SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION
Citation: *Lindsay-Graham v. Lindsay*, 2023 NSSC 197

Date: 20230626
Docket: *SFH* No. 1201-065011
Registry: Halifax

Between:

Melanie Janet Lindsay-Graham

Petitioner/Respondent

v.

Robert Dewar Lindsay

Respondent/Applicant

LIBRARY HEADING

Judge: The Honourable Justice C. LouAnn Chiasson

Heard: Final submissions – December 2022

Summary: Payor's non-disclosure resulted in significant retroactive child support. Credit is provided to the payor for some expenses paid for the benefit of the children during the period of retroactive adjustment. The parenting is confirmed to be a shared parenting arrangement. Payee's request to adjust parenting arrangements dismissed (for annual Voice of the Child reports and right of first refusal for childcare).

Key words: Family, Child support, Table amount, Special or extraordinary expenses (section 7 expenses), Disclosure, Retroactive, Unreasonable delay, Blameworthy conduct, Child's circumstances, Variation, Material change in circumstances, Corollary Relief Order, Shared Parenting

Legislation: *Divorce Act*, RSC 1985, C.3, 2nd Supp

Federal Child Support Guidelines, SOR/ 97-175

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Judge:	The Honourable Justice C. LouAnn Chiasson
Heard:	In Halifax, Nova Scotia, final submissions December, 2022.
Written Release:	June 26, 2023
Counsel:	Kenzie MacKinnon, K.C., counsel for Melanie Lindsay-Graham Heidi Foshay Kimball, K.C., counsel for Robert Dewar Lindsay

By the Court:

[1] This case is primarily about child support. Mr. Lindsay did not disclose his income to Ms. Lindsay Graham for a number of years and she is claiming a significant retroactive adjustment. Both parties wish to address some matters relating to the parenting arrangements.

[2] Ms. Lindsay Graham and Mr. Lindsay have three children. They were divorced in 2014. The parenting arrangements have changed since the Corollary Relief Order (CRO). Pursuant to the CRO, the children were in the primary care of their mother. Over time, each of the children began spending more time with their father.

[3] Ms. Lindsay Graham is not seeking to have the children return to her primary care, but each parent characterizes the current parenting arrangement differently. Mr. Lindsay indicates that the parenting arrangement is a split parenting arrangement and Ms. Lindsay Graham indicates that it is a shared parenting arrangement. The parties also disagree on whether the children should return to Ms. Lindsay Graham's care when Mr. Lindsay is travelling for work.

[4] Ms. Lindsay Graham is seeking a significant retroactive child support order because Mr. Lindsay's income increased significantly. Mr. Lindsay has paid significant expenses for the children that he wishes to claim as a credit towards any child support owing. Additionally, the court must address the ongoing child support payable.

[5] Both parties acknowledge that there has been a material change in circumstances sufficient to warrant variation. This decision will therefore address the appropriate remedies related to parenting and child support based on those material changes.

ISSUES

[6] The issues can be summarized as follows:

1) Retroactive child support:
    a. What is the appropriate period for the court to assess the claim to retroactive child?

b. What is that appropriate basis to calculate the retroactive child support owing by Mr. Lindsay to Ms. Lindsay Graham?
c. What credit should be provided to Mr. Lindsay in relation to expenses paid for the children?
d. What factors ought to be considered in establishing the appropriate amount of retroactive support owing?

2) Ongoing parenting arrangements:
    a. What is the current parenting arrangement- shared parenting or split parenting?
    b. What is the exchange time for the weekly transitions of the children during the summer months?
    c. Should Ms. Lindsay Graham have right of first refusal to care for the children when Mr. Lindsay travels for work?
    d. Should a Voice of the Child report be prepared for the children on an annual basis each summer?
3) Ongoing child support

BACKGROUND

[7] The parties were divorced in 2014 and a Divorce Order and Corollary Relief Order (CRO) were issued on July 10, 2014. At that time, the children were in the primary care of Ms. Lindsay Graham. Mr. Lindsay's income was noted to be $136,233 and his child support obligation was set at $2,321 per month. Ms. Lindsay Graham's income is not disclosed in the CRO but both parties acknowledge that she was not working outside the home at the time the CRO was issued.

[8] The CRO contained a provision requiring annual exchange of income tax returns. The CRO also stipulated that there would be an annual adjustment of the child support to accord with Mr. Lindsay's income from the previous year. Mr. Lindsay did not provide annual financial disclosure from the date of the CRO until the current court application was made. Child support was not adjusted in accordance with the CRO until this application was before the court.

[9] In 2018 Ms. Lindsay Graham returned to the work force as an apprentice electrician. She provided her annual tax disclosure to Mr. Lindsay. She cohabited

with a partner until the summer of 2022. Ms. Lindsay Graham filed a variation application on December 17, 2019.

[10] Mr. Lindsay has seen significant increases to his income since the CRO. He did not provide financial disclosure until the matter came to court on Ms. Lindsay Graham's variation application. He has re-partnered and he and his current spouse have another child.

[11] The parties live approximately one hour from each other. They are in separate school districts. The children are involved in a significant amount of activities with significant expenses.

[12] Following a hearing in July 2021, the court set Mr. Lindsay's income at $534,998 and ordered him to pay child support of $6,478 per month. The parenting arrangements were in dispute and the matter was scheduled for a further hearing.

[13] The parties acknowledge a material change in circumstances since the granting of the CRO. Pursuant to s. 17 of the *Divorce* Act, RSC 1985, c. 3, 2nd supp, there must be a material change found before dealing substantively with the issue of requests to vary. The issues before the court were ongoing parenting arrangements, retroactive and ongoing child support.

LAW & ANALYSIS

ISSUE 1(A)- What is the appropriate period for the court to assess the claim to retroactive child support?

[14] The CRO was issued on July 10, 2014. Child support set out in paragraph 22 specified that: [c]ommencing on January 1, 2014, Robert Lindsay shall pay to Melanie Lindsay child support in the amount of $2,321.00 per month based on his 2012 income of $136,233."

[15] Further at paragraph 23, the CRO indicated: "The parties shall exchange tax returns on or before June 30th of each year. The table amount of child support **shall be adjusted** in accordance with Robert Lindsay's income from the previous year." (emphasis added)

[16] Court orders are presumptively valid *(S. (D.B.) v. G. (S.R.),* 2006 SCC 37). The terms of the CRO mandated an adjustment as of June 30, 2015 based on Mr.

Lindsay's income as disclosed on his 2014 income tax return. The court cannot and should not order a retroactive adjustment prior to the adjustment date noted in the CRO absent fraud or misrepresentation.

[17] Ms. Lindsay Graham's request to adjust child support retroactively back to 2014 fails. Any retroactive adjustment would commence with the payment due July 1, 2015, at the earliest.

[18] Counsel for Mr. Lindsay indicates that the court should apply the presumptive date for variation as of December 2016. That date would be three years prior to Ms. Lindsay Graham's application (as set out in *S. (D.B.)*, *supra*).

[19] The court has discretion to permit a retroactive adjustment prior to that time if there has been blameworthy conduct on behalf of the payor (*S. (D.B.), supra*). The necessity for fulsome disclosure is a cornerstone of child support. It is enshrined in the legislation and in case law. Non-disclosure in the face of a court ordered obligation is even more egregious and amounts to blameworthy conduct.

[20] As noted at paragraph 45 of *Colucci v Colucci*, 2021 SCC 24:

> 45 In light of the existing approach to blameworthy conduct and the pervasiveness of non-disclosure, it may be necessary in a future case to revisit the presumptive date of retroactivity in cases where the recipient seeks a retroactive variation to reflect increases in the payor's income. A presumption in favour of varying support to the date of the increase would better reflect the recipient's informational disadvantage and remove any incentive for payors to withhold disclosure or underpay support in the hopes that the *status quo* will be maintained. Such a presumption would accord with other core principles of child support and reinforce that payors share the burden of ensuring the child receives the appropriate amount of support.

[21] One of the concerns with respect to retroactive orders for child support is that they may disturb the certainty that a payor has come to expect. This cannot be true, where the court order (as here) specifically contemplates an annual adjustment based on previous year's income. The integrity of the system of child support would be significantly undermined if a parent were able to avoid appropriate adjustments to child support by virtue of their own non-disclosure.

[22] The appropriate commencement date to consider a retroactive adjustment of child support is July 1, 2015.

ISSUE 1(B)- What is that appropriate basis to calculate the retroactive child support owing?

[23] Counsel for Mr. Lindsay requests that any calculation of retroactive child support be based on current year's income. The argument is that section 3(1)(a) of the *Federal Child Support Guidelines* SOR/97-175 mandates that child support be based on current income.

[24] This argument is untenable in this case for two reasons:

1. Section 16 of the *Federal Child Support Guidelines* SOR/97-175 provides that: "Subject to sections 17 to 20, a spouse's annual income is determined using the sources of income set out under the heading "Total income" in the T1 General form issued by the Canada Revenue Agency and is adjusted in accordance with Schedule III." Although the court may consider current year's income in determining the appropriate table amount of support payable, the Guidelines also provide for consideration of the income as noted in the T1 General form (i.e. the previous year's line 150 income).
2. Adopting the approach requested by Mr. Lindsay would render the provision at paragraph 23 null and void. I do not accept that to be appropriate. In accordance with the CRO, the calculation of child support owing is to be based on the previous year's income.

[25] As noted in the case of *Joudrey v. Reynolds*, 2020 NSCA 60, at paragraph 24:

> "In accordance with Section 16, the determination of a payor's income starts with his or her T1 General form. That starting point is only displaced if a court is satisfied some other method of calculation would result in a more fair determination of income…"

[26] There is no reason to deviate from the CRO whereby the parties utilized the previous year's income when calculating child support. This method of calculation includes any retroactive adjustment.

[27] There may be cases where it is appropriate to utilize the current incomes of the parties. This case is not one of those.

ISSUE 1(c)- What credit should be provided to Mr. Lindsay in relation to expenses paid for the children?

[28] Counsel for Mr. Lindsay requests the court reduce any retroactive monies owing by him in recognition of his payment of various expenses for the children. He has calculated this contribution to be $129,236.96 for the period 2015 to 2020.

[29] The expenses include costs related to haircuts, clothing, footwear and transportation. These expenses do not fit within the definition of section 7 expenses.

[30] There was no indication that Ms. Lindsay Graham did not appropriately provide any clothing, footwear, or transportation during her parenting time with the children. The affidavit of Mr. Lindsay filed June 22, 2021, indicated that he "frequently pa[id] for haircuts, clothing and footwear…" Even if these expenses were to be shared, Mr. Lindsay would be responsible for 90% of the expenses in accordance with the CRO.

[31] The evidence of Ms. Lindsay Graham was that the children were not allowed to take their clothes from Mr. Lindsay's home to Ms. Lindsay Graham's (ref. Exh 2, tab 13, paragraph 14). As such, it would be inappropriate to allow any reduction to child support properly owing related to clothing expenses. Ms. Lindsay Graham had to provide clothing for the children while in her care.

[32] Other expenses relate to extracurricular activities: equestrian, soccer, hockey, golf, skiing/ snowboarding, music, dance and motocross. Mr. Lindsay admitted that some of the expenses were shared with Ms. Lindsay Graham in the proportion noted in paragraph 26 of the CRO. The sharing of expenses is qualified by the provision in paragraph 27 whereby the parties will consult and agree on the activities prior to the children being enrolled.

[33] The evidence of Ms. Lindsay Graham indicates that she attempted to discuss alternatives to some of the children's activities with Mr. Lindsay. An example of this is her request to enroll one of the children in equestrian activities in the city (approximately half way between the parties' homes) to facilitate transportation issues. Mr. Lindsay did not support this, and the child continued to participate in the activity close to his home.

[34] Ms. Lindsay Graham testified that she fully paid the children's soccer registration from 2014 to 2017. She also testified that she paid "several years of weekly fiddle and guitar lessons for the two boys; gymnastics, dance and basketball for R.; and two years of junior golf memberships… for R and G." She

noted that these activities were close to her home, and Mr. Lindsay refused to contribute to the expenses.

[35] Mr. Lindsay filed a Statement of Extraordinary Expenses (ref. Exh. 13). Expenses included golf, hockey, motocross, snowboarding, equestrian activities, basketball, cross country running, biking, hunting, scuba diving, and rugby. The expenses not only included memberships and registration fees, but also equipment, clothing, accommodations. The Statement discloses the children's extracurricular expenses to be $57,330.31 per year.

[36] The most recent Statement of Income of Ms. Lindsay Graham notes her total annual income is $27,995 (ref. Exh 2, tab 13). The extracurricular expenses of the children claimed by Mr. Lindsay amount to more than double Ms. Lindsay Graham's gross annual salary.

[37] The credit sought for additional expenses paid by Mr. Lindsay is found at Exhibit 3 of his affidavit filed June 2021. This Exhibit lists expenses back to 2015 despite indicating that no retroactive adjustment is due until 2016. As noted above, the period of retroactive calculation commences July 1, 2015. Any expenses incurred prior to July 1, 2015 would therefore be disallowed. The expenses are not broken down by month or by year and it is impossible to calculate exactly the expenses from July 1, 2015 onward.

[38] Further, many of the expenses do not qualify as appropriate deductions from child support - i.e.: clothing, footwear, "miscellaneous expenses" of $994.94, mileage when the children were in Mr. Lindsay's care, etc..

[39] Other expenses may qualify as section 7 expenses but these expenses would need to be shared in accordance with the CRO (with Mr. Lindsay paying 90% of such expenses). Further complicating this financial reconciliation is that there is no specific quantification of the expenses paid by Ms. Lindsay Graham.

[40] One example of the difficulty in calculating an appropriate reduction (if any) to the retroactive monies owing relates to costs of music lessons/ instruments. Mr. Lindsay claims expenses related to music lessons/ instruments ($714.80), but Ms. Lindsay Graham testified that she paid "several years of weekly fiddle and guitar lessons…" It is impossible, therefore, to precisely quantify what amounts should be properly deducted from the retroactive child support due.

[41] Another example is highland dance. Mr. Lindsay claims expenses of $778 and Ms. Lindsay Graham testified that she paid some dance expenses. Receipts for the expenses were not provided for the period prior to 2020. A monthly/ annual breakdown was not provided for the expenses from 2015 to 2020.

[42] Ms. Lindsay Graham was aware that Mr. Lindsay was shouldering the expenses related to equestrian activities for one of the children. She did not indicate that the child should not participate in the activity. If the expense was not reasonable or necessary, Ms. Lindsay Graham ought to have confirmed her opposition. To the contrary, Ms. Lindsay Graham suggested that the child participate in this activity closer to her home.

[43] By silently permitting this expense to be paid year after year without any indication that it was unreasonable, Ms. Lindsay Graham may have acquiesced to the continued payments by Mr. Lindsay.

[44] Mr. Lindsay asserts that the court should reduce his retroactive child support by $19,825.58 related to “dirt bikes”. These dirt bikes were purchased by Mr. Lindsay and remained in his possession the vast majority of the time. The bikes were not available to the children when they were in the care of Ms. Lindsay Graham. Although the children may enjoy riding dirt bikes (as noted in Mr. Lindsay’s affidavit, exhibit 4, paragraphs 9 and 10) this expense does not qualify as a section 7 expense.

[45] Another major category of expense claimed by Mr. Lindsay is transportation- “weekends- sports”, “sports mileage”, “mileage during march [sic] break”, “Expenses and Mileage for LINKS (reading program)”. Transportation during a party’s parenting time is their responsibility. Additional transportation done by one parent outside of their parenting time may be considered if the parties confirm that the expense is to be shared or if the circumstances mandate that the expense should be shared.

[46] In this case, there is no suggestion that Ms. Lindsay Graham consented to the transportation expenses be shared. Further, the amounts claimed by Mr. Lindsay do not specify that these are transportation expenses during his parenting time or Ms. Lindsay Graham’s.

[47] I find as a fact that many of the expenses claimed as a credit by Mr. Lindsay are expenses that were shared with Ms. Lindsay Graham or were expenses properly paid by a parent with care of the children at any given time. A parent cannot

unilaterally incur an expense and automatically receive credit for the payment of that expense.

[48] The following expenses (for the period 2015-2020) may be appropriate to examine further in relation to a credit to Mr. Lindsay:

1.	Dental expenses	$852.72
2.	Pony expenses	$25,016.45
3.	Hockey	$2,706.50
4.	Skiing/ snowboarding	$3,838.57
5.	Sports expenses for equipment/athletic clothing	$13,806.72
6.	Accommodations, meals for sport (soccer, hockey)	$1,441.35
7.	Expenses for LINKS (reading program)- excluding mileage- unknown	
	TOTAL	$47,662.31

[49] As it relates to the expenses for LINKS, Mr. Lindsay did not differentiate between expenses for the reading program and mileage to attend the program. Expenses related to the reading program may be considered an appropriate expense to be shared between the parties. The transportation may not. Without further clarification, the expense is disallowed as a credit.

[50] Mr. Lindsay argued that the proportional sharing set out in the CRO may no longer be appropriate. In the brief filed on behalf of Mr. Lindsay in December 2022, counsel indicated that the expenses to be divided between the parties (with Mr. Lindsay paying 90%) were nominal and the expenses have increased exponentially since then.

[51] Mr. Lindsay did not seek to vary the proportional sharing of expenses. The proportional sharing of expenses favours Mr. Lindsay. Utilizing 2021 Line 150 incomes, Mr. Lindsay would have proportionally shared 93.9% of the expenses (v. 90%). In previous years, the proportion may have been even greater.

[52] If the court found all expenses noted in paragraph 47 to be reasonable, the credit to Mr. Lindsay would be 10% of $47,662.31 or $4,766.23.

[53] In 2021, Mr. Lindsay noted the expenses to be $44,233.10 (ref. exhibit 13). The expenses include golf, scuba, hunting, biking, cross country running, basketball, snowboarding, rugby, hockey, and horseback riding. Again, many of

these expenses would not qualify as credits to offset child support (i.e. dirt bike, bicycles). Other expenses may not qualify as appropriate section 7 expenses.

[54] Simply reducing this figure by the amount for dirt bikes and bicycles, amounts to a reduction of $22,840.84. The remaining expenses total $21,392.26. Even if all other expenses were appropriate to share with Ms. Lindsay Graham, the proportional credit to Mr. Lindsay is $2,139.23.

[55] I find as a fact that the total maximum credit available to Mr. Lindsay related to expenses paid from 2015 to 2021 is $6,905.46.

ISSUE 1(d)- What factors ought to be considered in establishing the appropriate amount of retroactive support owing?

[56] The Supreme Court of Canada in *S. (D.B.)*, *supra*, set out four factors to be considered in matters of retroactive variation: the reason for the delay in making the application, the payor's blameworthy conduct, the circumstances of the child, and lastly the hardship for the payor in paying a retroactive award.

[57] Ms. Lindsay Graham did not make her variation application until 2019. There is uncontroverted evidence that she advised Mr. Lindsay as early as February 2015 that she had not received his last year's tax return. Counsel for Mr. Lindsay indicates that the first formal request was made in October 2016. In acknowledging that there was reference to non-disclosure in 2015 and a specific request for tax returns in 2016, Ms. Lindsay Graham cannot be said to have unduly delayed in requesting financial disclosure.

[58] At the time of the requests, Ms. Lindsay Graham was not employed outside the home. Her source of income was the child tax benefit. She indicated that she had not received financial disclosure from Mr. Lindsay within months of receiving the CRO. She asked for financial documents that a court order provided she should receive. It should not be up to a payee to request reasonable and appropriate financial disclosure.

[59] Counsel for Mr. Lindsay conceded that the parties had a contentious relationship and there have been issues of control. Even if one were to accept this, the delay in commencing this application has meant that Mr. Lindsay has paid significant expenses for a number of years.

[60] Had the child support been adjusted, he may not have been able to continue to pay such expenses. Ms. Lindsay Graham was aware that he was paying significant additional expenses related to the children's activities and acquiesced to that continuing. Her delay in commencing the application is a factor for the court to consider in determining the retroactive amount owing by Mr. Lindsay.

[61] The second factor is the blameworthy conduct of Mr. Lindsay. As indicated previously, his non-disclosure of basic financial information is blameworthy conduct.

[62] The third factor is the circumstances of the children. The affidavit evidence discloses that Mr. Lindsay was able to provide the children with a standard of living well above that of Ms. Lindsay Graham. His contribution to their activities alone was more than double Ms. Lindsay Graham's income. With their father, the children were able to participate in activities well beyond the financial means of Ms. Lindsay Graham.

[63] Had appropriate child support been paid by Mr. Lindsay, it is quite possible that Ms. Lindsay Graham could have been able to provide the children with the lifestyle they enjoyed while living with their father. Ms. Lindsay Graham testified that they were unable to afford to buy the children name brand new clothing as Mr. Lindsay did. She indicated that she would often get the children second hand clothing as she did not have the financial resources Mr. Lindsay had.

[64] Mr. Lindsay was able to pay for activities, buy the children new clothing, and buy them dirt bikes, snowboards, skis, etc. His ability to pay for these things is a direct result of paying far less in child support than he ought to have paid.

[65] The fourth factor is the potential hardship to Mr. Lindsay if a retroactive award is made. In examining the issue of hardship, one must analyze the means, needs and conditions of the payor. During the time Mr. Lindsay underpaid his child support obligations, he was able to acquire four rental properties. The tax assessed values of the real estate owned by Mr. Lindsay is over $939,000. The fair market value of these properties is typically in excess of the tax assessed values.

[66] Mr. Lindsay provided tax returns to indicate that he is currently operating his rental properties at a loss. Ms. Lindsay Graham disputes the business losses. There would be no hardship, nor impact on his current cash flow to sell the additional business assets to pay the retroactive support owing. To the contrary, it

may assist his current cash flow to discontinue the business losses he is currently claiming and to have access to the capital from their disposal.

[67] This court is not mandating that Mr. Lindsay dispose of his rental properties acquired since the CRO was issued. The fact that Mr. Lindsay has rental properties, along with his significant income mandate against a significant reduction of the retroactive child support owing.

CONCLUSION RE: RETROACTIVE CHILD SUPPORT

[68] Mr. Lindsay owes Ms. Lindsay Graham retroactive child support. Both parties have quantified retroactive child support utilizing the set off method of paying child support.

[69] Applying the previous year's income to the calculation of support owing results in the following quantum:

Year	Income of Mr. Lindsay	Monthly s. 3 table amount of Mr. Lindsay	Income of Ms. Lindsay Graham	Monthly s. 3 table amount of Ms. Lindsay Graham	Set off amount (annual)	Amount paid by Mr. Lindsay (annual)	Amount owing
2015*	186,526	3,133	2,501	0	18,798	12,765	6,033
2016	219,805	3,632	6,721	0	43,584	27,582	15,732
2017	294,288	4,749	2,960	0	56,988	27,582	29,136
2018	504,558	7,903	0	0	94,836	27,582	67,254
2019	533,071	8,331	28,600	583	92,976	27,582	65,394
2020	499,754	7,831	18,679	284	90,564	27,852	62,712
2021	508,363	7,960	26,795	539	89,052	27,852	61,200
TOTAL							307,461

*2015 – adjustment for a 6 month period: July – December.

[70] Counsel for Ms. Lindsay Graham calculated the retroactive amount owing to be $353,440. Counsel for Mr. Lindsay calculated the retroactive amount owing to be $265,431 (prior to any credit to Mr. Lindsay). Based on the evidence, the appropriate retroactive amount is $307,461 prior to any credit to Mr. Lindsay.

[71] The income of Mr. Lindsay (noted above) is the income disclosed at Line 150 of his income tax returns. It includes business losses claimed by virtue of his four rental units. Ms. Lindsay Graham argued that these business losses should not be considered for the purpose of the calculation of support.

[72] As noted in the affidavit evidence of Ms. Lindsay Graham, there is some evidence that Mr. Lindsay's three oceanfront units in Chester basin may have been fully booked for the last two years. Whether any claimed business loss is reasonable on an ongoing basis remains to be determined. For the purpose of calculating the retroactive monies owing, however, I have included Mr. Lindsay's business losses.

[73] As noted in the table at paragraph 68, the retroactive figure was calculated utilizing the set off method of support. This was based on the full table amount payable. Deducting the credit of $6,905.46, leaves a balance of $300,555.54 ($307,461 less $6,905.46).

[74] Counsel for Mr. Lindsay argues that a further reduction in the retroactive amount owing should be made to account for the fact that the children's schedules began to change with their parents commencing in September 2021. Even if the court were to consider the changes to the children's schedules, the parenting arrangement remained a shared parenting arrangement. The calculation of retroactive adjustments up to December 2021 take that into account.

[75] In 2022, Mr. Lindsay paid child support of $6,470 for the months January to June and $3,326.26 for the months of July and August, 2022. He stopped paying support in September 2022 and asserted all the children were residing with him. The total support paid in 2022 by Mr. Lindsay was $45,472.52

[76] As noted at paragraphs 85 and 86, the parenting arrangement remains a shared parenting arrangement.

[77] Mr. Lindsay's income in 2021 was $431,792. Ms. Lindsay Graham's 2021 income was $27,995. The set off amount payable is $6,243 per month ($6,811.88 less $568.88). Support owing in 2022 amounted to $74,916.

[78] In paying $45,472.52 in 2022, Mr. Lindsay underpaid child support by $29,443.48. This increases the retroactive amount owing to December 2022 to $329,999.

[79] Pursuant to s.4 of the Federal Child Support Guidelines, the court has discretion in determining the appropriateness of the table amount of support where the payor has an income over $150,000.

[80] The court also has discretion to consider the factors noted in *S. (D.B.), supra*, in relation to the calculation of retroactive monies owing.

[81] Given the delay of Ms. Lindsay Graham in commencing the court application, the factors noted above, and her acquiescence to the continued payment of numerous and expensive activities, I am prepared to reduce the retroactive amount owing to $250,000.

ISSUE 2(a)- What is the current parenting arrangement- shared parenting or split parenting?

[82] The current parenting arrangement is a shared parenting arrangement as defined in the Federal Child Support Guidelines. Each of the parents has the children in their care a minimum of 40% of the time. All three children are following the same schedule of time with each parent.

[83] Mr. Lindsay does not dispute that the children spend significant time with both parents. His counsel argued that the children are in a split parenting arrangement. A split parenting arrangement is defined at s. 8 of the *Federal Child Support Guidelines* SOR/97-175 to be:

> "If there are two or more children, and each spouse has the majority of the parenting time with one or more of those children, the amount of a child support order is the difference between the amount that each spouse would otherwise pay if a child support order were sought against each of the spouses."

[84] The Variation Order specified that Mr. Lindsay had primary care of two of the children and Ms. Lindsay Graham had primary care of one child. The Variation Order indicated that child support was to be calculated based on a split custody arrangement.

[85] During this proceeding, further evidence was tendered in relation to the parenting schedules for the children. All three children are now following the

same schedule of time with each parent. The children split the ten week summer vacation equally between the parents. They also spend equal time with each parent over the Christmas holiday.

[86] Mr. Lindsay testified that there are adjustments made to the parenting schedule time to time by agreement. He did not contest, however, the evidence of Ms. Lindsay Graham that from August 1, 2021 to June 1, 2022, Ms. Lindsay Graham had the two older children in her care for 136 days and Mr. Lindsay had them for 168 days. It would now appear as though all three children are following a similar pattern of parenting time.

[87] Ms. Lindsay Graham was not cross examined on her affidavit filed on June 13, 2022. If the court accepts the parenting times as set out in her affidavit, she had the children in her care approximately 44.7% of the time. This calculation, which was not disputed by counsel for Mr. Lindsay, falls squarely within the parameters of a shared parenting arrangement.

[88] Counsel for Mr. Lindsay concedes that Ms. Lindsay has the children in her care twelve days per month during the school year which meets the 40% threshold for shared parenting. During summer months and holidays the parties share the time equally increasing the percentage of parenting beyond the 40% threshold.

[89] As noted in the decision of *Froom v. Froom*, 2005 CarswellOnt 545 (Ont C.A.), there is "no universally accepted method for determining the 40%...". Based on the evidence before me, I find as a fact that the children are in a shared parenting arrangement.

ISSUE 2(b)- What is the exchange time for the weekly transitions of the children during the summer months?

[90] Ms. Lindsay Graham wishes to transition the children on Wednesdays during the summer months for their week on/ week off schedule. Mr. Lindsay wishes to transition the children on Tuesdays by 5 pm to coincide with the regular weekend access. The endorsement issued on May 30, 2022, provided a transition on Tuesdays at 5 pm with the usual caveat that the parties may agree otherwise.

[91] The transition time for the children during the summer months will remain Tuesdays at 5 pm, unless otherwise agreed.

ISSUE 2(c)- Should Ms. Lindsay Graham have right of first refusal to care for the children when Mr. Lindsay travels for work?

[92] When the CRO was issued the children ranged from 4 to 7 years of age. The children are now 13 to 16 years of age. They are involved in a number of activities and their lives are much busier than they were previously.

[93] Mr. Lindsay has testified that his travel is considerably less than it was in previous years. He testified that his employment related travel has decreased and that he arranges the travel for times when the children are with their mother (for the most part).

[94] Given the distance between the homes, the decrease in the travel commitments of Mr. Lindsay, and the busy schedules of the children, the order will not contain a right of first refusal to care for the children. During their teenage years, the children should be able maintain a consistent schedule of parenting time at each of their parents' homes that is clear and predictable.

ISSUE 2(d)- Should a Voice of the Child report be prepared for the children on an annual basis each summer?

[95] The children will not participate in a scheduled Voice of the Child report on an annual basis. The children need some finality to the legal proceedings. They should not be subject to an automatic review of their wishes by an independent third party unless there are compelling reasons to do so. The children are of an age and maturity level whereby they are able to make their wishes known to their parents. If there is any difficulty with respect to ascertaining the children's wishes, and the court deems it appropriate, a Voice of the Child report may be ordered. There will be no automatic preparation of these reports on an annual basis.

ISSUE 3- What is the appropriate amount of ongoing child support payable?

[96] The parties have not provided an appropriate *Contino* analysis related to the payment of ongoing support (ref. *Contino v Leonelli-Contino*, 2005 SCC 63). The briefs filed by counsel relied on a calculation based on the set off method of child support. If the parties consent to the appropriate set off calculation, that may be included in the order.

[97] If the parties do not reach consent in relation to the ongoing child support, the parties are required to furnish appropriate financial information in order to

conduct a *Contino* analysis. The necessity for further financial information is set out in the case of *Woodford v. McDonald*, 2014 NSCA 31.

CONCLUSION

[98] ***Retroactive child support***: Mr. Lindsay owes retroactive child support of $250,000 to Ms. Lindsay Graham.

[99] ***Parenting***: The children will continue in the shared parenting arrangement. The transition day during the summer months will be Tuesdays. There is no right of first refusal for child care to either party. There is no annual Voice of the Child Report to be prepared.

[100] ***Prospective child support***: Ongoing child support may be determined by consent of the parties. Absent consent, the parties must file information to enable a *Contino* analysis (pursuant to *Woodford, supra*).

Chiasson, J.