Ms. Sibley's affidavit should be struck but that paragraph 18 should remain as it contains an expression of Ms. Sibley's belief.

[10] At the trial, for reasons offered during the trial, I struck the second sentence of paragraph 14, all of paragraph 87 and the first sentence of this paragraph 145.

[11] With respect to the balance of Ms. Harris' objections I have considered those objections and have not placed any weight on inadmissible evidence and have, in my review of the evidence assigned the weight I consider appropriate to admissible evidence.

1 Review of the regular parenting plan

1.2.1 The Burden

[12] Ms. Speight's right to a review of the parenting arrangement is granted in Paragraph 2 of the Consent Corollary Relief Order. In seeking this review, Ms. Speight need not first establish a material change in circumstances.

[13] Mr. Hilchey's lawyer asserts that, in this review, Ms. Speight bears the onus of proving that the current parenting arrangement is no longer meeting the needs of the children. Mr. Hilchey's lawyer asserts that "Ms. Speight must show that a change to the order, providing her with primary care, will result in an improvement to the circumstances of the children/greater fulfillment of their needs than the current arrangement is providing."

[14] Ms. Speight's lawyer asserts that there is no burden on Ms. Speight beyond showing that the current plan does not meet the children's best interest.

[15] Mr. Hilchey's lawyer relies on *Campbell v. Campbell* 2016 SKCA 39 for the proposition that Ms. Speight must show that the needs of the children are not being met before any change should be made to the parties' regular parenting plan. In that case, a Chamber's judge had undertaken a parenting plan review pursuant to a clause in the parties' interspousal agreement which specifically referenced the "children's needs" as a threshold for review. The Chambers Judge concluded, in part, "as I interpret the words used, the conflicting evidence does not satisfy me that the current parenting arrangement is no longer meeting the children's needs. Their needs are being met. The language does not specify that their needs must be met to the highest potential level or some other standard. It simply requires that their needs to be met".

[16] It appears that the test applied by the Chambers judge in *Campbell supra* was driven in part by the words chosen by the parties as the threshold test for review.

[17] On appeal, the Saskatchewan Court of Appeal in *Campbell v. Campbell, supra*, held that while the "needs" assessment was the basis of the review "[t]he

inquiry that the Chambers judge should have made in this case is whether the parenting arrangements was no longer meeting the children's needs in the context of their best interests."

[18] *Campbell, supra*, confirms that a court, in undertaking a review of a parenting arrangement, must consider the best interests of the children subject to the review. While parties may choose to focus the review on a particular aspect of the childrens' experience (their needs for example) the court must consider the best interests of the children.

[19] Appellate courts in other provinces have confirmed that a court undertaking a review of a parenting arrangement must remain focused on the best interests of the children. For example, Larlee, J. A. writing on behalf of the New Brunswick Court of Appeal in *Sappier v. Francis*, 2004 NBCA 70, held that a review "had to be conducted keeping in mind the best interests of the children." (paragraph 9) and that the purpose of a review "respecting a custody order is usually held to see if the order the judge has made is working well or needs to be fine-tuned in order to adhere to the principle of the best interests of the child." (paragraph 12)

[20] Similarly, Steele, J.A. writing on behalf of the Manitoba Court of Appeal in *JDB v. DKM* 2019 MBCA 68 affirmed that "[a]t all times, the ultimate focus of the reviewing judge is to be on the best interests of the children." Justice Steele also held that the "reviewing judge must broadly assess the needs of the children in a contextually sensitive and individualised manner, based upon all the evidence before the judge" which includes "consideration of all relevant factors set out in governing legislation relating to the best interests of the children in custody and access matters." (paragraph 84)

[21] In *SC v JS*, [2020] NBJ No 308 Justice Belanger-Richard considered an application for review by a father in which he sought a shared parenting order. Justice Belanger-Richard held that the "ultimate test will always be the best interests of a child whether it is a review or a fresh inquiry following a material change of circumstances" (paragraph 49) and that in seeking a review the father must show that the "current circumstances warrant a shared custody arrangement in the best interests of the child." (paragraph 50)

[22] In the case before me, Paragraph 1 of the Consent Corollary Relief Order stipulates a week on/week off shared parenting plan. Paragraph 2 of the Consent Corollary Relief Order notes that the regular parenting plan described in Paragraph 1 of the Consent Corollary Relief Order shall continue

uninterrupted until June of 2022 at which time either parent shall be at liberty to bring the issue of the regular parenting before the court for a review.

[23] The review clause in the Consent Corollary Relief Order does not stipulate that the parenting plan review be based upon an assessment of the childrens' needs as in *Campbell*.

[24] Based on the wording of the review clause set out in Paragraph 2 of the Consent Corollary Relief Order and the applicable jurisprudence I find that:

1. With respect to the test to be applied in reviewing the parenting plan, I must determine the best interests of the children by considering the relevant best interest factors identified in Section 16 of *the Divorce Act* and the jurisprudence; and
2. With respect to the burden, Ms. Speight must demonstrate on the evidence that the current (shared) parenting plan is not in the children's best interest and, by extension, that the primary care parenting plan she seeks is in the children's best interest.

1.3 Position of the Parties regarding the Appropriate Parenting Arrangement

1.3.1 Ms. Speight's reasons why the current shared parenting plan is not in the boys' best interests

[25] Ms. Speight asserts that the boys' behaviour establishes that the current parenting plan is not working for them and is not in their best interests. She asserts that there are two primary reasons why the shared parenting plan is not working for the children:

1. The children need consistency in each of their households to meaningfully engage and thrive in all areas of their lives. The children do not experience this necessary consistency in both parents' home. Given their particular needs, the routine and parenting differences in each household do not support the stability and consistency the children need to thrive; and

2. The parties do not share the requisite cooperation necessary to make a shared parenting plan to work to the benefit of the children.

1.3.2 Mr. Hilchey's reasons for retaining the shared parenting model

[26] Mr. Hilchey says that the status quo of shared parenting, which has been in place for the majority of the boys' lives, should be given significant weight and not lightly overturned. Mr. Hilchey says that the evidence does not support a

conclusion that the best interests and needs of the children would be best served by altering the status quo and placing the children in Ms. Speight's primary care.

1.4 The Best Interests of the Children

1.4.1 The *Divorce Act*

[27] As noted, Ms. Speight seeks a parenting order from this court granting her primary care of the children and granting Mr. Hilchey specified parenting time. Section 16 (1) of the *Divorce Act,* 1985, S.C. 1986, c.4 stipulates that in making a parenting order the court shall only take into account the best interests of the child of the marriage. The *Divorce Act* also stipulates in considering the enumerated best interest factors set out in Section 16 (3) of the Act that the court shall give primary consideration to the child's physical, emotional, and psychological safety, security and well-being.

[28] Section 16 (3) of the *Divorce Act* stipulates that in determining the best interests of the child the court shall consider all factors relating to the circumstances of the child including but not limited to the Eleven identified factors.

[29] Associate Chief Justice O'Neil in *Gibney v. Conohan*, [2011] NSJ No 431 identified thirteen factors to be considered by a court in determining the

appropriateness of shared parenting. Associate Chief Justice O'Neil noted that the shared parenting analysis factors he identified were "refinements to the best interests analysis".

[30] In *Hammond v Nelson*, [2012] NSJ No 35 Justice Dellapinna summarised "some of the considerations that the Court may consider when asked to decide whether a shared parenting arrangement should be ordered in any given case over the objections of one of the parents".

[31] To determine which parenting arrangement is in the boys' best interest I will assess the evidence by answering the following five questions:

1. Does the boys' behaviour establish that shared parenting is not in their best interests?
2. Does one of the two households do a better job of promoting consistency and routine in the best interests of the boys?
3. Does the nature and extent of the parties' communication and cooperation fall below the required level for effective shared parenting?
4. Do the *Divorce Act* considerations favour either parenting arrangement?

5. Does the jurisprudence when applied to the evidence favour either parenting arrangement?

1.4.2 Does the boys' behaviour establish that shared parenting is not in their best interests?

[32] Ms. Speight says that the boys' behaviour establishes that shared parenting in not in their best interests. Ms. Speight asserts that since the implementation of shared parenting she has observed Jace take a nosedive in his mental heath and that he has developed a pattern of disturbing behaviours. Ms. Speight asserts that Dawson requires a stable and structured routine which he does not experience to the same degree while in Mr. Hilchey's care.

[33] Ms. Speight's position requires consideration of the following four issues:

1. When did shared parenting commence?
2. When did Jace's difficulties commence?
3. When did Dawson's difficulties commence?
4. Do the boys have more behavioral concerns as a result of Mr. Hilchey's parenting time?

1.4.2.1 When did shared parenting commence?

[34] Mr. Hilchey's affidavit evidence states that the parties have been in a shared parenting arrangement (at least 40% of the time) since the parties separated in

2017. Mr. Hilchey asserts that the parties moved to a week on / week off shared parenting schedule in June of 2020 and that from 2017-2020 he had the children in his care two nights per week and every other weekend.

[35] Ms. Speight's counsel acknowledged that the parties have been in a week on / week off parenting time arrangement since the summer of 2020.

[36] Wayne Speight, Ms. Speight's father, filed an affidavit in support of Ms. Speight's parenting time review, and confirmed on cross examination that prior to the week on/week off arrangement (which commenced in 2020) that Mr. Hilchey had the boys in his care a couple of nights through the week and every other weekend.

[37] Ms. Speight did not, in either her affidavit or in cross examination, contradict Ms. Hilchey's evidence that the boys spent at least 40% of the available parenting time with their father prior to the summer of 2020.

[38] The evidence establishes Dawson and Jace have been in a week on/week off shared parenting schedule since the summer of 2020 and that prior to the summer of 2020 the parties maintained a shared parenting plan that gave each parent no less than 40% of the available parenting time.

1.4.2.2 When did Jace's difficulties commence?

[39] Jace was born on June 21, 2015, and his parents separated in October 2017 when he was 2 years, 4 months old. The evidence establishes that the parties had some form of shared parenting in place since Jace was just over two years and four months of age. Jace was five when the parties moved to week on/week off parenting.

[40] Although Ms. Speight correlates a change in Jace's behaviour with the commencement of shared parenting she does not offer any evidence regarding Jace's behaviour prior to the commencement of shared parenting. The absence of such evidence makes it difficult to determine if there is in fact a difference in his behaviour now as compared to before shared parenting and if so, what conclusion can be drawn from the difference in that behaviour.

[41] During her cross-examination Ms. Speight noted that Jace is being assessed to determine if he is on the autism spectrum. In her affidavit Ms. Speight noted that "it is believed Jace is struggling with anxiety".

[42] The evidence led by Ms. Speight establishes that Jace is having a difficult time and that his mental health and his behaviour at school and in the community is a concern. But the fact that Jace is struggling does not, without

some admissible evidence, lead to the conclusion that shared parenting is the cause of his struggle or that he would struggle less in a primary parenting situation.

[43] Although Ms. Speight associates Jace's difficulties arising with the commencement of shared parenting she has not offered any medical evidence to establish that her perceived change in Jace's mental health or his behavioural issues have arisen since shared parenting began or results from or are exacerbated by the fact of shared parenting. The evidence indicates that Jace is being assessed to determine if he is on the autism spectrum suggesting factors other than shared parenting may be the cause of Jace's difficulties.

1.4.2.3 When did Dawson's difficulties commence?

[44] Dawson has a history of attention deficit hyperactive disorder (ADHD) and takes medications to address the symptoms associated with that diagnosis.

[45] Mr. Hilchey's uncontradicted evidence establishes that:

1. Dawson's behavioural difficulties began prior to the parties' 2017 separation. Dawson experienced significant difficulty during his grade primary year (2017/2018) resulting in his referral to the IWK and which ultimately resulted in an ADHD diagnosis.

2. Dawson's behaviour did not initially improve notwithstanding the parties working together to make positive changes in terms of routine, diet and parenting strategies generally. Mr. Hilchey says that Dawson began ADHD medication in 2020 and that his behaviour generally improved thereafter both at home and at school.

3. Dawson had a long period of improvement after commencing medication but struggled in school last year and in the beginning of the current (2022/2023) school year. Mr. Hilchey says that Dawson's current behaviour is similar to that which she experienced before Dawson began his medication. Mr. Hilchey's believes that as Dawson has grown the medication has become less effective.

[46] Ms. Speight has not advanced medical or other professional evidence to establish that Dawson's behaviour has been negatively affected by the fact of shared parenting. The evidence establishes that Dawson's difficulties predate the parties' separation and that his symptoms did improve while the parties have engaged in share parenting.

1.4.2.4 Do the boys have more behavioral concerns as a result of Mr. Hilchey's parenting time?

[47] Ms. Speight suggests that the boys' mental health and happiness is improved when in her care, and diminished when in Mr. Hilchey's. Ms. Speight says, "I have noticed a significant improvement in their mental health and happiness as our week proceeds." Ms. Speight referred to an example where she was called to the school on January 26, 2023, this was because the school could not handle Jace's behaviour after Jace had been in Mr. Hilchey's care for two weeks.

[48] To rebut the inference that the boys fare better in Ms. Speight's care, Mr. Hilchey referred to an incident at school involving Jace which occurred on February 2, 2023. That day Jace's teacher advised both parties that Jace had had a difficult day, that he had not participated much, slammed the classroom door many times, screamed and was very upset. Mr. Hilchey noted that this event happened on a Thursday and that Jace had been in his mother's care since the previous Monday, January 30, 2023.

[49] A further example of behavioural concerns at school occurring during Ms. Speight's parenting week occurred two weeks later on February 17, 2023, when a teacher had reported (in Exhibit 7) that in an assignment when Jace was

expected to write a nice note about each student he instead wrote the word "DIE!" for one student.

[50] Both boys have adaptations at school.

[51] With respect to both boys, I am not satisfied from the evidence before me that their experience at school is different when in the care of one parent as compared to when they are in the care of the other parent. Both boys face challenges at school that appear to be constant throughout the school year and not associated with any particular parent's parenting time. I am not satisfied from the evidence that the boys' experience at school would be more positive in terms of behaviour or performance if they were in Ms. Speight's primary care.

[52] The evidence suggests that the boys' behaviour has more to do with their medical and personal circumstances and their lived experience each day than with the identity of the parent with whom they have parenting time before and after school on any given day.

[53] To attribute the behaviour of either child to the fact of shared parenting diminishes the importance of Dawson's medical diagnosis and the concerns being investigated about Jace. I am unable to accept Ms. Speight's position that the boys' behaviour establishes that shared parenting is not "working for

them.”, further, I am not able to accept that the boys’ lived experience establishes that primary care with their mother would be a better reality for the boys in any aspect of their lives.

1.4.3 Do one of the two households do a better job of promoting consistency and routine in the best interests of the boys?

[54] Ms. Speight says that the children need consistency and routine and that her home better provides for that consistency and routine.

[55] Although the parties have been separated for more than five years Ms. Speight says that Mr. Hilchey’s home does not provide sufficient consistency and routine.

[56] Both parties submitted evidence regarding the schedules they maintain in their homes. Both parties understand that their boys need routine and consistency in their schedules.

[57] In criticizing Mr. Hilchey’s parenting approach, Mrs. Speight notes the following differences as between her parenting style and Mr. Hilchey’s: the boys call her when they should be in bed, the children are regularly late for school and there are more people involved in their care when they are with Mr. Hilchey.

[58] Mr. Hilchey asserts that he tries to follow a regular routine with the boys that incorporates their likes/dislikes/interests and their needs. He denies that the boys are often late for school.

[59] Mr. Hilchey says that neither boy takes their technology into the bedrooms when they go to bed. Mr. Hilchey says that on occasion Ms. Speight calls the boys past their bedtimes. Mr. Hilchey says that if the boys' devices are not with them, they do not answer.

[60] With respect to the number of caregivers involved with the boys the evidence establishes that Ms. Speight's parents spend time with the boys and often share meals with the boys in their home. The boys do not sleep over at Ms. Speight's parents' home. The evidence establishes that the boys spend time with Mr. Hilchey's mother at her home and at Mr. Hilchey's home. The evidence does not support a conclusion that when the boys are with Mr. Hilchey that they spend most of their weekends with his mother.

[61] The evidence establishes that Mr. Hilchey's partner spends time with the boys at Mr. Hilchey's home. The evidence establishes what while his partner sometimes assists with homework, she is not a primary care giver. I do not have

any evidence that the boys' interaction with Mr. Hilchey's partner is problematic for the boys.

[62] The evidence does not establish that the boys' circle of care when they are with their father is any broader than when they are with their mother.

[63] I find that each parent is conscious of the boys' need for stability and routine and attempts to provide that stability and routine during their parenting time. While some variation between the parenting approach in each parent's home is to be expected I find that each parent provides a consistent routine for the boys during their parenting week and that the routine adopted by each parent is similar.

[64] In *Frank v Frank*, [2011] OJ No 4616, 2011 ONSC 4394, Justice Gordon noted that stability and consistency are necessary in all parenting arrangements, more so when a child has ADHD. I find that in this case both Mr. Hilchey and Ms. Speight through their parenting approaches have demonstrated that they understand the unique circumstances of each of their boys and need for stability and consistency that these circumstances require. Both parents have in fact achieved a high level of consistency and stability. They are to be commended in that regard.

1.4.4 Does the nature and extent of the parties' communication and cooperation fall below the required level for effective shared parenting?

1.4.4.1 Ms. Speight's perspective

[65] Ms. Speight says that co-parenting with Mr. Hilchey has been difficult. She says is that Mr. Hilchey often does what he thinks is best regardless of whether she has a different opinion.

[66] Ms. Speight cites as examples Mr. Hilchey's lack of cooperation:

1. a recent situation where Mr. Hilchey kept the children for two weeks after he missed a week of parenting time due to COVID-19,
2. the fact that he refused to allow the children to be vaccinated against the COVID-19 virus, and
3. Mr. Hilchey's reluctance to identify a new therapist for the children.

[67] Ms. Speight cites an example where Mr. Hilchey was critical of the children's winter clothing as an example of his lack of respect for her parenting.

[68] Ms. Speight says that Mr. Hilchey's enrollment of Jace in rugby is an example of the power imbalance between them.

[69] Ms. Speight noted that Mr. Hilchey placed his mother's relationship with the children over hers when he elected to attend a Mother's Day brunch with the boys and his mother.

[70] Ms. Speight testified that she has not provided some receipts to Mr. Hilchey (which could have been submitted to his insurer) to avoid communicating with Mr. Hilchey.

1.4.4.2 Mr. Hilchey 's perspective

[71] Mr. Hilchey acknowledges that the parties struggle with communication. Mr. Hilchey says that both parties have a part in that difficulty.

[72] Mr. Hilchey's affidavit offers the following insight into the nature of his co-parenting relationship with Ms. Speight:

> I acknowledge that Raechelle and I do not see eye to eye on many things and improvement is needed in our co-parenting and communication. There is a lot of mistrust. That being said, we have been able to advocate for the boys and get them the services they need. We have been able to work together to ensure their needs are met, while we don't always agree throughout the process. I believe the boys are loved and cared for in both homes and can feel safe and secure with both of their parents.

[73] Mr. Hilchey says that he attempts to engage Ms. Speight on issues but that she does not answer questions which he finds frustrating and that his frustration

comes through after several unsuccessful attempts to get Ms. Speight's attention on an issue.

[74] Mr. Hilchey cited one example of trying to raise with Ms. Speight an issue involving a dog that the boys had discussed with him. Mr. Hilchey attached as an exhibit to his affidavit an exchange of four e-mails between himself and Ms. Speight on that issue. In her first response to Mr. Hilchey's initial email Ms. Speight said in part "It's none of your business honestly" and in her further response to Mr. Hilchey said "The dog is not yours. I bought it. You left us and the dog in 2017. Go pound sand."

[75] Mr. Hilchey provided affidavit evidence and was cross examined regarding the incident when Mr. Hilchey kept the children for a two-week period after he had COVID-19. Mr. Hilchey says that he thought it was fair for him to have the children for two weeks as Ms. Speight had just had the children for two weeks. Mr. Hilchey says a similar two-week block occurred when Ms. Speight and Dawson had to isolate for COVID-19 in 2020.

[76] Mr. Hilchey denies that he refused to have the children vaccinated. Mr. Hilchey says he is fully vaccinated and believe that his children should also be fully vaccinated. Mr. Hilchey says that in March 2021 he asked Ms. Speight for

her opinion as to whether the boys needed the booster considering the fact that they probably had had COVID-19. Mr. Hilchey received no response to this inquiry.

[77] Mr. Hilchey says that Ms. Speight had the boys vaccinated without discussing the appointment with him.

[78] Mr. Hilchey did not agree to Jace seeing a new counsellor in 2021 because the children were already seeing a counselor (John Manning). Mr. Hilchey says that Ms. Speight did not raise the issue again until John Manning advised he was no longer able to see the children. Mr. Hilchey says that after Mr. Manning was no longer available, he took steps to have Jace consult with the therapist Ms. Speight had recommended in 2021 and also looked into a therapist for Dawson. Mr. Hilchey says that in attempting to discuss a new therapist for the boys Ms. Speight was not responsive and when she did respond she did so in a negative way.

[79] Mr. Hilchey responded to Ms. Speight's assertion that he was disrespectful regarding the boys' winter attire by saying that it was his view that their winter attire was either missing or not appropriate and tried to resolve the matter by asking her to pick appropriate items. Mr. Hilchey says that Ms. Speight argued

and refused to give the boys the winter clothing they needed when he and the boys stopped by her house.

[80] With respect to the Mother's Day issue Mr. Hilchey says that the parties have never set specific times for the other parent on Mother's Day or Father's Day. Mr. Hilchey says that on the particular Mother's Day in question he had arranged with Ms. Speight for her to pick the children up sometime around noon but that the parties had not set a specific pickup time. Mr. Hilchey says that Ms. Speight sent him a text while he was at brunch with his mother advising that she was on her way to his house to pick up the boys. Mr. Hilchey says that he dropped the boys off at Ms. Speight's mother's home after brunch. Later that day, Ms. Speight took the boys to the Discovery Centre and had supper with them before returning them to Mr. Hilchey.

[81] Mr. Hilchey provided evidence regarding Dawson speaking to him privately on the telephone while he was having parenting time with his mother. It is Mr. Hilchey's perspective that Dawson prefers to have conversations in private and that he encourages both of his sons to take their mobile phone into another room so they can have a private conversation with their mother.

[82] Mr. Hilchey says that he believes Dawson is asked questions about his conversations with Mr. Hilchey.

[83] Ms. Speight admitted on cross examination that Mr. Hilchey apologized for unilaterally signing Jace up for rugby.

[84] While there is evidence of conflict between the parents, which is exacerbated by poor communication, there was considerable evidence provided by both parties regarding the many ways in which they cooperate regarding their children. The evidence establishes the following examples of Mr. Hilchey and Ms. Speight collaborating to support their boys:

1. Both parents engaged with the IWK when Dawson was referred and ultimately diagnosed with ADHD. Both parents were engaged with the IWK to implement changes with respect to Dawson's routine and diet and to implement parenting strategies.

2. Both parents attend appointments with their boys' medical team.

3. Both parents kept a log of Dawson's recent experience regarding an experiment with increased medication. Both parents agreed to return Dawson to his existing medication level.

4. Both parents attended counseling sessions with John Manning in relation to Dawson.

5. Both parents attend meetings at the boys' school to discuss the specialized supports provided to each boy.

6. Both parents are routinely copied on e-mails from teachers.

7. Both parents look to teachers, doctors and counselors to assist them in determining what is in the boys' best interest and take guidance from those professionals.

8. Both parents have supported Jace's work with child psychologist Karen Mercer; both parents have met together with Ms. Mercer. Both parents have assisted Jace with his "homework" between sessions with Ms. Mercer.

9. Both parents agreed to put a hold on Jace's work with Karen Mercer and agreed instead to participate in parenting sessions with Ms. Mercer starting in February 2023.

10. Both parents have attended at Abenaki Aquatic Club (prior to 2022) to watch the boys swim or paddle. Both parents have attended at Jace's rugby.

1.4.4.3 Conclusion on Communication and Cooperation

[85] The parties do communicate, especially on important issues. For the most part, I find that the parties keep each other informed of important issues and make room for the other parent's voice to be heard. I find that both parents have the ability to communicate effectively and are willing to do so. I accept that at times friction between the parents frustrates or impedes full, frank and polite communication. Neither parent presents as being so opposed to or angry with the other parent that they are unable to communicate effectively.

[86] I agree with Mr. Hilchey that improvement is required in the communication between the parties; the parties need to be more responsive to each other when issues are raised and engage with the other in a respectful manner. That said, the parties' communication is not so bad that the children suffer. I find that the children's needs are being met by their parents however, the communication between parents could be more respectful, fulsome, inclusive and timely.

[87] Most importantly, the parties have done an admirable job of cooperating and collaborating when it comes to ensuring that their boys receive the medical, academic and psychological support they require. The parties have consistently placed the best interests of their boys ahead of their own feelings when it comes to ensuring that the boys needs are identified, understood and addressed.

1.4.5 Do the *Divorce Act* considerations favour either parenting arrangement?

[88] The evidence does not establish that the boys' behavioural concerns are caused or aggravated by the fact of shared parenting. Nor does the evidence establish that the parties' communication and capacity to cooperate is so poor that the children are negatively affected. Notwithstanding these findings, I must also consider whether the best interests of the boys is served by the shared parenting arrangement or whether their best interests are best served by primary parenting.

[89] While the *Divorce Act* mandates that in undertaking this review, I must consider all of the best interest factors identified in Section 16 (3) not all factors will be relevant in each case. Having heard the evidence and submissions of the parties, it is up to me to determine which factors are most relevant and among those relevant factors which, if any, will be given priority. In this case I find that the factors identified in Section 16 (3) (a), (d), (h) and (i) to be most relevant and of equal priority in assessing Ms. Speight's review.

1.5 The History of the Care of the Children (section 16 (3) (d))

[90] In considering the history of childcare, I find that the boys have been in a shared parenting arrangement for almost all of their lives. This parenting

arrangement has been predictable and consistent both in terms of schedule and parenting behaviour over a long period of time. The predictable and consistent nature of the childcare are factors which both parents strive toward and acknowledge are in their children's best interests.

1.6 The children's needs and the ability and willingness of each parent to care for and meet those needs (Section 16 (3) (a) and (h)):

[91] Both boys have needs which the parents seek to meet. Both parents make sacrifices for their children and are engaged all aspects of their children's lives. The evidence establishes that each parent has the ability and willingness to care for and meet the needs of their children.

1.7 The parenting approach in each household (Section 16 (3) (a) and (h))

[92] I have found that the parents strive to have consistent parenting approaches in each home.

1.8 The ability of each parent to communicate and cooperate (Section 16 (3) (i))

[93] I have found that the parties have the ability to communicate and cooperate and that the level of their communication and cooperation is sufficient for them to promote the best interest of each child.

[94] I find that the best interests of the boys are met in the current shared parenting arrangement.

1.9 Does the jurisprudence when applied to the evidence favour either parenting arrangement?

[95] I have considered the factors set out in *Gibney v. Conohan supra* and in *Hammond v. Nelson supra.* I find that the evidence, when considered in light of the jurisprudence, firmly aligns with a finding that shared parenting is in the boys' best interest. The following findings, based on my review of the evidence and consideration of the most relevant factors set out in *Gibney* and *Hammond* support a finding that shared parenting is in the boys' best interest:

1. Week about parenting permits each parent to be involved with homework (during the school year), medical appointments, therapy and activities (during both the school year and the summer). Each parent is engaged with each boys' teacher and treatment providers.

2. Each parent has demonstrated an understanding of each child's need and an ability to comfort each child and support them in their activities.

3. For the most part, the parties are able to communicate with each other and keep each other informed of matters relating to the children and make decisions together.

4. Most importantly, each parent has demonstrated a firm commitment to make whatever changes are necessary to put their children's needs ahead of their own.

1.10 Conclusion regarding Review of Shared (Week on/ Week off) Parenting Plan

[96] Based on the forgoing analysis I find that the current shared parenting arrangement is in the children's best interest. I am not satisfied that a primary care parenting arrangement with Ms. Speight is in the boys' best interest. Both boys have unique needs, but I am satisfied that the parties are working hard to understand those needs and ensure that their parenting time, individually and collectively, promotes the best interest of each child.

2 Variation of child support

[97] Mr. Hilchey seeks to vary the child support provisions set out in the 2021 Consent Corollary Relief order.

[98] Section 17 (1) of the *Divorce Act* empowers the court to vary a support order. Section 17 (4) of the *Divorce Act* stipulates that such an order can only

be varied if the court is satisfied that a change of circumstances, as provided for in the applicable guidelines, has occurred since the making of the child support order.

[99] Section 14 of the *Federal Child Support Guidelines* identifies changes in circumstances which give rise to a variation order which include, but are not limited, to “any change in the condition, means, needs or other circumstances of either spouse”.

[100] In *Gordon v Goertz*, [1996] 2 SCR 27 the Supreme Court of Canada considered the degree of change required to meet the threshold test for variation. In considering whether a change has occurred, the court should consider whether the previous order might have been different had the circumstances now existing prevailed earlier (paragraph 12).

[101] Mr. Hilchey bears the burden of proving that there has been a change in the condition, means, needs or other circumstances of one or both of the parties since the Consent Corollary Relief Order was issued: *RP v. RC*, 2011 SCC 65 at paragraph 25. The change "must have some degree of continuity, and not merely be a temporary set of circumstances": *LMP v. LS*, 2011 SCC 64 at paragraph 35.

2.1 Has a Material Change occurred?

[102] The change, Mr. Hilchey says, is Ms. Speight's increase in income since 2019.

[103] The 2021 Consent Corollary Relief Order stipulates that Mr. Hilchey's income in 2019 was $83,604.00 and Ms. Speight's 2019 income was $2,064.00.

[104] The evidence establishes the following income data for Ms. Speight:

Year	Income Date Source	Income	2019 Income	Increase over 2019 income
2020	NOA Line 15000	$22,207.00	$2,064.00	$20,143.00
2021	NOA Line 15000	$29,740.00	$2,064.00	$27,676.00
2022	Agreed by parties	$33,766.18 (net of Union dues of $512.88)	$2,064.00	$31,702.18

[105] Following the parties' separation, Ms. Speight earned a diploma in early childhood development. Since securing that diploma Ms. Speight has found work outside her home which has increased her annual income.

[106] Ms. Speight says that a material change has not occurred. While she acknowledges that her income has increased, she submits that in this case her income change is not determinative of the issue. Ms. Speight says that the circumstances as they existed at the time the Consent Corollary Relief Order was negotiated must be considered to determine if the material change threshold

has been reached. Ms. Speight says that the threshold of material change has not been reached for the following three reasons: 1) it was assumed that Ms. Speight's income would increase, 2) the parties acknowledged in agreeing to spousal support that Ms. Speight would be in need of financial assistance and 3) Ms. Speight agreed to minimal contribution from Mr. Hilchey for extracurriculars as she was receiving the full table child support.

[107] Courts in this province have accepted that a change in a parent's income that affects the parent's ability to pay child support can satisfy the threshold requirement of a material change; *Foss v Foss*, [2011] NSJ No 149, *Croscup v Lewis*, [2021] NSJ No 14 and *Newell v. Upshaw-Oickle*, [2017] N.S.J. No. 346.

[108] As noted, the change must be material and must have been more than temporary. Ms. Speight says that in addition to being anticipated her current employment is not permanent but rather subject to renew annually. I do not have any evidence that Ms. Speight's current contract is unlikely to be renewed. Further, Ms. Speight's qualifications in the field in which she has been employed bode well for her continued employment in this or other similar positions.

2.2 Material Change Conclusion

[109] I accept that Ms. Speight’s recently obtained diploma in early childhood development and the increase in her income since 2019 constitute material changes in her circumstances which permit me to consider Mr. Hilchey’s application to vary child support. I accept that while the parties may have anticipated a change in Mr. Spite’s income, it is not reasonable to assume that Mr. Hilchey’s child support obligations would remain the same notwithstanding her increase in income. The intention of the parties regarding Mr. Speight’s future income is not clear from the Consent Corollary Relief Order. Ms. Speight’s very low income is clear in the Order and is much lower than her current income.

2.3 Contino Analysis

[110] Child support in shared parenting arrangements is calculated following the three steps mandated by Section 9 of the *Federal Child Support Guidelines*. Justice Jollimore summarised these three steps as follows in *McCrate v McCrate*, [2019] NSJ No 228:

> Step one: subsection 9(a)
>
> **34** The first step is to calculate the set-off of the amounts each parent would pay the other under the Table.
>
> ….
>
> Step two: subsection 9(b)

> **38** The second step requires considering the increased costs of the shared parenting arrangements.
>
> ….
>
> Step three: subsection 9(c)
>
> **46** Subsection 9(c) vests me with "a broad discretion for conducting an analysis of the resources and needs of both the parents and the children".

2.3.1 Prospective child support as of March 1, 2023

[111] Mr. Hilchey seeks to reduce his child support as of March 1, 2023.

[112] The Consent Corollary Relief Order anticipated an annual review of child as of June 1. Mr. Hilchey's lawyer confirmed that the parties intended to use the "year behind" method to calculate child support, and consistent with that approach Mr. Hilchey's lawyer calculated Mr. Hilchey's claim for retroactive repayment of child support using the "year behind" method with June 1st of each year being the effective date when the prior year's income would determine the prospective child support payable for the year following June 1st.

[113] Because the parties intended to determine each year child support as of June 1st each year, I will reassess the child support payable as of June 1st, 2023, using the parties' 2022 incomes.

2.3.2 Step one: subsection 9(a)

[114] The *Federal Child Support Guidelines* stipulate that the first step in calculating the amount of child support payable in a shared parenting situation is to calculate the set-off of the amounts each parent would pay under the table. (*McCrate v. McCrate supra* para 34)

[115] Mr. Hilchey's employment income for 2022 was $85,025.00. His table amount of child support for two children is $1,192.00.

[116] Ms. Speight's employment income for 2022 was $33,766.18. Her table amount of child support for two children is $507.00.

[117] The set-off amount of child support payable in 2023 based on 2022 income is $696.00.

[118] Mr. Hilchey says that he should pay child support in the amount of $696.00 per month as of March 1, 2023.

[119] Justice Forgeron observed in *Wolfson v Wolfson*, [2021] NSJ No 358:

> ……. courts have consistently cautioned against using the set-off as the default, as it is counter to the required ***Contino*** analysis: ***Woodford v MacDonald***, *supra;* ***Boudreau v Marchand***, *supra;* and ***Dillon v Dillon***, *supra*. However, as noted in ***Dillon***, there are circumstances where the set-off is the appropriate outcome provided that it is supported by the s. 9(b) and (c) inquiries.

2.3.3 Step two: subsection 9(b)

[120] The *Federal Child Support Guidelines* stipulate that the second step in calculating child support in a shared parenting situation involves a consideration of the increased costs of the shared parenting arrangements.

[121] Justice Forgeron in *Wolfson v Wolfson supra* noted the following commentary regarding the analysis required by Subsection 9 (b) of the Guidelines:

> **435** Ms. Wolfson also referenced the article *The TLC of Shared Parenting: Time, Language and Cash*",**12** wherein Rollie Thompson provided commentary about subsection 9(b) of the *Guidelines*, indicating at page 334 that:
>
>> Under s. 9(b), a court has two concerns: the over-all increased total costs of child-rearing for both parents, especially duplicated costs; and any disproportionate assumption of spending by one parent or the other. The child-related expenses should be apportioned between the parents based upon their incomes, to verify the set-off and to determine the need for significant adjustments to the set-off amount.

[122] The jurisprudence establishes the following framework in conducting an analysis pursuant of Subsection 9(b) of the Federal Child Support Guidelines:

1. The total child rearing budgets and actual expenditures of both parents must be examined, and a determination made as to the monthly expenditures attributable to the children;

2. The duplication of fixed costs must be considered and if duplication exists the court must consider if the fixed costs of either parent have

increased or decreased because of the fact of shared parenting. (*Contino supra*, para 78 and 79)

3. A determination must be made whether shared parenting has resulted in increased child rearing costs of both parents (*Contino supra* para 52);

4. Consideration must be given as to whether one parent has assumed a disproportionate share of the child's costs (*Contino supra* para 53); and

5. The child rearing costs identified in the forgoing analysis must be apportioned between the parties in proportion to their incomes. (*Contino supra* para 53)

2.3.3.1 Total childcare costs and the increase in costs due to shared parenting

[123] The parties tendered Statements of Expenses. Neither party criticized the other for having an extravagant lifestyle or budget.

[124] The following table compares the monthly expense budgets each party identified for the boys:

Monthly budgeted child related expense	Ms. Speight	Mr. Hilchey

Telephone Postage	$58.49 (Identified as Phone & Security, Disney Plus, Amazon, Spotify)	$20.00 (for Jace)
Section 7 – Child-Related Expenses: Childcare expenses (day-care/baby sitting)	$40.00	$100.00
Section 7 – Child-Related Expenses: Primary or Secondary School Expense	$11.63	$0.00
Section 7 – Child-Related Expenses: Post Secondary School Expense	$100.00	$0.00
Section 7 – Child-Related Expenses: Extra Curricular Expenses	$160.00	$45.00
School Supplies, Tuition, Books	$50.00	$0.00
Children’s allowance and Activities	$100.00	$40.00
Hair and Grooming	$50.00	$60.00 identified for boys and Mr. Hilchey
Drugs	$40.00	$20.00 not broken down between Mr. Hilchey and boys
Dental	$15.00	Not included as children covered by MSI
Glasses	$45.00	$7.50
Christmas, Birthdays, Events and Gifts	$150.00	$50.00 not broken down between Mr. Hilchey and boys
Holidays	$100.00	$100.00 not broken down between Mr. Hilchey and boys
Savings	$0.00	$100.00 (for a trip for the boys for summer)
Total	$920.12	$542.50 - reduced to $490.30 to take into account Mr. Hilchey’s percentage share (assigned at 33%) of Hair and Grooming and Drugs expenses and to allocate half of the Christmas, Birthdays, Events and Gifts to the boys.

[125] Ms. Speight’s budgeted monthly expenses total $4,7776.26. Of this amount she identifies $920.12 as being expenses directly associated with the children.

She does not identify any expenses she incurs that are attributable solely to the fact of shared parenting. Ms. Speight's Statement of Expenses indicates that her monthly deficit is $2,879.62 before factoring in child support, the child tax credit or the GST credit.

[126] Mr. Hilchey's total budgeted monthly expenses are $4,128.67. Based on a detailed review of Mr. Hilchey's budget it appears that $490.30 of his expenses relate to the boys. Mr. Hilchey did not identify expenses he incurs which are attributable to the fact of shared parenting. Mr. Hilchey's Statement of Expenses indicates that his expenses exceed his income by $121.33 before taking into account his monthly child support payment of $1,174.00.

[127] Ms. Speight and Mr. Hilchey each pay for a cell phone for one of the boys.

[128] The parties did not submit any evidence regarding increased transportation or parking expenses.

2.3.3.2 Section 7 - special and extraordinary expenses

[129] Neither party filed a statement of special or extraordinary expenses. The statements of expenses filed by the parties identify the following "section 7" expenses:

Monthly budgeted child related expense	Ms. Speight	Mr. Hilchey

Section 7 – Child-Related Expenses: Childcare expenses (day-care/baby sitting)	$40.00	$100.00
Section 7 – Child-Related Expenses: Primary or Secondary School Expense	$11.63	$0.00
Section 7 – Child-Related Expenses: Post Secondary School Expense	$100.00	$0.00
Section 7 – Child-Related Expenses: Extra Curricular Expenses	$160.00	$45.00

[130] Ms. Speight identified $311.63 of her monthly expenses as being dedicated to Section 7 expenses. Of that amount, only the $160.00 extra curricular amount is arguably a Section 7 expense. Likewise, $45.00 of Mr. Hilchey's Section 7 expenses can arguably by considered a Section 7 expense.

[131] The Consent Corollary Relief Order stipulates that in addition to spousal support and child support Mr. Hilchey will contribute "50% of the cost up to a maximum of $500.00 per year, per child toward the children's enrollment in one activity a year."

[132] The evidence establishes that Mr. Hilchey has paid his required contribution to extra curricular activities. Based on his Statement of Expenses he is paying $540.00 per year toward extracurricular expenses.

[133] The evidence establishes that the boys are currently both in swimming at Cole Harbour Place and both are signed up for Abenaki Aquatic Club this

coming summer. In addition, Jace has been involved in rugby, it is not clear from the evidence if he will be participating in rugby again this year.

[134] I find that the Section 7 expenses related to extra curricular activities should not be included in the monthly budgets of the parties but rather should be addressed separately and apportioned between the parties based on their incomes.

[135] Ms. Speight's child related expenses including extracurricular expenses were $920.12 which amount is reduced to $760.12 after those expenses are removed from her child expense budget. Mr. Hilchey's child related expenses including extracurricular expenses were $490.30 which amount is reduced to $445.30 after those expenses are removed from his child expense budget.

2.3.3.3 Increased and Duplicated expenses

[136] The parties have been in a shared parenting situation for several years. As a result, increased costs due to shared parenting will be hard to identify as most childcare costs and fixed costs of both parties have been in place for many years. Justice Gass, in *Plourde v Morin*, [2005] NSJ No 505, considered the application of Section 9 (b) in circumstances where the parties had been in a shared parenting arrangement for many years and noted that as a result there

would be no changed or increased costs arising from the parenting arrangement and concluded that “the issue of "increased costs" fades in relation to the other factors, as the weight given to each factor will vary with the facts.”

[137] If the child rearing related expenses that the parties have identified are backed out of each parties’ Statement of Expense their monthly expenses are very close. Ms. Speight’s monthly expense without taking child related expenses into account is $3896.14. Mr. Hilchey’s Statement of Expense indicates that his monthly expenses once child related expenses are deducted is $3638.37.

[138] Many of the parties’ expenses are duplicated. The boys enjoy and benefit from two homes. The parties have not broken down the extent to which expenses are duplicated solely because of the fact of shared parenting.

[139] Many of the household costs incurred by a parent in a shared parenting situation would be incurred by that parent if they were in a parenting arrangement in which their children spent less than 40% of their available time with them. For example, most parents who have overnight parenting time with a child but in an amount less than 40% of the available parenting time would incur expenses in respect of insurance, shelter, utilities, food, clothing,

toiletries, internet, cable, entertainment, and transportation. It may be difficult to calculate the extent to which some of those costs are increased (if at all) due to the fact of shared parenting. Other expenses will be more easily identified as being incurred or increased as a result of shared parenting. The court must review all of the expenses related evidence to determine the extent to which the fact of shared parenting results in greater child rearing costs especially for the payor parent.

[140] As the parties have not identified any expenses which are duplicated solely because of the fact of shared parenting and because their monthly budgets, aside from child related expenses, are roughly equivalent, I will not make any adjustment to the set off amount solely on the basis of duplication of expenses.

2.3.3.4 Does one parent pay a disproportionate share of child related expenses?

[141] As observed by Justice Punnett in *Georgelin v Bingham*, [2011] BCJ No 55 a set off approach may not be appropriate when one parents bears more of the costs of the children than another. The boys divide their time equally between their two parents.

[142] Ms. Speight says that although time with the boys is evenly split, she pays for more child related expenses than Mr. Hilchey. In closing argument Ms.

Speight's lawyer noted that Ms. Speight paid for many expenses because Mr. Hilchey had paid full child support. Ms. Speight paid for items such as winter clothing and school supplies.

[143] There is no evidence that Ms. Speight pays the bulk of the boys' everyday expenses.

[144] The budgets of each parent are consistent with the fact that Ms. Speight pays more for clothing, school supplies and school expenses than Mr. Hilchey. I accept that Ms. Speight does pay for more child related expenses than Mr. Hilchey. Those amounts except for a child related clothing expense are included in her childcare expense portion of her budget. The distribution of childcare expenses between the parents will be considered further when the means and needs of the parties are considered.

2.3.3.5 Are expenses apportioned between the parties based on their incomes?

[145] The parties have identified $1,205.40 ($760.12 for Ms. Speight and $445.30 for Mr. Hilchey) in childcare expenses (not including extra curricular activities.) As noted, Ms. Speight says that she pays more for the children's clothes than does Mr. Hilchey. I accept that assertion but note that Ms. Speight

has not identified the portion of her clothing expenses ($100.00) that she attributes to the boys' clothing needs.

[146] If the parties' childcare expenses of $1,205.40 are apportioned between the parties based on their 2022 incomes ($85,025.00 for Mr. Hilchey and $33,766.18 for Ms. Speight), then Mr. Hilchey would be responsible for 72% of those expenses or $886.88 of the total childcare expenses. Mr. Hilchey incurs $445.30 of child related expenses each month which means that after paying his identified component of the $1,205.40 childcare expenses he should be contributing at least $422.59 toward Ms. Speight's child related expenses of $760.12.

[147] I must then consider if the set off amount is sufficient to apportion among the parties the child related expenses they incur based on their incomes. The set off amount of $696.00 does meet the objective of apportioning those expenses between the parties based on their incomes.

2.3.4 Step three: Subsection 9(c)

[148] In this stage of the analysis the court must consider the conditions, means, needs and other circumstances of both the parents and the children. The court must be especially concerned with the boys' standard of living in each

household and each parent's ability to manage the costs of maintaining the appropriate standard of living. *Smith v. Smith*, [2011] NSJ No 416 at paragraphs 69 and 70 and *Contino v. Leonelli-Contino*, *supra* at paragraph 68.

[149] As Justice Jollimore noted in *McCrate v. McCrate, supra*:

> **47** "[O]ne of the overall objectives of the *Guidelines* is, to the extent possible, to avoid great disparities between households.": *Contino v. Leonelli-Contino*, 2005 SCC 63 at paragraph 51. This means I retain discretion to modify the set-off amount if, considering the parents' financial realities, the set-off would "lead to a significant variation in the standard of living experienced by the children as they move from one household to another".

[150] The analysis under Subsection 9(c) may lead to the conclusion that Mr. Hilchey's contribution to child support should be higher than the amount mathematically arrived at pursuant to the subsection 9 (b) analysis.

[151] In considering the conditions, means, needs and other circumstances of the parties and the boys to determine if the set off amount should be applied or varied and if so to what extent I will assess the evidence to determine the following:

1. The parties' gross incomes and their disposable incomes,
2. The parties' assets and liabilities,
3. The parties' spending patterns and their capacity to meet their routine expenses, and

4. The boys' standard of living in each home.

2.3.4.1 The parties' gross incomes and their disposable incomes.

[152] Determining the parties' gross incomes and disposable incomes is necessary to determine not only the ability of each party to meet their ongoing financial obligations but also to determine whether the relative incomes of the parties provide for similar lifestyles in each home. This analysis is necessary to determine whether the unaltered set off amount would operate to the detriment of the boys' standard of living.

[153] Counsel for the parties calculated the disposable income of each party.

[154] Ms. Speight's counsel, Ms. Harris, calculated Mr. Hilchey's 2023 monthly disposable income as being $3,670.00 and Ms. Speight's monthly disposable income as being $5,416.00. (This calculation assumes Mr. Hilchey pays the full table amount of child support ($1,192.00) on his 2023 income of $85,025.00 and pays monthly spousal support of $550.00).

[155] Mr. Hilchey's lawyer did not calculate the parties' current disposable income using the same methodology. Ms. Reid provided a DivorceMate calculation that used different incomes for the parties ($84,084.00 for Mr. Hilchey and $31,968.00 for Ms. Speight) and which assumed set off child

support of $696.00 and ranges of monthly spousal support from zero dollars to $681.00.

[156] Ms. Speight's calculations of the parties' disposable income are detailed and are premised on the actual spousal support paid by the parties and the full amount of the table amount of child support. For these reasons, I accept Ms. Speight's calculations of the parties' monthly disposable incomes when spousal support and the full amount of table child support are considered.

2.3.4.2 The parties' assets and liabilities

[157] The following table compares the assets and liabilities of the parties:

Asset	Ms. Speight		Mr. Hilchey	
Real property	$202,800.00 (Tax assessment value. 2019 appraised value of $231,000.00 accepted)		None	
Vehicles	$9,000.00		None (Repossessed)	
Pension	$0.00		$104,652.00	
Pension	$0.00		$27,977.45	
RRSPS	$5,524.07		$0.00	
RRSPS	$6,142.14		$0.00	
Savings	$25,698.49		$983.22	
Total Assets	**$249,164.70** (Increased to $277,364.70 based on 2019 Real Property appraisal)		**$133,612.67**	
Debts				
	Mortgage	$141,789.28	CIBC LOC	$12,829.09
	CRA (CTB)	$16,000.00	VISA	$7,882.92
	$		Mastercard	$13,158.95
			Legal Fees	$7,365.86
			Car Financing	$18,385.05
			Personal Loan	$5,000.00
Total Debts		**$157,789.28**		**$64,621.87**

Assets exceed Debts by:	$119,575.42	$68,990.80

[158] Notwithstanding her lower gross income, Ms. Speight appears to be in a much healthier financial situation than Mr. Hilchey.

[159] Ms. Speight lives in and now owns the former matrimonial home. I find that the value assigned to the home by Ms. Speight is low based on Ms. Speight's admission that the market value of her home is more than the $202,800.00 noted in her Statement of Property and on Mr. Hilchey's uncontradicted evidence that the house was appraised at $231,000.00 in 2019.

[160] Ms. Speight's assets should be valued at $249,164.70 plus the difference between her home's tax assessment value and the 2019 appraisal of $28,200.00 for a minimum asset value of $277,364.70.

[161] Ms. Speight's assets exceeds Mr. Hilchey's assets by at least $143,752.03. Ms. Speight's assets exceed her liabilities by $119,575.42. Mr. Hilchey's assets exceed his liabilities by $68,990.80.

2.3.4.3 The parties' capacity to meet their obligations

[162] Mr. Hilchey's monthly budget indicates that he is unable to meet his monthly expenses. In his affidavit Mr. Hilchey says that he was left with a number of debts following the separation. Ms. Hilchey says he is no longer able

to satisfy those debts and has made a consumer proposal in which he pays $150.00 for the next five years and says that he is not certain that the debts will all be addressed at that time.

[163] In addition to being unable to pay his debts Mr. Hilchey says that he relies on charity for assistance. Mr. Hilchey says that he has received support from “Support our Troops” and from the OP Dasher program. Mr. Hilchey attached to his affidavit a letter, dated January 27, 2023, which noted that he has received $1,750 in support from these agencies.

[164] Mr. Hilchey’s position that he cannot meet his monthly budget is supported by the disposable income calculations. Mr. Hilchey’s monthly budget is $4,128.67 (before taxes and other deductions are included). His monthly disposable income (based on the current child support amount of $1,174.00) is $3,688.00.

[165] Ms. Speight’s monthly budget indicates that she is unable to meet her monthly budget as well. Her position is not supported by the evidence.

[166] Ms. Speight has two RRSPs and three savings accounts which total $37,364.70. In his affidavit Mr. Hilchey notes that Ms. Speight’s saving have grown since 2019 as she only had savings of $5,159.00 in 2019.

[167] In her affidavit Ms. Speight says that she owes CRA $15,000.00 as a result of overpayment of the Child Tax benefit and that she has not been able to save any money since the child tax benefit was reduced.

[168] Ms. Speight says that she shops at thrifts shops, waits for sales, does not have cable, has discounted internet costs and receives assistance from her family. Ms. Speight deserves credit for her frugality and the ways in which she keeps her expenditures as low as possible.

[169] In her affidavit, Ms. Speight says that she is no longer able to save money; her statement of income indicates that she falls behind each month. I am unable to accept that Ms. Speight does not have sufficient income to meet her needs on a monthly basis. Indeed, the increase in Ms. Speight's savings is inconsistent with an inability to meet her monthly expenses but rather is consistent with the fact that Ms. Speight's monthly disposable income of $5,046.00 (based on child support of $1,174.00) as compared to her monthly budget is $4,776.26. It appears that Ms. Speight's disposable income exceeds her monthly budget by $269.74. Ms. Speight has sufficient disposable income to meet her monthly needs.

2.3.4.4 The Boys' standard of living in each home

[170] Neither party criticized the other for living beyond their means or providing an inadequate level of care for the boys. In considering the recent lived experience of the parties and their boys I am satisfied that the children have similar standards of living in each home.

[171] The boys are fortunate to enjoy similar standards of living in each parent's home. That said, I am satisfied that providing a similar standard of living in each home is more difficult for Mr. Hilchey given his financial circumstances and the deficiency in his monthly disposable income in relation to his ongoing expenses.

2.3.5 Conclusion regarding Child Support payable on a prospective basis

[172] Hr. Hilchey contends that his prospective monthly child support should be based on the set-off amount of $696.00.

[173] Ms. Speight resists any reduction in child support, rather Ms. Speight seeks the full guideline amount based on Mr. Hilchey's income reviewed and changed annually.

[174] Based on the forgoing analysis I conclude that effective June 1, 2023, Mr. Hilchey will pay child support to Mr. Speight in the amount of $696.00.

[175] In undertaking the above noted analysis, I have not included the cost of extra-curricular activities. With respect to extra curricular activities, I direct that in addition to the set-off amount of child support Mr. Hilchey must also pay his proportionate share (72%) of one activity per child up to a maximum of $750.00 per year. If the children are involved in more than one activity, he must contribute to the most expensive activity provided that he is permitted to attend at all locations where the activity takes place. Absent his prior consent, Mr. Hilchey shall not be expected to contribute to more than one activity per child. Mr. Hilchey's proportionate share of one activity up to the $750.00 ceiling will be recalculated yearly based on his income.

3 Claim for Retroactive reduction in child support

[176] Mr. Hilchey seeks a retroactive variation of child support back to September 1, 2021.

3.2.1.1 Retroactive adjustment September 1, 2021, to December 31, 2021

[177] The starting point in this analysis is whether a material change occurred in this period compared to the circumstances that existed at the time the Consent Corollary Relief Order was issued in 2021. Based on the evidence previously reviewed regarding the increase in Ms. Speight's income in 2021 I accept a

change in circumstances has been established that justifies a reconsideration of the child support payable during this period.

[178] Determining whether a retroactive award is appropriate requires an analysis pursuant to section 9 of the Federal Child Support Guidelines as has just been undertaken to determine the appropriate quantum of child support as of March 1, 2023.

3.2.1.2 Step One – Set-off calculation

[179] The determination of child support during this period would be based on the parties' 2020 incomes.

[180] As noted, Mr. Hilchey's employment income for 2020 was $93,563.00. His table amount of child support for two children is $1,305.00.

[181] Ms. Speight's employment income for 2020 was $22,207.00. Her table amount of child support for two children is $314.00.

[182] The set-off amount of child support from July 1, 2021, to July 1, 2022, based on the parties' 2020 incomes is $991.00.

[183] Based on the forgoing analysis the set off child support payable between September 1, 2021, and December 31, 2021, would total $3,964.00. During this

period Mr. Hilchey paid child support in the amount of $4,696.00 which Mr. Hilchey says constitutes an overpayment of child support in this period in the amount of $732.00.

3.2.1.2.1 Step Two – Duplication of expenses

[184] Although Mr. Hilchey requests that I adjust his child support payments back to September 1, 2021, I have not been provided with monthly budgeted expenses details for 2021 nor have I been provided with child specific monthly budgeted expenses for 2021. Likewise, Ms. Speight has not provided any 2021 specific budget information. For the purposes of considering undertaking the required analysis under Section 9 of the federal Child Support Guidelines I have assumed that the expenses are presented at trial are representative of the expenses incurred by the parties in 2021, 2022 and to date in 2023.

3.2.1.2.2 Step Three – the means, needs and circumstances of the parties

[185] While it is not the sole consideration, I note that Ms. Speight's disposable income would drop well below Mr. Hilchey's disposable income if the child support payable in this period by Mr. Hilchey was based on the set off amount. The spread between the parties' incomes in 2020 was $71, 356 compared to $51,483.82 in 2022. The full amount of table child support in 2020 resulted in

the disposable incomes between the two households being approximately similar.

[186] Taking all the circumstances into account I am not prepared to reduce the table amount of child support in this period.

3.2.1.3 Retroactive adjustment January 1, 2022, to June 30, 2022

[187] The determination of child support during this period would also be based on the parties' 2020 incomes.

[188] Incorporating the above noted analysis with respect to all three stages of the shared parenting child support calculation analysis, I find that a material change in circumstances occurred during this period and that Mr. Hilchey should have paid child support in each month between January 1, 2022, and June 30, 2022, in the full table of $1,174.00 in these six months.

3.2.1.4 Retroactive adjustment July 1, 2022, to June 1, 2023

[189] Based on the 2021 incomes of the parties ($98,703.00 for Mr. Hilchey and $29,740.00 for Ms. Speight) I find that a material change occurred in this period as well.

3.2.1.4.1 Step one – Set-off calculation;

[190] Mr. Hilchey's employment income for 2021 was $98,703.00. His table amount of child support for two children was $1,367.00.

[191] Ms. Speight's employment income for 2021 was $29,740.00. Her table amount of child support for two children was $453.00.

[192] The set-off amount of child support is $914.00 payable as of July 1, 2022, based on Mr. Hilchey's 2021 income.

[193] Mr. Hilchey seeks a retroactive variation of child support for the period July 1, 2022, to February 28, 2023. Based on the forgoing analysis the set off child support in this period would total $7,312.00. During this period Mr. Hilchey paid child support in the amount of $9,392.00. He claims an overpayment of $2,080.00.

3.2.1.4.2 Step two – consideration of the increased costs of the shared parenting arrangements;

[194] As noted, I have assumed that the expenses are presented at trial are representative of the expenses the parties incurred in 2021, 2022 and to date in 2023.

3.2.1.4.3 Step three - the means, needs and circumstances of the parties;

[195] The 2022/2023 child support set-off amount (based on 2021 incomes) is $914.00.

[196] . The spread between the parties' incomes in 2021 was $69,963.00 compared to $51,483.82 in 2022.

[197] Mr. Hilchey provided 2021 disposable incomes calculations for the parties, but those calculations did not include the actual amount of spousal support paid of $550.00 per month nor was a calculation of net income provided based on the actual amount of child support paid of $1,174.00 per month. However, adjusting Mr. Hilchey's 2021 disposable income calculation to take into account the actual amount of spousal and child support paid in this period indicates that Mr. Hilchey still had a higher disposable income than Ms. Speight.

[198] Given the means and needs of the parties in this period I am satisfied that it was appropriate for Mr. Hilchey to pay the full amount of child support in this period.

[199] Mr. Hilchey's claim for a retroactive reduction in child support payments made from September 2021 to date, is dismissed.

3.3 Request for one consolidated order

[200] As noted, the parties' parenting and child support are governed by two orders of this court. The parties agree that the orders should be consolidated. Mr. Hilchey seeks a new revised order. Ms. Speight suggests that the orders be consolidated but not amended other than what falls within the scope for these two applications.

[201] Mr. Hilchey tendered a proposed form of order (exhibit 4) which contains some provisions not contained in either of the two existing orders.

[202] Ms. Speight on cross examination agreed that a number of the new or amended provisions in Exhibit 4 made sense or could benefit the parties. These provisions in exhibit 4 are as follows:

1. **Mother's Day and Father's Day:** Regardless of the regular schedule, the children shall be with the celebrating parent from 9:00 a.m. to 8:00 p.m. on Sunday.

2. **Remembrance Day:** Regardless of the regular schedule Daniel shall have the option to have the children in his care on Remembrance Day from 9:00 a.m. to 8:00 p.m.

3. The parties will immediately arrange co-parenting counselling with a plan to attend 1 session for month for a total of 12 sessions unless recommended by the counsellor that it end sooner or continue longer. The parties will choose a co-parenting counsellor within 3 weeks of the date of this Order. If the parties cannot agree on which counsellor to choose, the counsellor chosen will be the one with the first available appointment. The cost of the co-parent counselling will be shared by the parties equally after all coverage available to both of them is exhausted. The location, duration and method of counselling shall be determined by the counsellor. The counsellor will not be called as a witness for any purpose and the counselling records shall be confidential as between the counsellor and the parties.

[203] Ms. Speight also agreed that if a holiday falls on a Monday which is the usual transition day that the transition can and has been occurring on the following day. Paragraph 12 of Exhibit 4 contemplates a Friday transition and stipulates that if the transition is Friday, and that day is a holiday that the transition would occur on Thursday. Ms. Speight said she would have to think about that proposal.

[204] Ms. Speight agreed that the use of the My Family App is a good idea but does not want to have to communicate more than necessary with Mr. Hilchey.

[205] Paragraph 5 of Exhibit 4 proposed limiting contact with the parent not having parenting time to two calls per week. Ms. Speight did not agree to this as she would like to have daily contact with her sons when they have parenting time with Mr. Hilchey.

[206] I direct that a new order be drafted which will incorporate shared parenting, and the findings regarding child support and extra curricular activities. In addition, the order shall incorporate both orders subject to the following directions. In addition to the forgoing, the new order shall contain:

1. The following provisions from Exhibit 4:

    a. **Mother's Day and Father's Day:** Regardless of the regular schedule, the children shall be with the celebrating parent from 9:00 a.m. to 8:00 p.m. on Sunday.

    b. **Remembrance Day:** Regardless of the regular schedule, Daniel shall have the option to have the children in his care on Remembrance Day from 9:00 a.m. to 8:00 p.m.

c. Unless there is an emergency, or Daniel is deployed and it is not possible, the parties will communicate through the software program, Our Family Wizard. The parties will share the cost of the program equally. The program shall also be used to manage the children's calendars such as for extra-curricular activities.

d. The parties will immediately arrange co-parenting counselling with a plan to attend 1 session for month for a total of 12 sessions unless recommended by the counsellor that it end sooner or continue longer. The parties will choose a co-parenting counsellor within 3 weeks of the date of this Order. If the parties cannot agree on which counsellor to choose, the counsellor chosen will be the one with the first available appointment. The cost of the co-parent counselling will be shared by the parties equally after all coverage available to both of them is exhausted. The location, duration and method of counselling shall be determined by the counsellor. The <u>counsellor will not be called as a witness for any purpose and</u>

<u>the counselling records shall be confidential as between the counsellor and the parties.</u>

2. A stipulation that the parents [will use their best efforts to maintain similar routines in their home] and will advise each other if they decide to permanently change part of the routine maintained in either home. As the boys grow it is to be expected that some routines will change, and new routines introduced. This is to be expected and welcomed providing it is in their best interest. The order shall require the parties discuss permanent changes to routines and if they are in disagreement regarding a proposed routine change, they must seek and be guided by the advice of the appropriate professional (teacher, doctor, psychologist or counsellor). Such an order is appropriate in this case given the evidence I have heard of the importance of routine for these children.

3. The order shall stipulate that each parent may contact the boys when they are with the other parent once a day at 7:30 PM. It is to be expected that the boys may not always be available at that time. Further the contact occurring at that time will not be more than half an hour and may on many or most occasions be much shorter than that. I

have and accept evidence that the boys do not like talking on the phone. The boys will not be expected to maintain a call longer than they are willing or able to tolerate.

[207] Ms. Reid will prepare the order for review by Ms. Harris.

[208] If either party seek costs and the parties cannot agree, Mr. Hilchey must file his cost submission no later than June 23, 2023, and Ms. Speight must file her cost submission no later than July 21, 2023. If counsel want to adjust these deadlines, they may write me.

Ingersoll, J.