Supreme Court of Nova Scotia (Family Division)
Citation: *Richards v MacKinnon*, 2019 NSSC 163

ENDORSEMENT

Denise Richards v. John MacKinnon
May 16, 2019

SFSNMCA 101160

- Denise Richards, self represented
- John MacKinnon, self represented

Decision:

Reasons:

1. The parties are the parents of four daughters, Nikita, 30 years of age, Chelsie, 28 years of age, Kalie, 24 years of age, and Tessa, who is now 22 years old. The parties were divorced on June 14, 2005. A Corollary Relief Order (C.R.O.) was issued on the same date.

2. Mr. MacKinnon applied to vary the C.R.O. on June 24, 2014. Ms. Richards filed a Response on December 23, 2014. In her Response, Ms. Richards requested variation of the C.R.O. to retroactively adjust child support, to impute income, and to enforce the order.

3. Mr. MacKinnon failed to file income information in support of his Application from the outset. Despite this, an initial hearing date was set. At the same time, deadlines were set for disclosure and affidavits.

4. At a subsequent pretrial conference, by which time Mr. MacKinnon had still failed to make disclosure, Ms. Richards advised that, irrespective of what happened with Mr. MacKinnon's Application, she intended to proceed with her application to vary (as contained in her Response). Mr. MacKinnon's counsel was advised to communicate this information to Mr. MacKinnon, who was not present at the pretrial.

5. On the first date the hearing was set to commence, neither party was in a position to proceed. A witness was not available, and both parties had filed late documents. Mr. MacKinnon's counsel requested an adjournment, which was granted. Costs were awarded against Mr. MacKinnon, as the main impediment to proceeding lay with him.

6. Dates were set but adjourned by the court and rescheduled for October, 2018. On that day, counsel for Mr. MacKinnon was too ill to proceed, and a further adjournment was granted. The court was advised that Mr. MacKinnon had not paid his costs from the last adjournment.

7. New dates were set for December 20 and 21, 2018. Mr. MacKinnon was advised that unless he paid the costs awarded against him by the rescheduled date, his application to vary would not be considered. At a pre-trial conference held just days before the hearing at the request of his counsel, I was advised that Mr. MacKinnon had not paid the costs, nor would he be able to do so before the hearing.

8. Given that information and the fact that financial disclosure was still incomplete, I confirmed that I would not be considering Mr. MacKinnon's variation Application. I also confirmed that Ms. Richards' Application would be heard, and that Mr. MacKinnon's right to participate in that hearing was limited to cross-examination of witnesses and making submissions.

9. At another pre-trial conference held the following day, Mr. MacKinnon's counsel advised that he'd been instructed not to appear on Mr. MacKinnon's behalf for the hearing, and that Mr. MacKinnon would not be participating in the hearing either. Counsel confirmed that Mr. MacKinnon was aware of and understood the implications of his choice. I again confirmed that I would hear Ms. Richards' evidence and that Mr. MacKinnon was entitled to question her witnesses and make submissions on the evidence, but that I would not be hearing evidence from him.

10. On the morning of December 21, 2018 when the hearing was scheduled to commence, Mr. MacKinnon attended court without counsel. When told that he was not entitled to present evidence, and that his participation was limited to questioning witnesses and making submissions, he voiced his displeasure and left.

11. Ms. Richards' evidence was heard in Mr. MacKinnon's absence. The following is my decision arising from that evidence. First, I accept that there's been a material change in circumstances, both in the status of the dependent children and Mr. MacKinnon's income since 2005.

12. Ms. Richards seeks adjustment of the amounts of child support and s.7 expenses payable for her daughters. She also asks the court to impute income to Mr. MacKinnon. She alleges that he quits his job every time the Director of Maintenance Enforcement (M.E.P.) attempts to garnish his wages, and that despite his skills and work record, he chooses not to be employed to avoid paying child support.

13. Ms. Richards filed several affidavits, including one each from her daughters Chelsie (age 28) and Kalie (age 24). Her daughters Nikita and Tessa did not file affidavits or testify. Ms. Richards also filed extensive exhibits, as well as a chart of child support owing based on the status of each child.

14. Ms. Richards calculates her claim for retroactive child support under the Nova Scotia tables from 2004 to 2016 at $109,015, plus amounts to be adjusted for 2009, 2017 and 2018.

15. In accordance with the Supreme Court's direction in **D.B.S. v S.R.G.,** 2006 SCC 37 Ms. Richards must prove, on a balance of probabilities, that Mr. MacKinnon demonstrated blameworthy conduct which merits a retroactive adjustment for more than three years prior to her Response being filed in December, 2014.

16. She must also demonstrate that the other factors laid out by the SCC in **D.B.S.** weigh in favour of a retroactive award.

17. The first part of the **D.B.S.** test involves an inquiry into whether there was delay on Ms. Richards' part in advancing her claim for a retroactive adjustment of child support. The second consideration is whether there is blameworthy conduct on the payor's part. I must then consider the children's past and present circumstances and whether they'd benefit from a

retroactive award. Finally, I must look at whether making an adjustment to child support now would cause undue hardship for Mr. MacKinnon.

18. Ms. Richards did not apply to vary the C.R.O. prior to December, 2014. However, when M.E.P. wrote on April 25, 2014 to inquire into the status of the dependent children, she reported the following changes:

    - She advised M.E.P. that Nikita had ceased living with her as of January, 2005. Because Nikita was only 16 at that time, M.E.P. adjusted the termination date to her 19th birthday (October *, 2007). Nikita later returned to live with Ms. Richards for medical reasons, which is reflected in Ms. Richards' calculations (Schedule A).
    - She reported that Tessa had left home in March, 2014, but at the time, Tessa was only 16 years of age, so M.E.P. declined to make that adjustment. Tessa returned to live with her mother, but Ms. Richards' chart does not include a claim for her after age 19.
    - Ms. Richards reported that Chelsie had left home in June, 2013.
    - When Kalie left home in July, 2017 she reported that change to M.E.P. as well.

19. According to M.E.P.'s letter of May 2, 2014 the calculation of Mr. MacKinnon's arrears to that date was adjusted to reflect these changes. However, the figure in the letter is higher than the figure shown on the printout contained in Exhibit 7 at tab 3. That printout shows a balance owing of $70,393.49 on May 1, 2014 and a balance of $67,734.49 on December 31, 2014. Because that printout is more recent, I accept those figures as more accurate for purposes of my decision.

20. The letter from M.E.P. satisfies me that Ms. Richards' failure to file a variation application earlier did not prejudice Mr. MacKinnon. She reported changes which benefitted him, and those adjustments were made.

21. Next, I must look at whether there's blameworthy conduct on Mr. MacKinnon's part. He and Ms. Richards signed a separation agreement in March, 2004 which was incorporated into the C.R.O. issued on June 14, 2005. Mr. MacKinnon subsequently applied (twice) to vary the C.R.O., but he failed to file the appropriate financial information, so his applications were dismissed.

22. Mr. MacKinnon was obliged under the C.R.O. to make annual disclosure of his income information to Ms. Richards, which he failed to do. He also failed to pay increased support when his income increased.

23. Ms. Richards' affidavit recites in great detail the history of collection and enforcement attempts made by M.E.P. She notes that Mr. MacKinnon has made a number of payment arrangements with M.E.P. over the years (usually to have a garnishee lifted) but then he reneged. I accept Ms. Richards' evidence that Mr. MacKinnon has quit jobs through the years when M.E.P. caught up with him.

24. To add "salt to the wound", she calculates (from his bank statements which were provided) that in 2012, Mr. MacKinnon spent $1,807.35 at the liquor store, which is more than he paid

in child support that year. In 2013, the bank statements show that he paid more for a dog sitter than he paid in child support.

25. Mr. MacKinnon owes a significant amount of arrears. His failure to pursue two earlier variation applications, his failure to comply with deadlines set by this court, and his failure to pay the costs awarded against him compound his blameworthy conduct.

26. **D.B.S.** says that where blameworthy conduct exists, the court is justified in granting a retroactive increase in child support to the date when circumstances changed materially. In this case, that could be as early as 2006 when Mr. MacKinnon quit his job with the school board.

27. I must also consider the children's past and present circumstances and whether they'd benefit from a retroactive award. At the time she filed her Response, two of the children were still dependent and living with Ms. Richards. Kalie went to university on a scholarship, and Tessa went to police academy. Ms. Richards assisted Tessa with expenses such as a laptop, a uniform, and a briefcase.

28. Clearly, the children could have benefited from the money when it was payable. Ms. Richards worked, but her income wasn't enough to meet all of their needs. As Ms. Richards indicated in her submissions, it is not easy to raise 4 children without proper support from their father. The fact that she was able to do so is a credit to Ms. Richards. I'm satisfied that she would use the money for the benefit the children even now. At least one child has a student loan that could be paid with a retroactive award.

29. Lastly, I must consider any hardship that Mr. MacKinnon would suffer as a result of a retroactive award. Without evidence from him, my inquiry into this factor is limited. The evidence shows that he has worked in a number of different positions over the years, at least one of which generated income of over $100,000.00. He didn't increase his child support even then, and in failing to do so, he placed his interests above those of his daughters. His conduct cannot be condoned; any hardship arising from a retroactive award is of his own making, and he will have to make arrangements to deal with payment.

30. Ms. Richards provided a chart (incorporated in Schedule A to this Endorsement) of when she says each child lived with her or their father, when each became independent, and when 3 of the 4 children returned to live with her. I accept her evidence and the evidence of her two daughters as to when each child became independent.

31. I have cross-referenced the documents in Exhibit 7, and I'm satisfied that Ms. Richards' chart is correct. For example:

    a. The timeframe during which Tessa lived with her mother and with her father was not clear in Ms. Richards' affidavits. Ms. Richards says that Tessa was dependent until August, 2018 when she completed her post-secondary training. The evidence also indicates that in 2012 Tessa lived with her father for one month, and then again for several months in 2014. Kalie says that Tessa moved back to her mother's home in December, 2014. Ms. Richards' report to M.E.P. (Exhibit 7 tab 36) indicates that Tessa moved out in March, 2014, so I infer from that, that Tessa moved in with her father for the remaining nine months of 2014. The chart reflects this, although M.E.P.'s records do not.

b. Ms. Richards says that Kalie moved out in July, 2017 but moved back home with her in August, 2017. Exhibit F attached to Ms. Richards' affidavit filed May 14, 2018 is a copy of her letter to M.E.P. in which she indicates that Kalie moved out in July, 2017. That letter was signed in April, 2018 so if Kalie had moved back home in August, 2017 I would have expected to see that reflected in the letter. It was not, and so it's clear that Kalie was independent after July, 2017. The chart also reflects this.

32. In addition to asking the court to adjust child support retroactively, Ms. Richards asks me to impute income to Mr. MacKinnon. At the time of the divorce, he was employed as a teacher's aid. He subsequently quit that job to work as a massage therapist. He has also worked with the labourer's union in Western Canada, he's qualified as a commercial pilot, and he retrained in 2015 as an environmental health and safety tech.

33. Income may be imputed where a party fails to provide income disclosure, or if they are deliberately unemployed or underemployed. The purpose of imputing income is not to punish the payor, but to establish a reasonable figure on which child support should be paid, given the child's right to receive support commensurate with the payor's ability to pay. In determining a payor's ability to pay, I can consider their pattern and history of earnings, as well as their skills and qualifications.

34. Mr. MacKinnon has been employed in several skilled positions since 2005. He's earned a higher income in most years since the C.R.O. was granted. He worked in western Canada in 2015 and 2016, and according to the R.O.E.'s in Exhibit 7 at tab 20, he earned more working in construction in four months than he earned in any of the tax years 2004, 2005 or 2006.

35. Mr. MacKinnon did not file his income tax returns for 2017 or 2018. His Statement of Income filed to support his variation Application indicates that he was collecting Employment Insurance benefits in 2017. He estimated his income from E.I. in 2017 at $27,718.32. In addition to that, Ms. Richards argues that two deposits totaling $65,000.00 into his bank account that year represent further income. I have no other explanation for those deposits, but it's a huge leap to conclude that the monies represent income earned from employment.

36. Instead, I exercise my discretion to impute income to Mr. MacKinnon in 2017 and 2018 based on his 2016 income. He earned $88,996.30 that year, and there's no reason to believe that he couldn't earn income in that range in subsequent years, given his training, skills, and employment history. I therefore impute income to him of $85,000.00 per annum in 2017 and 2018.

37. Although Mr. MacKinnon's blameworthy conduct cries out for a retroactive adjustment prior to 2014, I have determined that, while a retroactive award is appropriate, it should be limited to a retroactive adjustment to 2015 prospectively, for several reasons:

- Ms. Richards' filed her Response containing a request to vary in December, 2014.
- Only two of the children remained dependent in 2015. The Supreme Court in **D.B.S**. said that "child support is for children of the marriage, not adults who used to have that status."

- M.E.P. adjusted Mr. MacKinnon's arrears in April, 2014 to reflect the changes Ms. Richards reported. There's no reason to revisit that figure again, except to adjust for the months Tessa lived with her father. That adjustment leaves Mr. MacKinnon with a credit of $1,320.00, which leaves the actual amount of arrears owing on December 31, 2014 at **$66,414.49**.

38. In 2018, there was one dependent child (Tessa) for 8 months. Mr. MacKinnon owes child support of $730.00/m x 8 = $5,840.00. In 2017 Kalie was dependent for 7 months so he owes $5,110.00 ($730.00 x 7). I accept Ms. Richards' calculations for 2016 ($11,325.00) and 2015 ($10,836.00) as shown on Schedule A. The amount of arrears owing since January 1, 2015 is therefore $33,111.00. Mr. MacKinnon's total arrears for table child support, including arrears as of December 31, 2014 totals **$99,525.49**.

39. Mr. MacKinnon shall repay the arrears at the rate of $750.00 a month until repaid in full. The Director of M.E.P. has already recorded a lien against his real property, which may be adjusted to reflect the adjusted arrears of $99,525.49 as of today.

40. Ms. Richards also asks for a contribution from Mr. MacKinnon for the children's special and extraordinary expenses. In the C.R.O., Mr. MacKinnon was ordered to pay his proportionate share of health expenses, specifically 56% of Chelsie's orthodontic expenses. His share amounted to $39.20 per month, which was paid until October, 2005 according to the M.E.P. printout.

41. Ms. Richards now asks that Mr. MacKinnon pay his proportionate share of Kalie and Tessa's post-secondary expenses from 2012 - 2017. Post-secondary expenses are not addressed in the agreement or the C.R.O., but a child opting to pursue further education is a change in circumstances that would merit variation of the child support payable. The question though, is whether s.7 expenses for an adult child should be paid in addition to the table amount.

42. Ms. Richards calculates Mr. MacKinnon's share of these expenses since 2012 at $10,597.55, plus his proportionate share of the 2017 expenses once income is imputed. Having decided that her retroactive claim is limited to 2015 prospectively, I must decide if Mr. MacKinnon should pay a proportionate share of the girls' 2015 and 2016 expenses as calculated by Ms. Richards. His share would be $4,361.96.

43. Because I have imputed income to Mr. MacKinnon of $85,000.00 in 2017, his proportionate share of the expenses claimed would be 60.4%. Expenses totaled $2,461.34 that year, so he would pay $1,486.65.

44. Given my determination that retroactive child support in the table amount should be paid for the dependent children from 2015 – 2018, I decline to order an additional contribution for s.7 expenses.

45. Ms. Richards also seeks assignment of Mr. MacKinnon's life insurance to her, as security for unpaid support. This was not a provision in the C.R.O., but it was included in the agreement. Mr. MacKinnon has never provided confirmation of the beneficiary designation to Ms. Richards. Where there is a significant amount of child support arrears, it's appropriate to direct that Mr. MacKinnon's life insurance be assigned to Ms. Richards forthwith. She will be

entitled to collect the proceeds of the policy only to the extent she is owed child support on the date of Mr. MacKinnon's death.

46. In the event that Mr. MacKinnon fails to assign his life insurance policy within 30 days of this decision, the Sheriff shall be authorized as Trustee to do so on his behalf. In the event he fails to identify a life insurer, the Sheriff shall be empowered as his Trustee to make inquiries of life insurance companies to ascertain whether Mr. MacKinnon is the holder of a valid life insurance policy.

47. In that regard, Ms. Richards points to the bank records for 2017, where a payment is shown to CUMIS Life. CUMIS Life will be directed to confirm whether it issued a life insurance policy to Mr. MacKinnon which remains valid at this time, and it will be directed to confirm the policy value (face and cash value) and the beneficiary designation.

48. In the event the assignment is not made before Mr. MacKinnon's death, and life insurance proceeds are payable to anyone other than Ms. Richards as a result of his death, the life insurance proceeds shall be impressed with a trust in favour of Ms. Richards, to the extent of outstanding amounts of child support owing by Mr. MacKinnon on his death.

49. Finally, Ms. Richards seeks costs. Under clause 19.1 of the separation agreement, if either party breached the agreement, the other is entitled to "all costs associated [with] the breach, including legal costs which shall be computed on a solicitor/client basis, together with disbursements." I agree with her that Mr. MacKinnon breached the agreement. He failed to make income disclosure as required, and he failed to pay child support as ordered.

50. Ms. Richards represented herself, though from the quality of her materials, it's apparent that she had legal assistance throughout. I am prepared to allow her the opportunity to file further information in support of her claim for costs. Written submissions must be received within thirty days. Should Mr. MacKinnon opt to respond, he may do so within fourteen days thereafter.

MacLeod-Archer, J.

Schedule A

Year	Children in Denise Richards' care	Children in John MacKinnon's care	Denise Richards' Income	John MacKinnon's Income	Denise Richards' pays	John MacKinnon pays	Adjusted
2015	2 (12 months)	0	$53, 267.00	$65,009.63	$0.00	2 children x 12 months $903.00 x 12 = $10,836.00 Total = $10,836.00	
2016	*2 (5 months) *1 (7 months) *Tessa off as of 19 but still home *Kalie still at CBU	0	$73,486.00	$88,996.30	$0.00	*2 children x 5 months $1,215.00 x 5 = $6,075.00 *1 child x 7 months $750.00 x 7 = $5,250.00 *Total = $11,325.00	
2017	1 (7 months) *2 children living at home but only 1 on. Kalie at CBU finishes classes July 28th *Tessa enrolled at CBU but decided not to go. Goes Jan-Aug 2018 to Holland College	0	$55,715.00	Imputed Income $85,000.00	$0.00	1 child x 7 months $ Total = $?	$730 x 7 = $5,110.00
2018	1 (8m)	0	N/A	Imputed Income $85,000.00	N/A		$730 x 8 = $5,840.00
							$33,111.00