NOVA SCOTIA COURT OF APPEAL
Citation: *Lockerby v. Lockerby*, 2017 NSCA 26

Date: 20170411
Docket: CA 449578
Registry: Halifax

Between:

Douglas Bruce Lockerby

Appellant

v.

Ero Anna Lockerby

Respondent

Judge:	The Honourable Justice Hamilton
Appeal Heard:	November 23, 2016, in Halifax, Nova Scotia
Subject:	Family Law; Child Support for Child over the Age of Majority attending University.
Summary:	The father applied to vary child support. In the outstanding order, the support payable by the father was paid on the basis the oldest of the four children was no longer a dependent child of the marriage and the payments were made directly to the child. Following the variation hearing, the judge ordered the father to pay support for her in accordance with the Nova Scotia table, pursuant to s. 3(2) of the *Guidelines*.
Issues:	Did the judge err in (1) granting Orders that differed materially from her oral decision, (2) finding there was a change of circumstances permitting a variation of support with respect to the oldest child because her personal circumstances had not changed or (3) ordering him to pay child support for her in accordance with the table pursuant to s. 3(2)(a) of the *Guidelines* when his application did not seek to change her support or, in the alternative, because she did not give sufficient deference to the manner in which child support was to be paid for the child pursuant to the outstanding order which was a consent order.

Result: Appeal allowed in part. The judge did not err as principally argued by the father. There was a change of circumstance. There was no error in the judge changing her decision prior to issuing the Variation Order. The judge did not err by not deferring to the method of support provided for in the outstanding order. The father's application was broad enough to allow the judge to order child support for the oldest child in accordance with the table pursuant to s. 3(2) of the *Guidelines* and the judge made it clear during the hearing that this was a live issue. There was, however, an error in the Variation Order as it related to the support the father was to pay for the oldest child for the months of September 2014 to April 2015 that was corrected.

NOVA SCOTIA COURT OF APPEAL
Citation: *Lockerby v. Lockerby*, 2017 NSCA 26

Date: 20170411
Docket: CA 449578
Registry: Halifax

Between:

Douglas Bruce Lockerby

Appellant

v.

Ero Anna Lockerby

Respondent

Judges:	MacDonald, Hamilton, Fichaud JJ.A.
Appeal Heard:	November 23, 2016, in Halifax, Nova Scotia
Held:	Appeal allowed in part, per reasons for judgment of Hamilton, J.A.; MacDonald, C.J.N.S. and Fichaud, J.A. concurring
Counsel:	Douglas Lockerby, appellant in person Ero Lockerby, respondent in person

Reasons for judgment:

[1] The appellant father's complaint with the judge's decision is that she ordered him to pay child support for the oldest of his four children, Maria-Nicole, in accordance with the Nova Scotia table pursuant to s. 3(2) of the *Child Support Guidelines* after finding his daughter was once again a child of the marriage.

[2] He argues that the judge erred because the support provisions for Maria-Nicole contained in the Variation Orders differ significantly from those provided for in her oral reasons. He also argues that she erred in finding that Maria-Nicole was a child of the marriage and ordering child support for her in accordance with the table, stating that he did not apply to vary her child support from that provided for in the Order outstanding at the time he made his application to vary or, alternatively, by not deferring to the method of child support provided for in the outstanding Order because the parties had consented to it. His final argument is that since there was no change of circumstances for Maria-Nicole specifically, as opposed to an overall change of circumstances with respect to the parties and two of their other children, the judge erred in varying his child support for Maria-Nicole.

[3] While I am satisfied the judge did not err for the reasons principally argued by the father, I am satisfied there is an error in the Orders with respect to the child support payable by the father for Maria-Nicole for the period from September 1, 2014 to April 1, 2015. In clause 20 of the October 27, 2016 Order, it provides that Maria-Nicole once again became a dependant child of the marriage as of August 1, 2015. The lack of support payable by the father for Maria-Nicole for the months of May, June and July, 2015 reflects this finding and is supported by Clause 3(a) and the suggestions in the record that Maria-Nicole had additional income in 2014/2015. Clauses 18 and 19 fail to take this into account from September 1, 2014 to April, 2015. Accordingly, as will be dealt with commencing at paragraph 58 of these reasons, I would allow the appeal in part to correct this error, without costs to either party.

Background

[4] In September 2014, the appellant father applied to vary the child support provisions of the parties' May 17, 2013 Variation Order ("May Order") that was issued with the parties' consent following a settlement conference. It dealt with the

parties' four children. In his Notice of Variation Application, he checked the boxes indicating he was requesting child support changes concerning the table amount, special or extraordinary expenses and the number of dependant children. In his Statement of Contact Information and Circumstances and in his Parenting Statement submitted with his Notice, he listed Maria-Nicole as one of the children subject to his application. He also mentioned Maria-Nicole's support in a number of other documents he filed in connection with his application.

[5] As the father did not raise on appeal any issue relating to the support of the other three children, these reasons will only refer to the treatment of Maria-Nicole.

[6] The May Order made no provision for custody of Maria-Nicole, who at the time was almost 19 years old and attending an out-of-town university on a full time basis. It provided for her support for eight months as follows:

> 3.(H) Child support for Maria-Nicole Lockerby ("Nikki"), born June 27, 1994 will be as follows:
>
> (i) for the 2013-2014 university academic year, Mr. Lockerby will pay in September 2013 and January 2014 Nikki's tuition and books (to a combined maximum of $10,000);
>
> (ii) commencing September 1, 2013 and continuing through to the month of April 2014 (provided Nikki remains in full-time attendance at Acadia University), the sum of $250.00 per month will be paid by Mr. Lockerby directly to Nikki, the full amount being paid prior to the end of each month;
>
> (iii) should Nikki have other reasonable educational expenses or needs, Ms. Lockerby would be responsible for 25% of such expenses. These arrangements are to be made between Ms. Lockerby and Nikki.
>
> (iv) there will be no other child support payable for Nikki beyond this at this time.
>
> 4. It is acknowledged that the child support arrangements may be the subject of review by Application to Vary, showing a change in circumstances, after the 2013-2014 university academic year, as Cassy's [the second oldest child] post-secondary plans clarify and Nikki's employment and educational pursuits evolve.
>
> 5.(A) This Order assumes that Nikki shall transfer to Mr. Lockerby the maximum tuition, testbook (sic) and textbook credit amount available for transfer by Nikki for the taxation years 2012, 2013 and 2014.

[7] The father's $10,000 payment provided for in clause 3(H)(i) was to come from the children's common Registered Education Savings Plan ("RESP").

[8] There was no provision for child support to be paid for Maria-Nicole beyond April 2014.

[9] At the hearing of the father's variation application before Justice Cindy G. Cormier on July 2 and 3, August 7 and October 21, 2015, and on appeal, each party was self-represented.

[10] Following the hearing, the judge gave an oral decision on November 16, 2015. Unfortunately, it was not as clear as it could have been. This resulted in clarifications being sought and suggested errors being pointed out by the parties while the judge was giving her decision.

[11] In her oral decision the judge found a change of circumstances justifying a variation:

> …and pursuant to the *Divorce Act* there needs to be a change of circumstance in order to vary any order. There are many changes of circumstance with respect to this particular file and it's not difficult to find a change in circumstance in that there are now two children over the age of majority, and another child who's started university – his circumstance has changed, as well as both of your incomes have changed. So there are certainly variables that have changed that can account for changing or varying the orders as requested, to review the orders as requested.

[12] She found that Maria-Nicole had once again become a dependant child of the marriage for child support purposes and would continue as such until September 2016, the end of the summer after she graduated from university:

> Maria Nicole, and I understand both of you to have expressed some confusion about the word "child of the marriage", but I consider Maria Nicole not to be entirely independent of you both at this time.
>
> …
>
> Now we haven't dealt with Maria Nicole. That's the issue of child support. Maria Nicole does not reside at home, that I can see. She, she has a full-time home… She pays for an apartment in, at Acadia, in Wolfville. She pays, she stayed part of the time in Calgary, she stayed part of the time with dad, she stays with mom, and she's a bit older than the other three, and both of you have said to me at times that she's not a child of the marriage. Well, it's hard for me, when I look at a child or a young person who's only 21 years old and I see that she's making $8,000, which

> is great, but I see that $12,000 [expenses less employment income] and I need to know who's paying that difference. And unless I know, until I know what the difference is, then I don't know what you owe. Because somebody has to help her, … I'm going to make an order that assumes something about what type of help she's getting in terms of an RESP or a loan, and I'm going to say that, for the purposes of this order, that she will remain a child of the marriage until September 2016,…

[13] The judge stated the amount the parents would pay for Maria-Nicole's support:

> …and until then, dad will continue to contribute, it's 2,500 in all, but which he already indicates he has, he does contribute, generally, but between December 1st, 2015, and September 2016, dad will continue to pay $250 to Maria Nicole directly, and mom will pay $80 toward Maria Nicole directly. …that's the support that you are providing her on a monthly basis.

[14] By letter to the judge dated November 24, 2015, the father set out his understanding of the oral decision and suggested it did not deal with everything required.

[15] The judge's Variation Order was issued on February 27, 2016 ("February Order"). It confirms her finding that there was a change of circumstances:

> It has been determined there has been a change in circumstances with respect to custody, child support, special or extraordinary expenses, since September 1, 2014.

[16] It confirms her finding that Maria-Nicole was once again a child of the marriage, needing her parents financial support until September 2016:

> 3 a Nikki is found to be attending Acadia University in Nova Scotia on a full time basis since the application to vary was filed in September 2014 and **to have been residing primarily with Ero Lockerby during the month of August 2015 and when Nikki was or is not attending a full time educational program during the 2015/2016 academic year**. Nikki is scheduled to complete her post-secondary program in April 2016. Pursuant to the *Divorce Act* Nikki is found to be a child of the marriage until August 31, 2016.
>
> [Emphasis added]

[17] Clauses 18(a)(i) and 19(a)(i) provided that during the university term from September 1, 2014 to April 1, 2015, the father will pay the respondent mother child support for Maria-Nicole in an amount equal to one-half the table amount pursuant

to s. 3 of the *Guidelines*. No child support for Maria-Nicole was ordered for the months of May, June and July, 2015 in clause 20 of the February Order. No one suggests the judge erred in ordering no support be paid by the father for these three months. I will deal with the error in clauses 18(a)(i) and 19(a)(i) of the Orders, for the months of September 2014 to April 2015, starting in paragraph 58 of these reasons.

[18] From August 1, 2015 until September 2016, the February Order requires the father to pay child support for Maria-Nicole pursuant to s. 3 of the *Guidelines* in accordance with the table, half the table amount during the university term and the full amount during the summer break. No support was to be paid for her after September 2016.

[19] In addition to the amounts of child support the father is required to pay pursuant to s. 3, the February Order requires the parents to contribute to Maria-Nicole's post-secondary education expenses under s. 7 of the *Guidelines* from December 1, 2015 to April 1, 2016 - $250 per month by the father and $80 per month by the mother, payable to their daughter. The February Order specifically states that no s. 7 expenses for Maria-Nicole are to be paid from September 2014, the date of the father's application to vary, until September 2015, due to insufficient evidence of her financial resources, such as from bursaries and student loans.

[20] Following receipt of the February Order, the father wrote several times to the judge seeking a conference to review it. He attempted to provide additional information and pointed out the difference between the support provisions for Maria-Nicole in the oral decision and the February Order and stated that he did not apply to vary Maria-Nicole's support.

[21] A conference call with the judge took place on August 3, 2016. During the hearing of this appeal, the panel asked the father to file a copy of the transcript of that conference call, which he did on February 1, 2017. The parents were also given the opportunity to file submissions on the transcript if they wished to do so. No submissions were filed.

[22] The transcript of the August 3 conference call shows that the judge stated that following her oral decision she recognized the confusion caused by her oral decision, that she reviewed the file as she indicated she would when she gave her oral decision and that she made the changes reflected in her February Order when she discovered errors and oversights, including some relating to child support for

Maria-Nicole. She stated she would not consider any additional information, except as it related to braces for another child, which is not raised as an issue in this appeal. After input from the parties, she recognized that she had made an error in her February Order and indicated she would correct it in an amended order, which she did in the Amended Variation Order issued on October 27, 2016 (October Order). The only clarification relevant to the issues raised in this appeal is the addition of the following:

> 20. Nikki is found to have returned to live with her mother as a dependent child of the marriage August 1, 2015.

[23] The judge's findings that there was a change of circumstances and that Maria-Nicole had regained her status as a dependant child of the marriage were consistent throughout her oral decision and both Orders.

[24] The provisions for child support to be paid by the father for Maria-Nicole were significantly different between her oral decision and the Orders.

Issues

[25] As indicated, the father argues the judge erred in (1) granting Orders that differed materially from her oral decision, (2) finding there was a change of circumstances permitting a variation of support with respect to Maria-Nicole because her personal circumstances had not changed and (3) ordering him to pay child support for her in accordance with the table pursuant to s. 3(2)(a) of the *Guidelines* when his application did not seek to change her support or, in the alternative, because she did not give sufficient deference to the manner in which child support was to be paid for Maria-Nicole pursuant to the May Order which was a consent order.

Standard of Review

[26] The standard of review we are to apply in reviewing the judge's decision on the amount of child support is set out in *Hickey v. Hickey*, [1999] 2 SCR 518:

> [10] When family law legislation gives judges the power to decide on support obligations based on certain objectives, values, factors, and criteria, determining whether support will be awarded or varied, and if so, the amount of the order, involves the exercise of considerable discretion by trial judges. They must balance the objectives and factors set out in the *Divorce Act* or in provincial support statutes with an appreciation of the particular facts of the case. It is a

> difficult but important determination, which is critical to the lives of the parties and to their children. **Because of its fact-based and discretionary nature, trial judges must be given considerable deference by appellate courts when such decisions are reviewed.**
>
> [11] **Our Court has often emphasized the rule that appeal courts should not overturn support orders unless the reasons disclose an error in principle, a significant misapprehension of the evidence, or unless the award is clearly wrong.** These principles were stated by Morden J.A. of the Ontario Court of Appeal in *Harrington v. Harrington* (1981), 1981 CanLII 1762 (ON CA), 33 O.R. (2d) 150, at p. 154, and approved by the majority of this Court in *Pelech v. Pelech*, 1987 CanLII 57 (SCC), [1987] 1 S.C.R. 801, per Wilson J.; in *Moge v. Moge*, 1992 CanLII 25 (SCC), [1992] 3 S.C.R. 813, per L'Heureux-Dubé J.; and in *Willick v. Willick*, 1994 CanLII 28 (SCC), [1994] 3 S.C.R. 670, at p. 691, per Sopinka J., and at pp. 743-44, per L'Heureux-Dubé J.
>
> [12] There are strong reasons for the significant deference that must be given to trial judges in relation to support orders. This standard of appellate review recognizes that the discretion involved in making a support order is best exercised by the judge who has heard the parties directly. It avoids giving parties an incentive to appeal judgments and incur added expenses in the hope that the appeal court will have a different appreciation of the relevant factors and evidence. This approach promotes finality in family law litigation and recognizes the importance of the appreciation of the facts by the trial judge. **Though an appeal court must intervene when there is a material error, a serious misapprehension of the evidence, or an error in law, it is not entitled to overturn a support order simply because it would have made a different decision or balanced the factors differently.**
>
> [Emphasis added**]**

[27] The standard of review for findings of fact is palpable and overriding error. It is the same for findings of mixed fact and law unless the issue is primarily one of law, when the standard of review is correctness; *Housen v. Nikolaisen*, 2002 SCC 33.

[28] With respect to the father's argument that the judge erred by granting Orders that differed from her oral decision, there is no standard of review. We consider it for the first time.

Analysis

Orders differed from oral decision

[29] I will first deal with the father's argument that the judge erred by issuing Orders that differed from her oral decision. There is no merit to this argument. While certainly not to be encouraged, a judge in a civil matter such as this is permitted to change his or her decision until such time as their order is issued. It is only then that the judge is *functus*; *Burke v. Sitser*, 2002 NSCA 115, para. 9; *Crédit foncier franco-canadien v. Fort Massey Realities Ltd.* (1981), 49 N.S.R. (2d) 646 (S.C.), para. 10; *MacLellan v. MacDonald*, 2010 NSCA 34, para. 26. Here, the judge's recognition of her initial errors and oversights as a result of points raised by the parties was a circumstance that permitted her to make the change in her decision with respect to the support payable for Maria-Nicole which she reflected in her February Order.

[30] I would dismiss this ground of appeal.

Change of Circumstances

[31] The father agrees there was a change of circumstances generally as the judge found. That was, after all, the foundation of his application to vary child support. In his affidavit in support of his application he states:

> 48. I submit there is a material change in that Ms. Lockerby has returned to work, Cassandra is now attending university and Maria-Nicole is continuing her studies in university this year again;

He also argued several times in his submissions to the judge that there was a change of circumstances.

[32] His argument before this Court is that there was no change in Maria-Nicole's personal circumstances so that the mandatory threshold was not met for altering her child support. He points out that she was attending an out-of-town university full time when the May Order was issued and was doing the same at the time of the variation hearing. He says this precludes the judge from varying Maria-Nicole's support.

[33] For two reasons, I do not accept this argument.

[34] First, there was evidence of a change in Maria-Nicole's financial circumstances.

[35] Section 14(b) of the *Guidelines* provides that a change in a child's "needs" constitutes a change of circumstances:

> 14 For the purposes of subsection 17(4) of the Act, any one of the following constitutes a change of circumstances that gives rise to the making of a variation order in respect of a child support order:
>
> …
>
> (b) in the case where the amount of child support does not include a determination made in accordance with a table, any change in the condition, means, needs or other circumstances of either spouse or of any child who is entitled to support; …

[36] The evidence before the judge indicated Maria-Nicole received at least $10,000, if not $17,000, from the RESP towards her expenses for the eight months covered by the May Order, whereas she was only going to receive $4,500 from the RESP for the 2015/2016 year. More importantly, there was insufficient evidence to establish how she could pay her yearly expenses of $20,000 for 2015/2016 without financial help from her parents, indicating a "need" that did not exist at the time of the May Order.

[37] Second, both parents' incomes had increased from the time of the May Order and they now had two children over the age of majority and a third who had started university. This change in the parents' "means" and "circumstances" also constitutes a change of circumstances under s. 14(b).

[38] I am satisfied the judge did not make a palpable and overriding error when she found there was a change of circumstances justifying a variation of Maria-Nicole's support.

Child of the Marriage and Support pursuant to s. 3(2)(a)

[39] The father argues that the judge erred in finding that Maria-Nicole was a child of the marriage and entitled to child support in accordance with the table pursuant to s. 3(2) of the *Guidelines* because (1) he did not raise this issue in his application to vary or, (2) alternatively, the judge should have deferred to the method of supporting Maria-Nicole set out in the May Order because the parents consented to it.

[40] For the purpose of determining the right of adult children to child support, "child of the marriage" is defined in s. 2(1) of the *Divorce Act*:

> *child of the marriage* means a child of two spouses or former spouses who, at the material time,
>
> (a) is under the age of majority and who has not withdrawn from their charge, or
>
> (b) is the age of majority or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessaries of life;

[41] In determining an adult child's right, if any, to child support, s. 3 of the *Guidelines* is a key provision:

> **Presumptive rule**
>
> 3 (1) Unless otherwise provided under these Guidelines, the amount of a child support order for children under the age of majority is
>
> (a) the amount set out in the applicable table, according to the number of children under the age of majority to whom the order relates and the income of the spouse against whom the order is sought; and
>
> (b) the amount, if any, determined under section 7.
>
> **Child the age of majority or over**
>
> (2) Unless otherwise provided under these Guidelines, where a child to whom a child support order relates is the age of majority or over, the amount of the child support order is
>
> (a) the amount determined by applying these Guidelines as if the child were under the age of majority; or
>
> (b) if the court considers that approach to be inappropriate, the amount that it considers appropriate, having regard to the condition, means, needs and other circumstances of the child and the financial ability of each spouse to contribute to the support of the child.

[42] There is nothing in the *Divorce Act* suggesting that a child cannot regain his or her status as a child of the marriage. Whether the status has been regained is a question of fact (Julien D. Payne & Marilyn A. Payne, *Canadian Family Law*, 6th ed, (Toronto: Irwin Law, 2015), p. 392).

[43] I am satisfied the father's application to vary, referred to in paragraph 4 above, was broad enough to allow the judge to determine that Maria-Nicole had once again become a child of the marriage entitled to child support by reference to

the table pursuant to s. 3 of the *Guidelines*, even if this was not his goal in making his application.

[44] Even though the application itself gave the judge jurisdiction to consider Maria-Nicole's status and the basis on which support should be ordered, it was incumbent upon her, particularly when dealing with self-represented parties, to make reasonable efforts to inform them that she would be considering both, to give them the opportunity to present all relevant evidence and make relevant submissions.

[45] The record indicates, and the father acknowledges, that the judge regularly indicated to them during the hearing that she was considering whether Maria-Nicole had again become a child of the marriage because there was insufficient evidence as to how she could meet her acknowledged expenses of $20,000 per year and that the judge needed the parents to provide financial evidence concerning Maria-Nicole's employment income and any loans or bursaries.

[46] The judge went so far, at what was to have been the end of the hearing, to give the parties a further opportunity to provide additional financial information and make further submissions:

> The Court: …Well, as long as you understand that the Court can't make a proper decision about young adults who are children of the marriage unless we know what they're earning. …
>
> The Court: So yes, please get the information in. …
>
> After that, I'm going to ask that…I'm going to say two hours be found somewhere so that you can have an opportunity to ask any questions or make any submissions about those documents because it's not fair that the documents just be submitted to me without you having an opportunity to speak to them….
>
> …
>
> The Court: …If you want to make written submissions, it will save time and it may be easier for you to do it that way than orally. Please refresh your memories about the law in the area about children who are university aged and their requirement to contribute, all right?
>
> …
>
> Mr. Lockerby: Is there specific information that Your Honour would like?
>
> The Court: Okay. Imagine yourselves trying to make the decision. And I need to know… what your incomes are. …

> Once I establish what your incomes are, then I need to establish what is it that we need to pay, what is it that needs to be paid. If Nicky is no longer supporting herself and she's going to be determined to be a child of the marriage, I need to know what her expenses are.
>
> If she has loans, scholarships, all of that, it all comes into play. If it's for university, it's for university. I'm not double-paying Nicky to go to university. I'm not going to order that she be double-paid by her parents. She's an adult. If she can afford it, she will pay.

[47] The father says despite this, he did not understand that the judge was considering ordering him to pay child support for Maria-Nicole pursuant to s. 3 of the *Guidelines* in accordance with the table.

[48] It is unfortunate if the father did not anticipate the judge's child support order. However, I am not satisfied the judge erred.

[49] She told the parties the evidence they had presented suggested to her that Maria-Nicole needed their financial support and that she was considering whether their daughter was once again a child of the marriage. She explained the parents' obligation to provide reasonable support for Maria-Nicole's post-secondary education and gave them the opportunity to provide additional evidence of her income from all sources.

[50] Having told the parents what was required and having given them the opportunity to provide it, she had to make her decision based on the evidence before her, which she did. She accepted the evidence that Maria-Nicole's post-secondary education expenses for her last year of university would be $20,000, that she would not be receiving as much from the RESP as she had received in earlier years and that she would earn $8,000 from part-time employment. She considered the lack of evidence concerning other funds available to Maria-Nicole such as from bursaries and student loans. She accepted the mother's evidence that Maria-Nicole was living with her out of term. In light of this, the judge was satisfied Maria-Nicole was once again unable, by reason of attending university, to obtain the necessaries of life, without the financial support of her parents and was a child of the marriage living with her mother out of term from August 1, 2015 to September 2016.

[51] As Maria-Nicole was a child of the marriage over the age of majority, s. 3(2) of the *Guidelines* applies. It provides that Maria-Nicole's child support be determined by applying the applicable table, unless the court considers that

approach inappropriate. The Orders indicate the judge did not find applying the table to be an inappropriate approach.

[52] I am satisfied the judge made no palpable and overriding error in finding Maria-Nicole was a child of the marriage and made no error in principle, did not misunderstand the evidence and was not clearly wrong in reaching her decision on the amount of child support to be paid for her.

[53] In the alternative, the father argues the judge erred in ordering child support for Maria-Nicole pursuant to s. 3(2) of the *Guidelines* in accordance with the table because she should have deferred to the method of supporting her set out in the May Order because it was agreed to by the parents. He relies on cases that have followed *Miglin v. Miglin*, [2003] 1 S.C.R. 303, where courts considered the effect of a separation agreement or consent order on subsequent applications for **spousal** support, arguing similar principles should apply for **child** support. He points out that those cases have manifested a reluctance to interfere with final settlements and notes their reference to the need for a party seeking a change from the consent order or agreement to show that new circumstances have arisen that were not reasonably anticipated by the spouses when the agreement was executed or the consent order entered into.

[54] In *Turpin v. Clark*, 2009 BCCA 530, the Court states:

> [70] A variation application of a consent order that incorporates an agreement on child support is subject to the s. 17(4) *Divorce Act* jurisdictional test of a material change in circumstances. It is not subject to the higher threshold established in *Miglin* for the variation of an agreement. There are no limitations on a court overriding or varying a child support agreement that is incorporated into a court order where the provisions of the agreement are found to be unreasonable. In *Willick*, Sopinka J., for the majority, stated that "[t]he reasoning which supports the restrictions with respect to interspousal support [from a complicated separation agreement] does not apply to child support" (para. 16).

[55] The Court in *K.K. v. A.K.*, 2012 NBQB 276, states:

> [97] … the right to claim child support and corollary expenses, although invariably claimed by the custodial parent, are not the parent's right but that of the child or children as the case may be. Several judgments support that conclusion.
>
> [98] … in *Richardson v. Richardson*, [1987] 1 S.C.R. 857, at pp. 869-70, Wilson J. explained the different nature of the two rights:

> This inter-relationship [between spousal maintenance and child support] should not, however, lead us to exaggerate its extent or forget the different legal bases of the support rights. The legal basis of child maintenance is the parents' mutual obligation to support their children according to their need. That obligation should be borne by the parents in proportion to their respective incomes and ability to pay: *Paras v. Paras, supra*.... Child maintenance, like access, is the right of the child: *Re Cartlidge and Cartlidge*, 1973 CanLII 844 (ON CJ), [1973] 3 O.R. 801 (Fam. Ct.). For this reason, a spouse cannot barter away his or her child's right to support in a settlement agreement. The court is always free to intervene and determine the appropriate level of support for the child.... Further, because it is the child's right, the fact that child support will indirectly benefit the spouse cannot decrease the quantum awarded to the child.

[56] The *Miglin* criteria are inapplicable to child support. Courts will not hesitate to order the appropriate amount of child support where there has been a change of circumstances and a prior consent agreement prejudicially affects the financial welfare of children. Child support, like access, is the right of the child, and neither parent has the authority to waive or restrict the statutory obligations that each parent owes to his or her dependent children.

[57] I am satisfied the judge did not err by not giving deference to the provisions for child support for Maria-Nicole provided for in the May Order.

Child Support for Maria-Nicole Ordered from September 1, 2014 to April 1, 2105

[58] As indicated, I am satisfied the judge did not err in finding a change of circumstances, that Maria-Nicole was a child of the marriage entitled to child support pursuant to s. 3(2) of the *Guidelines* by reference to the table and in changing the amount of child support payable for her between her oral decision and the Orders, as referred to in paragraphs 3 and 17 above. However, I am also satisfied there is an error in the Orders as to the amount of child support the father is to pay for Maria-Nicole between September 1, 2014 and April 1, 2015. The Orders provide for child support for Maria-Nicole during this period on the basis she is a child of the marriage financially dependent on her parents, whereas in other clauses it states that she did not become a dependent child of the marriage again until after that time, namely on August 1, 2015, and that she was not entitled to support for May, June and July, 2015 (clause 20).

[59] To correct the error in the Orders, changes must be made to paragraphs 18, 19, 22 and 23 of the October Order. I have made the required changes in Appendix A attached hereto. Clauses 18, 19, 22 and 23 set out in Appendix A replace those clauses in the October Order. Accordingly, as of the effective date of the October Order, $3,626 is owed by the mother to the father.

[60] I would allow the appeal in part and order each party to bear their own costs for this appeal.

Hamilton, J.A.

Concurred in:

MacDonald, C.J.N.S.

Fichaud, J.A.

Appendix A

18. Retroactive child support pursuant to ss. 3 and 8 of the *Federal Child Support Guidelines* (September 1, 2014 to December 1, 2014)

(a) Douglas Lockerby's base salary amount for **2013** is determined to be $100,000.00 with a year-end cash incentive award of $56,400.00 for a total income of $156,400.00 for the purpose of determining retroactive child support payable starting September 1, 2014-December 1, 2014.

i. The set off amount for child support purposes would be $1,220.00 + $49.00 = $1,269/2 = $635.00 per month owed by Douglas Lockerby for Cassy with $969.00 per month owed by Ero Lockerby for Tomas and Luca for a set off of $969.00 - $635.00 = $334.00 per month owed by Ero Lockerby to Douglas Lockerby.

ii. Ero Lockerby notionally owes Douglas Lockerby $334.00 x 4 = **$1,336.00** for the period between September 1, 2014 and December 1, 2014.

19. Retroactive child support pursuant to ss. 3 and 8 of the *Federal Child Support Guidelines* (January 1, 2015 to April 1, 2015)

(a) Douglas Lockerby's base salary amount for **2014** is determined to be $102,000.00 with a year-end cash incentive award of $57,500.00 for a total income of $159,500.00 for the purpose of determining retroactive child support in 2015.

i. The set off amount for child support purposes would be $1,220.00 + $72.00 = $1,292.00/2 = $646 owed by Douglas Lockerby for Cassy with $969.00 owed by Ero Lockerby for Tomas and Luca, $969.00 - $646.00 = $323.00 per month.

ii. With Ero Lockerby notionally owing Douglas Lockerby $323.00 x 4 = **$1,292.00** for the period between January 1, 2015 and April 1, 2015.

22. Total Retroactive child support pursuant to ss. 3 and 8 of the *Federal Child Support Guidelines* (Douglas Lockerby and Ero Lockerby) since court application September 2014

a. Money notionally owed by Ero Lockerby to Douglas Lockerby for child support:

i. $1,336.00.00 between September 1, 2014 and December 1, 2014.
ii. $1,292.00 between January 1, 2015 and April 1, 2015.

b. Money notionally owed by Douglas Lockerby to Ero Lockerby for child support:

iii. $2,053.00 between May 1, 2015 and August 31, 2015.
iv. $174.00 between September 1, 2015 and November 1, 2015.

c. For a notional total of **$401.00** owing by Ero Lockerby to Douglas Lockerby.

23. Total child support paid pursuant to ss. 3 and 8 of the *Federal Child Support Guidelines*, since September 2014

a. Court ordered payment from Douglas Lockerby to Ero Lockerby.

i. Pursuant to a Court Order granted by the Honourable Justice Williams and issued May 17, 2013 Nikki was found to be a dependent child of the marriage until April 2014. Notice of Variation Application was filed by Douglas Lockerby on September 23, 2014.

ii. $415.00 paid by Douglas Lockerby **to Ero Lockerby** for Cassy between September 2014 and November 2014, $415.00 x 3 = **$1,245.00** pursuant to ss. 3 and 8 of the *Federal Child Support Guidelines.*

1. $250 paid by Douglas Lockerby to Cassy between September 2014 and November 2014 was not found to be child support pursuant to ss. 3 and 8 of the *Federal Child*

Support Guidelines. Payments to Cassy found to be child support payments pursuant to section 7(e) of the *Federal Child Support Guidelines.*

iii. $165.00 paid by Douglas Lockerby to Ero Lockerby for Cassy between December 1, 2014 and November 1, 2015, $165.00 x 12 = **$1,980.00** pursuant to ss. 3 and 8 of the *Federal Child Support Guidelines.*

1. $250.00 paid by Douglas Lockerby to Cassy between December 2014 and November 2015, $250 x 12 = $3,000.00 was not found to be child support pursuant to ss. 3 and 8 of the *Federal Child Support Guidelines*. Payments to Cassy are found to be child support payments pursuant to section 7(e) of the *Federal Child Support Guidelines*.

iv. For a total overpaid by Douglas Lockerby to Ero Lockerby pursuant to ss. 3 and 8 of the *Federal Child Support Guidelines* of $3,225.00 (1,245.00 + $1,980.00) + $401.00 (Clause 22(c)) = **$3,626.00**.

b. This overpayment may be dealt with by way of deferred child support payment from Douglas Lockerby to Ero Lockerby.