SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: *McCalla v. Briand-McCalla*, 2018 NSSC 158

Date: 2018-06-29
Docket: No. SFHMCA-097721
Registry: Halifax

Between:

Everol McCalla

Applicant

v.

Trina Briand-McCalla

Respondent

LIBRARY HEADING

Judge:	The Honourable Justice Leslie J. Dellapinna
Heard:	March 6, 2018 and April 13, 2018 in Halifax, Nova Scotia
Subject:	Variation of parenting and child support pursuant to section 37 of the *Parenting and Support Act*. Sections 3 and 7 of the Guidelines. Imputing income. Undue hardship.
Summary:	The parties are husband and wife and together have one child, a daughter, who at the time of the hearing was seven years of age. The parenting arrangements between the parties were agreed upon at a settlement conference in June 2016 and incorporated into an order issued August 10, 2016. The Respondent mother had primary care and residence. The Applicant father had afternoon parenting time Monday through Friday as well as parenting time on alternate weekends. The Applicant father applied to vary the parenting provisions of the order as well as the child support provisions of the order under section 37 of the *Parenting and Support Act* citing changes in his income since the granting of the order as well as a breakdown in the parenting arrangements. The Respondent mother also applied to vary the child support provisions of the order both on a prospective and retroactive basis.
Issues:	Were there changes in circumstances that would warrant a variation of the parenting and child support provisions of the current order?
Result:	There was no change in circumstances that would warrant a variation of the parenting provisions of the order beyond the parties' unwillingness to cooperate to the degree necessary to give effect to the Court order. Acrimony that existed at the time the original order was granted could

not be relied upon as grounds to reopen the parenting arrangements. The existing parenting arrangements were in the child's best interests and the parties were expected to comply with the order.

The Applicant's income did change following the parties' agreement to the court's order. The child support provisions of the order were varied pursuant to section 3 and section 7 of the *Provincial Child Support Guidelines* both on a prospective and retroactive basis. Income was imputed to the Applicant and the Applicant's claim for relief based on undue hardship was dismissed.

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Counsel:	Terrance Sheppard for the Applicant Laura Ann McCarthy for the Respondent

By the Court:

INTRODUCTION

[1] On March 6, 2017 Mr. McCalla filed a Notice of Variation seeking to have the court vary the custody, access and child support provisions of an order issued August 10, 2016.

[2] On April 3, 2017 Ms. Briand filed a Response to Variation Application seeking to vary the child support provisions of the same order and more specifically to vary it insofar as special or extraordinary expenses were concerned.

[3] Both Mr. McCalla's Application and Ms. Briand's Response were made pursuant to section 37 of the *Parenting and Support Act*, R.S.N.S. 1989, c.160 ("the *P.S.A.*")

[4] Hereafter I will refer to Mr. McCalla as the Applicant and Ms. Briand as the Respondent and when I refer to them both I will refer to them as the "parties".

BACKGROUND

[5] The parties are husband and wife. They were married on September 7, 2013 and separated a year later on September 7, 2014. Together they have one child, a daughter, Neveah, who is now seven years of age. Neveah lives primarily with the Respondent. Both parties have children from other relationships.

[6] The order the parties seek to vary is a consent order granted by the Honourable Justice Lynch which the parties negotiated during a settlement conference on June 15, 2016.

[7] The order provides that the parties are granted joint custody of Neveah and the Respondent has primary care and residence of her.

[8] The order also provides that the Applicant is to have specified parenting time every weekday from Monday to Friday from 2:30 p.m. to 5:00 p.m.. He is to pick up Neveah from school and at 5:00 p.m. the Respondent is to pick her up at "a third-party location". The order says that if the Respondent is unable to pick her up at 5:00 p.m. the Applicant's older daughter from a previous relationship, Jhenielle (19 as of the days of the hearing but now 20 years of age), is "capable" of caring

for Neveah. That provision was included because it was contemplated that the Applicant may have to leave home to go to his place of work after 5:00. p.m..

[9] In addition, the Applicant is to have care of Neveah every second weekend from Friday at 2:30 p.m. until the following Sunday at 9:30 a.m..

[10] It is apparent from the order there was disharmony between the parties when it was negotiated as it states that transitions are to be at neutral sites and communication between the parties is to be child focused, by text and only in the case of an emergency by phone.

[11] With respect to child support, the order provides that the Applicant "has an annual income of $41,100.00" and based on that he is to pay the Respondent $346.00 per month by the last day of each month, starting June 30, 2016. $346.00 was the monthly table amount for one child for a payor in Nova Scotia earning $41,100.00 per year when the order was agreed upon.

LEGISLATION

[12] Section 37 of the *PSA* provides as follows:

> **37 (1)** The court, on application, may make an order varying, rescinding or suspending, prospectively or retroactively, a support order or an order for custody, parenting arrangements, parenting time, contact time or interaction where there has been a change in circumstances since the making of the order or the last variation order.
>
> **(1A)** In making a variation order regarding custody, parenting arrangements, parenting time, contact time or interaction, the court may include any provision that could have formed part of the original order that is being varied.
>
> **(2)** When making a variation order with respect to child support, the court shall apply Section 10.

[13] Section 10 of the *PSA* provides the powers of the court when determining the amount of support to be paid for a dependent child and says, among other things, that while there are exceptions in certain circumstances generally child support shall be determined in accordance with the *Provincial Child Support Guidelines*. Neveah is a dependent child as defined by section 2(c) of the *P.S.A.*.

POSITIONS OF THE PARTIES

[14] The parties are of the view that circumstances have changed since the current order was agreed upon.

[15] Both agree that the parenting arrangement that they negotiated broke down – although they disagree on why it broke down. Each blames the other.

[16] Both also agree that the Applicant's income has changed from what he said it was in June 2016.

[17] The Applicant seeks an order that provides that the parties continue to have joint custody of Neveah but he wants an equal shared parenting arrangement whereby he would have the care of Neveah two days each week (preferably Monday and Tuesday) as well as alternate weekends from Friday after school until the following Monday morning. The remaining time Neveah would be in the care of the Respondent. It was his evidence that following the settlement conference he had Neveah in his care more often than the times specified in the order before the parenting arrangement broke down. He said that during that time the Respondent raised no parenting concerns. The Applicant was referring to the months in 2016 following their agreement and the first three or four months in 2017.

[18] The Applicant said that if his proposed shared parenting arrangement is ordered by the court, he can arrange his work schedule to accommodate it.

[19] In the alternative the Applicant seeks as much parenting time with Neveah as the court concludes to be in her best interests.

[20] Regarding child support he proposes that if shared parenting is ordered that both parties provide for Neveah while she is in his or her care and that no table amount of child support change hands.

[21] If the court does not order a shared parenting arrangement, his position is that he should not be required to pay the full table amount as that would cause him undue hardship as contemplated by section 10 of the *Guidelines*. Specifically, it is his position that the evidence shows that he has a legal duty to support his four other children.

[22] Finally, if the court grants his request for a reduction in child support he wants the order to be given retroactive effect.

[23] The Respondent wants the court to maintain the joint custody arrangement and that she continue to have primary care and residence of Neveah. However, she proposes that the Applicant's parenting time with Neveah be varied such that the Applicant would have the care or Neveah every second weekend beginning on Friday after school until the following Monday morning when the Applicant would return Neveah to her school. The Respondent did not offer any other weekday parenting time.

[24] Regarding child support, she asks that the court review the child support the Applicant paid under the existing order and compare it to what he should have paid based on his actual income and if the court concludes that the Applicant has underpaid then she seeks an order in the correct table amount having retroactive effect back to June 30, 2016 – the date the first child support payment was due pursuant to the order. Further, if there are any arrears owing then she wants those arrears to be paid.

[25] Further, the Respondent questions the accuracy of the Applicant's reported income and submits that if his current income is as low as he claims, he is not doing enough to find other employment (and therefore more income) and thus the court should impute a higher level of income to him. She also seeks retroactive and prospective child support in accordance with the income imputed by the court.

[26] The Respondent also wants a contribution by the Applicant, both prospectively and retroactively, to section 7 expenses incurred by the Respondent for childcare and Neveah's ballet lessons.

[27] Regarding the Applicant's claim for relief under section 10 of the *Guidelines*, the Respondent does not accept that the Applicant actually contributes to the support of his other children, at least not to the extent that he claims, and that he has not met the onus required of him to receive relief based on undue hardship.

ANALYSIS – CHANGE IN CIRCUMSTANCES

[28] Section 37 of the *PSA* provides that the Court may vary a custody or support order where there has been a change in circumstances since the making of the previous order. In *Willick vs. Willick*, [1994] S.C.J. 194 the Supreme Court said that a change in circumstances means a material change in circumstances such that if known at the time of the original order it would likely have resulted in a different order.

[29] Section 14 of the *Provincial Child Support Guidelines* provides:

> 14. For the purposes of Section 37 of the *Act*, any one of the following constitutes a change in circumstances that gives rise to the making of a variation order in respect of a child support order:
>
> > (a) in the case where the amount of child support includes a determination made in accordance with the applicable table, any change in circumstances that would result in a difference child support order or any provisions thereof;
> >
> > (b) in the case where the amount of child support does not include a determination made in accordance with a table, any change in the condition, means, needs or other circumstances of a parent or of any child who is entitled to support;
> >
> > …

[30] Regarding child support, if I conclude there has been a change in circumstances, then I am to apply section 10 of the *P.S.A.*.

[31] I should note that the Respondent completed her Response to Variation Application at a time when she was without counsel. She indicated the change she sought was only with respect to special or extraordinary expenses. She did not check off the box indicating that she was seeking a variation of the table amount. However, in her affidavits sworn on July 3, 2017 and January 14, 2018, she clearly stated that she also sought a variation of the table amount. The Applicant received her affidavits shortly after they were sworn and the hearing did not start until March 6, 2018. It cannot be said that the Applicant was taken by surprise. I also accept the Respondent's explanation that she was not aware of the Applicant's increased income (in 2016 and 2017) until she received his disclosure required by these proceedings. I will treat her failure to complete the pleadings appropriately as an irregularity (see *Civil Procedure Rule* 2.02(1)) and if I find it appropriate I will order a variation of the table amount.

[32] Regarding a variation of a custody order, the Supreme Court in *Gordon vs. Goertz*, [1996] 2 S.C.R. 27 said in paragraph 49 that once the Applicant establishes a material change in circumstances both parties bear the burden of establishing what parenting arrangement would be in the child's best interests. In so doing there is no legal presumption in favor of the custodial parent, although the custodial parent's views are entitled to great respect. In this case, the parties share joint

custody of Neveah. The Respondent has primary care and residence and the Applicant has parenting time.

[33] I have concluded that there have been a number of changes in circumstances since the terms of the August 10, 2016 order were agreed upon including the following:

1. Changes in the Applicant's income in that it increased for a period of time before it apparently declined;
2. Changes in the Applicant's work hours;
3. The birth of a younger daughter to the Applicant from a relationship with another woman. That child was born on August 19, 2016.

[34] To be clear, circumstances that have not changed since the granting of the court's order include the Applicant's care and financial responsibilities for his older daughter Jhenielle. They were known when the order was negotiated. They also do not include whatever financial responsibilities the Applicant may have for his two sons from another relationship who reside with the Applicant's mother. When the order was negotiated the Applicant had the same responsibilities for his sons. That said, any support the Applicant pays for his sons will be considered in deciding how much child support should be paid to the Respondent.

[35] The Applicant also had the care of Neveah for more than the specified times mentioned in the current order. That is not a change in circumstance as the current order contemplated that happening. Paragraph 8 of the order reads:

> "[The Applicant] will have such other parenting time as agreed to by the parties."

[36] I find also that there has not been a change in circumstances that would warrant or necessitate a change in the custodial or parenting arrangements with respect to Neveah for the reasons that follow.

ANALYSIS - PARENTING OF NEVEAH

[37] The current order does not specifically state when the parenting arrangement described in the order was to begin but it was negotiated on June 15, 2016 and the Applicant's block summer parenting time with Neveah began on June 24 of that year. The child support provisions required the Applicant's first payment to be paid

no later than June 30, 2016. From that I assume his weekly parenting time was to take effect immediately after the agreement was negotiated.

[38] The parenting arrangement is not boilerplate. It is tailored to the parties' work schedules.

[39] According to the Applicant he had the care of Neveah much more often than the minimum amount of parenting time stipulated for him in the order. He said Neveah was in his care virtually every weekend as well as each weekday from 2:30 to 5:00 p.m.. He said that she was also in his care additional times when the Respondent went on vacations to Jamaica and New York. He also said that during his weekday time the Respondent was frequently late in picking Neveah up from his home after she got off work and he therefore had to take Neveah with him to his place of work.

[40] According to the Applicant the parenting arrangements started to deteriorate in the middle of December 2016. He claimed that there was an incident on December 18 when he said the Respondent went to his place of employment to pick up Neveah. An argument took place. He said she threatened to have him killed and exposed herself to his co-workers. That is an allegation the Respondent denies. She said the events alleged by the Applicant never happened.

[41] The Applicant subsequently made a complaint to the police and the Respondent was charged with uttering threats. Notwithstanding the Respondent's denials that charge was resolved by way of the Respondent entering into a recognizance (also referred to as a Peace Bond) by which, among other things, she agreed to have no contact or communication with the Applicant, directly or indirectly, "except through a lawyer or through a third party". The recognizance appears to have been signed on June 19, 2017. There was no provision in it allowing for some degree of contact to accommodate the Applicant's parenting time with Neveah.

[42] Between December 2016 and the signing of the recognizance in June 2017 the Applicant says he continued to have Neveah in his care at least every second weekend and often much more often than that. However, after the signing of the recognizance he said that exercising his parenting time became more problematic because of the restrictions placed on the Respondent.

[43] The Respondent had a different version of the same events.

[44] She said out that even on those weekends when the Applicant had the care of Neveah, he had her only until Sunday at 9:30 a.m..

[45] Also, the Respondent denied that the Applicant had the care of Neveah every weekend as he claimed and said that on many occasions when he did have Neveah over and above that which was specified in the order, it was not because of any agreement between them but rather because he refused to return Neveah to her.

[46] She did acknowledge that there were occasions when she agreed with the Applicant having additional parenting time, such as over Christmas in December 2016 and when she went on vacations in February and December 2017 and other times.

[47] As for the December 2016 incident she said that after the Applicant's weekend with Neveah ending December 18, 2016, he informed her he would not be taking Neveah after school the following week because he was going to Jamaica for a vacation. She said she had to make last minute arrangements for Neveah's care.

[48] Then, she said, in March or April 2017 the Applicant had her charged with uttering threats and he then stopped picking Neveah up from school on weekday afternoons. She had to resort to the help of friends and family to care for her instead. Ultimately, she paid to have Neveah placed in an after-school care program. It was her evidence that after she was charged the Applicant only had the care of Neveah on alternate weekends.

[49] While the circumstances that occurred between December 2016 and the summer of 2017 could be described as changes in circumstance, they were not the kind of changes contemplated by the Court in *Willick* (*supra*). Rather, they were changes created by the parties themselves.

[50] The current order was negotiated by the parties with the assistance of their counsel in June 2016. The arrangement they agreed upon seemed reasonable. It allowed both parties to have frequent contact with their daughter and more importantly it allowed Neveah to have frequent contact with both of her parents. The Applicant's time with his daughter negated the need for after-school care and the associated cost. The order appeared to be in Neveah's best interests while at the same time accommodating the needs of the parties.

[51] The order describes a form of shared parenting although not shared to the extent that it requires an alteration to the table amount of child support. The Respondent has "primary care and residence" of Neveah and the Applicant is to have Neveah in his care Monday through Friday of each week as well as Saturday and a portion of Sunday of every second week. While his time with Neveah during the weekdays may be brief, the arrangements still gave Neveah the opportunity to spend time with both of her parents for some of almost everyday of the week. There is no evidence that suggested that Neveah had a problem with the parenting arrangements. While it is true that while in his care the Applicant failed to get Neveah to a couple of her dance lessons, that was due to the fact that he Applicant was without a vehicle for a couple of weeks as a result of a car accident.

[52] Barely six months after the parties negotiated the order they had a disagreement. It was the kind of disagreement that separated spouses will have from time to time. The Applicant informed the Respondent that he was unable to care for Neveah during a week in December 2016 when he planned to visit his family in Jamaica. He said that he previously informed the Respondent of his plans so that she knew she had to make other arrangements. The Respondent said that he did not. She felt that he was simply ignoring his responsibilities.

[53] While the whole episode surrounding the disruption in the parenting arrangements was unfortunate, the Applicant's vacation plans should not have resulted in an insurmountable and permanent breakdown in the parenting arrangements.

[54] No parenting order can be crafted to anticipate every possible event that may temporarily interfere with the parties' daily schedules and their parenting arrangements. Illnesses sometime disrupt such arrangements. Weather can present difficulties. Unexpected employment obligations may occasionally get in the way and parents sometimes go on vacations without their children. The Respondent did a number of times and the Applicant cared for Neveah on those occasions. The court expects parents, particularly parents who share joint custody, to work cooperatively with each other and manage such disruptions. In this case it seems that both parties took advantage of what was a temporary problem and used it as a reason to disregard the terms of the court's order.

[55] The parenting arrangements as described in the order did not breakdown because of unforeseen changes in circumstances outside of the control of the parties. On behalf of the parties it was argued that communication between the two

of them is poor. That is not new. Communication between the two of them was poor when they negotiated the order.

[56] Counsel on behalf of the Applicant said during summation that the parties' relationship was one of "high conflict". Again, conflict existed between the parties before they agreed on the order. In spite of that conflict they showed that they were able to agree on the terms of the order and once their agreement was reached they were able to put their differences aside and negotiate temporary arrangements that accommodated their vacation plans and the like when it suited them both. It's not clear what changed between them in December 2016. In any event the acrimony between the parties that was known at the time of the original order cannot be used now as grounds to reopen the parentings arrangements. (See *Litman v. Sherman*, 2008 ONCA 485) If the court was to conclude otherwise any parenting order would be subject to variation whenever former spouses decide not to comply with its terms.

[57] The recognizance was also not a material change in circumstances. I would describe it a speed bump, not a road block. Had both parties applied to the Provincial Court, there is a high probability that the Court would have been prepared to vary the terms of the recognizance to allow for contact between the parties for the purpose of giving effect to the Supreme Court order.

[58] As said earlier, I find that there has been no material change in circumstances that would allow for or require the variation of the parenting terms of the existing order. Neveah was entitled to expect her parents to try to resolve their temporary problems constructively without resorting to arguments, threats, police involvement and ultimately more litigation.

[59] For the above reasons I decline to vary the parenting provisions of the order. Had I concluded that the breakdown in the parties' parenting arrangements was a "change in circumstances" my ultimate decision regarding parenting would be the same.

[60] Subsection 18 (5) of the *PSA* provides that in any proceeding concerning custody, parenting arrangements and parenting time, the court should give paramount consideration to the best interests of the child.

[61] Subsection (6) includes a list of circumstances that are to be considered when determining what is in a child's best interests.

[62] Subsection (8) provides that in making an order concerning custody, parenting arrangements or parenting time "the court shall give effect to the principle that a child should have as much contact with each parent as is consistent with the best interests of the child ...".

[63] Having considered the evidence presented by the parties and the circumstances listed in the *P.S.A.,* I am unable to conclude that an equal shared parenting arrangement such as the one proposed by the Applicant would be in Neveah's best interests.

[64] The Applicant is currently working less than previously was the case (approximately three hours each workday) but plans to obtain either more hours with his present employer or other employment which will mean more work hours during the day. While his plan is to structure his work week in such a way as to accommodate an equal shared parenting arrangement, it is uncertain whether it will be possible for him to do so without limiting his employment options. More importantly however, Neveah appears to be well cared for while in the "primary care" of the Respondent and the Applicant has not convinced me that a plan different from that which is contained in the order would be better for Neveah.

[65] The Respondent's proposed parenting arrangement is to limit the Applicant's parenting time to every second weekend from Friday until Monday morning. It was submitted on her behalf that while the Applicant would be seeing Neveah fewer days, the total number of hours that he would spend with her over a two-week period would be approximately the same as it is under the current order.

[66] While the Respondent's math may be correct, there is clearly a difference to a parent and their child who get to see each other for two and a half days every two weeks as compared to a portion of 12 days out of every 14. The Respondent's plan all but ignores ss. 18(8) of the *P.S.A.*.

[67] There is a lot to be said for the care arrangements in the current order. Under the terms of that order Neveah is in the primary care of the Respondent – under which she is apparently doing well. The order also gives her regular contact with the Applicant and her two sisters.

[68] I have come to the conclusion that no other parenting arrangement is likely to have a much greater chance of success while still meeting what I consider to be the best interests of Neveah. I therefore decline to order a variation of the parenting arrangements as contained in the August 10, 2016 order.

[69] To be clear, the following is ordered:

i The parties will continue to share joint custody of Neveah.

ii The Respondent will continue to have primary care and residence of Neveah.

iii The Applicant will have care and residence of Neveah Monday to Friday from approximately 2:30 p.m. to approximately 5:00 p.m.. The Applicant will pick Neveah up from school at approximately 2:30 p.m. (assuming school is in session) or if she is in after-school care, he will pick her up from the after-school care program.

iv The Respondent will pick up Neveah at a third-party location to be agreed upon by the parties at approximately 5:00 p.m. or as soon as possible thereafter. Should she be unable to pick Neveah up at 5:00 p.m. it will be satisfactory for Neveah to stay in the care of her older sister, Jhenielle, until such time as the Respondent picks her up. The Applicant indicated to the court that he could alter his work schedule to accommodate a shared parenting arrangement. Assuming that is still the case, I would expect him to do what he can to alter his work schedule (without jeopardizing his employment) so that whenever possible Neveah remains in his care each weekday until she is picked up by her mother.

v In addition to the foregoing, the Applicant will have care of Neveah every second weekend from Friday at approximately 2:30 p.m., with pick up being at her school or after school program, and returning her to the Respondent the following Sunday at approximately 9:30 a.m. at a location to be agreed upon by the parties.

vi The Applicant will have such other parenting time with Neveah as the parties agree to from time to time.

[70] I have not included any different parenting time during the summer months, during Neveah's March break or Christmas vacation or any other special occasion as no specific request was made for an order for those times. There is also no evidence that would assist me in determining how those times should be changed for those occasions. I encourage the parties, through their counsel, to try to agree on Neveah's parenting arrangements during those special occasions. I see no reason why the Applicant should not have additional time during the summer months when Neveah is not in school and when the Respondent may be working

and he is not, and during her March break, Christmas break, on her birthday, on Father's Day and other holidays and special event days during the year. There is nothing in the evidence that would suggest that those parenting times should not be shared in some fair and perhaps equal fashion. If the parties are able to agree on the terms of those special event times they may be included in the court's variation order with an indication that they are by consent.

[71] The court's variation order will also include paragraphs 10, 11 and 12 of the August 10, 2016 order which provide that if Neveah has an extracurricular activity during their parenting time, they will ensure she attends that activity, that Neveah will not be exposed to any person under the influence of drugs or alcohol and communication between the parties will be child focussed and unless they agree otherwise by text. They may communicate by phone or in person in the event of an emergency.

[72] By the time this decision is released, the terms of the Respondent's recognizance will have come to an end.

ANALYSIS – CHILD SUPPORT

[73] Since the order was granted there have been changes in the Applicant's employment circumstances. Subsequent to the settlement conference on June 15, 2016 and the issuance of the order on August 10, 2016 the Applicant earned more income than was contemplated when the order was agreed upon. More recently the Applicant said his income has dropped below the previously agreed figure of $41,100.00. Whereas I am satisfied that there have been changes to the Applicant's employment circumstances and his income for child support purposes, the issue becomes whether the child support provisions of the August 10, 2016 order should be varied and if so, how? Sub-issues raised by both parties are:

i What is the Applicant's current income for child support purposes?

ii Do I accept the Applicant's stated employment figure for child support purposes or, as suggested by the Respondent, should I impute further income to him before determining the amount of child support to be paid?

iii Is the Applicant entitled to relief based on undue hardship?

iv Is the Respondent entitled to any further child support by virtue of section 7 of the *Child Support Guidelines* and if so, how much?

v Should the court vary child support on a retroactive basis and if so, to what date and in what amount?

[74] The Applicant says that his current income is $1,352.00 paid twice a month or $32,448.00 per year. His evidence is supported by a letter from his employer and pay stubs showing that rate of income since the middle of November, 2017. At that level of income the table amount for child support for one child would be $277.00 per month.

[75] The Respondent submitted that I should not accept his current income for child support purposes but rather I should impute an additional amount of income to him. It is her position that the Applicant is intentionally under-employed.

[76] Sub-section 19 (1) of the *Guidelines* allows the court to impute additional income to a parent as the court considers appropriate in the circumstances. One such circumstance would be if the court considers the parent to be intentionally under-employed other than where the under-employment is required by the needs of a child to whom the order relates or any child under the age of majority or by the reasonable education or health needs of the parent.

[77] The burden of establishing that income should be imputed rests upon the party making the claim, in this case on the Respondent. The burden shifts to the payor (in this case the Applicant) if he is asserting that his income or his income earning capacity has been reduced due to ill health (see *MacDonald vs. MacDonald*, 2010 NSCA 34 and *MacGillivray vs. Ross*, 2008 NSSC 339). In this case, the Applicant does not argue that his income is limited to what it is due to ill health or the needs of a child. Rather his income was reduced by his employer in November 2017 because of a shortage of available work. His employer testified that he had no problem with the quality of the Applicant's work and that he may increase his hours in the future if he obtains more contracts. He also said that he had no objection to the Applicant finding work with other cleaning companies.

[78] The Applicant's total income in 2014 was $41,261.00. In 2015, while working with his current employer, the Applicant earned a total income of $62,239.00. In September 2015 the Respondent applied for an order for custody, access and child maintenance. That application eventually led to the June 2016 settlement conference referred to earlier.

[79] In December 2015, approximately six months prior to the settlement conference, the Applicant's employer provided a letter stating that he was reducing

the Applicant's income to $42,806.00 per year due to dissatisfaction with the quality of his work. The agreement reached between the parties was based on the Applicant having an income of $41,100.00 per year.

[80] In the calendar year 2016, the Applicant's income turned out to be $53,085.00. It was his evidence that the difference between what he received from his cleaning position and his total income was attributable to additional work he obtained installing flooring over the course of a month during which he earned in excess of $10,000.00.

[81] In 2017 I find that the Applicant earned approximately $54,288.00. Clearly the Applicant has the ability to earn more than $32,448.00.

[82] I have concluded that this is an appropriate case to impute additional income to the Applicant. Section 19 of the *Guidelines* provides the court with a discretionary authority to impute additional income which must be exercised judicially, not arbitrarily. There should be a rational and solid evidentiary foundation grounded in fairness and reasonableness. The goal of imputing income is to arrive at a fair estimate of income, not to arbitrarily punish the payor. (*Parsons vs. Parsons*, 2012 NSSC 239 (N.S.S.C., F.D.))

[83] The court is not restricted to actual income earned but may look to the payor's earning capacity having regard to subjective factors such as the payor's age, health, education, skills, employment history and other relevant factors. (*Parsons, supra*)

[84] The Applicant is employed by a cleaning services company. He cleans the premises of various automobile sales companies during the evening and weekends when the businesses are closed to customers. It is his position that his income is limited to what it is now because of the shortage of work available to his employer. However, history over the past two to three years has shown that work may become available and his income may increase. There are other cleaning companies that employ workers for the same purpose and it is open to the Applicant to seek employment from them in addition to the work that he gets from his current employer. His evidence also shows that he is capable of working in other areas, most notably installing flooring.

[85] He said in his affidavit that he has sought work elsewhere but, according to him, he was not successful in obtaining other employment. Based on his evidence I do not believe that he has been putting enough effort into obtaining additional

employment. Therefore, taking into account his age, his abilities, his work experience and his past income, I impute to him an income of $43,000.00 which I consider to be conservative relative to his income earning capacity. At that level of income, the table amount of child support would be $366.00 per month for one child.

[86] The Applicant has requested that I order something less than the full table amount based on undue hardship. Section 10 of the *Provincial Child Support Guidelines* reads as follows:

> **10 (1)** On the application of a parent, a court may award an amount of child support that is different from the amount determined under any of Sections 3 to 5, 8 or 9 if the court finds that the parent making the request, or a child in respect of whom the request is made, would otherwise suffer undue hardship.
>
> **(2)** Circumstances that may cause a parent or child to suffer undue hardship include the following:
>
> (a) the parent has responsibility for an unusually high level of debts reasonably incurred to maintain the parents and their children prior to the separation, where the parents cohabited, or to earn a living;
>
> (b) the parent has unusually high expenses in relation to exercising parenting time or interaction with a child;
>
> (c) the parent has a legal duty under a judgment, order or written separation agreement to support any person;
>
> (d) the parent has a legal duty to support a child, other than a child to whom the order relates, who is
>
> (i) under the age of majority, or
>
> (ii) the age of majority or over but is a dependent child within the meaning of clause 2(c) of the Act; and
>
> (e) the parent has a legal duty to support any person who is unable to obtain the necessaries of life due to an illness or disability, including a dependent parent within the meaning of clause 2(d) of the Act.
>
> **(3)** Despite a determination of undue hardship under subsection (1), an application under that subsection must be denied by the court if it is of the opinion that the household of the parent who claims undue hardship would, after determining the amount of child support under any of Sections 3 to 5, 8 or 9, have a higher standard of living than the household of the other parent.

> **(4)** In comparing standards of living for the purpose of subsection (3), the court may use the Comparison of Household Standards of Living Test referred to in Schedule II….

[87] The Applicant relies on sub-section 10 (2) (d) and submitted that his undue hardship is caused by his legal duty to support his other children being his two sons, his young daughter who lives in Halifax and his 20 year old daughter who lives with him.

[88] It was the Applicant's evidence that his sons, J.M. and T.M., aged 12 and 10, reside with his mother in Jamaica and have since they were infants. He testified that the boys' mother, T.D., does not provide them with support but he also admitted that he has never pursued her for support for the children.

[89] There is no court order that requires the Applicant to provide support for his sons but there is little doubt that he has a legal duty to provide for them.

[90] The Applicant says that he provides that support in the form of monthly payments of $400.00 to his mother as well as $400.00 a year for each of his sons' school fees, a further $300.00 per child per year for their school books and a further $200.00 each per year for school uniforms.

[91] The Applicant says he also provides support "when [he] can" for his soon to be two year old daughter who lives with her mother, A.F., in Halifax. Again, there is no court order that requires that support. If the support is paid, it is being paid on a voluntary basis. Finally, he points to the needs of his older child, Jhenielle, who is now 20 years of age and who resides with him. Jhenielle's mother, S.S., apparently does not provide support for her.

[92] With respect to his sons, in addition to his affidavit evidence he provided copies of Western Union receipts in various amounts but which generally show an average of $400.00 a month being paid. However, the recipient of those payments is not his mother. Some payments were made to the Applicant's niece and more recent payments were to the Applicant's brother. The Applicant said the payments were forwarded to his niece until she moved and after that to his brother because his mother "found it difficult handling the paperwork".

[93] The Respondent doubts that the money or at least all of it ever reaches his mother. She suspects that the money goes to the Applicant's own bank account in Jamaica. She said that prior to her separation from the Applicant she observed him

withdrawing money from a bank account in Jamaica while they were in that country. The Applicant testified that he closed his Jamaican account years ago.

[94] The only evidence that the Applicant provided to establish that the money actually went to his mother was a handwritten letter from a person purporting to be a Justice of the Peace in Jamaica. In the letter the author says that he has known the Applicant's mother for over 40 years, that the Applicant's two sons have lived with the Applicant's mother from "baby stage" and that they have been supported financially by the Applicant who sends money to his mother every month through his brother. In the letter he does not say how he knows that to be the case although there is a signature at the bottom of the letter (below that of the author) which I assume is supposed to be the signature of the Applicant's mother. The letter is not convincing. It is hearsay. The Applicant offered no evidence from his mother, his brother or from his niece.

[95] I am not convinced that the money is paid to his mother for the support of his sons.

[96] The Applicant has provided no proof that he provides financial support to his youngest child. He provided no cancelled cheques. The child's mother with whom he apparently has a good relationship resides in the Halifax Regional Municipality but the Applicant did not have her present any evidence.

[97] Finally, with respect to his older daughter, she is 20 years of age. She is not presently going to school or university although he says that it is her intention to return to school in September 2018. It was his evidence that she works part-time and that she pays him between $60.00 and $70.00 per month to assist with the cost of groceries. I find that at the present time she is not a "dependent child".

[98] Notwithstanding the fact that the Applicant may have a legal duty to support his sons and his youngest child, the evidence does not convince me that he is providing them with support other than the relatively modest sums that he may contribute to his sons' school costs. That is not enough for me to conclude that he would suffer undue hardship if he was required to pay the table amount of child support for Neveah. That being the case it is not necessary for me to compare his household standard of living with that of the Respondent.

[99] It was submitted on the Applicant's behalf that the Applicant's monthly expenses demonstrate that with the added burden of a child support payment for Neveah his monthly costs will be such that he would suffer undue hardship. The

Applicant does report high monthly expenses relative to his income (and imputed income). However they are high largely because of his shelter expenses which total almost $2,000.00 a month. Of that total he pays $1,600.00 a month for rent. He also has high motor vehicle expenses. He has a car payment of $544.00 a month and a gas expense of $250.00 a month. Considering his modest income he may want to reassess whether he can afford his current accommodations and car payment. Support for his daughter should be given priority.

[100] Prospectively, I therefore order that he pay the table amount of child support to the Respondent in the sum of $366.00 per month based on an imputed income figure of $43,000.00. His current monthly child support payments are due on the last day of each month. This new level of child support will commence on June 30, 2018 and continue to be paid at that rate no later than the last day of each month thereafter until otherwise ordered. The support cheques will be made payable to the Respondent and will be paid through the Office of the Director of Maintenance Enforcement.

[101] The Respondent asked that I order the Applicant to contribute to certain section 7 expenses most notably the cost of Neveah's after-school care and summer camps as well as the costs associated with Neveah's ballet lessons, costume rentals, etc.

[102] Sub-section 7(1)(f) of the *Provincial Child Support Guidelines* provides that in a child support order the court may provide for an amount to cover all or a portion of certain expenses including "extraordinary expenses for extracurricular activities". I have reviewed the Respondent's evidence with respect to the costs associated with Neveah's ballet, including registration costs, lessons and costume rentals. When averaged to a monthly figure and taking into account that she apparently has no other extracurricular activity costs, I do not consider the cost of her ballet to be "extraordinary" as contemplated by ss. 7(1)(f) and therefore I make no order with respect to that activity.

[103] As for childcare, in light of what I have already decided with respect to the Applicant's time with Neveah after school, there will be no need for a childcare expense on a prospective basis other than perhaps during the summer months. If childcare is required during the summer months because Neveah cannot be cared for by either of her parents due their employment commitments, then the cost of that childcare will be shared by the parties proportionate to their incomes. What that cost will be remains to be seen. In 2017 the childcare cost during the summer

months while Neveah was not in school came to a total of $460.00 before taking into account any tax savings that the Respondent may have experienced. If the parties through their counsel are able to determine what the net cost will be during the summer months, they can include that figure in the court's Variation Order. If they are unable to do so, the gross amount of the childcare will be shared by the parties proportionate to their incomes. They may then each claim for tax purposes the portion of the cost they paid.

[104] I have already determined the Applicant's income for child support purposes to be $43,000.00 per year. Assuming the Respondent's 2017 income to be representative of what she is likely to earn in 2018 I calculate her income for child support purposes to be $58,734.91 (line 150 amount $59,651.00 less union dues of $916.09). The Applicant's proportionate share of child care costs would therefore be 42.2% and the Respondent's would be 57.8%.

[105] The Applicant will also include Neveah on his Pharmacare Plan.

[106] Lastly, the Respondent has asked that the court order the Applicant to pay retroactive child support representing the underpayment of child support based on his income since the granting of the previous order.

[107] The wording of section 37(1) of the *P.S.A.* makes it clear that the court may make a variation order on both prospective and retroactive basis.

[108] The leading case with respect to retroactive support orders is that of the Supreme Court of Canada in *D.B.S. vs. S.R.G.*, 2006 SCC 37. The headnote reads in part:

> "In determining whether to make a retroactive award, a court should strive for a holistic view of the matter and decide each case on the basis of its particular facts. The payor parent's interest in certainty must be balanced with the need for fairness to the child and for flexibility. In doing this, the court should consider the reason for the recipient parent's delay in seeking support, the conduct of the payor parent, the past and present circumstances of the child, including the child's needs at the time the support should have been paid, and whether the retroactive award might entail hardship."

[109] The court may decline to order support on a retroactive basis if the recipient spouse delays pursuing his or her claim without good reason. In this case, the Respondent did not seek retroactive support from the Applicant sooner than when she filed her Response because she was unaware of the fact that the Applicant's

income was more than had been estimated when the current order was agreed upon. The reason she did not know of his income leads to the second consideration, the conduct of the payor parent. Among other things the order contains at clause 18 a provision that requires both parties to annually provide the other with a copy of his or her income tax return. That exchange was to take place no later than June 1 of each year. Considering the date the order was issued, presumably the first exchange was to take place on June 1, 2017. That exchange did not take place. Both parties are equally to blame for that but the Applicant's failure to provide that disclosure was of greater consequence to Neveah than was the Respondent's failure to disclose.

[110] The Applicant knew that the support he was paying was based on the assumption that his income was $41,100.00 per year. He knew within six and a half months after the settlement conference that his income for 2016 was not $41,100.00 but rather was $53,085.00. He also knew that for most of 2017 he was receiving a pay cheque, twice a month, in the gross sum of $2,392.00, i.e. a yearly rate of $57,408.00. Bastarache, J. in *D.B.S.* (*supra*) said at paragraph 54:

> "…parents have an obligation to support their child in a way that is commensurate with their income.
>
> …
>
> a payor parent who does not increase his/her child support payments to correspond with his/her income will not have fulfilled his/her obligation to his/her children".

[111] The Applicant's failure to disclose his increased income to the Respondent is the kind of "blameworthy conduct" later referred to in *D.B.S.* (*supra*). In paragraph 106 blameworthy conduct is characterized as:

> "anything that privileges the payor parent's own interests over his/her children's right to an appropriate amount of support."

[112] Regarding Neveah's "past and present circumstances", she was and is a young child in need of support from both of her parents. There is nothing about her circumstances that should reduce the Applicant's obligation to provide support for her.

[113] Finally, will a retroactive award entail hardship to the Applicant? Based on my calculations the financial hardship to the Applicant will be minimal.

[114] The current order requires the Applicant to pay the table amount of child support in the sum of $346.00 a month, on the last day of each month, commencing June 30, 2016 based on an income of $41,100.00. I will give to the Applicant the benefit of the doubt by not ordering any retroactive increase in child support for the period June 30, 2016 to and including December 31, 2016. There is a slim possibility that he may not have appreciated just how much his 2016 income exceeded $41,100.00 until the end of the year. In 2017, I have calculated his income for child support purposes to be $54,288.00. Using the child support tables that were in effect during 2017 up until November 22, 2017 I order that the Applicant pay to the Respondent the table amount of child support in the sum of $457.00 per month starting January, 2017 to and including October 31, 2017. The current tables took effect as of November 22, 2017 and therefore for the months of November and December, 2017 I order the Applicant to pay to the Respondent child support in the sum of $460.00 for each of those two months.

[115] On behalf of the Applicant it was argued that the Applicant should not be required to pay additional retroactive support in the early months of 2017 because according to the Applicant Neveah was in his care at least 40% of the time. I am not satisfied that that was the case. In any event, section 9 of the *Provincial Child Support Guidelines* does not guarantee that even if the Applicant had parenting time with Neveah for "not less than 40% of the time" that he would be required to pay less than the full table amount. (See *Contino vs. Leonelli-Contino*, 2005 SCC 63) The Applicant did not convince me not to apply the method of calculating the child support found in ss. 3(1)(a) of the *Guidelines*.

[116] In 2018 the Applicant's actual income was $2,704.00 per month, or a rate of $32,448.00 per year. His rate of pay was changed by his employer in November 2017 due to a lack of work. Previously I indicated that on a prospective basis I was imputing a higher level of income to the Applicant to take effect as of June, 2018. I consider the period between November, 2017 and May, 2018, inclusive, as a reasonable period of time during which the Applicant should have sought additional or different employment and therefore I will order retroactive support based on his actual income, not the imputed figure. At $32,448.00 per annum the Applicant is ordered to pay on a retroactive basis for each of the months of January 2018 to and including May 2018 the table amount of $277.00.

[117] It should be noted that that is a reduction from the current order. I also note that in September 2017 the parties were before me on an interim variation motion and at that time I granted an Interim Variation Order pending the outcome of these

proceedings requiring the Applicant to pay the Respondent the increased sum of $484.00 per month based on an income of $57,400.00 per annum which figure was derived from pay stub information supplied by the Applicant at that time. That order took effect on September 30, 2017. My Variation Order will replace that order.

[118] My order will require the Director of Maintenance Enforcement to adjust their records in accordance with my Variation Order, give to the Applicant full credit for any payments that he has made during the retroactive period (whether it was payments made directly by him to the Director or payments garnished by the Director) and from that information determine whatever overpayment or underpayment may still exist.

[119] In addition to the aforementioned table amount variation, the Respondent has asked that I require the Applicant to pay an additional retroactive amount pursuant to section 7 towards the childcare costs that she incurred in 2017 and 2018.

[120] It was approximately March of 2017 that the Applicant stopped having the care of Neveah from Monday to Friday. Initially, the Respondent relied on family and friends to provide daycare but eventually she had to pay for after school care and childcare during the summer. The Applicant may take the view that the Respondent was solely responsible for the need to pay for childcare. I find that both parties are responsible for that cost. They both failed to comply with the court order. Between March 10, 2017 and June 22, 2017 the Respondent incurred a cost of $1,330.00 which was paid to a Ms. G.M. who provided that care. In the summer months in 2017 she incurred the cost of $460.00 by sending Neveah to the Ward 5 Neighborhood Centre until such time as she began attending after school care at the YMCA in September. The Respondent has provided her figures for the calculation of that childcare and she took them up to the end of school in June, 2018. Her figures are based on a charge of $15.84 per day when school is in session and $30.00 a day for in-service days. By multiplying those figures by the number of days school is in session and the number of in-service days she came up with a figure of $3,228.72. The total of all her childcare costs for the period March 10, 2017 to the end of June 2018 comes to $5,018.72. I find that that expense was both reasonable and necessary and I order the Applicant to pay his proportionate share of that expense after the Respondent’s tax savings are taken into account.

[121] Without knowing what all of her tax deductions might be, I have done my best to estimate the after tax cost to the Respondent of her childcare over those two years as coming to approximately $3,385.00.

[122] I have calculated the Applicant's percentage share in 2017 as being approximately 48% and in 2018 as being approximately 39% (for tax purposes I used $2,704.00 a month for the Applicant's income for the first five months of 2018 and $3,583.33 for June 2018). I therefore calculate the Applicant's share of the net childcare expenses incurred by the Respondent from March, 2017 to the end of June, 2018 as coming to $1,508.37.

[123] I order that the Applicant pay to the Respondent that sum as retroactive child support pursuant to section 7 of the *Guidelines*. The Director of Maintenance Enforcement will record that as a retroactive amount fixed as of the date of my order.

[124] The total retroactive support plus the arrears of support owed by the Applicant to the Respondent according to the calculations of the Director of Maintenance Enforcement will be paid by the Applicant to the Respondent at the rate of $100.00 per month over and above the prospective support that I have already ordered until the total arrears and retroactive support has been paid in full. According to my math the retroactive support that I have ordered will result in an additional sum owed by the Applicant to the Respondent of approximately $1,260.00 over and above what would have been payable under the 2016 order.

[125] Finally, the court's Variation Order will continue to include a provision requiring the parties to exchange their tax returns and Notices of Assessment or Re-Assessment, as the case may be, no later than June 1 of the following year.

[126] I direct counsel for the Respondent to prepare the court's order.

Dellapinna, J.