

**SUPREME COURT OF NOVA SCOTIA**  
**(FAMILY DIVISION)**

**Citation:** *Corbett v. McEachren*, 2017 NSSC 108

**Date:** 21-April-2017

**Docket:** SFSNMCA-014933

**Registry:** Sydney

**Between:**

Christopher Corbett

Applicant

v.

Terri McEachren

Respondent

**Judge:** The Honourable Justice Theresa Forgeron

**Heard:** April 12, 2017, in Sydney, Nova Scotia

**Decision:** April 21, 2017

**Counsel:** Chris Corbett, on his own behalf  
Danielle MacSween, for Terri McEachren

## **By the Court:**

### **Introduction**

[1] Christopher Corbett is the father of two teenage boys who live with their mother, Terri McEachren. One of the boys has cerebral palsy and the other is diagnosed with hemophilia.

[2] Mr. Corbett pays child support under the provisions of a 2010 court order. Mr. Corbett wants to retroactively vary his child support obligation so that he pays less than the table amount. He says that he can't afford to pay the table amount. He notes that he recently was diagnosed with a rare muscular disorder that negatively affects his ability to work. Mr. Corbett also asks that all outstanding arrears be forgiven.

[3] Ms. McEachren disputes Mr. Corbett's application. She says that the children require the table amount of support. She notes that her income is considerably less than Mr. Corbett's income. Ms. McEachren wants all arrears collected and she further asks that child support be retroactively increased for 2013 and 2014 because Mr. Corbett's salary increased during those years.

### **Issues**

[4] I will resolve this application by determining the following four issues:

- What was and is the income of Mr. Corbett from 2013 to date?
- Should Mr. Corbett be excused from paying the table amount of child support because of undue hardship?
- What should the prospective child support payment be?
- Should retroactive child support be granted?

### **Background Information**

[5] At the time of the March 2010 court order, both parties were living in CBRM. The children were placed in the sole custody of Ms. McEachren. Child support was based on Mr. Corbett's projected annual income of

\$40,000. This resulted in a monthly support obligation of \$579, together with an additional monthly payment of \$100 until the \$9,736 in retroactive child support was paid in full. Further, Mr. Corbett was directed to provide Ms. McEachren with a copy of his income tax return and assessment by June 30 of each year.

[6] After the 2010 order issued, Mr. Corbett moved to Alberta to work. He became involved in a relationship with Danielle Nice. Two girls were born of this relationship. The girls live primarily with Ms. Nice while Mr. Corbett exercises regular parenting time.

[7] Mr. Corbett's income increased after the 2010 court order issued. He earned \$69,173 in 2013 and \$88,306 in 2014. Ms. McEachren was not aware that Mr. Corbett's income increased because Mr. Corbett did not provide her with copies of his tax returns and assessments.

[8] On March 9, 2015, Mr. Corbett became seriously ill while he was working. He was eventually diagnosed with a rare genetic muscle disorder – episodic rhabdomyolysis. The treating specialist, Dr. Khan provided a report to Mr. Corbett's disability provider. In this report, Dr. Khan indicated that given the episodic nature of the rhabdomyolysis, there would be periods when Mr. Corbett would exhibit fewer symptoms and have good function, but during periods of crisis, Mr. Corbett could be completely incapacitated and in need of hospitalization.

[9] Given his diagnosis, on July 22, 2015, Mr. Corbett filed an application seeking a variation of child support as of March 9, 2015.

[10] Mr. Corbett also applied for disability benefits. On August 25, 2015, he received confirmation from Great West Life that his LTD application was approved; Mr. Corbett would receive payments of \$2,500 per month effective September 8, 2015. The monthly LTD benefits were ultimately terminated on March 15, 2016.

[11] After his LTD benefits were terminated, Mr. Corbett applied for and received social assistance. He also asked for emergency relief from the court. On October 13, 2016, Associate Chief Justice O'Neil issued a holding order indicating that no ongoing child support was payable and that the collection of arrears was suspended pending a further hearing.

[12] Further, on September 20, 2016, Mr. Corbett filed an ISO application seeking the same relief as outlined in his variation application of July 22, 2015. Mr. Corbett filed another ISO application on March 23, 2017, again seeking the same relief. This decision will resolve all issues arising from the three variation applications.

[13] Sometime in 2016, Mr. Corbett began to work, at first with a hotel and then with a construction company. Mr. Corbett did not voluntarily pay child support once he resumed employment.

[14] When Ms. McEachren was served with Mr. Corbett's application, she became aware that his income increased in 2013 and 2014. As a result, she seeks a retroactive increase in child support for those years. In addition, Ms. McEachren is satisfied that ongoing child support should be based on Mr. Corbett's income.

[15] I heard the variation application on April 12, 2017. Mr. Corbett, Ms. Nice and Ms. McEachren testified. The evidence of Mr. Corbett and Ms. Nice was provided via video link. Oral and written submissions were provided and reviewed. Both parties acknowledge the existence of a material change in circumstances.

### **Analysis**

[16] **What was and is the income of Mr. Corbett from 2013 to date?**

[17] Mr. Corbett's income for 2013 and 2014 is not disputed. In 2013, Mr. Corbett earned \$69,173; in 2014, Mr. Corbett earned \$88,306.

[18] Mr. Corbett's 2015 and 2016 income is composed of taxable and non-taxable income, specifically Mr. Corbett received LTD benefits. The fact that the LTD benefits were non-taxable is confirmed in the Great West Life letter dated August 25, 2015, which was appended as exhibit C to the affidavit of Mr. Corbett filed on February 23, 2017. On page 1 of this letter, the following is stated:

#### **Payment details**

Your monthly LTD benefit is \$2500.00. This is the flat rate within your plan.

Your first LTD payment will be issued by September 8, 2015 for the period of September 8, 2015 to October 8, 2015. You can expect future benefits to be issued monthly.

Your LTD benefits are non-taxable as you pay the entire LTD premium for your coverage. As a result a T4A will not be issued.

[19] In 2015, Mr. Corbett received \$10,000 in LTD benefits; in 2016, he received \$7,500. These non-taxable benefits must be added to Mr. Corbett's taxable income. In 2015, Mr. Corbett's income is reported as \$22,244 which when added to the \$10,000 in LTD benefits equates to an annual salary of \$32,244. In 2016, Mr. Corbett shows an income of \$32,070 to which another \$7,500 in non-taxable benefits must be added for a total 2016 income of \$39,570.

[20] Ordinarily this court would gross up the non-taxable income earned. In the circumstances of this case, I will not do so because Ms. McEachren has not requested a gross up and given Mr. Corbett's financial circumstances.

[21] The following chart represents the income earned by Mr. Corbett between 2013 to 2016:

2013	69,173
2014	88,306
2015	32,244
2016	39,570

[22] On a go forward basis, Mr. Corbett's income for 2017 will be approximately \$30,000 based on his year-to-date earnings and his stated projections.

**[23] Should Mr. Corbett be excused from paying the table amount of child support because of undue hardship?**

## Law

[24] Section 10 of the *Child Support Guidelines* provides the court with the discretionary authority to reduce the amount of child support in circumstances where the payor would suffer undue hardship. Section 10 specifies a two stage test. First, the payor must prove that they would suffer undue hardship in the circumstances, including the non-exhaustive list of examples outlined in s.10(2). Second, if circumstances of undue hardship are proven, then the court must compare household standards of living. If the payor has a lower standard of living after the payment of child support, then the court may reduce the child support payable. However, the court can also refuse to reduce child support even where there is a lower household standard of living: **Hanmore v. Hanmore**, 2000 ABCA 57 (Alta. C.A.), at para. 9, leave to appeal to the Supreme Court of Canada refused at [2000] S.C.C.A. No. 182 (S.C.C.)

[25] In **Pretty v. Pretty**, 2011 NSSC 296 (N.S.S.C.), this court reviewed applicable legal principles to a claim of undue hardship at para. 78, which provides, in part, as follows:

- A narrow definition of "**undue hardship**" must be adopted to ensure that the objectives of the *Guidelines* will not be defeated. Only exceptional circumstances will justify a reduction in child support: **Hanmore v. Hanmore**, *supra*, at para 10.
- The burden of proof is on the person claiming the relief: **Hanmore v. Hanmore**, *supra*, at para 11.
- "Hardship" is defined as "difficult, painful suffering", and "undue" is defined as "excessive, disproportionate." To succeed, one must prove that the hardship is exceptional, excessive, or disproportionate in the circumstances. This produces a "very steep barrier" to a successful claim: **Hanmore v. Hanmore**, *supra*, at paras 11 and 17, and quoting from **Barrie v. Barrie** (1998), 230 A.R. 379 (Alta. Q.B.).
- A departure from the *Guidelines* for **undue hardship** should be the "exception and not the norm": **Hanmore v. Hanmore**, *supra*, at

para. 13, and quoting from **Hansval v. Hansval**, [1998] 4 W.W.R. 202 (Sask. Q.B.).

- Parents are expected to exhaust all efforts to increase their incomes and decrease discretionary expenses before consideration can be given to reduce a child support obligation: **McPhee v. Thomas**, 2010 NSSC 367 (N.S. S.C.).

[26] In **T.(L.C.) v. K.(R.)**, 2017 BCCA 64, Garson J.A. held that the trial judge erred in granting an undue hardship claim because the trial judge did not recognize the high threshold required for such a finding. The Court of Appeal noted that “[t]he test for undue hardship requires that the hardship be severe and unreasonable”: para 83.

### *Decision*

[27] I find that Mr. Corbett did not prove, on a balance of probabilities, that he is experiencing undue hardship such that he should be excused from paying the table amount of child support to Ms. McEachren. I make this finding for the following reasons:

- Mr. Corbett did not prove that his circumstances produced an undue hardship. Mr. Corbett does not actually pay child support to Ms. Nice for their two children. Both Ms. Nice and Mr. Corbett confirmed that their court order was replaced by a subsequent verbal agreement. Ms. Nice and Mr. Corbett state that no child support is expected or payable.
- Mr. Corbett and Ms. Nice do not share parenting of their two children. Mr. Corbett parents his daughters for about 48 hours every weekend, and he also takes one of his daughters to soccer for 1.5 hours on Monday and Wednesday evenings. This schedule does not equate to a shared parenting regime, but represents an approximate 69%-31% parenting schedule.
- In contrast, Ms. McEachren lives with the parties’ two teenage sons. She does not share expenses with another adult. There is no credible evidence that Ms. McEachren lives in a common law relationship. Suspicion and allegations are not proof.

- Mr. Corbett also earns significantly more income than does Ms. McEachren. Mr. Corbett currently earns about \$2,500 a month; Ms. McEachren earns \$400 per month. There is no credible evidence to suggest otherwise. Suspicion and allegations are not proof.
- Ms. McEachren has a lower standard of living than does Mr. Corbett because she earns significantly less income than Mr. Corbett and is responsible for the care of two children.
- Mr. Corbett has not produced the type of evidence that is required to succeed in an undue hardship claim. He did not prove hardship that was exceptional, excessive, disproportionate or severe and unreasonable in the circumstances.

**[28] What should the prospective child support payment be?**

[29] Child support on a go forward basis will be based on Mr. Corbett earning an annual income of \$30,000. The Alberta table for two children results in a monthly payment of \$436.

**[30] Should retroactive child support be granted?**

*Position of the Parties*

[31] Mr. Corbett seeks to have all arrears forgiven and to be excused from making a retroactive payment in 2013 and 2014 based upon what he should have paid. Mr. Corbett cites his health difficulties and his dire financial circumstances as reasons in support of his application.

[32] In contrast, Ms. McEachren states that a retroactive increase is appropriate for 2013 and 2014 and that arrears should not be forgiven based on the needs of the children. Ms. McEachren has no difficulty in child support being based on Mr. Corbett's actual earnings in 2015 and 2016.

*Law*

[33] In **S.(D.B.) v. G.(S.R.)**, 2006 SCC 37 (S.C.C.), the Supreme Court of Canada confirmed the legal test to be applied when retroactive child support is sought. Bastarache J. stated as follows:

- Child support is the right of the child and such right survives the breakdown of the relationship of the child's parents [para 3]
- The child loses when one parent fails to pay the correct amount of child support [para 45].
- Parents have an obligation to support their child according to their income and this obligation exists independent of any statute or court order [para 54].
- The payment of a retroactive award is not an exceptional remedy [para 97].
- A retroactive maintenance award should be payable from the date the custodial parent gave effective notice to the non-custodial parent [para 118]. It is generally inappropriate to make a retroactive award more than three years prior to the date when formal notice was provided to the non-custodial parent [para 123].
- The quantum of a retroactive award must be tailored to fit the circumstance of the case [para 128].
- The court must examine and balance four factors when determining the issue of retroactivity.
- The first factor concerns the reasonableness of the custodial parent's excuse for failing to make a timely application in the face of the nonpayment of child support, or in the face of an insufficient payment of child support: paras 101 and 104.
- The second factor relates to the conduct of the non-custodial parent. If the non-custodial parent engages in blameworthy conduct, then the issuance of a retroactive award is usually appropriate. The determination of blameworthy conduct is a subjective one based upon objective indicators [para 108] and the court should take an expansive view as to what constitutes blameworthy conduct in the face of the nonpayment or insufficient payment of child support: paras 106 and 107.

- The third factor to be balanced focuses on the circumstances, past and present [para 110] of the child, and not of the parent [para 113], and include an examination of the child's standard of living [para 111].
- The fourth factor requires the court to examine the hardship which may accrue to the non-custodial parent as a result of the non-custodial parent's current financial circumstances and financial obligations [para 115], although hardship factors are less significant if the non-custodial parent engaged in blameworthy conduct [para 116].

[34] In **Smith v. Helppi**, 2011 NSCA 65 (N.S.C.A.), Nova Scotia of Appeal reviewed the applicable legal test when a retroactive reduction in child support is sought, together with a forgiveness of arrears. Oland, J.A. adopted the reasoning set out in **Brown v. Brown**, 2010 NBCA 5 (N.B.C.A.) which stated the test as follows at para 21:

21 In summary, the jurisdiction to order a partial or full remission of support arrears is dependent on the answer to two discrete questions: Was there a material change in circumstances during the period of retroactivity and, having regard to all other relevant circumstances during this period, would the applicant have been granted a reduction in his or her support obligation but for his or her untimely application? As a general proposition, the court will be asking whether the change was significant and long lasting; whether it was real and not one of choice.

### *Decision*

[35] I find that Ms. McEachren has proven on a balance of probabilities that a retroactive increase in child support should be granted for the years 2013 and 2014 for the following reasons:

- Ms. McEachren did not delay in filing her application. When she became aware of Mr. Corbett's income, Ms. McEachren indicated that she wanted child support to be recalculated.
- Mr. Corbett acted in a blameworthy fashion in that he did not give his income tax returns and assessments to Ms. McEachren and he did not voluntarily increase his support payments even though his income

had increased substantially from that upon which the 2010 order was based.

- The children are in need of retroactive support. Ms. McEachren earns a limited income and is solely responsible for the care of two teenage boys. Ms. McEachren will use the retroactive support to meet the needs of the children.
- Although Mr. Corbett may experience budgeting challenges, any hardship was largely self-induced. For example, Mr. Corbett could and should have increased his child support payments when his income increased in 2013, 2014 and 2016 after he resumed work. He chose not to do so. Further, he did not ask for the holding order to be lifted once his income increased. Mr. Corbett should not benefit from this inappropriate strategy. In any event, the retroactive claim will be payable in monthly instalments which should alleviate some of Mr. Corbett's financial difficulties.

[36] I deny Mr. Corbett's application to forgive child support arrears. At no point did Mr. Corbett's annual income fall below the threshold required for the non-payment of child support. Mr. Corbett, although suffering a significant health issue, has an ability to earn income and has in fact earned significant income. His children, Brett and Austin, have the right to receive child support and they are entitled to support.

[37] In summary, I grant the retroactive child support request and refuse to cancel any arrears that are outstanding. Child support is payable as provided in the following table:

Year	Annual Income	Table Amount	Annual Amount Due	Annual Amount Paid	Arrears
2013	\$69,173	\$985	\$11,820	\$8,220	\$3,600
2014	\$88,306	\$1260	\$15,120	\$7,560	\$7,560
2015	\$32,244	\$463	\$5,556	\$5,285	\$271

2016	\$39,570	\$556	\$6,672	\$1,410.15	\$5,261.85
2017	\$30,000	\$436 x 4 months	\$1,744	\$0	\$1,744

[38] Total retroactive child support and maintenance arrears for the period between January 2013 to April 2017 equal \$18,436.85, less any additional payments received through the Maintenance Enforcement Program and for which credit has not been calculated. This retroactive award and arrears are to be paid at a rate of \$100 per month. This payment will commence after the outstanding arrears stemming from the 2010 order are paid in full.

### **Conclusion**

[39] The March 2010 child support order is varied such that Mr. Corbett will pay child support in the table amount of \$436, together with a lump sum award in the amount of \$18,436.85 which is payable at a rate of \$100 per month.

[40] Mr. Corbett's application for undue hardship is denied.

[41] Mr. Corbett's application for arrears forgiveness is denied.

[42] Ms. McEachren seeks \$1,000 costs. I am not awarding costs because Mr. Corbett has no ability pay costs given the maintenance order. Priority attaches to the payment of child support.

[43] Ms. MacSween will draft and circulate the variation order.

Forgeron, J.