SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION
Citation: *Knowles v Green*, 2014 NSSC 290

Date: 2014-07-30
Docket: 1201-064449; SFHD-069490
Registry: Halifax

Between:

Wendy Margaret Knowles

Petitioner

v.

Michael Scott Green

Respondent

Judge:	The Honourable Justice Elizabeth Jollimore
Heard:	May 6, 2014, in Halifax, Nova Scotia
Written Submissions:	June 9, 2014
Counsel:	Nicolas Hoehne and Karlan Modeste for Wendy Knowles Michael Green, not present and not represented

By the Court:

Introduction

[1] Wendy Knowles has applied to vary child support prospectively and retroactively. Her application is a provisional one, pursuant to subsection 18(2) of the *Divorce Act*, R.S.C. 1985 (2nd Supp.), c. 3.

[2] Ms. Knowles' variation application relates to child support for the two daughters of her marriage to Michael Green. The prospective part of her claim engages sections 3 and 7 of the *Federal Child Support Guidelines*, SOR/97-175. Her retroactive application seeks to vary the table amount of child support retroactively to January 2011, and to have Mr. Green ordered to contribute to special or extraordinary expenses from January 2012.

[3] Additionally, Ms. Knowles asks that I make a number of other orders. She asks that I order Mr. Green to take at least one week off work each year to spend "quality time" with their daughters. She wants me to order him to pay the girls' travel costs for at least one visit each year. She asks that I order him to pay one-quarter of Chelsea's post-secondary student loans and related costs and one-quarter of Shanna's future post-secondary education expenses.

Family and litigation history

[4] Ms. Knowles and Mr. Green married in 1992. Their daughter Chelsea was born in October 1993 and is now twenty, and Shanna, who was born in November 2000, is now thirteen. The parties separated in January 2009. According to Ms. Knowles, Mr. Green moved to Ontario in June 2010.

[5] The parties' divorce was finalized in November 2010. According to their Corollary Relief Order, Mr. Green's annual income was $12,000.00. The girls, then aged seventeen and ten, were to be in their mother's custody. Mr. Green was ordered to pay child support of $144.00 each month pursuant to clause 3(1)(a) of the *Federal Child Support Guidelines*, and he was ordered to provide medical, dental and drug plan coverage for them. As well, he was ordered to provide a copy of his tax return to Ms. Knowles annually, each June.

[6] Ms. Knowles said Mr. Green still lives in Ontario where he's employed.

[7] Ms. Knowles filed a Statement of Income, a Statement of Expenses, two affidavits, a Statement of Special or Extraordinary Expenses and an amended Statement of Special or Extraordinary Expenses in support of her application. Following the hearing, her counsel filed submissions.

[8] Ms. Knowles' hearing was adjourned five times between October 2013 and May 2014. On all but one occasion, the adjournment was to allow her to improve the evidence in support of her claims. One consequence of these adjournments is that her evidence about the girls' special or extraordinary expenses is inconsistent: amounts contained in her Statements of Special or Extraordinary Expenses don't match those in her Statement of Expenses and these don't match the amounts in her affidavit. Where there is conflict, I have relied upon the amounts contained in her Amended Statement of Special or Extraordinary Expenses because it is the most recent information.

[9] These inconsistencies were noted in the preparation of post-hearing submissions which included new information not contained in Ms. Knowles' affidavits, financial statements or her testimony, despite the adjournments. Coming in the brief, the information was not offered by Ms. Knowles, nor was it sworn or affirmed. Just as I would be compelled to disregard this information if counsel offered it in oral argument, I disregard it here.

Threshold for varying child support prospectively

[10] Before I may vary a child support order I must be satisfied that there's been a change in circumstances "as provided for in the applicable guidelines" since the most recent child support order was granted, according to subsection 17(4) of the *Divorce Act*. The applicable guidelines are the *Federal Child Support Guidelines*. Section 14 of the *Guidelines* lists various changes in circumstances that allow for a variation of child support. Where child support is determined based on the tables, as it is here, the circumstances that allow me to vary child support include a change in the payor's income.

[11] When the Corollary Relief Judgment was granted, Mr. Green's annual income was $12,000.00.

[12] While the Corollary Relief Judgment required Mr. Green to disclose his financial circumstances annually, his first (and last) disclosure was provided almost two years after the divorce, in October 2012. Mr. Green provided two 2011

T4 slips (from Fowler Metal Industries and Kelly Services), a 2011 T4E slip and a paystub for the pay period ending on October 15, 2012.

[13] Based on this disclosure, Mr. Green's total 2011 income was $29,000.02. His 2012 paystub showed year-to-date earnings of $32,104.88, which included his earnings until October 15, 2012. According to his paystub, he was paid weekly for a forty hour week at a rate of $17.00 per hour. The October 15, 2012 paystub covers the first forty weeks of the year. Extrapolating this to fifty-two weeks results in an annual income of $41,736.34 for Mr. Green in 2012, and I find this to be his income.

[14] The change in Mr. Green's income is a change according to section 14 of the *Guidelines*. I find there has been a material change in circumstances.

Approach to prospective and retroactive claims

[15] In *Staples v. Callender*, 2010 NSCA 49, at paragraphs 41-43, Justice Bateman, with whom Justices Beveridge and Farrar concurred, held that a relevant consideration in deciding whether to exercise my discretion to order retroactive support is the impact such an order might have on Mr. Green's ability to pay prospective support. To consider this properly I must have some idea of Mr. Green's prospective obligation, so I will deal with the prospective variation first.

Prospective child support

[16] The bases for calculating child support differ depending on the child's age. Subsection 3(1) of the *Guidelines* applies to children under the age of majority and says that unless otherwise provided, the amount of child support is the amount in the applicable table and any amount determined as a contribution to special or extraordinary expenses. Shanna is under the age of majority and subsection 3(1) applies to her. Subsection 3(2) applies to children over the age of majority, like Chelsea. Subsection 3(2) says that unless otherwise provided, the amount of child support is the amount that I'd calculate under subsection 3(1) or, if I considered that approach to be inappropriate, some amount that I would consider appropriate, having regard to the child's condition, means, needs and other circumstances and each parent's financial ability to contribute to the child's support.

[17] My choice is between the approach in clause 3(2)(a) which treats Chelsea as if she is still under the age of majority by applying the tables and section 7 and the

approach in clause 3(2)(b) which permits me to calculate an appropriate amount of child support, considering Chelsea's condition, means, needs and other circumstances and her parents' financial ability. I can take the latter approach if I think the former is "inappropriate".

[18] I note that I am determining whether the "approach" in clause 3(2)(a) is inappropriate, not the amount calculated pursuant to that clause. The *Guidelines* specifically use the word "approach", rather than "amount", though there are some decisions (notably, *Rebenchuk*, 2007 MBCA 22 at paragraph 23) which suggest that I am to decide whether the amount calculated using the tables is inappropriate.

[19] In *Wesemann*, 1999 CanLII 5873 (BC SC) at paragraphs 20-21, Justice Martinson said, "[I]f there is no challenge to the usual *Guidelines* approach the amount payable is determined under the *Guidelines* in the same way it is decided for a child under the age of majority". The burden to prove inappropriateness is on the person who makes that claim. Because this is a provisional proceeding, it's possible that Mr. Green may make that claim in Ontario – where the confirming judge is less able to assess it, because Chelsea's circumstances and her expenses are not present. So, I've reviewed that information.

[20] At paragraph 31 in *Wesemann*, 1999 CanLII 5873 (BC SC), Justice Martinson suggested that the closer a child's circumstances match those where the *Guidelines* apply, the less likely the approach in clause 3(2)(a) will be inappropriate. (I should note that the paragraph numbering in this reported version of *Wesemann* is not correct. The paragraph numbering in the decision reported in the Reports of Family Law is correct and I am referring, in this paragraph and the previous paragraph, to paragraphs 12-13 and to paragraph 18, respectively, in the decision reported at (1999) 49 R.F.L. (4th) 435 (B.C.S.C.)) Justice Martinson's analysis was adopted by the British Columbia Court of Appeal in *W.P.N. v. B.J.N.*, 2005 BCCA 7.

[21] Here, Chelsea lives at home when not attending university. She does not earn an income and is dependent on support from her parents. Her student loan and grant cover her university costs, but no other costs. All other costs are paid by Ms. Knowles from her own income and with the support she receives from Mr. Green. This money paid to establish Chelsea at university and to send her for visits with her father. I find that the approach prescribed by clause 3(2)(a) is appropriate for Chelsea in these circumstances. The degree of Chelsea's

dependency makes the approach of clause 3(2)(a) appropriate, so I will determine support on that basis.

Section 3

[22] The first element of child support considered in subsection 3(1) is the table amount. I have found Mr. Green's annual income to be $41,736.34. He lives in Ontario, so that province's tables apply. Accordingly, Mr. Green's monthly payment for two children is $609.37.

Section 7

[23] The second element of child support considered in subsection 3(1) is the contribution to special or extraordinary expenses. According to subsection 7(1) of the *Federal Child Support Guidelines*, one former spouse can ask that I order the other pay all or any portion of certain enumerated expenses. The amount of the expense claimed may be estimated. In making an order under section 7, I am to consider the necessity of the expense as it relates to the child's best interests and the reasonableness of the expense in relation to the former spouses' and the child's means and the family's pre-separation spending pattern.

[24] For Shanna, Ms. Knowles seeks a contribution to ringette, soccer and paddling, her trumpet purchase, an art and cooking class (a form of summer childcare), her tuition at the Halifax Grammar School, her future braces, her future driver education cost and her future post-secondary education costs.

[25] For Chelsea, Ms. Knowles seeks a contribution to her future braces, her future driver education cost and her post-secondary education.

[26] Before I can order that Mr. Green contribute, I must be satisfied that the cost is necessary in relation to each girl's best interests and reasonable in relation to the parents' means, the girl's means and the family's pre-separation spending pattern. According to Justice Roscoe (with whom Justices Saunders and Oland concurred), at paragraph 27 in *L.K.S. v. D.M.C.T.*, 2008 NSCA 61, it's "preferable to deal first with subsection 7(1) to determine whether the expenses are necessary in relation to the child's best interests and reasonable in relation to the means of the parents before dealing with the definition of extraordinary expenses in subsection 7(1A)." (Leave to appeal this decision to the Supreme Court of Canada was denied at *D.M.C.T. v. L.K.S.*, 2009 CanLII 1998 (SCC).)

Shanna

[27] As noted, Ms. Knowles seeks a contribution to Shanna's current expenses for ringette, soccer and paddling, the purchase of a trumpet, an art and cooking class (summer childcare) and Halifax Grammar School tuition. She also seeks a contribution to the cost of braces, a driver education course and future post-secondary education costs.

[28] Of the six categories of expense enumerated in section 7, two are categories of expenses which must be "extraordinary" in order to be the subject of an order for contribution. Expenses for primary school education fall into one such category and are listed in clause 7(1)(d). Expenses for extracurricular activities are listed in clause 7(1)(e) and must also be extraordinary. So, if I consider these costs to be necessary and reasonable, I must determine they are also extraordinary before I can order that Mr. Green share in their cost.

[29] Ms. Knowles spoke with conviction in describing Shanna's need to take part in sports, both for Shanna's physical and emotional health. I also understand the need for Shanna to participate in the art and cooking class: Ms. Knowles works full-time, and Shanna cannot be on her own during the summer months. Shanna is a good student and benefits from the educational opportunities available to her at the Halifax Grammar School. All of these expenses are, I find, necessary in relation to Shanna's best interests.

[30] I find that expenses for the purchase of a trumpet and for braces are not necessary in relation to Shanna's best interests. I was given no evidence about the necessity of purchasing a trumpet. Ms. Knowles was clear in saying that while braces have been "recommended" for Chelsea, Shanna is "not at the same level". It appears that braces have been suggested, but are not necessary. Ms. Knowles did not provide information from an orthodontist about any need for braces: her information was simply a summary of costs taken from "docbraces.com located in Halifax".

[31] At this point, I'm not commenting on the necessity of expenses for driver education and post-secondary education. My decision with regard to those costs is determined on another basis.

[32] For expenses which are necessary, there is also the question of whether the expense is reasonable. This is determined in the context of the parents' means, the child's means and the family's pre-separation spending pattern.

[33] Ms. Knowles' means are limited. She said she anticipated earning $18,000.00 this year. I have found that Mr. Green's income is approximately $41,700.00. Shanna has no means of which I'm aware. The family's pre-separation spending pattern did include involving the girls in extra-curricular sports and their attendance at private school, though Ms. Knowles said that she still owes $2,400.00 for past private school costs which haven't been paid.

[34] The total cost of Shanna's sports is $1,120.08. This amount doesn't consider the availability of the Fitness Tax Credit which reduces it by $75.00 to $1,048.08.

[35] The summer camp costs $60.00 and can be deducted as childcare, reducing its cost to approximately $51.00.

[36] Shanna's earned a bursary which covers much of her Halifax Grammar School tuition. According to Ms. Knowles' Statement of Expenses, the annual shortfall is $2,280.00 (which includes the cost of Shanna's uniform and school activities).

[37] I have no information about what driver training will cost when Shanna is old enough to obtain a license: she's thirteen now. The current cost is $750.00. Similarly, I can't estimate what post-secondary education costs will be when Shanna completes high school. She's just finished grade seven. These expenses are not ones to which I will order any contribution by Mr. Green. The expense does not currently exist, and it may not exist in the future. Shanna may not choose to learn to drive. Scholarships may defray her post-secondary expenses. In the future, a judge may order Mr. Green to make a contribution to these expenses; now, the parties' means are exhausted by existing expenses, making future expenses unreasonable.

[38] With regard to Shanna, I find that the expenses for sports, the art and cooking class, and the Halifax Grammar School are both necessary and reasonable.

[39] According to the *Guidelines*, expenses for extra-curricular activities and secondary school education must be "extraordinary" (as well as necessary and reasonable) before I can order Mr. Green to share in their cost, so I turn to that analysis now.

[40] Whether an expense is "extraordinary" is determined by virtue of subsection 7(1.1) of the *Guidelines*. This subsection provides two possible measures of what's extraordinary. The first measure, in clause 7(1.1)(a), says that expenses are

extraordinary if they exceed those that Ms. Knowles can reasonably cover, taking into account her income and the table amount of child support she'd receive. The second measure, in clause 7(1.1)(b), is invoked where clause 7(1.1)(a) "is not applicable" and directs me to consider various other factors.

[41] In the present circumstances, I find that Shanna's expenses for extracurricular activities and secondary school education are extraordinary: they well exceed what Ms. Knowles can reasonably cover, considering her income and Mr. Green's monthly child support. Those two sources of income provide her with $25,312.44 each year, while these expenses total $3,376.08 (more than thirteen percent of her pre-tax income).

[42] Subsection 7(2) of the *Guidelines* says that the guiding principle in sharing expenses between parents is that of proportionality, after deducting the child's contribution to the expense. Here, Shanna makes no contribution. Where Mr. Green's income is $41,736.00 and Ms. Knowles' is $18,000.00, Mr. Green would contribute seventy percent of the cost. This amount equals $2,363.25 annually or $196.93 each month.

Chelsea

[43] Considering Chelsea, Ms. Knowles seeks a contribution to her future braces, her future driver training course and her post-secondary education.

[44] As with Shanna, there is no indication from a dentist or orthodontist that Chelsea requires braces. In her evidence, Ms. Knowles said, "Are braces essential? Well, there's not a medical reason, however, she has severe crowding and braces are recommended." She did not say who made this recommendation. It isn't clear that braces are necessary, rather than "recommended".

[45] Ms. Knowles said that she taught Chelsea to drive and that professional training is "essential for safety". Ms. Knowles' tax returns show she's claimed motor vehicle expenses in the past, so I believe she has a car. Chelsea lives on campus while she is in university, and she isn't employed. It's not clear that Chelsea needs to drive. I accept that driver training is positive, but I am not persuaded that it's a necessity in Chelsea's best interests at this time.

[46] Lastly, there is the expense of Chelsea's post-secondary education. Prior to attending university, Chelsea worked part-time as a lifeguard and swimming

instructor. She needs to further her education if she is to advance her prospects. I find that the expense for post-secondary education is necessary.

[47] The next issue is whether the university cost is reasonable, in the context of the parents' means, Chelsea's means and the family's pre-separation spending pattern. Ms. Knowles provided me with some information about Chelsea's university costs. I have details of the tuition and ancillary costs including meal plans in 2013-2014 and the residence costs in 2014-2015. According to this information, Chelsea's pre-tax cost in 2014-2015 will be $16,723.53.

[48] Subsection 7(3) of the *Guidelines* requires that in determining the amount of an expense, I consider the availability of and eligibility to claim subsidies, benefits, income tax deductions and credits relating to the expense. Though *Civil Procedure Rule* 59.22(1) requires litigants to provide evidence about these subsidies, benefits, income tax deductions and credits by filing a Statement of Special or Extraordinary Expenses (Form FD4). Ms. Knowles did not provide information about Chelsea's post-secondary education in this form, nor did she provide this information in her affidavits or testimony.

[49] The tuition tax credit is provided for in section 118.5 of the *Income Tax Act*, R.S.C. 1985, (Supp. 5), c. 1, and described in an Interpretation Bulletin, IT 516R2, December 9, 1996. Expenses that are considered eligible tuition fees are: admission fees, library or laboratory fees, examination fees, application fees where the student subsequently enrolls in the particular institution, confirmation fees, fees for a certificate, diploma or degree, membership or seminar fees, mandatory computer service fees and academic fees. If HST is added, the HST is also an eligible tuition fee. Fees for athletic and health services that are paid to the institution and are required to be paid by all students are also tuition fees. If not all students are required to pay athletic and health services fees, their eligibility is limited to $250.00.

[50] Fees which aren't eligible are: student activity fees, student union dues, medical or health care fees, transportation and parking, room and board, materials with enduring value that the student will keep (books, laboratory items, clothing) and initiation fees.

[51] The tuition tax credit is equal to 23.79% of eligible tuition fees. According to the university circular, the tuition for Chelsea's courses is $6,802.00 each year. Those expenses which are not part of her tuition are her residence, her student

fees, her books, and her meal plan, for example. I calculate her eligible tuition fees to be $6,802.00. At 23.79%, the tuition tax credit is $1,618.20.

[52] Chelsea's also entitled to claim the education tax credit and the textbook tax credit which are provided for in subsections 118.5(2) and (2.1) of the *Income Tax Act*, respectively. The combined education and textbook tax credits are worth $88.00 per month for every month a student is in full-time attendance at university. The education and textbook tax credits reduce her post-secondary education expense by $704.00 annually since she's in full-time attendance at the university for eight months each year.

[53] For the 2014-2015 academic year, Chelsea's cost will be $16,723.53, less the tuition tax credit of $1,618.20 and the education and textbook tax credits of $704.00, making the after-tax cost $14,401.33. She received a loan of $10,812.00 and a grant of $4,448.00 in 2013. If her grant and loan amounts are unchanged, they will cover all her costs at the university. Without directly saying so, Ms. Knowles intimated that Chelsea will continue to access student loans and grants to pay for her post-secondary expenses, saying that Chelsea will have loans to repay when she graduates. I have assumed that Chelsea will continue to rely on these funds, given her parents' means and her own unemployment. At the current rate of funding, her university expenses (tuition, books, fees, residence) will be paid by her loans and grants.

[54] As well, Chelsea is choosing to live away from home while attending university, incurring an annual expense in the range of $9,000.00 to $10,000.00 for residence and a meal plan. A more affordable option, in light of the family's financial circumstances, would be to remain at home and study at one of the universities in Halifax. I appreciate the maturing experience that can come from living away from home. While Chelsea and her mother may desire that experience for Chelsea, it is costly. Based on the family's finances, as I understand them, it is not a reasonable expense. If, at the confirmation hearing, Mr. Green's financial circumstances are found to be more favourable than I have found them, another judge may confirm my order with variation to allow this claim.

[55] I dismiss Ms. Knowles' claim for a contribution from Mr. Green to Chelsea's expenses for braces, driver training and post-secondary education. The first two expenses are not necessary and the last is not reasonable.

Conclusion regarding prospective child support

[56] I have found that Mr. Green's annual income is $41,736.00 and Ms. Knowles' is $18,000.00. I've determined that Shanna's annual expenses for extra-curricular activities (ringette, paddling and soccer), for childcare (an art and cooking class) and for secondary school education (attending Halifax Grammar School) are reasonable and necessary. I've concluded that Shanna's extra-curricular activities and private school costs are extraordinary. Other expenses for Shanna and Chelsea do not meet the requirements of being necessary and reasonable.

[57] On a provisional basis, I order Mr. Green to pay monthly child support of $609.34 pursuant to the child support tables for Ontario and to make a proportionate contribution of seventy percent to the after tax cost of Shanna's special or extraordinary expenses in the monthly amount of $196.93. The total monthly child support payment is $806.4827.

Retroactive child support

[58] Ms. Knowles began her application in December 2012. It was heard on May 6, 2014, after five adjournments. Because it is a provisional application, further time will pass before the matter is finally concluded.

[59] In *Staples v. Callender*, 2010 NSCA 49, Ms. Staples appealed from a decision of mine, where I declined to award her retroactive child maintenance starting at the date of her younger child's birth in 2005. (In fact, I declined to award retroactive maintenance even from the later date when she filed her application, in October 2008.) Justice Bateman, who wrote the Court of Appeal's unanimous decision, addressed the issue of backdating maintenance to the date of the application, considering it in the analytic framework of a retroactive award. So I, too, consider both aspects of child support (the table amount and special or extraordinary expenses) prior to the date of my decision to be "retroactive" and subject to the discretion outlined in *D.B.S. v. S.R.G., L.J.W. v. T.A.R., Henry v. Henry, Hiemstra v. Hiemstra*, 2006 SCC 37.

Chelsea

[60] Ms. Knowles claims retroactive child support pursuant to section 3 of the *Guidelines* from January 2011, and pursuant to section 7 of the *Guidelines* from

January 2012. In dealing with these claims I want to be clear that I am considering only the claim that relates to the parties' younger daughter, Shanna.

[61] The jurisdiction to award child support retroactively is limited to cases where the person for whom support is sought was entitled to support when the application was filed. If the person was not a child at the time of the application's filing, there is no jurisdiction to make a retroactive order for support, according to Justice Bastarache at paragraphs 86 to 90 of *DBS v. SRG, LJW v. TAR, Henry v. Henry, Hiemstra v. Hiemstra*, 2006 SCC 37. (The minority decision does not disagree with this proposition.)

[62] Ms. Knowles filed her application on December 20, 2012. One of the changes she requested be made to the Corollary Relief Order was a "change in number of dependent children". She amended her application on May 8, 2013, continuing to seek a change in the number of dependent children. Both documents were filed after Ms. Knowles said Chelsea ceased to be a child of the marriage: according to the affidavit filed with her initial notice of variation application, Chelsea graduated from high school in June 2012 and turned nineteen in October 2012. Ms. Knowles said that Chelsea was "currently living independently and working part -time". At the conclusion of her affidavit, Ms. Knowles said, "Our daughter Chelsea is no longer a child of the marriage", and asked to vary the number of dependent children retroactive to Chelsea's nineteenth birthday. Ms. Knowles says that Chelsea returned home in March 2013, which is after the period for which she seeks a retroactive award.

[63] As a result, I conclude that Chelsea was not a dependent child when the variation application was filed, and I do not have jurisdiction to consider a claim for retroactive support with regard to her.

[64] I appreciate the apparent conflict between this position, which I take as a result of *D.B.S. v. S.R.G., L.J.W. v. T.A.R., Henry v. Henry, Hiemstra v. Hiemstra*, 2006 SCC 37, and the fact that I am making a prospective award of child support for Chelsea. This is another area where the judge presiding at the confirmation hearing may vary my decision.

[65] I specifically asked Ms. Knowles' counsel to address this point in post-hearing submissions. Many of the decisions provided to me pre-date the 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 and none addressed the issue.

Shanna

[66] Shanna has been entitled to receive child support ever since her parents separated. She is thirteen years old and lives with her mother.

[67] Retroactive awards are neither automatic nor exceptional: they depend on the circumstances. In considering whether I should make a retroactive award, I am to balance the competing principles of certainty and flexibility, while respecting the core principles of child support. Those core principles are that: child support is the children's right; the children's right to support survives the breakdown of the relationship between their parents; child support should, as much as possible, perpetuate the standard of living the children experienced before their parents' relationship ended; and the amount of child support varies, based upon the parent's income.

[68] Specifically, when determining if a retroactive award is appropriate, I am to consider: the reason for Ms. Knowles' delay in claiming support; Mr. Green's conduct; 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, who wrote the majority decision of the Supreme Court of Canada in *D.B.S. v. S.R.G., L.J.W. v. T.A.R., Henry v. Henry, Hiemstra v. Hiemstra*, 2006 SCC 37 at paragraph 99.

Ms. Knowles' delay

[69] Ms. Knowles said that despite the requirement for annual income disclosure in the Corollary Relief Judgment, Mr. Green did not provide her with copies of his income tax return. The Judgment was granted in November 2010, so Mr. Green was first required to provide this information in June 2011. She said her counsel requested current income information from him. I wasn't told when this request was made. In October 2012, a single 2012 paystub was received, along with two 2011 T4 slips and one 2011 T4E slip.

[70] Ms. Knowles filed her application two months later. She did not unreasonably delay her application.

Mr. Green's conduct

[71] Mr. Green failed to provide the income disclosure ordered by the Corollary Relief Judgment. When asked, he provided some disclosure of his income. I don't

know exactly what information was requested of him, so I cannot conclude that he has failed to respond fully. I have no information that Mr. Green did anything to thwart Ms. Knowles' pursuit of increased child support.

[72] It was Ms. Knowles' evidence that when Mr. Green began working they agreed his child support payments would increase from $144.00 to $200.00 each month. This amount, she says, he started to pay in December 2012, though some arrears have accumulated.

Shanna's past and present circumstances

[73] Shanna has been involved in extra-curricular activities and attended private school in the past, with the assistance of a bursary. According to Ms. Knowles, Shanna had to leave private school when it could no longer be afforded. I don't know when this occurred. Ms. Knowles continues to owe $2,400.00 to the school. Shanna has since been able to secure generous scholarships to the Halifax Grammar School.

[74] Mr. Green does not visit in Nova Scotia. Shanna has visited Ontario infrequently and no more than once each year. Ms. Knowles has paid for this. Mr. Green was not contributing to Shanna's needs by spending regular time with her and paying her costs during that time.

[75] Ms. Knowles' income is modest. According to the tax materials she filed, her total income in 2011 was $9,861.00 and in 2012 it was $12,990.00. She said her income was less than $15,000.00 in 2013, and a portion of this sum was social assistance payments. She struggles to afford Shanna's expenses. Shanna would benefit from a retroactive award.

Whether a retroactive award would result in hardship

[76] Because this application proceeds provisionally, I have no evidence from Mr. Green and no basis to assess whether he would experience hardship if a retroactive award was made.

[77] Considering the evidence I have regarding these four factors, I am prepared to make a retroactive child support award. Ms. Knowles promptly pursued an increase in child support, and Mr. Green would have known that Ms. Knowles was seeking to increase child support when he heard from her lawyer in 2012. Shanna would benefit from a retroactive award.

The retroactive award

[78] Ms. Knowles claims retroactive child support pursuant to section 3 of the *Guidelines* from the start of 2011 and pursuant to section 7 of the *Guidelines* from the start of 2012.

[79] In *D.B.S. v. S.R.G.; L.J.W. v. T.A.R.; Henry v. Henry; Hiemstra v. Hiemstra*, 2006 SCC 37 at paragraph 117, the majority identified two elements which are relevant to calculating the amount of a retroactive award: the date to which the award should be retroactive and "the amount of support that would adequately quantify the payor parent's deficient obligations during that time".

The effective date

[80] Presumptively, the date to which the award should be retroactive is the date of effective notice, defined at paragraph 121 of *D.B.S. v. S.R.G.; L.J.W. v. T.A.R.; Henry v. Henry; Hiemstra v. Hiemstra*, 2006 SCC 37 as "any indication by the recipient parent that child support should be paid, or if it already is, that the current amount of child support needs to be re-negotiated."

[81] For Ms. Knowles and Mr. Green, the effective date is not known. Ms. Knowles said in her initial affidavit that "I did not receive any income information despite my request." She did not say when she made her request. She said that her counsel requested up-to-date financial information from Mr. Green, but didn't say when that request was made. She did say the information was received in October 2012.

[82] My best estimate of the date of effective notice is October 2012.

Making an award before the effective date

[83] Ms. Knowles seeks a retroactive award that dates from from the start of 2011 (for the table amount) and from the start of 2012 (for section 7 expenses). Both these dates are before the effective date.

[84] To make a retroactive award prior to the effective date of October 2012, I must consider the comments of Justice Bastarache at paragraph 125 in *D.B.S. v. S.R.G.; L.J.W. v. T.A.R.; Henry v. Henry; Hiemstra v. Hiemstra*, 2006 SCC 37 where he summarized the "proper approach": a support payor's interest in the certainty of the existing order is protected only until the interest is unreasonable.

"In the majority of circumstances, that interest will be reasonable up to the point when the recipient parent broaches the subject, up to three years in the past." Here, Ms. Knowles broached the subject less than three years ago, by requesting retroactive support in 2012 for 2011.

[85] When the couple divorced in November 2010, Mr. Green's annual income was stated to be $12,000.00 in the Corollary Relief Judgment and he was ordered to pay monthly child support of $144.00 for his two daughters.

[86] Mr. Green's 2011 annual income was $29,000.00. He disclosed this in October 2012, four months after the Corollary Relief Judgment compelled him to disclose this information and in response to a request from Ms. Knowles' counsel. The increase in his income was a material change. If not as 2011 was progressing, then certainly by the end of that year, Mr. Green would have known that his income for 2011 would exceed the $12,000.00 stated in the Corollary Relief Judgment. His income more than doubled.

[87] In her testimony Ms. Knowles said that she "requested contribution to expenses on a regular basis" and that "[w]hen he started working", she asked him to pay $200.00 each month. She testified that, "It seems to have been in the past year and a half he's been paying $200, at least for the last two and a half." When asked to clarify, she was unsure and ultimately said, "I could give him the benefit of the doubt and say that he's been paying since December 2012, $200 a month."

[88] I find this is an appropriate case to consider a retroactive award that begins before the effective date. Mr. Green's continued reliance upon the terms of the Corollary Relief Judgment after his income increased and after he'd received disclosure requests is unreasonable.

The amount of the retroactive award

[89] According to Justice Bastarache at paragraph 128 of *D.B.S. v. S.R.G.; L.J.W. v. T.A.R.; Henry v. Henry; Hiemstra v. Hiemstra*, 2006 SCC 37, I am to determine the retroactive award by applying the *Guidelines*, though I am not to blindly adhere to them. I may consider whether a retroactive award will engender hardship and modify it on that basis, or I may alter the retroactive period. As Justice Bastarache said at paragraph 130: "Unless the statutory scheme clearly directs another outcome, a court should not order a retroactive award in an amount that it considers unfair, having regard to all the circumstances of the case."

[90] According to the Ontario tables, monthly support for one child at an income of $29,000.00 is $258.00: this amount is $114.00 more each month than he was ordered to pay by the Corollary Relief Judgment. Based on the tables, there's a shortfall of $1,368.00 for 2011.

[91] I have found Mr. Green's 2012 annual income to be $41,736.34. According to the Ontario tables, monthly support for one child at this income level is $376.00. This is $232.00 more each month than he was ordered to pay by the Corollary Relief Judgment. Applying the annual income of $41,736.00 to 2012, 2013 and the first eight months of 2014, Mr. Green would owe $7,424.00, assuming he has paid all amounts ordered under the Corollary Relief Judgment.

[92] In total, the amount calculated pursuant to section 3 from January 2011 until August 2014 is $8,792.00. This amount, again, presumes that Mr. Green has fully paid the child support obligation imposed by the Corollary Relief Order.

[93] Looking to Shanna's special or extraordinary expenses for the period from from January 2012 to date, it's difficult to quantify the amount Ms. Knowles seeks because of the varied filings that I referred to in paragraph 8.

[94] In 2012, Shanna played ringette and her monthly cost was $36.00. There was an additional $200.00 for travel and tournaments. Her soccer cost $25.00 each month. Considering the Fitness Tax Credit, the net cost of these extra-curricular activities would have been $857.00. Mr. Green's income was $41,736.00 and Ms. Knowles' was $12,990.00. Proportionately shared, Mr. Green's contribution to these costs would have been seventy-six percent, or $54.27 per month ($651.32 for the year).

[95] In 2013, Shanna was involved in various sports which, after the Fitness Tax Credit, cost $1,120.08. The school costs which weren't covered by her scholarship were $2,280.00. Mr. Green's income was $41,736.00 and Ms. Knowles' was $15,000.00. Proportionately shared, Mr. Green's contribution would have been seventy-four percent, or $209.67 per month ($2,516.05 for the year).

[96] I've calculated Shanna's 2014 special or extraordinary expenses at paragraph 42. Mr. Green's proportionate share is seventy percent, $196.93 each month for the first eight months of 2014, totaling $1,575.44.

[97] My earlier conclusion that these costs were necessary, reasonable and extraordinary remains.

[98] The total retroactive contribution to special or extraordinary expenses is $4,742.81.

[99] At paragraph 43 in *Staples v. Callender*, 2010 NSCA 49, Justice Bateman said that there is no fixed rule in ordering support retroactively to the date of an application, and deciding whether to do so is a matter in my discretion, "considering, in particular, the payor's ability to respond to the order."

[100] Again, this is a provisional application and I am without information from Mr. Green. I do not know whether Mr. Green has the ability to respond to such an order. I will not presume that he cannot respond. I will make the provisional order that he must pay this amount and leave to the judge presiding at the confirmation hearing whether this order ought to be confirmed with or without variation, refused or remitted for further evidence as permitted by section 19 of the *Divorce Act*.

Other requests for relief

[101] Ms. Knowles asked that I make a number of other orders, ordering Mr. Green to take at least one week off work each year to spend "quality time" with their daughters; ordering him to pay the girls' travel costs for at least one visit each year; ordering him to pay one-quarter of Chelsea's post-secondary student loans and related costs; and ordering him to pay one-quarter of Shanna's "future post-secondary education expenses".

[102] In her post-hearing submissions, Ms. Knowles withdrew her request that I order Mr. Green to schedule his vacation to coincide with the girls' visits, acknowledging that I lacked the jurisdiction to make this order.

[103] Neither the tables nor section 7 of the *Guidelines* are premised on any particular allocation of access costs. Access costs are addressed in undue hardship claims pursuant to section 10 of the *Guidelines*. Clause 10(2)(b) is framed for application to Mr. Green who is the parent "exercising access".

[104] I am not persuaded that I have the authority to order an allocation of travel expenses in the context of a provisional variation application, and I decline to do so. I do note that Ms. Knowles has paid these costs in the past as this may be considered relevant to the confirming judge in hearing the remainder of this application.

[105] With regard to Chelsea's student loans, I decline to order Mr. Smith to pay one-quarter of these loans. I do so in light of Justice Roscoe's comment, at paragraph 20 in *Selig v. Smith*, 2008 NSCA 54, that, "The higher the parents' income, the less the student should be required to contribute." Her Ladyship's remark was in the context of holding that there is no error for a judge to assume that a grown child will be expected to borrow to finance post-secondary education even where the parents' combined annual incomes exceeded $96,000.00. Justice Davison reached a similar conclusion in *MacDonald v MacDonald*, 2001 NSSC 158, where the parents' combined incomes approached $160,000.00. Here, the parents' combined annual incomes are less than $60,000.00.

[106] I addressed Shanna's future post-secondary education expenses in paragraph 33.

Conclusion

[107] On a provisional basis, I order Mr. Green pay prospectively monthly child support of $609.37 for Shanna and Chelsea pursuant to section 3 of the *Guidelines* and I order him to pay a monthly contribution of $196.93, which is equal to seventy percent of the after-tax cost of Shanna's ringette, soccer and paddling, her art and cooking class (summer childcare) and her Halifax Grammar School expenses. Respectively, these expenses fall within clauses 7(1)(f), 7(1)(a) and 7(1)(d) of the *Guidelines*.

[108] I dismiss the request for a contribution to Shanna's expenses for the purchase of a trumpet, future braces, future driver training and future post-secondary education. These costs do not meet the requirements of being necessary and reasonable. I dismiss the request for a contribution to Chelsea's expenses for future braces, future driver training and post-secondary education. These expenses are not necessary and reasonable.

[109] I order Mr. Green to pay $8,792.00 retroactively as child support for Shanna based on the child support tables. This amount was calculated on the basis that Mr. Green has met his monthly obligation to pay $144.00 provided for in the Corollary Relief Judgment. This amount is calculated retroactively from January 2011 until and including August, 2014.

[110] I order Mr. Green to contribute $4,742.81 retroactively to Shanna's expenses for extra-curricular sports and private school education in 2012, 2013 and earlier in 2014.

[111] I dismiss Ms. Knowles' claims for an order compelling Mr. Green: to take at least one week off work each year to spend with Shanna and Chelsea; to pay the girls' travel costs for at least one annual visit; to pay one-quarter of Chelsea's post-secondary student loans and related costs; and to pay one-quarter of Shanna's future post-secondary education expenses.

Elizabeth Jollimore, J.S.C.(F.D.)

Halifax, Nova Scotia