SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION
Citation: *Harrison v. Falkenham*, 2017 NSSC 139

Date: 2017-05-23
Docket: 1201-65693; SFH-077905
Registry: Halifax

Between:

Connie Frances Harrison

Petitioner

v.

Michael Russell Falkenham

Respondent

LIBRARY HEADING

Judge: The Honourable Justice Elizabeth Jollimore

Heard: October 11, 2016 and January 6, 2017

Summary: Application to vary child support prospectively and retroactively, considering: entitlement of children over the age of majority, calculation of support for child over the age of majority; calculation of child support in shared and hybrid parenting arrangements, and imputation of income.

Key words: Family – child of the marriage, child support, imputing income, retroactive, variation

Legislation: *Divorce Act*, R.S.C. 1985 (2nd Supp.), c. 3
Federal Child Support Guidelines, SOR-97/175

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Heard:	October 11, 2016 and January 6, 2017
Submissions:	January 31, 2017 by Ms. Harrison January 18, 2017 by Mr. Falkenham
Counsel:	Connie Harrison for herself Mark T. Knox and Michael Potter, Articled Clerk, for Michael Falkenham

By the Court:

1. Introduction

[1] This variation application requires me to address five aspects of the *Federal Child Support Guidelines*, SOR-97/175: entitlement to child support for children over the age of majority; calculation of child support for children over the age of majority; calculation of child support in hybrid parenting arrangements; imputation of income; and retroactive child support.

[2] Connie Harrison and Michael Falkenham are the parents of three children: 16 year old Libby, 21 year old Ryan, and 23 year old Mark.

[3] The parents' most recent variation order was granted in January 2014: it contained no provision for Mark's support and did not explain how the amount of child support was determined for Ryan and Libby. Before me, the parties agreed that the order was premised on both Ryan and Libby being in a shared parenting arrangement, and calculated child support under subsection 9(a) of the *Guidelines* where Mr. Falkenham's annual income was $60,900.00 and Ms. Harrison's annual income was $44,800.00. Mr. Falkenham was ordered to pay monthly child support of $218.00 to Ms. Harrison.

[4] The parents agree that Libby has remained in a shared parenting arrangement and that Ryan has not. Ryan has spent little time in his father's home since April 2014. The parents don't agree that Ryan has had his primary home with his mother from May 2016 to date. They don't agree that Mark has remained independent.

[5] Ms. Harrison applied to change child support both prospectively and retroactively. I must deal with the prospective aspect of her application first. So, I start with her claim for a variation of child support after September 16, 2015 when she filed her variation application. Then, I consider her claim for a retroactive variation as of April 1, 2014. In August 2016, Mr. Falkenham filed a response to the variation application, seeking child support for Mark.

2. Prospective variation application: September 16, 2015 to date

2.1 Who is entitled to child support?

[6] The parties agree that Libby is entitled to support throughout the prospective period. They disagree whether Mark and Ryan are entitled.

[7] In deciding whether Mark and Ryan were entitled to child support, I have conducted my analysis in the context of *Farden*, 1993 CanLII 2570 (BC SC), paragraph 15.

2.1.1 Is Mark entitled to child support?

[8] The 2014 variation order did not include child support for Mark who was 20. Mark had been living in Calgary. He returned to Nova Scotia and, after spending one night at Ms. Harrison's, lived with Mr. Falkenham from late December 2013 until April 2014 when he moved

to Ontario to play lacrosse. I wasn't told when Mark completed high school or how long he had been living apart from his parents. Both parents knew Mark was living with Mr. Falkenham when the last order was granted: they expected Mark would move to Ontario in the spring and continue to be independent.

[9] While he lived with Mr. Falkenham in early 2014, Mark didn't attend school or look for work. Mark moved to Ontario in April and lived there until August 2014. He boarded with a family, played lacrosse, and worked at a welding shop. At the end of the lacrosse season in August 2014, Mark returned to his father's, leaving his full-time job at the welding shop.

[10] When Mark returned to Nova Scotia, he was 21. He'd been out of school for an indeterminate period. He lived with his father who said, "Mark worked very little during this time". Both parents encouraged Mark to find work. In 2015, Mark's T4 slips disclosed income of $10,337.00, derived from employment with five different local employers. He did additional work at the Halifax Forum bingo games which wasn't reflected in the T4 slips provided.

[11] Mark returned to school from December 28, 2015 until April 1, 2016, taking the Emergency Services Achievement Program. He was paid to attend the course. This course provided Mark with a work placement "in the hopes of returning to the workforce". Mr. Falkenham directed Mark to use his earnings to pay his debts because Mr. Falkenham wanted Mark to get a new start and to "get on [his] feet" before paying Mr. Falkenham back.

[12] Without question, Mr. Falkenham provided financial assistance to Mark from August 2014 until June 2016, when Mark left Mr. Falkenham's home. Mr. Falkenham paid Mark's legal bills (though Mark was eligible for Legal Aid) and Mark's phone bill. He paid the fee for a course so Mark could get his driver's license back. He "set Mark up with a gentleman who helped write up a resume and gave tips on how to look and apply for a job". Mr. Falkenham said he paid out $5,500.00 for Mark. Mr. Falkenham provided Mark with a place where he could live at no cost.

[13] Mark works full-time at Dale Fabrication.

[14] I conclude Mark was not a child of the marriage following his return to Mr. Falkenham's home in 2014. Mark was 21 and not making a serious effort to find work or to prepare himself for work. He'd worked at a welding shop, but left that job. He had no plans for his own education or work, though both his parents were pushing him to find work. During 2015, he worked at various jobs. When he took the Emergency Services Achievement Program, he was paid which would have enabled him to live independent of his father.

[15] Child support is an entitlement of a child of the marriage: a person who is unable to be self-sufficient because of illness, disability or some other cause. Other cause has been interpreted to mean that the person is pursuing an education which will ready him or her for appropriate entry level employment.

[16] Mr. Falkenham was very generous in assisting Mark with his needs. However, the *Divorce Act*, R.S.C 1985 (2nd Supp.), c. 3 does not entitle children whose parents are divorced to

be supported while they are underemployed. It is more limited in the obligation it imposes on parents – illness, disability or other cause (education) that prevents the child from withdrawing from the parents' charge or obtaining the necessaries of life: *Divorce Act*, subsection 2(1). Mark was not within those categories.

[17] Mr. Falkenham has failed to prove that Mark regained the status of child of the marriage, so I make no order for child support for Mark.

2.1.2 Is Ryan entitled to child support?

[18] As of September 2015, Ryan was taking courses at Dalhousie University and at St. Mary's University, and living at Ms. Harrison's home. Ryan had various surgeries and stayed with Ms. Harrison during his recovery periods.

[19] Ryan is a child of the marriage entitled to receive child support. He is enrolled in university, successfully pursuing a reasonable course of study. Because of his career with a hockey team, his post-secondary education costs are paid. By times, Ryan is employed and able to contribute to his own support. He has not unilaterally terminated his relationship with either parent.

[20] Since May 2016, Ryan's primary home has not been with Ms. Harrison. In May 2016 Ryan left Ms. Falkenham's home to live with a "wealthy friend". In July 2016, Ryan purchased a two-unit rental property. Ryan has lived with his girlfriend at times and, at other times, he provided a place for his mother to stay. At the time of the hearing, Ryan was sharing a place with three roommates. Ms. Harrison planned to have a two-bedroom apartment following the sale of her home in late 2016. This plan doesn't readily permit her to offer a home to Ryan and to Libby. That Ryan doesn't have his primary home with his mother doesn't mean he is no longer a child of the marriage. However, it is relevant to how child support is calculated.

2.2 What parenting arrangements are in place?

[21] Libby is in a shared parenting arrangement. While each parent has suggested that, at times, Libby had spent more time with him or her, neither has proven that Libby has spent less than forty percent of the time with the other parent "over the course of a year" as required by section 9 of the *Guidelines*, so I must calculate child support for Libby according to section 9.

[22] Both parents agree that Ryan had his primary home with Ms. Harrison from September 2015 until May 1, 2016.

2.3 Calculating child support

[23] Calculating child support is complex. Libby is in a shared parenting arrangement which requires considering the circumstances in each parent's home. In addition to determining how Ryan's support should be calculated (whether under subsection 3(1) or under clause 3(2)(b) of the *Guidelines*), I must determine how to calculate support in a hybrid situation where both a primary care parenting arrangement and a shared custody parenting arrangement exist.

2.3.1 How to calculate child support for Ryan?

[24] Because Ryan turned 19 in October 2014, I must decide whether it is inappropriate to calculate his support by applying the *Guidelines* as if he was under the age of majority.

[25] The word "inappropriate" was considered by the Supreme Court of Canada in *Francis v. Baker*, 1999 CanLII 659 (SCC). I apply the reasoning in that case to subsection 3(2) of the *Guidelines* which means that I follow the *Guidelines* as if Ryan was under the age of majority unless there's clear and compelling evidence that this approach is unsuitable. If I determine this approach is inappropriate, then I am to consider Ryan's condition, means, need and other circumstances, and each parent's financial ability to contribute.

[26] The closer a child's circumstances match those where the *Guideline*s apply (i.e., the child lives at home, the parent who provides the home makes a significant contribution to the child's support by providing the home, the child does not earn an income and is dependent on the parents), the less likely the approach in subsection 3(1) will be inappropriate: *Wesemann*, 1999 CanLII 5873 (BC SC) at paragraph 31.

[27] I find that it is not inappropriate to calculate child support for Ryan based on the *Guidelines* from September 2015 until April 30, 2016. Ryan lived at his mother's home. Ryan was recovering from multiple surgeries. From his hockey career, Ryan had the means to finance his post-secondary education, but there were no special funds available to pay his living costs.

[28] I find it is inappropriate to calculate child support for Ryan based on the *Guidelines* as of May 1, 2016, when Ryan's circumstances changed. His residence was not at his mother's on a constant basis. He lived with a "wealthy friend" in a condominium. He stayed with his girlfriend. In July 2016, he purchased a two-unit rental property. During the fall of 2016, Ryan even provided Ms. Harrison with a place to live as she and her partner separated and arranged to sell their home. In these circumstances, it's appropriate to determine child support for Ryan based on his own condition, means, need and other circumstances and each parent's financial ability to contribute.

2.3.2 How to calculate child support in hybrid circumstances?

[29] The *Guidelines* explain how to calculate child support in primary care, split custody and shared parenting circumstances. Hybrid parenting arrangements are those where one or more children are in a primary care parenting arrangement and one or more children are in a shared custody parenting arrangement. The *Guidelines* do not explain how to calculate child support in hybrid parenting arrangements.

[30] There are two different ways to calculate support in hybrid parenting circumstances. In New Brunswick, Newfoundland and Labrador, Ontario, and British Columbia, the economies of scale approach is used. In Saskatchewan, Yukon, and Northwest Territories the two-stage approach is used. There are no written decisions in Nova Scotia on child support in hybrid cases. I found no decision where the hybrid parenting arrangement includes a child over the age of majority whose child support is calculated under clause 3(2)(b) of the *Guidelines*.

[31] The economies of scale approach recognizes that, for example, the costs in a household comprised of six people are not six times greater than the costs of a single person household.

[32] The table amounts of the *Guidelines* are built on Statistics Canada's 40/30 Equivalence Scale and its empirical foundation that there is an approximately 40% increase in household expenses when a second full-time member is added to the household and an approximately 30% increase in household costs for each additional full-time member added to the household.

[33] If the economies of scale approach is used, I determine the amount of support Mr. Falkenham would pay Ms. Harrison for Libby and Ryan, and offset this against the amount Ms. Harrison would pay Mr. Falkenham for Libby, who is in shared custody. I would then complete the section 9 analysis, considering subsections 9(b) and 9(c).

[34] If the two-stage approach is used, I first determine the support payable for Ryan under the presumptive rule of section 3 – as if he is the only child in Ms. Harrison's home - and then determine the support payable for Libby under section 9.

[35] The economies of scale approach is said to have an advantage over the two-stage approach because the two-stage approach calculates Ryan's support in isolation from Libby's, ignoring the possibility of any economy of scale for the two children in Ms. Harrison's home. The economies of scale approach is also said to retain the flexibility to examine the actual financial circumstances of the parties and the children: *Sadkowski v. Harrison-Sadkowski*, 2008 ONCJ 115 at paragraphs 26-27.

[36] Between the two approaches, I determine that the economies of scale approach is the correct one to use. I do this for four reasons.

[37] First, by starting with Mr. Falkenham's child support amount for two children, it respects the *Guidelines*' quantification of the economy of scale.

[38] Second, by offsetting Ms. Harrison's child support for Libby, it incorporates the analysis of subsection 9(a) into the calculation.

[39] Third, it brings the remainder of section 9 into the analysis, ensuring the integrity of section 9 as a complete code for the determination of child support in shared custody circumstances is respected.

[40] Fourth, it better meets the *Guidelines'* objective of ensuring consistent treatment of similarly situated spouses and children by reflecting economies of scale.

[41] My next step is to determine the parents' incomes.

2.4 What is each parent's income?

2.4.1 Should income be imputed to Ms. Harrison?

[42] Mr. Falkenham asked me to impute an annual income of $82,475.05 to Ms. Harrison.

[43] Ms. Harrison said that no income should be imputed to her and I should determine her income to be the total of her earnings, less her professional dues and her work expenses. This means her annual income would be $55,841.13 as shown below.

Sixty percent position at hospital	$49,642.98
Sexual Assault Nurse Examiner earnings	$10,747.55
Less professional dues to the Nova Scotia Nurses Union and the College of Registered Nurses of Nova Scotia	($1,419.79)
Less work expenses (average of 2014 and 2015 expenses)	($3,129.60)
Total income	$55,841.13

[44] At the hospital, Ms. Harrison is paid $38.70 per hour and she earns an extra $1.85 per hour for the night shift. She works 45 hours every two weeks. Full-time staff work 75 hours every two weeks.

[45] Working as a Sexual Assault Nurse Examiner requires Ms. Harrison to be on call, available to perform examinations. She's required to work eight on call shifts each month. A shift appears to be twelve hours long, based on the invoices provided. If she performs an examination or works on client files, she is paid an additional amount. Based on the invoices, Ms. Harrison is paid $5.30 for each hour that she is on call and $40.00 per hour for her client care hours.

[46] Ms. Harrison testified that she could likely move to a full-time position at the hospital if she requested such a move. She has chosen not to do this for three reasons: she has a young child from another relationship; Ryan, her father and her now-former partner have had health problems; and she also works as a Sexual Assault Nurse Examiner.

[47] I find it is appropriate to impute income to Ms. Harrison based on full-time employment. I find she is underemployed and this is not required by the needs of a child or her own reasonable education or health needs.

[48] Ms. Harrison's youngest child is now of school age. She and the child's father are now separated and she expected the child would be in a shared parenting arrangement, alternating weeks between her home and the father's home. The child's attendance at school and the shared parenting arrangement mean that the child's needs don't require Ms. Harrison to be employed on a part-time basis. She has the capacity to work longer hours.

[49] It's not expected that Ryan will have any more surgery. Ms. Harrison's relationship has ended, so she won't be required to care for her former spouse. Continuing care for her father is a lesser obligation than caring for her father, her son, and her partner.

[50] Working 35 hours bi-weekly at the hospital and 96 hours each month on call means that Ms. Harrison works and is on call for roughly 172 hours each month. A full-time employee works roughly 162 hours. If Ms. Harrison worked full-time at the hospital she could earn $82,738.30, while dedicating less time to her employment.

[51] I impute an annual income of $82,738.30 to Ms. Harrison beginning in 2017. This amount is calculated by taking the amount she earns working a sixty percent position and converting it to a full-time (100%) position. From this, I must still deduct her professional dues to the Nova Scotia Nurses Union and the College of Registered Nurses of Nova Scotia. This reduces her imputed income from $82,738.30 by $1,419.79 to a total annual income, for child support purposes, of $81,318.51.

[52] In 2015 and 2016, Ms. Harrison was required to care for Ryan and her youngest son, who hadn't started school. The youngest son's father travelled as a requirement of his work, leaving Ms. Harrison to care for the child. In these years, I find Ms. Harrison's income to be the amounts shown on line 150 of her tax returns. Her underemployment was required by the health and care needs of her children. In 2015, her income for child support purposes was $60,572.00 and in 2016, her income for child support purposes was $55,841.13.

2.4.2 Should Mr. Falkenham's retention bonus be treated as income for child support purposes in 2016?

[53] Mr. Falkenham estimated his 2016 income was $68,619.82. In making this estimate, he excluded a retention bonus of $9,000.00 that he was paid. Mr. Falkenham said that this bonus "should be treated as income in future year(s), in accordance with how and when he withdraws the funds from the RRSP" into which the bonus was deposited.

[54] Ms. Harrison included the retention bonus in her calculation of Mr. Falkenham's 2016 income and said his income for that year should be set at $77,619.82.

[55] Mr. Falkenham offered no legal authority for deferring the inclusion of his retention bonus into his income.

[56] Mr. Falkenham's retention bonus should be treated as current income for child support purposes in 2016 and $77,619.82 will be the basis of his prospective support obligation. Mr. Falkenham's retention bonus, having been considered now, shall not be considered income when the funds are withdrawn from his RRSP.

[57] It's a fundamental principle of child support that the amount of support changes to reflect changes in the paying parent's income. Children are to receive the benefit of their parent's income *when* the parent receives the income. Deferring the benefit may disadvantage the child: consider what would happen if Mr. Falkenham didn't withdraw the retention bonus from his RRSP until he retired. There would be no children entitled to support and the children would never receive the benefit of this money.

[58] In Schedule II, the *Guidelines* permit some deductions in determining the income on which child support is based. The *Guidelines* do not permit me to postpone including sums of money into my calculation of a parent's income where the parent has deferred those sums to future use by way of RRSPs, savings, pensions or Canada Pension Plan contributions.

[59] Mr. Falkenham will need to monitor the change in the value of this $9,000.00 contribution so he can prove future withdrawals stem from it and are not counted a second time when he withdraws money from the RRSP.

2.5 Child support calculations

[60] Ms. Harrison's prospective claim for child support covers four periods: first, from September to December 2015; second, from January to April 2016; third, from May 2016 to December 31, 2016; and fourth, from January 1, 2017 onward. These periods are distinguished by the parents' incomes and differing approaches to determining Ryan's support.

[61] My calculations do not address special or extraordinary expenses. Ryan's university costs are financed by scholarships earned while he played hockey and Libby's are implicit in my section 9 analysis: the parents have shared the cost of Libby's activities equally and this shall continue.

2.5.1 Child support from September 16, 2015 to December 31, 2015

[62] From September 16, 2015 to December 31, 2015, Ryan was in his mother's primary care and Libby was in shared parenting. Mr. Falkenham's income was $65,723.79 and Ms. Harrison's income was $60,572.00.

[63] Mr. Falkenham would pay Ms. Harrison monthly child support of $912.00 which would be offset against Ms. Harrison's payment of $512.00 for a net payment of $400.00.

[64] Subsection 9(b) of the *Guidelines* requires me to consider the increased costs of the shared custody arrangements. Neither party provided any evidence of any increased costs arising from Libby's shared custody.

[65] Subsection 9(c) requires me to consider the condition, means, needs and any other circumstances of each spouse and of any child for whom support is sought. Both parents provided Statements of Expenses which allow me to compare and contrast their standards of living. In his Statement of Expenses, Mr. Falkenham overestimated his CPP and EI premiums and underestimated his income taxes. His Statement shows less discretionary spending on holidays than Ms. Harrison, and similar levels of expense for other items. Ms. Harrison has more employment-related expenses (pension, union dues, medical plan) than Mr. Falkenham. Otherwise, the condition, means, needs and other circumstances of the parties, as reflected in their Statements of Expenses are quite similar.

[66] I conclude that the parents' actual spending patterns and the standard of living in each household do not require me to make any further adjustment to the set off amount that I

calculated in paragraph 63. For September, October, November and December 2015, Mr. Falkenham shall pay Ms. Harrison child support of $400.00.

2.5.2 Child support from January 1, 2016 to April 30, 2016

[67] From January 1, 2016 to April 30, 2016, Ryan was in his mother's primary care and Libby was in shared parenting. Mr. Falkenham's income was $77,619.82 and Ms. Harrison's income was $55,841.13.

[68] Mr. Falkenham would pay Ms. Harrison monthly child support of $1,070.00 which would be offset against Ms. Harrison's payment of $470.00 for a net payment of $600.00.

[69] Again, I have no evidence of any increased costs arising from Libby's shared custody under subsection 9(b) of the *Guidelines*.

[70] Having regard to subsection 9(c), given the parents' Statements of Income, I conclude that the parents' actual spending patterns and the standard of living in each household do not require me to make any further adjustment to the set off amount of $600.00. This amount allows the children to benefit from their father's increased income and preserves a comparable standard of living in the parents' homes for Libby. For January, February, March and April 2016, Mr. Falkenham shall pay Ms. Harrison child support of $600.00.

2.5.3 Child support from May 1, 2016 to December 31, 2016

[71] I've determined that it's inappropriate to calculate child support for Ryan under clause 3(2)(a) for the period after May 1, 2016. Ryan's support must be determined considering his condition, means, needs and other circumstances and each parent's ability to contribute to his support.

[72] Ryan is a successful university student. Depending on the demands of his work and health, he has attended university part-time and full-time. He is hardworking and, in addition to attending university, he earns money by operating a two-unit rental building, marking university papers, and scouting for a hockey team. The rental building generates gross monthly rent of $2,000.00. There are associated expenses which were not quantified. Mr. Falkenham offered evidence that Ryan would receive "$500 more than his expenses" from renting both units.

[73] Ryan's greatest expense is for his university education which is fully financed by his past hockey career. I was not provided with Ryan's Statement of Expenses, identifying his other costs.

[74] There was no evidence that Ryan wasn't able to support himself during the times he lived away from his mother's home. He now has a rental property and income from it, as well as earnings.

[75] I have concluded that Ryan is a child of the marriage and entitled to receive child support. The amount of Ryan's entitlement depends, under clause 3(2)(b) of the *Guidelines*, on

his circumstances and his parent's ability to contribute. Ms. Harrison, who claims child support for Ryan, has not proven Ryan needs any amount of child support. I dismiss her claim for child support payments for Ryan, but acknowledge his entitlement.

[76] I am left to consider the claim for child support for Libby. The set off amount of $187.00 is based on Mr. Falkenham's income of $77,619.82 and Ms. Harrison's income of $55,841.13. There is no adjustment to be made relating to additional costs because of the shared custody arrangement. I have determined that Ryan no longer had his primary home at his mother's as of May, 2016. While this would have decreased certain of Ms. Harrison's costs, she still would have had a home sufficient for him until she sold the home. So, I find it is appropriate to maintain an increased level of support – beyond the set off amount – so that Libby would not experience a decline in her living standard because of the change in Ryan's circumstances. In making this decision, I consider Judge Sparks' decision in *Elliott v. MacAskill*, 2005 NSFC 20. From May, 2016 until and including December 2016, Mr. Falkenham shall pay Ms. Harrison monthly child support of $300.00 for Libby.

2.5.4 Child support from January 1, 2017 onward

[77] In 2017, I calculate the set off amount based on the income I have imputed to Ms. Harrison. At $81,318.51, she would pay Mr. Falkenham $688.00. He would pay her $657.00. Ms. Harrison would pay Mr. Falkenham the set off amount of $31.00.

[78] There is no adjustment to be made for additional shared custody costs.

[79] I have noted the similarity in the parents' actual spending patterns and the standard of living in each household. It is unnecessary to adjust the set off amount to ensure Libby has an equivalent standard of living in each household. From January 1, 2017 onward, Ms. Harrison shall pay Mr. Falkenham monthly child support of $31.00 for Libby. The parents will continue to share Libby's expenses in their current fashion.

3. Retroactive variation application: April 1, 2014 - September 16, 2015

3.1 Should child support be varied retroactively?

[80] Ms. Harrison asked that child support be varied effective April 1, 2014 - roughly two months after Justice Campbell granted the order she seeks to vary and roughly seventeen months before she filed her variation application.

[81] Parents are responsible for continually ensuring that their children receive an appropriate amount of support. In deciding whether to vary child support retroactively, I must balance Mr. Falkenham's interest in certainty (not varying the order) and the children's interest in fairness and flexibility (varying the order). I must consider: the reason for Ms. Harrison's delay in seeking to vary the order; Mr. Falkenham's conduct; the past and present circumstances of the children (including the children's needs when the support ought to have been paid); and whether a retroactive award would cause hardship.

3.2 Was Ms. Harrison's delay in applying to vary reasonable?

[82] Ms. Harrison did not offer a reasonable explanation for her seventeen-month delay in applying to vary the child support payments.

[83] Ms. Harrison said that by April 1, 2014 it was known that Ryan had not reverted to a shared parenting arrangement as the parents anticipated he would: within approximately two months of the order being granted, she knew the order wasn't appropriate for the existing circumstances.

[84] Ms. Harrison swore that before filing her variation application in September 2015, she "made several contacts with Mike requesting he and I adjust the child support for Ryan but he was not agreeable." She provided copies of emails sent to Mr. Falkenham on August 14, 2015 and August 22, 2015. She requested a response by August 26, 2015. Mr. Falkenham acknowledged receiving an email in August requesting that child support be adjusted. Ms. Harrison did not seek to vary child support until August 2015, though she knew the existing order was not appropriate in April 2014.

[85] I conclude that Ms. Harrison didn't offer a reasonable explanation for her delay because she offered no explanation for it.

3.3 Was Mr. Falkenham's conduct blameworthy?

[86] Ms. Harrison says that Mr. Falkenham's conduct was blameworthy in (a) failing to fully disclose billeting money he received for Ryan; (b) keeping billeting money he received when Ryan lived with Ms. Harrison; and (c) not disclosing his receipt of a retention bonus until he was cross-examined.

[87] Blameworthy conduct is viewed expansively and is any conduct which privileges the payor parent's own interests over the children's right to the appropriate amount of support: *DBS v. SRG; LJW v. TAR; Henry v. Henry; Hiemstra v. Heimstra*, 2006 SCC 37 at paragraph 106.

[88] Ryan's billeting money has long been a contentious issue for Ms. Harrison. Billeting money is paid to those with whom hockey players live, to defray costs for additional food, transportation to and from practices and games, and fitness supplements, for example. Billeting money is paid even when the player lives with his own family.

[89] Mr. Falkenham failed to fully disclose the billeting money he received for Ryan. He provided some disclosure but it was incomplete. Incomplete disclosure feeds Ms. Harrison's suspicions that something is amiss.

[90] While the money was for Ryan's additional expenses, Mr. Falkenham chose to pay those expenses and to save the billeting money for Ryan's future costs, including the purchase of a car which made it easier for Ryan to get to school, hockey and work. The savings meant that Mr. Falkenham didn't seek a contribution from Ms. Harrison to the future costs.

[91] I find there is no blameworthiness in how Mr. Falkenham conducted himself in receiving, saving and spending the billeting money he received for the time when Ryan lived with him.

[92] Additionally, Ms. Harrison said Mr. Falkenham kept the billeting money he received during a six-month period when Ryan was living with her and she should have received it.

[93] Mr. Falkenham testified that Ms. Harrison did not ask him for the billeting money. Mr. Falkenham said he continued to save the money because Ryan said he wanted the money to be saved, and that Ms. Harrison agreed Mr. Falkenham could keep the money.

[94] When children are caught in the middle – acting as messengers between parents – there can be problems. A child, even one who is 19, may relay messages inaccurately between parents. A child, even one who is 19, may speak on behalf of one parent without actually asking that parent what that parent wants, attempting avoid conflict or to achieve the child's own purpose.

[95] Direct communication between the parents could have avoided this problem. The failure to communicate is as much Ms. Harrison's failure as it is Mr. Falkenham's. The failure does not come within the definition of blameworthy conduct because it does not privilege Mr. Falkenham's interests over those of his children to receive an appropriate amount of support. I conclude that this is not blameworthy conduct.

[96] Mr. Falkenham disclosed that he received a $9,000.00 retention bonus for continuing to work after his employer had been sold, during his cross-examination in January 2017. He received this money at some point in August 2016. He explained that he didn't mention the retention bonus when he filed his pay statements on August 16, 2016 because he was still trying to negotiate a larger bonus and hadn't received the bonus yet. Mr. Falkenham filed an affidavit on September 13, 2016 in which he didn't mention of the bonus. He said he forgot about it. While it is possible he forgot the bonus, it is unlikely: in the previous month, he actively negotiated the bonus, received it and arranged to deposit to his RRSP.

[97] Failing to disclose income is usually blameworthy because it reduces child support. Mr. Falkenham's retention bonus doesn't affect the amount of support he would pay during the retroactive period because it wasn't received during the retroactive period. Bonus information would have been available to Ms. Harrison when Mr. Falkenham provided her with his 2016 tax return: she learned of the bonus during the hearing, after it was received, and before Mr. Falkenham's 2016 tax return would be prepared and disclosed.

3.4 The children's circumstances

[98] Ms. Harrison has provided no evidence of the children's past and present circumstances or their needs during the time when the retroactive award would have been paid. She did not file a Statement of Expenses identifying the children's costs.

[99] During the retroactive period (April 1, 2014 – September 16, 2015), Libby continued to be in a shared parenting arrangement deriving the benefit of being in each parent's home. In

addition to his child support payments, each month Mr. Falkenham paid $50.00 toward Libby's school fees and supplies, and $300.00 toward her sports costs. Ms. Harrison contributed equally to these costs.

[100] During the retroactive period, Ryan lived primarily with his mother. His educational costs were financed by his hockey career. Ryan provided a 2014 T4A showing other income of $3,217.09, and a 2015 T4A showing other income of $9,851.58. In addition to his child support payments, each month Mr. Falkenham paid $65.00 for Ryan's phone and $50.00 for Ryan's MacPass.

[101] Mark was solely supported by his father with no financial assistance from his mother. Mr. Falkenham testified that he spent $5,500.00 on Mark's expenses. Mark was not and is not a dependent child, but his expenses were being borne by his father.

[102] Ryan now owns a property which contains two rental units. Ms. Harrison testified that Ryan's educational costs are paid and that they may be paid entirely even if Ryan goes on to earn a Master's degree.

[103] The only child who would benefit from a retroactive award is Libby. She is in a shared parenting arrangement: a transfer of money from her father's home to her mother's would disadvantage one home where she lives in favour of the other home.

[104] I am satisfied that the children's needs have not suffered during the retroactive period.

3.5 Would a retroactive award cause hardship?

[105] Mr. Falkenham lost his job when his employer closed its local operation. His salary will continue until July 2017. He received a retention bonus for staying at work, rather than leaving quickly for another job. As of January, 2017, Mr. Falkenham hadn't found replacement employment. He was working part-time at a warehouse and earned very small amounts acting as a referee at volleyball games.

[106] Mr. Falkenham's financial circumstances are more precarious than Ms. Harrison's: she has stable employment and could, she testified, work greater hours at the hospital. He has lost his job and has found no replacement.

[107] I find that a retroactive award of child support would create undue hardship for Mr. Falkenham. Where Libby is in a shared parenting arrangement, an award would have an impact on her home with her father.

3.6 Dismissal of retroactive variation application

[108] Considering all the factors and the fundamental principles of child support, I decline to award retroactive child support to Ms. Harrison. Her unexplained delay would foster Mr. Falkenham's belief that the child support order remained appropriate and acceptable. Mr. Falkenham's conduct did not contribute to Ms. Harrison's delay or privilege him at the

children's expense. The children did not receive enhanced support during the retroactive period, but Mr. Falkenham made additional provision for the children beyond the requirements of the 2014 variation order. A retroactive award would cause hardship to Mr. Falkenham.

4. Future variation

[109] Mr. Falkenham predicted that his income will likely change in July 2017, depending on whether he finds a job. He asks that I grant an order that would "enable the parties to account for this without returning to the Court for a subsequent Variation Application". He offers no suggestion how this might be done.

[110] Libby is in a shared parenting arrangement, income has been imputed to Ms. Harrison, and I have found that it is inappropriate to determine Ryan's child support by applying the *Guidelines*. Each of these circumstances requires the exercise of discretion to determine child support. Without knowing Mr. Falkenham's future income, I cannot determine what amount of child support would be appropriate in the future.

[111] If the parties cannot agree, they must have recourse to the court.

5. Costs

[112] Ms. Harrison failed in her request for retroactive child support.

[113] Mr. Falkenham failed in his request for child support for Mark.

[114] Child support was varied prospectively, which benefit both Ms. Harrison and Mr. Falkenham, since each receives child support at different times.

[115] Each parent was successful in arguing that the income of the other ought be increased for the purpose of determining child support.

[116] I am not inclined to make an award of costs given the divided success. However, I do not know whether settlement offers have been made or if there is some other relevant consideration. If either party wishes to make submissions on costs, they must be filed at the court and delivered to the other party no later than June 16, 2017.

6. Conclusion

[112] I dismiss Mr. Falkenham's claim for child support for Mark. Mark is not a child of the marriage and is not entitled to child support. I dismiss Ms. Harrison's claim for retroactive child support.

[113] For September, October, November and December 2015, Mr. Falkenham shall pay Ms. Harrison child support of $400.00 for Libby and Ryan.

[114] For January, February, March and April 2016, Mr. Falkenham shall pay Ms. Harrison child support of $600.00 each month.

[115] From May, 2016 until and including December 2016, Mr. Falkenham shall pay Ms. Harrison monthly child support of $300.00 for Libby.

[116] Mr. Falkenham's past payments are to be offset against the new amounts owed.

[117] From January 1, 2017 onward, Ms. Harrison shall pay Mr. Falkenham monthly child support of $31.00 for Libby.

[118] Throughout, the parents will continue to share Libby's expenses in their current fashion.

[119] Mr. Knox shall prepare the variation order.

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

Halifax, Nova Scotia