

SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION

Citation: *CT v. JB*, 2023 NSSC 283

Date: 20230831
Docket: 082045
Registry: Sydney

Between:

C.T.

Applicant

v.

J.B.

Respondent

Judge: The Honourable Justice Lee Anne MacLeod-Archer

Heard: November 22, 23, 24, 2022; March 2, 3, 2023; July 18, 19, 20, 2023; and August 17, 2023 in Sydney, Nova Scotia

Written Release: August 31, 2023

Counsel: Chris Conohan, for the Applicant
Alan Stanwick, for the Respondent

By the Court:

[1] The parties are the parents of SAT, who is thirteen (13) years old. They have been involved in a bitter custody battle over SAT's care since 2019. Police and Child Protection Services (CPS) have been involved, and the parties have filed numerous "emergency" applications seeking the return of the child and/or seeking enforcement of the existing order.

[2] A hearing was held over nine (9) days. I heard from the parties, CT's partner DK, two of JB's adult daughters from other relationships, several school representatives, a mental health provider, several police officers, and two CPS social workers. A number of business records were also tendered.

Issue #1: Has there been a change in circumstances?

[3] The order CT seeks to vary was issued in 2013. At the time, SAT was a toddler and CT was living in Halifax. For CT to be successful in varying the 2013 order, he must demonstrate on a balance of probabilities that there's been a change in circumstances sufficient to justify variation.

[4] JB concedes that with the passage of time and CT's move to Cape Breton, circumstances have changed. I find that those changes materially affect CT's ability to provide care for SAT, and they affect SAT's circumstances. She is now a teenager, with much different needs than a toddler. She is also old enough now to voice her views on what parenting arrangements best meet her needs.

Issue #2: What parenting arrangement is in SAT's best interests?

[5] CT seeks primary care and decision-making authority for SAT. The current order dating from 2013 grants primary care to JB. CT is entitled to specified parenting time, in addition to other time as agreed between the parties.

[6] CT says that he should be granted primary care for several reasons, including:

- SAT wishes to live with him according to the Voice of the Child (VOC) Report and update;
- SAT's mental and physical health is at risk in her mother's care; and
- SAT's education has suffered in her mother's care.

[7] JB argues that the application should be dismissed. She wants the current order to continue unchanged. However, she previously suggested to CPS that CT's parenting time should be terminated or supervised. She denies that SAT's education has suffered in her primary care, and she denies that SAT has any mental health challenges at present. She also says that CT has manipulated SAT, such that the VOC reports do not accurately reflect her wishes.

[8] I heard much evidence about the conflict between the parties, particularly since 2019. I do not intend to review it in great detail here. However, I have carefully considered the evidence as a whole, in the context of the legislative factors to be considered, and in view of the arguments advanced by counsel for both parties.

[9] Before making findings of fact, I had to make findings of credibility. In doing so, I have considered the comments of Forgeron, J. in *Baker-Warren v Denault*, 2009 NSSC 59:

18 For the benefit of the parties, I will review some of the factors which I have considered when making credibility determinations. It is important to note, however, that credibility assessment is not a science. It is not always possible to "articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events:" *R. v. Gagnon* 2006 SCC 17, para. 20. I further note that "assessing credibility is a difficult and delicate matter that does not always lend itself to precise and complete verbalization:" *R. v. R.E.M.* 2008 SCC 51, para. 49.

19 With these caveats in mind, the following are some of the factors which were balanced when the court assessed credibility:

- a) What were the inconsistencies and weaknesses in the witness' evidence, which include internal inconsistencies, prior inconsistent statements, inconsistencies between the witness' testimony, and the documentary evidence, and the testimony of other witnesses: *Re: Novak Estate*, 2008 NSSC 283 (S.C.);
- b) Did the witness have an interest in the outcome or was he/she personally connected to either party;
- c) Did the witness have a motive to deceive;
- d) Did the witness have the ability to observe the factual matters about which he/she testified;
- e) Did the witness have a sufficient power of recollection to provide the court with an accurate account;
- f) Is the testimony in harmony with the preponderance of probabilities which a practical and informed person would find reasonable given the particular place and conditions: *Faryna v. Chorney* [1952] 2 D.L.R. 354;
- g) Was there an internal consistency and logical flow to the evidence;

- h) Was the evidence provided in a candid and straight forward manner, or was the witness evasive, strategic, hesitant, or biased; and
- i) Where appropriate, was the witness capable of making an admission against interest, or was the witness self-serving?

[10] Because of the high conflict on this file, it's not surprising that factions have developed, and views are polarized. JB's counsel aptly described the situation as "war". The conflict impacted witness testimony, as several family members took the witness stand as advocates, defenders, and even crusaders.

[11] I find that JB lacked overall credibility for several reasons:

1. She refused to make admissions against interest, particularly as it relates to the recordings which were presented to her;
2. She denied that SAT's presentation during a recorded phone call between SAT and her father illustrated any concerns;
3. She attributed all of SAT's problems to CT, without any acknowledgment that her behaviour has contributed to the high conflict;
4. She alleged that CT coached SAT to express certain views to the VOC assessor without any evidence to support it;
5. She was evasive and at times simply refused to acknowledge a question on cross-examination because she claims CT's affidavit is "abusive";
6. Her evidence was self-serving and tone-deaf;
7. She didn't give evidence so much as advocate for her position, despite having able counsel available to argue her case; and
8. She embellished at times, and minimized at other times, always in an attempt to support her position.

[12] JB's mother lacked credibility for many of the same reasons. She regarded her role not so much as a witness, but as an advocate. In addition, her opportunity to observe JB's parenting was limited to blocks of time several years ago, so her evidence wasn't overly helpful to the court in any event.

[13] Likewise, JB's daughter, JDB, was not credible. She denied that her mother

yelled at her, though she said she will get a “scolding” on occasion. Even when confronted with audio recordings of her mother directing profane language in a raised, angry voice at her, JDB refused to acknowledge that the words and tone were abusive. She tried to take the blame by suggesting that she picks at her mother until she “snaps”. Ultimately, she did concede that the recording didn’t reflect a mere “scolding”.

[14] In contrast, JB’s father was a credible witness. He was candid, straight-forward, and he did not embellish his evidence. He’s heard JB speak negatively to SAT about CT, and JB raising her voice when dealing with the children.

[15] CT presented as a credible witness who did not embellish or diminish his evidence to suit his narrative. Most of what he said was corroborated by other evidence. He accepted part of the blame for SAT being exposed to parental conflict, though he also blames JB for the conflict.

[16] His partner, DK, was less credible. She hedged and became argumentative under cross-examination when pressed on her social media posts. I find that her concession that she shouldn’t have made those posts about JB was strategic and insincere. However, despite those concerns, she wasn’t questioned about her affidavit evidence, so I accept it as unchallenged.

[17] JB’s other adult daughter testified on behalf of CT. I approach her evidence with caution, as she has an axe to grind with her mother. Despite this, I accept her evidence as generally credible. She wasn’t shaken on cross-examination, and she did not embellish or approach her evidence strategically.

[18] CT’s mother testified, but she also lacked credibility. She initially evaded questions about her social media posts, but then she became defiant, claiming that she was just “defending my son”. Although she expressed regret and apologized for some of her posts, it’s clear that she was not contrite. Her evidence is too tainted to accept in these circumstances.

[19] The other witnesses were all credible as non-party professionals who have no reason to favour either party. I accept their evidence.

[20] In particular, I accept the evidence of what SAT told police, CPS, and school officials about her home life, her wishes, and her stress. A *voir dire* was held to address the admissibility of SAT’s statements to these third-party professionals. Necessity was conceded. I ruled that the statement made to Cst. Blanchard met the test for threshold reliability. As a result, JB’s counsel conceded that the other statements likely met the threshold test as well. The ultimate reliability of those statements was left for determination when the evidence was completed.

[21] Having heard all of the evidence, I find that SAT’s statements are reliable

and merit weight. They are consistent, they were made to people in authority with experience dealing with children (which enhances their trustworthiness) and they are corroborated by numerous other statements attributed to SAT, including the VOC Reports. Those statements paint a picture of a child caught in the middle of her parents' dispute; a child in distress, who wants her concerns to be heard.

[22] I also accept the VOC Reports and the recommendations made in the first report. JB took issue with the Report and update, claiming that the results were engineered by CT. There's no evidence to support that claim. In fact, the assessor was aware of JB's concern with coaching, so she turned her mind to that possibility. She found that SAT used some phrases that both of her parents used, which tells me that **both** parents discussed adult matters in front of SAT. Despite that, the assessor concluded that what she communicated in her report reflects SAT's wishes and not a parroted version of her parents' wishes.

[23] Based on my review of the evidence as a whole and my assessment of credibility, I make the following findings of fact:

1. The parents successfully co-parented prior to 2019;
2. CT played a larger role in SAT's life after his move to Cape Breton;
3. CT was reluctant to challenge JB's parenting decisions before 2019 because she is volatile and responds aggressively to criticism;
4. CT's concerns as reported to CPS were substantiated;
5. CT has a history of mental health challenges that does not detract from his ability to parent;
6. The conflict was not solely attributable to JB;
7. The child, SAT, has been directly exposed to the parental conflict;
8. SAT is articulate but speaks in a manner that suggests exposure to adult discussions;
9. The parental conflict added stress and anxiety to SAT's life at a time when her life was already complicated by educational challenges and bullying at school;

10. SAT was also exposed to stress in her mother's home as a result of JB's parenting style;
11. JB's parenting style is coercive as opposed to supportive; her response to SAT's cutting was "don't let me see you do that again" rather than looking for the reason she was self-harming;
12. JB has a quick temper, which blows up more often than she or JDB admit; JB's presentation in court and on the recordings confirms that when she "snaps" she becomes aggressive, abusive, dismissive, loud, and disrespectful;
13. JB uses profane and aggressive language with her children, as well as CT;
14. JB is unable or unwilling to recognize the impact on SAT of the parental conflict and her parenting style;
15. JB is unwilling to recognize that SAT needs support in dealing with her stress and anxiety because JB doesn't believe that she plays a role in it;
16. JB has weaponized the current order to punish CT for questioning her parenting decisions and for calling CPS in 2019;
17. JB is likely to continue to weaponize any court order that grants her primary care and decision-making responsibility; and
18. SAT loves both of her parents, but she wishes to live with CT for valid reasons which include the stability and lack of conflict in his home.

[24] I have considered s.18(5) of the *Parenting and Support Act*, R.S.N.S. 1989, c. 160 (PSA), which directs me to give priority to the best interests of the child. I've considered the factors listed in s.18(6) in light of the evidence, and I've weighed each side's argument in determining what parenting arrangement is in SAT's best interests.

[25] After doing so, I find that the balance weighs in favour of CT's plan to parent SAT as primary caregiver. Although SAT has been in her mother's care until now, I must craft an order that looks to the future. I find that CT is the parent most attuned to SAT's current needs. He and SAT share a stable and loving relationship. He is more capable and willing than JB to support SAT's physical,

social, emotional, and educational needs, her future development, and her relationship with extended family, most especially the other parent.

[26] CT has shown that he's prepared to parent cooperatively with JB, despite JB's cynicism that his emails offering to collaborate were simply for show in this proceeding. In contrast, JB's refusal to address the child's needs during this proceeding because she believes that CT engineered the problem is highly concerning.

[27] I find that the parenting arrangement that's in the best interests of the child is joint custody, with CT exercising primary care and decision-making responsibility. The parties must consult on major decisions, and absent agreement, they will defer to the recommendation of any professional involved (for example if it's a medical decision, they will follow the physician's recommendation). If there's no professional involved, CT will make the final decision.

[28] I reject the recommendation in the updated VOC that SAT should be able to determine whether she spends time with her mother. That's too much responsibility for a child her age, especially given the stress she's been under in negotiating the level of parental conflict to date.

[29] JB and SAT share a loving and close, but at times fraught, relationship. I've structured JB's parenting time so that SAT will know that her wishes were heard, but without burdening SAT with the decision on whether and when to see her mother.

[30] JB will therefore have parenting time as follows:

1. In week one (starting September 8, 2023) - from Thursday at 7 pm through to Sunday at 4 pm;
2. In week two – Thursday from 4 pm to 7 pm, and again from Saturday at noon until Sunday at 4 pm;
3. If week one runs into a long weekend, JB will keep SAT until Monday at 4 pm;
4. Each parent may initiate a video call with SAT on evenings when SAT is not in their care, such calls to be placed no later than 8 pm on weeknights and 9 pm on weekends, and lasting no more than 15 minutes per call;

5. During summer break, JB will have two 14-day blocks of parenting time (not to run consecutively) with her choice of dates, provided those dates are communicated by May 15th of each year in writing. If JB fails to communicate her choice of block summer parenting time by May 15th, CT will be entitled to set her dates and communicate them to her in writing by May 30th;
6. March break from Friday at 3 pm through to the second Sunday of March break at 4 pm in even numbered years starting in 2024;
7. JB shall return SAT at noon on Father's Day Sunday instead of 4 pm;
8. If Easter Friday falls on week two, then JB shall have additional parenting time on Friday from noon to 7 pm. On Easter Sunday, she must return SAT by noon instead of 4 pm;
9. On Christmas break the regular schedule will be suspended between December 20th – Jan 3rd each year inclusive. Instead, SAT will be in her mother's care from December 20th at 4 pm through to December 25th at 4 pm, and again from December 29th at noon until January 3rd at 4 pm in even numbered years starting in 2024. She will be in her father's care for those days in odd numbered years. The regular schedule will resume as of January 4th each year;
10. No special times are set for the child's birthday, Halloween, or Thanksgiving. The regular schedule will apply;
11. The parties may agree on changes to this schedule or to additional time, in writing in advance.

[31] In addition to the above parenting schedule, I direct the following terms in the best interests of the child:

1. The parent who will be taking the child into their care will be responsible for transportation. The driver and any passengers shall not exit the vehicle, they will not engage in any inappropriate conversation, and will they not make any inappropriate gestures during exchanges. There shall be no recording of exchanges.
2. Either parent may travel with SAT within Nova Scotia during their parenting time without notice to the other.

3. If either parent plans to travel outside of Nova Scotia with the child, but within Canada, they must provide a week's notice to the other parent, as well as a return date, and contact information for the child for the duration of the trip.
4. Neither parent will unreasonably withhold consent for the other parent to travel with the child internationally. The parent not travelling with the child will provide a letter of consent, in the form recommended by Canada Border Services, to the parent travelling with the child, provided that details of the travel have been given to the non-traveling parent at least thirty (30) days in advance. Details of the travel shall include departure and return dates, flight numbers and carrier if available, an address while out of the country, and contact information for the duration of the trip.
5. In the event that either parent requests the other parent sign a passport application or other documentation for the child, the documentation shall be signed within seven (7) days of presentation.
6. The child's documents, which will include but not be limited to health cards, birth certificates and passports, will remain with CT but will be provided to JB upon request, and will be returned when they are no longer needed. JB may keep copies of all of the child's documents.
7. Both parents and their respective partners and family members are permitted to attend the child's school and extracurricular activities, regardless of whose scheduled time it is with the child. There must be no conflict between the parents, their families, and their partners at such venues, and the parents, partners, and family members will keep a reasonable distance between themselves and the others at all times. There will be no inappropriate comments or gestures made, and no inappropriate comments made to (or within hearing of) the child.
8. Both parents shall be entitled to speak directly to all service providers involved with the child, including but not limited to teachers, doctors, dentists, counsellors and coaches. Both parents may make inquiries directly of the service providers and be provided with documents and information, without the need for

the other parent to provide consent. They will both have access to the school's portal to obtain information on the child's progress.

9. Routine communication shall be through text message or email. In the event of an emergency involving the child, contact with the other parent or their partner must be made as soon as possible by phone.
10. All communication must be done in a polite and respectful manner, and must be child-focused at all times. Any non-emergency communication requiring a response must be answered within seven (7) days.
11. There will be no adult discussions surrounding this legal proceeding, this order, parenting arrangements, child support, or other adult topics with the child or in her hearing. Both parents will ensure that others refrain from doing so as well.
12. Neither parent will speak disparagingly about the other to SAT or within her hearing and will ensure that others refrain as well.
13. There must be no inappropriate social media posts and communications. They do not serve the best interests of the child.
14. SAT's cell phone will remain with her, charged and available at all times so that the parents can reach her when in the other parent's care.
15. Both parents will ensure that SAT's Both parents will ensure SAT attends all scheduled health and education appointments irrespective of whose time they fall on.
16. CT must ensure that SAT continues her individual counselling. When her counsellor feels that the time is right, SAT must engage in joint counselling with JB to address the stresses in their relationship.

Issue #3: What child support is payable by whom?

[32] Under the current order, CT is required to pay the table amount of child support, less a deduction of \$200/month for travel between Halifax and Cape Breton. He was also required to contribute towards SAT's childcare expenses in the amount of \$100/month.

[33] CT didn't increase the amount of child support he's paid over the years, despite no longer incurring travel expenses and having higher income. Likewise, JB didn't advise CT when her childcare costs ended.

[34] CT's counsel argues that he shouldn't be required to pay retroactive support. He argues that SAT would not benefit from such an award. He also says that there's no blameworthy conduct because there was no reporting clause in the order and JB didn't ask him to pay more.

[35] JB's counsel rightly points out that recent Supreme Court cases (*D.B.S. v. S.R.G.*, 2006 SCC 37; *Michel v Graydon*, 2020 SCC 24; *Colucci v Colucci*, 2021 SCC 24) make it clear that the obligation to pay according to a payor's means is one that exists irrespective of reporting requirements in a court order. He argues that child support should be adjusted retroactive to September, 2014 when CT moved back to Cape Breton, reduced his travel expenses, and started earning higher income.

[36] Justice Martin stated in *Colucci* (supra):

114 It is also helpful to summarize the principles which now apply to cases in which the recipient applies under s. 17 to retroactively increase child support:

- a) The recipient must meet the threshold of establishing a past material change in circumstances. While the onus is on the recipient to show a material increase in income, any failure by the payor to disclose relevant financial information allows the court to impute income, strike pleadings, draw adverse inferences, and award costs. There is no need for the recipient to make multiple court applications for disclosure before a court has these powers.
- b) Once a material change in circumstances is established, a presumption arises in favour of retroactively increasing child support to the date the recipient gave the payor effective notice of the request for an increase, up to three years before formal notice of the application to vary. In the increase context, because of informational asymmetry, effective notice requires only that the recipient broached the subject of an increase with the payor.
- c) Where no effective notice is given by the recipient parent, child support should generally be increased back to the date of formal notice.
- d) The court retains discretion to depart from the presumptive date of retroactivity where the result would otherwise be unfair. The *D.B.S.* factors continue to guide this exercise of discretion, as described in *Michel*. If the payor has failed to disclose a material increase in income, that failure qualifies as blameworthy conduct and the date of retroactivity will generally be the date of the increase in income.
- e) Once the court has determined that support should be retroactively increased to a particular date, the increase must be quantified. The proper amount of

support for each year since the date of retroactivity must be calculated in accordance with the *Guidelines*.

[37] While *Colucci* was decided under the *Divorce Act*, RSC 1985, c.3, and in this case the *PSA* applies, the same principles apply to retroactive claims.

[38] In terms of delay, JB did not advise CT that she was seeking increased child support after his move to Cape Breton in 2014. However, when JB filed her Response to Variation Application on December 4th, 2020, CT was made aware that she was seeking a retroactive adjustment to child support. He didn't increase his child support then, or at any time since.

[39] I find that the test for retroactive support is met. Although she delayed pursuing a claim for increased support, I accept that JB didn't want to "rock the boat". CT was taking SAT more frequently, especially at JB's request, and they were cooperatively parenting with few hitches. I accept that there's a good reason for the delay.

[40] I find that CT exhibited blameworthy conduct by not increasing the child support when his income increased, especially in view of his reduced access costs.

[41] The child is still dependent and will be dependent for some time. If the money is directed to an RESP as requested by CT, then SAT will directly benefit from it. However, JB has "made do" without the proper amount of child support since 2014. She worked various jobs to support herself and SAT, and at times (like when she moved in with her parents after leaving an abusive relationship) it's very likely that she could have used the extra funds.

[42] There's no evidence that CT would suffer hardship in paying a retroactive award, especially if it is structured over time.

[43] However, with the change in primary care, JB will be required to pay child support to CT. Instead of ordering payment of a retroactive award, I will reduce the amount she must pay to CT, and I am directing that a portion be paid towards an RESP for SAT.

[44] Although I decline to adjust the table amount of child support retroactive to 2014, I find that CT should not have deducted the \$200/month for travel expenses from his child support after he moved in September, 2014. He clearly knew that he no longer had travel expenses and he should have adjusted the amount he was paying for that, at the very least. I also find that it's reasonable to end the childcare expenses for SAT at age 12, so the additional \$100/month that CT was required to pay will end effective October, 2021.

[45] The figure CT must repay for travel expenses he didn't incur amounts to

\$21,600.00 from September, 2014 to August, 2023 inclusive. If he paid childcare after SAT turned 12 years of age, he is entitled to a credit against that total.

[46] I find that it's appropriate to adjust the table amount of child support payable retroactive to January 1, 2021 (the month after JB's Response was filed) to August, 2023 inclusive. I don't have his tax return for 2022 or a recent paystub, so counsel can either agree on the income figures for 2022 and 2023 and calculate the retroactive sum owing or request a conference for the court to address the issue.

[47] I make no adjustment in his child support for the 72 days during the pandemic when CT withheld the child from JB, or for the period after May 19, 2023 when SAT refused to return to her mother's care, as those decisions were made without JB's agreement or a court order.

[48] The amount CT actually paid must be deducted from what he should have paid. I don't have the totals, so if counsel cannot agree on the proper calculation for what CT paid, they can seek a conference with me to determine it.

[49] Once that retroactive figure is determined, CT will pay half into an RESP for SAT within thirty (30) days. JB will then get credit for the other half she's owed, to be used towards her child support payments. The credit will be calculated at \$500/month until the amount CT owes her is retired.

[50] I'll deal next with the table amount payable by JB prospectively. She works for the municipality and earned \$52,398.00 in 2021. She did not tender her 2022 tax return. However, on cross-examination she said that she earned almost \$80,000.00 last year. CT says that she should pay the table amount of child support based on that income. I'm prepared to accept that income figure.

[51] I direct that JB pay the table amount of child support for SAT to CT in the monthly amount of \$686.00/month (subject to the above credit) starting September 1st, 2023 and continuing monthly thereafter until further order of the court.

[52] The order will include standard disclosure and recalculation clauses.

[53] In addition to the table amount of child support, CT claims section 7 expenses for SAT. I accept that tutoring expenses are a reasonable and necessary expense, given SAT's learning disability. I direct that the parties equally share her tutoring expenses, effective September 1st, 2023. CT must send copies of paid invoices to JB, who must e-transfer her share to CT within seven days.

[54] I also direct that the parties equally share uninsured health expenses for SAT effective September 1st, 2023. Both parents must maintain SAT as a dependent child under their respective health plans, and they must cooperate to submit and coordinate claims. If either party pays an uninsured expense, they must send a

copy of the paid invoice and the explanation of benefits form their insurer, after which the other parent will reimburse 50% of the uninsured cost.

Conclusion

[55] CT will exercise primary care and decision-making responsibility for SAT. JB will exercise specified parenting time. JB will pay child support prospectively and CT will pay retroactive child support. Ancillary parenting clauses are granted as outlined.

[56] If the parties wish to be heard on costs, CT may send written submissions within 14 days and JB may respond within 14 days of CT's filing.

MacLeod-Archer, J.