**SUPREME COURT OF NOVA SCOTIA**
**Citation:** *Morrison v. Morrison*, 2017 NSSC 163

**Date:** 2017-06-15
**Docket:** Ken No. 1204-004306
**Registry:** Kentville

**Between:**

Leigh Thomas Morrison

Applicant

v.

Cheryl Anne Morrison

Respondent

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**LIBRARY HEADING**

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| **Judge:** | The Honourable Justice Peter P. Rosinski |
| **Heard:** | June 6 and June 8, 2017 in Kentville, Nova Scotia |
| **Final Written Submissions:** | June 9, 2017 |
| **Written Decision:** | June 16, 2017 |
| **Subject:** | s. 17 Divorce Act retroactive variation of table amount and s. 7 expenses claim by payor parent on basis of *de facto* shared parenting arrangement arising after the CRJ. |
| **Summary:** | Payor parent claiming four years of overpayment on child support obligations, and reasonableness of private off-campus rental for child attending university. |
| **Issues:** | (1) Can payor parent claim retroactive repayment of table amount and s. 7 expenses as a result of change in custody, especially *de facto* shared parenting?<br>(2) Are "without prejudice" settlement offers admissible when costs are being considered? |

**Result:**

1. No precedent found that would allow payor parent to use D.B.S. v. S.R.G. principles to claim retroactive overpayments be repaid in the circumstances of this case. Claim rejected on specific facts here;

2. "Without prejudice" settlement offers presumptively inadmissible in costs context.

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| **Editorial Notice:** | The electronic version of this decision has been modified to remove some personal information |
| **Judge:** | The Honourable Justice Peter P. Rosinski |
| **Heard:** | June 6 and June 8, 2017, in Kentville, Nova Scotia |
| **Final Written Submissions:** | June 9, 2017 |
| **Counsel:** | Lynn M. Connors, Q.C. for the Applicant<br>Donald Urquhart for the Respondent |

**By the Court:**

## Introduction

[1] Leigh and Cheryl were married September 2, 1995, separated October 21, 2005, and were divorced March 1, 2007. They had three children while married:

- *Lauren* […] – she is presently 21 years old;
- *Roslyn* […] – she is presently 18 years old;
- *Ethan* […] – he is presently 16 years old.

[2] After extensive negotiations, their counsel (who are their present counsel in this proceeding) presented the court with a consented-to Corollary Relief Judgment, which was signed by Justice Goodfellow, and issued on June 13, 2007. Since then, Leigh has been paying $1,628 per month child support for three children based on his then income of $92,000.

[3] On April 10, 2017, Leigh filed an application to vary his child support obligations pursuant to s. 17 of the *Divorce Act*. He says the circumstances of the children have changed materially since June 2007, and he seeks retroactive variation of his child support obligations back to January 1, 2013. Significantly, he claims that since January 1, 2013, there has been in place a de facto "shared parenting" arrangement for the children-therefore his child support obligations (table amount and s. 7 expenses) should be modified retroactively and prospectively to account for the different household incomes of Leigh and Cheryl throughout those time periods.

[4] They have both re-partnered:

- Cheryl, for the last four years with William Seto;
- Leigh, since at least the last four years with Tana Morrison, who has two children, Taylor and Maggie MacMillan, respectively, DOB: May 27, 2001 and July 17, 2004.

[5] I recognize that there was contact between counsel for Leigh and Cheryl as early as May 2016 regarding some of the issues herein. Nevertheless, the fact remains that Leigh was intimately aware of all the children circumstances, especially Lauren's, yet waited until April 10, 2017 to make his application to terminate child support obligations in relation to the payments he was making to Cheryl.

[6] In order to successfully make his claims, Leigh must satisfy the court:

i. That there has been a material change in the circumstances of the children since June 2007 (whether a de facto shared parenting situation later arose, or other material changes in circumstances) - **I am satisfied there has been a material change in circumstances, among other things, as a result of Lauren no longer being a child of the marriage;**

ii. What effect the material change in circumstances had/has upon Leigh's child support obligations - I will explain the effects in greater detail later;

iii. For what past time period he is entitled to retroactive variation of his child support obligations (see *DBS v SRG*, 2006 SCC 37 and *Contino v Leonelli-Contino*, 2005 SCC 63) - **I am not satisfied that variation of Leigh's child support obligations should take effect before May 1, 2017**; and

iv. What costs award, if any, should be made.

[7] Let me explain in greater detail.

## 1- Has there been a material change in circumstances?

### *Position of the parties*

[8] In his June 2, 2017 brief, Leigh specifically claims the following (in addition to claiming there has been a *de facto* shared parenting arrangement since January 1, 2013):

i. Retroactive termination (as of September 2014 – this was modified in his June 9, 2017 brief to effective January 1, 2015 and ending April 1, 2017) of his obligation to pay table amount support for *Lauren*, because "she commenced University and was no longer resident with [Cheryl]"- Leigh's brief p. 14;

ii. Termination (as of August 31, 2017) of his obligation to pay table amount support for *Roslyn*, "as she will be attending University in September 2017"- p. 14, brief;

iii. Retroactive (to January 1, 2013) proportional sharing of s. 7 expenses, and the monthly table amount child support for the children based on a *de facto* shared parenting arrangement.

[9] Leigh also claims that there has been "a material change in the financial circumstances":

- For him, as a result of: Tana Morrison's inability to continue working as a nurse (which I note is only relevant if shared parenting and household incomes are to be considered – which I find is not the case here); and
- For Cheryl, as a result of an increase in her own employment income, and because she has re-partnered with William Seto, giving their household a greater overall income (which I note is only relevant if shared parenting and household incomes are to be considered – which I find is not the case here).

[10] Cheryl agrees that Lauren is no longer a child of the marriage- brief, p. 1, and that Roslyn is no longer following the parenting schedule, but notes she has plans to attend Acadia University in September 2017. Ethan is still following the parenting schedule.

**Credibility findings**

[11] The only witnesses were Leigh and Cheryl. I observed them closely while they testified. Generally, I find that both were credible, however, where the evidence between them varied, I preferred the evidence of Cheryl.

[12] I say this because I found her evidence to be given in a candid, consistent and clear manner and responsive to the questions asked. She frequently admitted facts that may have placed her in an unfavourable light with the court – e.g. that Leigh had contributed "99%" of Ethan's hockey expenses; she agreed that she contributed nothing to the purchase of either vehicle for Lauren or Roslyn, nor that she paid any amounts towards the maintenance and costs thereof; nor that she contributed towards cell phones or laptops for the kids, any monies towards Lauren's student loan repayment etc. She was not caught in any contradictions throughout her evidence. Her evidence was consistent with the documentary evidence.

[13] In contrast, at times I had concerns regarding the reliability of Leigh's evidence - e.g. I find as a fact that he was reimbursed or at least was reimbursable by a third party for the computer he bought for Lauren, yet he included this amount

as a s. 7 claim; I find as a fact that of the $6,600 for Ethan's braces, which were presented as a s. 7 expense, Leigh was ultimately reimbursed by insurance plans from Cheryl and Walter in the amount of $4,000, and the remainder was reimbursed to him either through Tana Morrison's or his own health plan; Leigh claimed Ethan skates, which I find Cheryl's Visa card receipt references their payment. He appeared to claim that "he" personally bought Roslyn a car – yet the documentary evidence suggests that the car was invoiced to the corporation which he co-owns with his brother, Workplace Essentials Ltd-and similarly so for Ethan's laptop computer.

[14] While testifying, I found his answers were sometimes interspersed with self-serving explanations – e.g. he was asked when Lauren moved in with him in January 2015, didn't he consider making an application to vary his child support obligations at that time [given that she continued to live there until April 2017] – he answered "I have no answer for that… sometimes you get bullied off your intentions…". If at all, he only very infrequently provided answers that would cast Cheryl in a good light, when it might have been appropriate to do so (for example for her continuing to accumulate an RESP for the children's education after their divorce) and he criticized her for her (in my view understandable) frugal financial approach with the children.

[15] I find as a fact that he knowingly, voluntarily, and in a calculated manner, deferred making an application to vary his child support obligations until April 2017. That he brought up some of the issues as early as May 2016 is no answer, because the crux of his position was that there was a *de facto* shared parenting arrangement in place since 2013, and he knew Cheryl did not agree with that position at any time. Moreover, while he may have delayed his application, so to avoid what he believed would be a negative reaction from his children, that is not a good reason in law for his now late claim for retroactive variation. He could have done so as early as January 2015 when Lauren came to live with him, particularly since he stated in his affidavit June 1, 2017 para. 5, that he believed "[Cheryl] completely abandoned Lauren by drawing a line in the sand… completely ignored these issues as it was inconvenient for her… paying rent at [Cheryl's] was not the "whole" reason Lauren did not live with [her]. [Cheryl] compares to [sic] girls to each other and does not really support Lauren's decisions."

[16] Nevertheless, I wholeheartedly accept that he is a well- intentioned parent, and that is what has motivated a number of the unnecessary expenses he has taken

on. I agree, as suggested by Cheryl's counsel, that he can be "generous to a fault" when it comes to the children.

[17] I should point out here that, I do not accept the suggestion from Leigh that Cheryl through her words and actions *intended* to create discord and dissension between Leigh and any of the children. But for the delay in contributing to Ethan's braces, I find as a fact that she conducted herself reasonably vis-à-vis the children and financial issues, particularly insofar as Leigh's financial obligations were concerned.

**There has been a material change in circumstances**

[18] In my view, a material change in circumstances, that would be significant, long-lasting, and not self- induced, could arguably relate to Leigh's income (which I don't find to be the case), the effect of changes in the parenting arrangements (I don't find there was a shared parenting arrangement), and if the circumstances of the children change in a significant manner (this changed), or if the children are no longer "children of the marriage" (this changed).

**i) Lauren**

[19] Lauren is no longer presumed a child of the marriage under the *Divorce Act*, because she is older than 19 years of age, and in my view was capable of withdrawing from the charge of her parents as of January 1, 2016. The evidence suggests that she entered studies at Acadia University in the fall of 2014, and has not returned since December 2014. She is presently employed part-time at the Winners store in New Minas. From January 2015, until approximately April 2017, she lived with Leigh and his family (during which time there is very little evidence she was working much at all)– since then she has been locally resident with her grandmother.

[20] Leigh testified that he has hopes that she will return to studies at the Nova Scotia community college. He conceded that she has […] health issues, […], and that she has not taken responsibility in many respects, for her own behaviours (such as taking money from the household and unauthorized usage of Leigh's credit card, etc.), or for her own future (though Leigh's testimony suggest that he would assist her financially if she wished to return to continue her studies). There is no evidence that Lauren actually intends to continue her studies in the near term.

[21] As to what is a "child of the marriage" Justice Scanlan considered this in *Rondeau v. Rondeau*, [2002] NSJ 651, at para. 15, wherein he endorsed the comments of Judge Daley in *Cole v. Cole* [1995] N.S.J. 362, at paras. 12 – 14.

[22] Judge Daley stated in part: "generally these cases demonstrate that a child may be a child of the marriage on proof that the child is in preparation for his/her future independence by the reasonable active pursuit of education within the limits and wishes of the child, and intention to continue a return to education or because the of the local prevailing unemployment circumstances over which the child may have no control."

[23] Though Lauren may at some point in the future return to studies, whether it University or the Nova Scotia Community College, at present I conclude more likely than not that she is not "a child of the marriage" anymore, and that she has not been so since one year after leaving Acadia University, having moved in with Leigh and his family in December 2014 - see for example the comments in *Penney v. Simmons*, 2016 NSSC 277, per Archer-MacLeod L. I find a period of one year provided her with enough time to get back on her feet and return to her studies or to find full time work.

[24] Thus, **as of January 1, 2016 Lauren was no longer a child of the marriage**, even though presumed to be so under the *Divorce Act* until at least July 29, 2015. As of January 2015, Lauren was no longer resident with Cheryl. Those are both clear material changes in circumstances, potentially affecting Leigh's child support obligations. However, neither are of any effect as I decline to award retroactive variation of Leigh's obligations to any point before May 1, 2017.

[25] Before January 2015, and certainly after January 1, 2016, Leigh was intimately aware of Lauren's circumstances, yet he waited until April 10, 2017 to make his application to terminate his child support obligation in relation to the payments he was making to Cheryl for Lauren.

[26] A review of the factors in *DBS* regarding claims for retroactive adjustments to child support obligations, strongly supports rejection of Leigh's claim insofar as Lauren is concerned.

1. Leigh's reasons for why the variation was not sought earlier include: "we tried and tried [to have Cheryl agreed to changes]"; "any time I brought it up there was a negative reaction from the kids… So I backed off"; when asked why when Lauren moved in with him in January 2015 he did not make an application then, he answered "I have no answer for

> that… Sometimes you get bullied off your intentions" – Leigh voluntarily declined to make the application earlier though he had knowledge of material changes in circumstances –Cheryl's counsel wrote to Leigh's counsel on September 16, 2016 [Exhibit 16 Cheryl's affidavit] offering to accept table amount child support for only two children as of September 1, 2016 with a review in June 2017.

[27] Moreover, I note here that in *DBS v. SRG*, 2006 SCC 37, the Supreme Court of Canada only focused its attention on retroactive variations of support, where the *recipient parent* is unaware of material changes in circumstances of the payor parent – as Justice Bastarache stated in *DBS* at para.97: [retroactive child support is appropriate to ensure that] "**children are returned the support they are rightly due**". Similarly at paragraph 100 Justice Bastarache emphasized: "**The circumstances that surround the recipient's choice** (if it was indeed a voluntary and informed one) **not to apply for support earlier will be crucial in determining whether a retroactive award is justified**."

[28] Here, it is Leigh as the payor parent who seeks retroactively to take money back for claimed overpayments. I question whether the same considerations should apply in such cases. Ultimately, it is what is reasonable and in the best interests of the children that matters most. However, even attempting an application of the *DBS* factors to the payor parent's circumstances, I find there is no basis for a retroactive variation in child support (table amount or s. 7). I observe in this case, Leigh, as the payor parent has not been impoverished going forward by the claimed overpayments.

2. There is no evidence of material blameworthy conduct on the part of Cheryl. Whether through the children or by virtue of living in the same small community area, Leigh would have been well aware of any of the material changes in circumstance he is presently relying upon – and he has not suggested in his evidence that he was unaware of those material changes in circumstances;
3. Regarding Lauren's past and recent circumstances (while she was still a child of the marriage – i.e. until January 2016), they do not suggest her household or she (while living with Leigh between January 2015 and January 2016) was deprived of material monies as a result of Leigh's continued payments to Cheryl for Lauren. I bear in mind here as well that Leigh's income in 2007 which is the baseline, was 92,000 resulting in table amount for three children of $1628 a month – his

income in the years since December 31, 2012 was respectively: $112,350; $122,358; $94,693; $85,535 – which would have resulted in him paying higher table amounts presuming three children remained in Cheryl's custody. I also note that Leigh's employment income is paid by way of dividends from a company he and his brother own (60% and 40% ownership) and work for, which provides a tax advantage to him, but also means he has substantial control over how much income he takes each year;

4. Retroactive termination of Leigh's table amount payments obligation for Lauren between January 1, 2015 and January 1, 2016, would likely require Cheryl to repay Leigh approximately $4,920 (payment for two children versus three children table amount at his income of approximately $100,000 per annum: 1760 - 1350 = $410 x 12 = $4,920/excluding consideration of any s. 7 expenses amount attributable to Lauren paid by Leigh during that period). Cheryl's average income for the last four years was $50,000, and she has testified that her net cash income, excluding child support payments by Leigh, is $1,100 biweekly or $2,400 per month. Her repaying the $4,920 to Leigh would constitute some hardship to her, but would not be a hardship for him to go without. He conceded that Lauren living in his household made no appreciable difference to household expenses.

[29] I also say this because, among other things, I find that he has also had sufficient funds to make a number of unnecessary or unreasonable (given his claim that they are "s. 7" FCSG expenses) expenditures in favour of the children, without the agreement of Cheryl, which agreement I find, he did not expect to, nor did he actually, receive. This suggests that he estimated that he had sufficient financial ability to do so:

a. He bought iPhones for all three children resulting in a substantial initial outlay as well as monthly payments [Cheryl was only prepared to have the children supplied with prepaid and cheaper android phones to control costs] – as an example, the monthly amounts for Lauren and Roslyn for October 2016 were $112.86 and $281.32 – see December 19, 2016 email in Leigh's statement of extraordinary expenses;

b. He bought computers for all three children resulting in a substantial initial outlay [although I note that the computer bought for Ethan ($2,100 in April 2015) was actually bought by

Leigh's company "Workplace Essentials"– whereas the laptop for Lauren ($1,913.29 on August 29, 2014); and the laptop for Roslyn ($1,538.93 on August 27, 2016 –) were bought through his Visa card – see his statement of extraordinary expenses];

c. He bought Lauren a car on December 15, 2016 $4,600/2006 VW Jetta, 165,000 km, and has been paying insurance maintenance and gasoline – he testified he bought it "to allow her to get to work"- she is working part-time at Winners in new Minas - he is thereby also responsible for $1072 insurance costs every year. Cheryl testified that she helped Lauren get a full-time job at a call centre, but that Lauren quit because "she didn't like the hours";

d. He bought Roslyn a car on January 31, 2017 - $3,450/VW Jetta (although the car was purchased by Workplace Essentials Ltd. according to an invoice from February 28, 2017) – no justifiable reason was given why the car was purchased – he will also thereby be responsible for whatever insurance costs, maintenance etc. may be associated with the vehicle – Roslyn does not have any employment presently and may very well likely not have employment during the 2017 summer; in September she will be resident at the Micro Boutique Apartments as a student at Acadia, across the street from Acadia University – her need for a car there is questionable – I note that Leigh and his family live five minutes away and her mother lives approximately 15 minutes away;

e. Leigh encouraged Roslyn to live away from her mother's home while attending Acadia University, and co-signed a lease at the Micro Boutique apartments in Wolfville, on February 26, 2017 [Exh. 5 to Cheryl's affidavit] which involves monthly $775 rent and other expenses. I note that Cheryl states Leigh did this "without consulting me and against my better judgment…" [para. 16 affidavit] but she does not dispute that she and Walter Seto accompanied Roslyn for a viewing of the apartment, which likely happened on February 23, 2017 – see Exh. 10. Thus, given the consistent testimony by Cheryl and Leigh that generally they "do not communicate", Leigh may have assumed that Cheryl was not an entirely against Roslyn taking an apartment there. The difficulty with that, is that the Corollary Relief Judgment makes

> any extra -ordinary expenditures incurred by one parent solely their responsibility unless they have the prior agreement of the other, and that understanding between Leigh and Cheryl has remained expressly acknowledged by them both to present day.

[30] Cheryl is of the view that Roslyn could live at home with her while attending Acadia. In that way her gluten-free, non-dairy, and food allergy concerns could be addressed, and the expense would be much less – i.e. Leigh would still have to pay table amount for two children for the entire 12 months of the year rather than just four months per year when Roslyn is not at Acadia. Cheryl says a close- by neighbour travels to Acadia every day and Roslyn could get rides with her, Cheryl could drive her, or she could take a bus.

**ii) Roslyn**

[31] On August 31, 2017, Leigh seeks the termination of his obligation to pay table amount support for Roslyn because she will be attending University in September 2017.

[32] On February 26, 2017 Leigh, without consultation with Cheryl, co-signed the lease for Roslyn to live at the Micro Boutique apartments in Wolfville during the September 2017 – May 2018, Acadia University academic year. I note that Cheryl lives in Kentville which is a relatively short drive away by car - Roslyn does have a car at present, but there was no evidence that she would *need* one during the academic year. Cheryl is of the view that the apartment rental was made without consultation, and is "an extravagance" so she is not prepared to help with the cost of the rental, but will help Roslyn with other expenses. She was prepared to pay $15 a day while Roslyn is at Acadia (over eight months that is approximately $3,650). To her great credit, Roslyn has secured $4950 bursary for her first year at Acadia which is renewable in the amount of $1750 each subsequent year if she maintains good standing.

[33] Roslyn will remain a child of the marriage throughout the academic year 2017 – 2018, and perhaps beyond (at least presumptively until she turns 19 years of age on March 3, 2018). Thus, a basis for Leigh's child support obligation toward her remains. However, I believe it reasonable that she live at home at least for the months of May June July and August each year to reduce costs, even though she may be taking summer courses. There is no basis presented for terminating his child support obligations vis-à-vis Roslyn, although her not living at the home for the remaining

months September – April does justify a reduction in the child support payments by Leigh.

[34] I will note here as well, I find it more likely than not that:

1. There is no material change in Leigh's own financial circumstances – his personal income has not fluctuated materially in a negative manner/moreover I note that his income is really within his own control since he is 60% shareholder and president of the company that employs him, and his brother is the other shareholder;
2. The reduction in Tana Morrison's income could only be relevant if the court finds that there is a *de facto* shared parenting arrangement – which I find there is not;
3. There may be said to be a material change in Cheryl's income since June 2007, but that is not relevant to the table amounts payable by Leigh since 2013, as she is a recipient and not payor, unless there is a de facto shared parenting arrangement -which I find there is not (similarly therefore, it is not a material change in circumstance that both parties have re-partnered). Her income increases would be relevant to s. 7 expenses, but since 2013 her income has not materially fluctuated during those years.

[35] Roslyn's commencing university in September 2017 will trigger s. 7 expenses, and for those that are necessary and reasonable, subject to the unreasonable/unapproved choices already made about expenditures referenced herein, Leigh and Cheryl (and Roslyn through her scholarship, and 50% of any net employment income) will be responsible.

[36] Insofar as retroactive variation of Leigh's child support obligation vis-à-vis Roslyn and Ethan, for similar reasons articulated in relation to Lauren, I reject that claim for any period before May 1, 2017.

[37] Without agreeing therewith, I note however that specifically regarding Roslyn, and Ethan, Leigh's counsel has calculated in his June 2, 2017 brief, what would be the difference between Leigh's table amount payments for the three or two children as the case may be between January 1, 2013 and April 1, 2017, versus the shared parenting offset amount he would be responsible to pay, and assuming those calculations to be roughly accurate, the analysis would require Cheryl to re-pay Leigh for the years 2013, 2014, 2015 and 2016, the following approximate amount: $25,000.

[38] In relation to claimed s. 7 expenses, Leigh's counsel's calculation is as follows: for the years 2013, 2014, 2015 and 2016, the following amounts: $5,228; $4,823; $5,111; $8,871; for a total of $24,033 in addition.

[39] Those calculations reinforce why it would be inappropriate to consider ordering retroactive suggested overpayments by Leigh of child support obligation payments be made by Cheryl to Leigh.

**iii) Retroactive to January 1, 2013 proportional sharing of s. 7 expenses for the children**

[40] As indicated earlier in relation to Lauren, the eligible period could only include between January 1, 2013 to January 1, 2016, when she ceased to be a child of the marriage.

[41] In relation to Roslyn and Ethan, the eligible period could include between January 1, 2013 and April 30, 2017.

[42] As Justice Wilson reiterated in *Conohan v. Cholock*, 2017 NSSC 7, the onus is on the parent claiming the expense to show that the expense is extraordinary, and that therefore "just listing the expenses is not sufficient to establish a claim".

[43] In the Federal Child support guidelines, s. 7 provides for "special or extraordinary expenses" reasonable and necessary. "Extra ordinary expenses for extracurricular activities" are specifically defined in subsection 1.1.

[44] For necessary and reasonable extraordinary expenses, the guiding principle is that there shall be a presumptive contribution from each spouse according to their respective incomes. I have found that Cheryl's income is approximately $50,000, and Leigh's income is approximately $100,000 per year.

[45] I have reviewed the large number of claimed section 7 expenses dating back to January 1, 2013.

[46] Significantly, the Corollary Relief Judgment of June 13, 2007 provides in part:

> 24- … Cheryl Morrison shall pay for extracurricular activities of the children and said extracurricular activities shall be agreed upon by the parties. Neither party shall register the children or promise the children participation in an extracurricular activity without first consulting the other. If either party registers the children in an extracurricular activity without prior agreement from the other, that party will be solely responsible for the cost of that extracurricular activity.

…

[47] And by incorporation the following provisions were included:

> 1-In relation to the custody of the children of the marriage…, and their parenting plan, paragraph four of the partial minutes of settlement attached hereto as schedule A have been incorporated into the terms of this order
>
> …
>
> [That Schedule A included:]
>
> 4-Custody and Access
>
> [Leigh and Cheryl] shall have joint custody, care and control of the children of the marriage…. The children shall be primarily resident with [Cheryl]. [Leigh and Cheryl] agree and undertake that any major decisions regarding the care and upbringing of the children of the marriage and in particular, issues of medical treatment, education, religion, and/or extracurricular activities shall be where practicable, the joint decision of [Leigh and Cheryl].… Each parent shall make the day-to-day decisions concerning the care of the children while the children are in their care and shall endeavor to maintain consistency in the areas of discipline, homework, meal at bedtime, and extracurricular activities.
>
> …
>
> (h) [Leigh's] parenting time with the children shall follow a three week cycle as follows:
>
> > Week number one
> >
> > From Monday after school until Tuesday morning with [Leigh] dropping the children off at school.
> >
> > From Friday after school with a return to [Cheryl] at 12 noon Sunday
> >
> > Week number two
> >
> > From Monday after school until Tuesday morning with [Leigh] dropping the children off at school.
> >
> > From Thursday after school until Monday morning with [Leigh] dropping the children off at school.
> >
> > Week number three
> >
> > From Monday morning at the commencement of school until Tuesday morning with [Leigh] dropping the children off at school.

[48] Thereafter, one finds a schedule splitting holidays, birthdays etc. roughly equally between the parties.

[49] In his brief, Leigh claims that as of January 1, 2013, Cheryl should be responsible, proportionate to their respective incomes, for s. 7 expenses that he says are reasonable and necessary, including: tutoring, dance, drivers education, cell phone expenses, gym expenses, medical insurance, braces, sports expenses and computers – p. 9, brief.

[50] In her brief, Cheryl acknowledges that some of those expenses are true s. 7 expenses, but most are "normal childcare expenses" – p. 4, brief. She notes that Leigh does not provide any specific calculations. Her counsel noted in court that essentially the court will be left to go through those expenses receipt by receipt and make its own determination.

**In relation to the claimed s. 7 expenses, I make the following determinations**:

1. For the reasons stated above, that because generally a retroactive order is not appropriate here (and the vast majority of those expenses are not truly extraordinary given the financial means of the parties here, the nature of the expenses, or the lack of clear evidence regarding their necessity and reasonableness given that overall the children have had significant opportunities and exposure to extracurricular activities etc.) **there will be no across-the-board retroactive s. 7 expenses order – only those true extraordinary expenses after May 1, 2017 will be considered**;
2. In any event, I am not satisfied that Leigh has established his entitlement to reimbursement specifically in relation to:
    a. His 2014 claim regarding the laptop computer for Lauren – see Exhs. 5 [Appendix C] and 14 – it does appear that the expense was reimbursed/reimbursable;
    b. The orthodontic/braces expenses for Ethan – though Cheryl delayed for approximately two years, she and Mr. Seto did contribute $4,000 through their insurance plans, such that Leigh only had to draw on Tana's or his insurance plan for the remainder $2,600 – meaning ultimately, Leigh was not out of pocket for this;
    c. Skates for Ethan/it does appear that Cheryl paid for these – this leads to my further observation and concern that the

> quantity of receipts over this four your time period practically frustrates the ability of the court to assess the reasonableness,necessity and characterization of expenses claimed as "extraordinary" or not – and the onus is on the claiming party;

3. Regarding Leigh's purchase of a car for Lauren – that was done without consultation with Cheryl; and more importantly the Kentville Chrysler Dodge and Jeep dealership bill of sale is dated December 15, 2016 – at a point in time when Lauren is no longer a child of the marriage;

4. Regarding Leigh's co-signing of Roslyn's rental apartment at Micro Boutique, he did not consult with, and get the agreement of Cheryl to this arrangement, and it is arguably not a necessary or reasonable expense since Roslyn could have remained living at home with Cheryl albeit with some difficulty if she does not have her own vehicle for travelling from Kentville to Wolfville to attend classes – while I understand the sincerity of Leigh's motivation, the law does not require Cheryl to contribute to that rental expense;

5. Regarding Lauren's student loan repayment, Leigh testified that the remainder is "due to be paid off by me shortly…". It seems Lauren has not repaid any of it herself – see Exh. No. 9 [revenues and expenses as between Dad and Lauren]. The student loan initially was limited to a principal balance plus capitalized interest of $6026.57 as of June 26, 2015. Leigh paid $3,013.29 on or about November 17, 2015. Cheryl says that she should not have to repay 50% of the student loan expenses because she disagreed with Lauren staying in-residence as opposed to living at home with her. At that time, Lauren was a child of the marriage, and I infer and find that Cheryl agreed with Lauren going to Acadia, therefore she should share some of the responsibility for those costs with Leigh and Lauren. Lauren is presently unwilling, or unable to contribute. Based on their 100,000, and $50,000 incomes, and because Cheryl and Leigh both promised their children they would help them financially with the costs of University (as borne out by the fact that they have both contributed to RESP's – they have a joint one with a $20,000 balance; and Cheryl has one in her name alone for $25,000 – intended for use by all three children) and as an exception to my finding that retroactive section 7 expenses are not appropriate here, I do find it appropriate to order Cheryl to pay to Leigh roughly one third of the student loan amount, namely $2,000 by September 30, 2017 – I observe

that even if Lauren had stayed living at home with Cheryl, Cheryl would have still been responsible for some portion of her tuition costs, etc. - see the October 6, 2014 email from Lauren to Cheryl regarding the Acadia University costs – Exh. 5, Leigh's Statement of extraordinary expenses;

6. Regarding Roslyn's attendance at Acadia, I find it appropriate to order Cheryl and Leigh to pay one third and two thirds of all her properly receipted reasonable and necessary expenses of her anticipated full time attendance at Acadia University September 2017 – April 2018 and for summer 2018 courses (less any amounts that she receives for bursaries, scholarships or student loans and 50% of any net employment income) – I acknowledge there is great uncertainty about what employment, if any, she will have during the summer of 2017.

[51] I should note that Cheryl did not request reimbursement from Leigh for Roslyn's Italy/Greece March break 2016 trip. The total amount was $5,000 of which Cheryl paid $2,500 and Roslyn contribute the other $2,500. I would not have considered it a s. 7 expense had it been presented as such.

**Why there is no shared parenting arrangement here**

[52] The burden is on Leigh, as the claiming party, to establish that there is a shared parenting arrangement here such that the requirements of s. 9 of the Federal Child Support Guidelines (FCSG) are met. This requires that "a spouse exercise a right of access to, or has physical custody of, a child for not less than 40% of the time over the course of a year" – or in other words, that each spouse does so in relation to a child for 40% or more of the time over the course of a year.

[53] Ethan has followed the parenting schedule set out in the Corollary Relief Judgment. In his April 4, 2017 affidavit, Leigh took the position that he had Ethan for "approximately 42% of the time". My calculation of that parenting schedule shows that on average during those three weeks, Leigh has Ethan 37% of the time. The holidays and special times are split equally between Leigh and Cheryl. My overall calculation thereof suggests that the average over 12 months is that Leigh does not have Ethan for 40% or more of the time. I find the evidence does not change that calculation materially. I find that (formally) until this application was made, or (informally) at the earliest in 2016, neither parent seriously suggested this was a shared parenting arrangement. This is also evident in Leigh's brief:

> It is respectfully submitted that it was [sic] the foundation for shared parenting was laid in the Corollary Relief Order and [Cheryl] refused to expand it, despite frequent requests to do so since the order was issued.

[54] As he points out, the 2007 Order provided for "joint custody, care and control of the children of the marriage… the children shall be primarily resident with [Cheryl]… and that [Leigh's] parenting time with the children shall follow a three-week cycle as follows…".

[55] In 2007, after what must have been very extensive negotiations between counsel, in the consented-to documents filed and issued by the court the parties themselves specifically rejected the notion of shared parenting- see *Lake v. Lake*, 2016 NSSC 25, per Warner J.

[56] Leigh did not expressly characterize the parenting arrangement as "shared parenting" until early 2016.

[57] Both Leigh and Cheryl have re-partnered since 2012. But no application to vary was forthcoming.

[58] I might add that a shared parenting arrangement does require that parents work together closely as co-parents, and Cheryl and Leigh themselves knew that that was not, and is not, realistic here – *Chisholm v. Chisholm*, 2017 NSSC 45.

[59] Moreover, there are practical difficulties in suggesting that there is a shared parenting arrangement here. Even if Leigh had Ethan with him for more than 40% of the time since January 1, 2016, I find myself very satisfied that he did not have Roslyn with him for more than 40% of the time. Is the court then to attempt a shared parenting analysis in relation to Ethan, and award a table amount payable in relation to Roslyn?

[60] Not only do I find that there was not in fact a shared parenting arrangement in the past, there is not one presently.

[61] Roslyn is not following the schedule set out in the Corollary Relief Judgment. As Leigh has stated himself, she has a "strong bond with her mom" and she has been estranged from him off and on, and especially after their acrimonious communication in October 2016 [para. 13, Leigh's affidavit]. While that situation may have improved after several months, both parents acknowledged that Roslyn also avoided Leigh's place because she and Lauren do not get along – and Lauren only left Leigh's household about two months ago after having been present since

January 2015. Thus, for some time now Roslyn has had less contact with Leigh than she would if she followed the parenting schedule therein. It has not been a shared parenting arrangement. Moreover, when she goes to University, there will be no shared parenting arrangement since she will be living with neither parent for eight (8) to possibly twelve (12) months of the year.

[62] Based on the evidence (testimonial and documentary) I am not satisfied that it is more likely than not, that Leigh has established, that there was a shared parenting arrangement in place in relation to Roslyn or Ethan, regarding either his retroactive variation claim from January 1 2013 to April 30, 2017, or any claimed prospective variation since May 1, 2017.

**Summary**

**Leigh's application to vary his child support obligations is granted to the following extent, and I find**:

1. Based on his past earnings, I infer, or alternatively impute to Leigh for 2016 and 2017, a $100,000 income;
2. That Lauren ceased to be a child of the marriage on January 1, 2016 – there is no proper basis for me to order any retroactive repayment by Cheryl to Leigh/nor is a prospective table amount payment by Leigh ordered regarding Lauren living away from his personal household at present;
3. There is not presently, nor has there been at least since January 1, 2013 a shared parenting arrangement; nor is there a proper basis for me to order retroactive table amount child support or s. 7 expenses (with one exception noted below);
4. Both Roslyn and Ethan remain children of the marriage; notionally therefore Leigh should pay through the Maintenance Enforcement Program, a table amount of (two children) child support of $1,350 per month commencing May 1, 2017; *except if* Roslyn attends Acadia University and lives at the Micro Boutique apartment (or elsewhere for rent outside of Cheryl's home) – in that circumstance, his table amount child support payment for Roslyn will be suspended, and he will be responsible to pay table amount of (one child ) child support of $837 per month commencing September 1, 2017 until May 1, 2018, and Leigh will be solely responsible for the rent and any other rental

expenses associated with the Micro Boutique (or other rental) September 1, 2017 – May 1, 2018 (including tenant insurance, etc.); Cheryl will bear sole responsibility for Roslyn's food needs while she lives outside of Cheryl's home and is attending Acadia from September 1, 2017 to May 1, 2018;

5. Any true extraordinary expenses (necessary and reasonable) prospectively incurred, which expenditures have been agreed upon by Leigh and Cheryl, shall be shared between them on the basis of two thirds and one third responsibility respectively (additionally Cheryl shall pay to Leigh $2,000 by September 30, 2017 as her share of Lauren's student expenses between September and December 2014). Both Leigh and Cheryl have RESP's that should permit them to contribute, at a minimum, to Roslyn's ongoing reasonable and necessary remaining educational and related costs for the academic year September 2017 – April 2018.

**Costs**

[63] The position of the parties on costs is as follows:

- **Leigh** – attached to his June 9, 2017 brief are "settlement proposals that were forwarded to [Cheryl] and her counsel dated May 3, 2016, September 7, 2016, October 5, 2016, an email dated June 6, 2017." Using the principles referred to by Justice Warner in *Redmond v Redmond*, 2016 NSSC 350, he argues that he took a reasonable position in trying to resolve the matter without unnecessary litigation, and that Cheryl has been unreasonable: in relation to the payment of the table amount child support for Roslyn upon her attendance at Acadia; her refusal to acknowledge her financial obligations for Lauren upon her assuming residence with Leigh; and her refusal to acknowledge the financial benefit that she receives as a result of the expenses that Leigh pays for, and has paid for historically; such that no costs should be awarded in this matter.

- **Cheryl** – in her June 2, 2017 brief, she claimed costs in the amount of $3,000. At that date, the matter had been set down for a mere 1 ½ hours on June 6, 2017. In her June 9, 2017 brief, she notes the matter should have been set down for more time, possibly as an Application in Court. She asks for solicitor-client costs (i.e. a substantial

> contribution towards those costs) based on an anticipated legal bill of $7,000 in fees plus taxes and disbursements, for her counsel, called to the bar 1996 with an hourly rate of $230, and specializing in family matters. She references the summary of legal principles of party and party costs by Justice MacDonald in *Gagnon v. Gagnon*, 2012 NSSC 137, and relies on her not marked as "without prejudice" September 16, 2016 written offer to Leigh's counsel which took the position that there was no basis in fact or law for a retroactive payment; that Lauren is no longer a child of the marriage; there is not a shared parenting arrangement; that she would accept to child table amount payments based on $109,800 income – $1,470 per month commencing September 1, 2016 with a review in June 2017 once the parties have filed their 2016 tax returns. Lastly for Roslyn's attendance at Acadia, Cheryl had set aside her own RESP money and once exhausted would be unable to contribute further, thus the children would have to rely upon student loans and other resources.
>
> In the alternative, Cheryl suggests (based on*: Armoyan v Armoyan*, 2014 NSSC 403*; O'Neil v. O'Neil*, 2013 NSSC 64; *Lamarche v. Lamarche*, 2011 NSSC 133) that the court consider the "amount involved" as $20,000 per day and since the hearing took two days $40,000 in total, on Tariff A, the range for costs is $4,688 plus $2,000 to $7,813 plus $2,000.

[64] I observe that more recently Justice Wilson of the Family Division canvassed the relevant principles in *Conahan v. Cholock*, 2017 NSSC 69, however, those principles remain constant.

[65] Insofar as the factual circumstances are concerned, I make the following findings:

1. Presumptively, the 2007 Corollary Relief Judgment provisions remained valid. The onus was on Leigh as the moving party claiming material changes in circumstances. Leigh requested the court vary his obligations retroactively and prospectively. He was unsuccessful in demonstrating: retroactive table amount and s. 7 expense repayments were due and owing from Cheryl; and that the court should declare this

to be a shared parenting situation. While Leigh was successful in demonstrating that there were material changes in circumstances since 2007, Cheryl did not dispute that there were some. Based on the outcomes, I would characterize Cheryl as the substantially more successful party;

2. The CRJ requires that "the parties shall exchange their respective income tax returns, completed and with all attachments, even if the returns are not filed, along with all notices of assessment receive from Canada Revenue Agency on an annual basis on or before June 1st." Cheryl provided her income tax return for 2016 as Exh. 19 to her May 18, 2017 sworn affidavit. She swore therein that she had not seen Leigh's 2016 tax return. This would make it difficult for her to engage in meaningful settlement negotiations, in lieu of and in advance of this hearing. In Leigh's statement of income dated April 10, 2017 one finds a letter from the accountant for Workplace Essentials Ltd that Leigh's "income to the end of December 31 will be $85,535.34 in the form of dividends". There is no income tax return, or other confirmation of his income other than general references in his evidence that financially for him, 2016 was not a good year;

3. Leigh's application for the four years claimed retroactive variations to his child support obligations, table amount and s. 7 expenses throughout (based on his claim, that there had been a *de facto* child sharing arrangement in place since January 1, 2013 and consequently all child support should be determined with reference to household incomes and offset amounts) had very little chance of complete success, and only a slightly better chance of some success. Moreover, specifically, the claim that Cheryl had engaged in blameworthy conduct by her unreasonable lack of agreement to his proposed changes, had very little chance of success;

4. Leigh's reliance on his "settlement proposals" is misplaced. Firstly, only the May 3, 2016 written proposal is not marked "without prejudice". In my opinion only that settlement proposal should be considered by this court, even at this stage when costs are considered. With great respect to those that are of another opinion, I find support for this position in principle and the jurisprudence. When a party marks a document "without prejudice", absent any qualification thereto contained in the document, the document should be considered inadmissible at any time in the proceedings thereafter. Positions taken

in such settlement proposals can negatively affect that party's position when costs are considered by a court. Moreover, as I understand the purpose of such settlement proposals, it is to allow the parties to have candid discussions without later negative repercussions against their interest. Making settlement proposals [whether formal or informal] known to the courts at the end of the proceeding when costs are in issue, is relevant in the court's assessment of whether augmented costs are appropriate or not against the unsuccessful party. The party's position in a settlement proposal is seen to be a reference point in assessing of their conduct/ reasonableness during the litigation- see eg *Roscoe v. HRM*, 2013 NSSC 5, per Muise J.. In British Columbia and Saskatchewan, courts have, in matrimonial matters, prevented parties from relying upon "without prejudice" offers unless the offer contains a clause reserving the right to refer to the offer at some point in the future – this has become known as a *Calderbank* offer based on the English Court of Appeal case: *Calderbank v. Calderbank*,[1975] 3 All ER 333 (CA), cited with approval in *Thompson v Thompson*, 2008 SKQB 116, and *Demeria v. Demeria*, [1991] B.C.J. 2449 (BCSC). Our Court of Appeal has recently commented on informal settlement offers and costs in *Doucette .v Nova Scotia*, 2017 NSCA 17 at paras. 44 – 55. Although a review of the trial decision does not mention whether the offers made there were "without prejudice", an examination of the trial file documents confirms that they were not "without prejudice" offers. At para. 53, Justice Scanlan confirmed as proper, the trial judge's consideration of the offers, and stated that although they "may not have complied with all aspects of the Rules as to fall within Rule 10, the trial judge was correct in her determination of the offer was something that she was entitled to consider under Rule 77(2)(b)."

Even if I were to consider the content of the settlement proposals, in tandem with the (not marked "without prejudice") September 16, 2016 offer by Cheryl, Leigh and Cheryl both fundamentally disagreed with each other's position regarding whether there had been a shared parenting arrangement and whether there should be any retroactive variation to Leigh's child support obligations. Ultimately, the settlement proposals largely represent the position of the parties respectively throughout. As I indicated, I found Cheryl's position throughout generally to be the more reasonable position. At the hearing,

her position was presented with greater focus on the significant and determinative issues.

5. There are no compelling reasons here not to award costs as against the substantially unsuccessful party, Leigh;

6. Given that costs should represent a substantial contribution towards Cheryl's reasonable expenses, I find that I can accept the representations of her counsel that his fees will approximate $7,000, plus HST and disbursements. The jurisprudence tends to indicate that a "substantial contribution" has been considered to be between 50 and 65% of the reasonable legal fees of counsel – or $3,500 to $4,550. Alternatively, I find it also appropriate to examine costs within the confines of Tariff A rather than Tariff C. The hearing took two days. That accounts for $4000. The "amount involved" is not easily discernible here and may have been as high as $50,000 according to Leigh's June 2nd brief. However, I find it fair to say the "amount involved" was less than $25,000 -I find it unnecessary to use the $20,000 per day rule of thumb sometimes used by our courts. On the Basic Scale 2, that amount suggests $4,000 in additional costs. Thus, a total of $8,000.

[66] Bearing in mind that Leigh has been generous to the children, and that he will have some relatively substantial ongoing obligations to them, I am inclined to conclude that it is in the interests of justice here, as an exercise of my discretion in balancing all the relevant factors, to order costs against Leigh in the amount of $4,550 plus HST and reasonable disbursements to be established by an accounting from Cheryl's counsel.

**Conclusion**

[67] But for Cheryl's payment to Leigh of $2,000 by September 30, 2017, as her share of Lauren's Fall term expenses at Acadia, there will be no retroactive variation of the table amount of child support paid by Leigh to Cheryl, nor will there be any retroactive repayment by her to Leigh for any s. 7 expenses before May 1, 2017.

[68] As of May 1, 2017, Leigh will pay the table amount for two children based on his $100,000 annual income, and if Roslyn attends post secondary education, during September 2017 – May 2018, his table amount will be reduced to one child at $100,000 annual income during her attendance. If Roslyn attends Acadia University and lives in an off-campus rental accommodation Leigh will be solely responsible

for the lease/rental costs, whereas Cheryl will be solely responsible for Roslyn's food needs.

[69] Costs are awarded against Leigh in the amount of $4,450 plus HST and disbursements, payable by July 30, 2017.

Rosinski, J.