SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION
Citation: *Young v. Young*, 2014 NSSC 261

Date: 2014-07-09
Docket: *SFSND* No. 1206-004517
Registry: Sydney

Between:

Henry Ernest Young

Applicant

v.

Wanetta Young

Respondent

Judge:	The Honourable Justice Lee Anne MacLeod-Archer
Heard:	June 20, 2014, in Sydney, Nova Scotia
Counsel:	Theresa O'Leary, Counsel for Henry Ernest Young T.J. McKeough, Counsel for Wanetta Young

By the Court:

INTRODUCTION

[1] The parties were married on January 18, 1992 and divorced on December 4, 2006. They had three (3) dependent children at the time of their divorce, namely Brandon Young, born May 18, 1992; William (Billy) Young, born March 24, 1994, and Ryan Young, born November 8, 1998. The parties share joint custody, with Ms. Young initially having primary care. The boys' primary residence changed over the years and all three lived primarily with Mr. Young at different times.

BACKGROUND

[2] The parties reached agreement on corollary relief issues and signed Minutes of Settlement in October 2005. Those Minutes of Settlement were incorporated in the Corollary Relief Order that was issued by the court on December 4, 2006.

[3] Mr. Young was required to pay child support, in the amount of $519 per month for the three dependent children.

[4] The agreement also provided that, although no extraordinary expenses were to be paid at the time the agreement was reached, Ms. Young might apply at some point in the future for a contribution from Mr. Young for section 7 expenses.

[5] The agreement also dealt with matrimonial assets, and, in particular, real property. The matrimonial home was to be signed over to Ms. Young , and she was required to assume the mortgage. Ms. Young was to quit claim her interest in four acres of land adjacent to the matrimonial home. The agreement expressly noted the following condition on this transfer: "Provided this transfer is approved by the trustee in bankruptcy". Ms. Young was an undischarged bankrupt when the agreement was signed.

[6] The agreement also contained a prohibition against Mr. Young entering on the four acres of land adjacent to the matrimonial home.

[7] Mr. Young filed an application to vary the custody and support conditions of the Corollary Relief Order on October 30, 2006. A hearing was held on June 20, 2014.

ISSUES

(1) Has there been a change in circumstances to justify a variation of the custody and support provisions of the Corollary Relief Order?

(2) If there has been a change in circumstances, should the custody provisions of the Corollary Relief Order be varied?

(3) If there has been a change in custody, should the support provisions of the Corollary Relief Order be varied?

(4) If the support provisions are to be varied, should they be varied retroactively?

(5) If the support provisions are to be varied to require Ms. Young to pay support, should income be imputed ?

(6) Should there be a retroactive award for section 7 expenses ?

(7) What Order is appropriate in relation to the four acres of land that were to be transferred to Mr. Young under the CRO?

(8) Should costs be awarded?

ANALYSIS

Issue 1: Has there been a change in circumstances to justify a variation of the custody and support provisions of the Corollary Relief Order?

[8] Section 17 of the *Divorce Act* applies to this Application. The relevant sections read:

> **Order for variation, rescission or suspension**
>
> **17.** (1) A court of competent jurisdiction may make an order varying, rescinding or suspending, prospectively or retroactively,
>
> (*a*) a support order or any provision thereof on application by either or both former spouses; or
>
> (*b*) a custody order or any provision thereof on application by either or both former spouses or by any other person.
>
> …
>
> **Factors for child support order**
>
> (4) Before the court makes a variation order in respect of a child support order, the court shall satisfy itself that a change of circumstances as provided for in the applicable guidelines has occurred since the making of the child support order or the last variation order made in respect of that order.
>
> …
>
> **Factors for custody order**
>
> (5) Before the court makes a variation order in respect of a custody order, the court shall satisfy itself that there has been a change in the condition, means, needs or other circumstances of the child of the marriage occurring since the making of the custody order or the last variation order made in respect of that order, as the case may be, and, in making the variation order, the court shall take into consideration only the best interests of the child as determined by reference to that change.
>
> **Variation order**
>
> (5.1) For the purposes of subsection (5), a former spouse's terminal illness or critical condition shall be considered a change of circumstances of the child of the

> marriage, and the court shall make a variation order in respect of access that is in the best interests of the child.
>
> **Conduct**
>
> (6) In making a variation order, the court shall not take into consideration any conduct that under this Act could not have been considered in making the order in respect of which the variation order is sought.
>
> **Guidelines apply**
>
> (6.1) A court making a variation order in respect of a child support order shall do so in accordance with the applicable guidelines.
>
> Court may take agreement, etc., into account
>
> (6.2) Notwithstanding subsection (6.1), in making a variation order in respect of a child support order, a court may award an amount that is different from the amount that would be determined in accordance with the applicable guidelines if the court is satisfied
>
> (*a*) that special provisions in an order, a judgment or a written agreement respecting the financial obligations of the spouses, or the division or transfer of their property, directly or indirectly benefit a child, or that special provisions have otherwise been made for the benefit of a child; and
>
> (*b*) that the application of the applicable guidelines would result in an amount of child support that is inequitable given those special provisions.
>
> …
>
> **Maximum contact**
>
> (9) In making a variation order varying a custody order, the court shall give effect to the principle that a child of the marriage should have as much contact with each former spouse as is consistent with the best interests of the child and, for that purpose, where the variation order would grant custody of the child to a person who does not currently have custody, the court shall take into consideration the willingness of that person to facilitate such contact.

[9] The oldest child, Brandon, moved to his father's home in September 2006 at age 14. The evidence is disputed whether or not Ms. Young continued to share in his parenting to age 16. It is not disputed that after age 16, Mr. Young was responsible for Brandon's primary care.

[10] Brandon dropped out of high school in the 2009-2010 academic year and started work as a traffic control flag person, earning approximately $16,000 per year. He is now 22 years old and no longer a dependent child of the marriage.

[11] Billy shared time between his mother's and father's homes until age 18, when he moved in with his father until age 19. It is only for that one year period that Mr. Young claims support for Billy. Billy turned 19 years of age in March 2013 and after running into conflict with the law, is now incarcerated.

[12] The youngest child Ryan moved in with his father in April 2013 at age 14. Ryan continues to reside with his father at this time.

[13] In **Legace v. Mannett,** 2012 NSSC 320, Jollimore, J. noted:

> **5** In an application to vary a parenting order, I'm governed by *Gordon v. Goertz*, 1996 CanLII 191 (S.C.C.). At paragraph 10 of the majority reasons in *Gordon v. Goertz*, 1996 CanLII 191 (S.C.C.), then-Justice McLachlin instructs me that before I can consider the merits of a variation application, I must be satisfied there has been a material change in the child's circumstances that has occurred since the last custody order was made.
>
> **6** At paragraph 13, Justice McLachlin was more specific in identifying the three requirements that must be satisfied before I can consider an application to vary a parenting order. The requirements are:
>
> 1. there must be a change in the condition, means, needs or circumstances of the child or the ability of the parents to meet the child's needs;
>
> 2. the change must materially affect the child; and

> 3. the change was either not foreseen or could not have been reasonably contemplated by the judge who made the initial order.
>
> **7** Material change is more than a threshold to be crossed before varying a parenting order. All parenting applications, including variation applications, are determined on the basis of the child's best interests. Initially proving that there has been a material change establishes that the current order is no longer in the child's best interests and must be changed to do so. Identifying the change which has occurred informs how the new order should be formulated to reflect the child's best interests in the new circumstances.

[14] I find there has been a change in the circumstances of the children justifying a variation of the Corollary Relief Order. Brandon moved in with his father at age 14. Billy lived with his father for a full year before he turned 19 years of age. Ryan now lives with his father. These are material changes in the primary care arrangement in place when the Order was issued.

Issue 2: If there has been a change in circumstances, should the custody provisions of the Corollary Relief Order be varied?

[15] The two older boys are no longer the subject of a custody Order but Ryan is still in high school and a dependent child. I find it is in Ryan's best interests to maintain his living arrangements, and I grant primary care of Ryan to Mr. Young.

[16] Ryan is almost 16 years old and of an age where he can determine his access arrangements with his mother.

Issue 3: If there has been a change in custody, should the support provisions of the Corollary Relief Order be varied?

[17] Mr. Young paid child support under the Order until July, 2011. Ms. Young did not pay any support for the children after they moved in with their father. She continued to collect support for all three children until July, 2011.

[18] Ryan now resides primarily with Mr. Young and I find it is appropriate to vary the child support provisions of the Corollary Relief Judgment. Mr. Young has met the onus of proving a material change in circumstances, one that would have warranted a different child support award at the time the change occurred (***Divorce Act*** s.17(4) and Federal ***Child Support Guidelines***, s.14).

Issue 4: If the support provisions are to be varied, should they be varied retroactively?

[19] Mr. Young filed his application to vary on October 30, 2006 (amended November 16, 2006 and May 23, 2014). He seeks a retroactive award for Brandon

from September, 2006 to March, 2013. He seeks an award of support for Billy from March, 2012 to March, 2013, and for Ryan from April 1, 2013 to present.

[20] Justice Jollimore in **Legace v Mannett**, (*supra*) noted:

> **97** Retroactive variations of child support are governed by SCC decision in *D.B.S. v. S.R.G., L.J.W. v. T.A.R., Henry v. Henry, Hiemstra v. Hiemstra, 2006 SCC 37*. According to the unanimous reasons in that case, written by Justice Bastarache, retroactive awards are neither automatic nor exceptional. In considering whether I should make a retroactive award, I am to take a holistic approach, balancing the competing principles of certainty and flexibility, while respecting the core principles of child support. Those core principles are that: child support is the right of child; the child's right to support survives the breakdown of the parents' relationship; child support should, as much as possible, perpetuate the standard of living the child experienced before the parents' relationship broke down; and the amount of child support varies, based upon the parent's income.
>
> **98** In determining whether a retroactive award is appropriate, I am to consider: the reason for the parent's delay in claiming support; the conduct of the parent who ought to have paid (typically viewed to determine if it's been blameworthy); the child's past and present circumstances; and whether a retroactive award would result in hardship. All of these factors must be considered and none is dispositive on its own, according to Justice Bastarache at paragraph 99 in *D.B.S. v. S.R.G., L.J.W. v. T.A.R., Henry v. Henry, Hiemstra v. Hiemstra, 2006 SCC 37*.

[21] The Nova Scotia Court of Appeal in **Smith** v **Helppi** 2011 NSCA 65 noted the distinction between retroactive child support awards and retroactive reductions. In the case of a new award, the factors set out in **DBS** v **SRG** 2006 SCC 37 apply. On the other hand, retroactive reductions often involve a request that arrears accumulated under the Order be forgiven (**Smith v Helppi** (supra) and **Brown** v **Brown** 2010 NBCA 5).

[22] In this case, Mr. Young seeks not only a retroactive award of child support, but also retroactive reduction of his support obligations and forgiveness of arrears.

[23] Both tests for retroactive variation apply; both require a change in circumstances. I find that the change in primary residence of the boys constitutes a material change which justifies variation of the original child support Order. This change was not contemplated at the time of the agreement which forms the basis of the Order.

[24] The next consideration is whether the change was significant, long-lasting, real and not one of the parents' choosing. The change in primary residence of the boys was a real and significant change, which lasted several years in the case of Brandon, and one full year for Billy. Ryan has now been with his father for over a year.

[25] These changes were not of the parents' choosing and were not imposed unilaterally. There was some suggestion that Mr. Young enticed the boys to move in with him, but no evidence was advanced to support that assertion.

[26] Mr. Young applied to vary a month after the oldest child moved in with him. He did not delay in filing, but he did not advance his claim in a timely manner.

Had the matter been heard earlier, the Order would have been varied to reflect the changes in primary care after 2006. However, at the time of the hearing, almost eight years had passed since his Application was filed, and no reasons were provided to explain the delay.

[27] Ms. Young knew that Brandon was living with his father and later that Billy had joined them. She continued to collect support in the amount ordered until Mr. Young stopped paying in July, 2011. She paid no support to Mr. Young. I find her conduct blameworthy. She suggests Mr. Young enticed the children to live with him, but the fact remains that she collected support for three children and paid none. She was working and able to pay support. Mr. Young is disabled and receives a disability pension.

[28] Her failure to pay support is tempered somewhat by the fact that she and Mr. Young shared parenting responsibility for Billy to age 18 and she assisted Billy in obtaining addiction services while he was living with his father. She also paid for some of his dental care in 2011. Her family paid Ryan's private school fees until last year.

[29] The older boys are now adults. Brandon supports himself by working in western Canada. Billy is incarcerated. Their needs were met while living with

their father. He presented no evidence of debt acquired to meet their needs. There is no evidence that a retroactive award would benefit the older boys. Brandon testified his father loaned him money to buy a car, but he gave no evidence of any other personal debt.

[30] There was no evidence to demonstrate how Ryan would benefit from a retroactive award. However, Ryan is still in high school and his future plans are unknown. Likewise, Billy's future plans are unknown.

[31] Ms. Young started a new business in 2013, from which she draws a modest salary. Prior to that, she was employed earning approximately $23,000.00 per year. She is not in a position to pay a significant retroactive award and I find it would cause her hardship if support for Brandon is ordered retroactive to 2006. Such an Order might also impede her ability to pay future support. (**Conrad** v **Skerry** 2012 NSSC 77; **Kelly** v **Anthis** 2012 NSSC 88; and **Korol** v **O'Dwyer** 2013 NSSC 48)

[32] However, I am prepared to order retroactive adjustment of the support paid by Mr. Young while Brandon lived with him between May, 2008 and May, 2011 when he reached age 19 – a period of 37 months. The difference in the *Guidelines* table (2006) amount for 2 and 3 children based on Ms. Young's

incomes as shown below shall be calculated and is repayable by Ms. Young to Mr. Young. I acknowledge that for part of this period, Mr. Young shared parenting of Billy, but I am not prepared to adjust for that during this timeframe.

[33] There will be an adjustment in support for Billy for the year he lived primarily with his father before turning 19 years of age. Ms. Young will pay retroactive support in the *Guidelines* table amount for Billy for twelve months (April, 2012 – March, 2013).

[34] She will also pay child support for Ryan, retroactive to April 1, 2013.

Issue 5 If the support provisions are to be varied to require Ms. Young to pay support, should income be imputed ?

[35] Ms. Young's income since 2008 was as follows:

2008	$27,951
2009	$15,134
2010	$24,553
2011	$24,192
2012	$23,418

[36] In 2013 her income was reduced because she left full time employment to pursue her own business. I accept her counsel's suggestion that income should be imputed to Ms. Young in the amount of $25,000.00 in 2013 for purposes of paying retroactive child support under the *Federal Child Support Guidelines*. This figure as reasonable, given the fact that Ms. Young's business is still in its infancy and there was no suggestion she is deliberately underemployed. It is roughly equivalent to what she earned in 2012.

[37] Ms. Young shall pay retroactive child support for Ryan in the *Guidelines* table amount from April 1, 2013 to June 1, 2014 based on an income of $25,000.00.

[38] Ms. Young shall also pay prospective child support for the dependent child, Ryan. This will be based on an income of $25,000.00 under the Nova Scotia table, commencing July 1, 2014, and continuing monthly until such time as Ryan is no longer a dependent child under the *Divorce Act*.

Issue 6: Should there be a retroactive award for section 7 expenses ?

[39] Mr. Young seeks a retroactive award for section 7 expenses. These include the cost of dental work for Ryan and Billy between 2011- 2013. The agreement

signed in 2005 which forms the basis of the Corollary Relief Order does not require payment of section 7 expenses but does state:

> 6.3 While this agreement does not presently provide for extraordinary expenses for the children, the Respondent [Henry Ernest Young] acknowledges that the Petitioner [Wanetta Ann Young] may at some point in the future apply to the court for a contribution from the Respondent on a pro rata basis.

[40] The agreement does not contemplate the possibility that Mr. Young might seek payment of section 7 expenses. Mr. Young did incur expenses for the children when they changed their primary residence. He filed a statement of extraordinary expenses which shows that between 2011 – 2013, he incurred dental care costs for Brandon and Ryan in the amount of $936.00 and dental costs for Billy in the amount of $424.00. He seeks a contribution of half these costs from Ms. Young.

[41] While the order does not contemplate the payment of section 7 expenses by Ms. Young, it follows from my ruling that child support be adjusted to reflect the change in primary residence that a variation of the clause dealing with section 7 expenses is warranted.

[42] I find that Ms. Young should contribute 50% of the section 7 expenses incurred by Mr. Young for the boys' dental care. She was not paying child support during this period and the parties were earning equivalent income.

Payment of half this cost will not cause her hardship. Her 50% contribution is to be paid within 30 days.

Issue 7: What Order is appropriate in relation to the four acres of land that were to be transferred to Mr. Young under the CRO?

[43] The agreement which forms the basis of the Order provides as follows:

> **10.2** The wife shall quit claim her interest in the 4 acres of land adjacent to the matrimonial home on LeBlanc Rd., Millville, Nova Scotia, to the husband provided this transfer is approved by the Trustee in Bankruptcy. The Respondent is not to enter upon the five (5) [*sic*] acres of land adjacent to the matrimonial home that is the subject of this agreement.

[44] The trustee communicated her position by correspondence to Mr. Young's counsel dated May 3, 2006. She advised that upon receipt of $2,000.00, the trustee would release its interest in the property. Ms. Anderson testified that the value of $2,000.00 reflected half the value of the lands, being Ms. Young's share. The letter did not specify who was to pay the $2,000.00.

[45] An assignment in bankruptcy severs a joint tenancy (**Re White** (1928) 8 CBR 544, [1928] 1 D.L.R. 846, 33 OWN 255 (Ont. SC), so at the time the agreement was signed between the parties, they held the lands as tenants in common. Ms. Young offered to transfer her interest if Mr. Young paid the

amount owing to the trustee. Mr. Young refused. It is his position that Ms. Young should have paid that amount and transferred the deed to him.

[46] I find the requirements for transfer was met. The trustee approved the transfer. She placed a condition on her approval, that payment of $2,000.00 be made to compensate creditors for the value of Ms. Young's equity in the lands.

[47] Ms. Young paid $2,000.00 plus fees to the trustee and was provided with a deed. She never transferred the lands to Mr. Young. I find Ms. Young in breach of the court order requiring her to transfer the property to Mr. Young.

[48] Justice Forgeron in **Power v. Jackman**, 2008 NSSC 389, dealt with a similar situation. The parties had agreed their pensions would be divided on divorce. Disagreement arose as to how the husband's pension split was to be effected. The pension administrator provided options for the transfer, but the husband did not agree with the wife's choice.

[49] Forgeron, J. quoted from **Royal Bank of Canada v. 1542563 Ontario Inc**, 2006, Carswell Ont 5761 where Mossip, J. summarized the applicable principles in interpreting the language of a court order.

[50] Justice Forgeron adopted and stated those principles of interpretation as follows:

(a) A broad and liberal interpretation is to be used to achieve the objective of the court in making the order;

(b) The language must be construed according to its ordinary meaning and not in some unnatural or obscure sense;

(c) A certain flexibility must be available in recognition of the fact that life is not static; developments beyond the contemplation of the parties often arise;

(d) The court must examine the context in which the order was issued, evaluate the order in accordance with the circumstances of the case, and question whether the acts or omissions could reasonably have been contemplated to fall under the terms of the order; and

(e) A party cannot hide behind a restrictive and literal interpretation to circumvent the order and make a mockery out of the administration of justice.

[51] Similar principles of interpretation have been applied in family law cases including **Tetarenko v. Tetarenko**, 2005 Carswell Alta 588, and **Randall v. Randall**, 2003 BCJ No. 1095. In **Power** (supra) Justice Forgeron stated:

> **23** The Corollary Relief Judgment created immediate ownership rights for each party in both pensions, regardless of whose name the pension was actually

> registered. The Judgment also established a trust which took effect in the event the pension administrator was unable or unwilling to implement the terms of the order.
>
> **24** When the consent order was created, neither party anticipated that the pension administrator would require a further agreement before Ms. Power's share of the Marine Atlantic pension would be transferred out of Mr. Jackman's name. Thus, the Corollary Relief Judgment is silent on how this issue is to be resolved in the event of a dispute.

[52] Similarly in the case before me, Mr. Young obtained an immediate ownership interest in the lands when the agreement was signed. The one condition was that the trustee approve the transfer, which she did. It was not contemplated that the trustee would require a payment before the lands could be transferred out of Ms. Young's name. The agreement is silent on how that issue was to be resolved.

[53] I find on a review of the agreement as a whole, that to require Mr. Young to pay for Ms. Young's interest in the lands would be contrary to the spirit and intention of the corollary relief order. The parties reached a comprehensive agreement on the division of matrimonial assets. Clause 15.2 provides that the terms of the agreement shall not be varied. To interpret the agreement as requiring payment from Mr. Young would constitute a variation which is disallowed by the agreement and would lead to an absurd result.

[54] I therefore direct that Ms. Young shall forthwith execute a quit claim deed for the 4 acres of land adjacent to the former matrimonial home on LeBlanc Rd., Millville, Nova Scotia to Mr. Young. The deed shall be prepared at her expense and recorded at the expense of Mr. Young.

[55] Pending recording of the deed, the prohibition on Mr. Young's entry to the lands is vacated. Ms. Young no longer lives in the matrimonial home, so this provision is no longer necessary.

COSTS

[56] Mr. Young seeks costs on a solicitor-client basis. The agreement incorporated in the Court Order provides as follows:

> **19.3** Notwithstanding paragraph 19.1 and 19.2 [dealing with costs of drafting of the agreement and divorce proceedings] the parties hereto agree that in the event of violation or breach of either party of any of the terms contained herein that the party causing the violation of the terms shall be responsible to pay to the other party forthwith all costs associated by the breach, including legal costs which shall be computed on a solicitor/client basis, together with disbursements. This provision does not apply to clause 5,ie access.

[57] I have found that Ms. Young is in breach of the order by failing to transfer her interest in the 4 acres of land to Mr. Young. His original application did not reference the lands. It was amended on May 23, 2014, to include a request that

the lands be transferred. The late amendment did not prejudice Ms. Young, as she was aware of the claim as early as 2011.

[58] Mr. Young had to bring the issue before the Court for determination and present evidence, including the evidence of the trustee who appeared under subpoena.

[59] Civil Procedure Rule 77.03(2) gives this Court discretion to award costs on a solicitor-client basis in exceptional circumstances recognized by law. The case law suggests this discretion is to be exercised only in "exceptional and rare" cases where the conduct of the parties warrants such an award.

[60] However, that limitation does not apply here, where the parties have agreed that solicitor-client costs "shall be imputed" if there is a breach of the agreement. The agreement did not address the possibility that the trustee might require payment for Ms. Young's interest in the lands, nor who would be responsible for payment of any monies to the trustee.

[61] This issue required interpretation by the Court. Mr. Young is entitled to an award of costs on the issue of the lands, in accordance with clause 19.3 of the agreement incorporated in the Order. He has also been successful in his claim

for retroactive adjustment of child support. The parties will have thirty days to present written submissions on costs.

CONCLUSION

[62] Mr. Young shall have primary care of Ryan Young. Ms. Young shall pay the monthly table amount of child support for Ryan from July 1, 2014 prospectively, until Ryan is no longer a dependent child. Retroactive adjustment of child support shall be made for Brandon, Billy and Ryan as set out above. Any sums owing by Ms. Young shall be offset against the arrears owing by Mr. Young under the Corollary Relief Judgment. She shall pay her share of the section 7 expenses within thirty days. A separate Order on costs will follow after receipt of submissions from counsel.

_____

MacLeod-Archer, J.