**NOVA SCOTIA COURT OF APPEAL**
**Citation:** *White v. Bradley*, 2024 NSCA 46

**Date:** 20240412
**Docket:** CA 519963
**Registry:** Halifax

**Between:**

Philip Kevin White, Jr.

Appellant

v.

Amy Elizabeth Bradley

Respondent

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**Judge:** The Honourable Justice Elizabeth Van den Eynden

**Appeal Heard:** December 7, 2023, in Halifax, Nova Scotia

**Subject:** *Parenting and Support Act,* variation of child support, retroactive and prospective child support; imputation of income, bias, costs

**Summary:** Appellant seeks to overturn provisions of a variation order issued under the *Parenting and Support Act.* He challenges the judge's retroactive and prospective child support determinations, income imputation, costs award and alleges judicial bias.

**Issues:**

1. Did the judge err by finding T had his primary home with Mr. White since May of 2020?
2. Did the judge err by not awarding Mr. White retroactive child support from February 2020?
3. Did the judge err by finding T was employed on a full-time basis?
4. Did the judge err by finding that T graduated in February 2022?

5. Did the judge err by not awarding Mr. White prospective child support from October 2022 and continuing until T completes any post secondary education?
6. Did the judge err by imputing income of $49,086 to Ms. Bradley?
7. Did the judge err by not awarding Mr. White retroactive payment of 50% of T's medical expenses incurred between February - October 2022?
8. Did the judge err by not ordering Ms. Bradley to repay child support she received during the period January 2020 - October 2022?
9. Did the judge err by not awarding Mr. White prospective child support of 50% of T's post secondary education costs and expenses.
10. Did the judge err by not awarding Mr. White costs for filing fees or amounts for lost wages?
11. Did the judge demonstrate bias towards Mr. White?

**Result:** Appeal dismissed. The appellant did not establish any reviewable error. Costs awarded to respondent in the amount of $2,000 inclusive of disbursements.

***This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 59 paragraphs.***

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|---|---|
| **Judges:** | Farrar, Scanlan, Van den Eynden, JJ.A. |
| **Appeal Heard:** | December 7, 2023, in Halifax, Nova Scotia |
| **Held:** | Appeal dismissed with costs, per reasons for judgment of Van den Eynden, J.A.; Farrar and Scanlan, JJ.A. concurring |
| **Counsel:** | Philip Kevin White, Jr., appellant in person<br>Michelle Axworthy, for the respondent |

**Reasons for judgment:**

**Overview:**

[1] Mr. White seeks to overturn certain aspects of a variation order issued under the *Parenting and Support Act*[1] by Justice Elizabeth Jollimore, then of the Nova Scotia Supreme Court (Family Division).

[2] Mr. White challenges the judge's determinations respecting retroactive and prospective child support regarding the child T. As well, Mr. White asserts the judge did not properly impute income to Ms. Bradley, neglected to address his claim for costs, and demonstrated bias towards him.

[3] For the following reasons, I would dismiss the appeal with costs.

[4] A review of the relevant background and grounds of appeal, together with the applicable standard of review they attract, precedes my analysis of Mr. White's complaints of error.

**Background**

[5] The hearing in the court below took place on October 13 and 14, 2022. The judge delivered her decision orally on October 31, 2022, subsequently reported as 2022 NSSC 391.

[6] The parties have two children, "T" and "J". T was 18 years old at the time of the hearing. He turned 19 on the day the judge delivered her oral decision. J is several years older and independent. The issues on appeal only relate to T.

[7] The order Mr. White sought to vary was issued in January 2020. This 2020 order placed T in Ms. Bradley's care and ordered Mr. White to pay child support for T to Ms. Bradley.

[8] Mr. White asked the judge to: terminate his support payments for T effective January 20, 2020; order Ms. Bradley to pay him child support for T retroactive to January 20, 2020; and, to modify the payment terms of the 2020 order for retroactive child support.

[1] R.S.N.S. 1989, c. 160

[9] The judge had affidavit evidence from 7 witnesses, heard oral testimony from four (including the parties and T), and had the parties' submissions.

[10] The judge made the following determinations which are relevant to Mr. White's appeal:

- T did not live with Ms. Bradley after January 2020. Thus, Mr. White's child support obligation, payable to Ms. Bradley, terminates after January 2020 (paras. 39-40 of decision);
- T lived independently of his parents during part of March and April 2020 (para. 46);
- T finished high school in August 2021 and continued in an upgrading program until early 2022. T graduated in February 2022 and worked full time since February 2022 (paras. 21, 23 and 25);
- For the purpose of calculating Ms. Bradley's child support obligation, the judge imputed income to her for 2022 of $49,086 (para. 34).

[11] In Mr. White's pre-hearing brief, he requested additional relief which the judge did not expressly address in her decision. In particular, he wanted Ms. Bradley to: contribute to retroactive medical expenses for T; reimburse him for child support amounts he had paid; contribute to T's prospective post-secondary education costs; and, pay him costs related to certain expenses and lost wages.

[12] I will supplement additional background, as needed, in my analysis of the grounds of appeal.

**Issues**

[13] Mr. White raises the following grounds of appeal:

1. Did the judge err by finding T had his primary home with Mr. White since May of 2020?
2. Did the judge err by not awarding Mr. White retroactive child support from February 2020?
3. Did the judge err by finding T was employed on a full-time basis?
4. Did the judge err by finding that T graduated in February 2022?
5. Did the judge err by not awarding Mr. White prospective child support from October 2022 and continuing until T completes any post secondary education?
6. Did the judge err by imputing income of $49,086 to Ms. Bradley?

7. Did the judge err by not awarding Mr. White retroactive payment of 50% of T's medical expenses incurred between February - October 2022?
8. Did the judge err by not ordering Ms. Bradley to repay child support she received during the period January 2020 - October 2022?
9. Did the judge err by not awarding Mr. White prospective child support of 50% of T's post secondary education costs and expenses.
10. Did the judge err by not awarding Mr. White costs for filing fees or amounts for lost wages?
11. Did the judge demonstrate bias towards Mr. White?

[14] In my analysis, I will address related grounds together.

## Standard of review

*Errors of law, factual errors or a mixture of both*

[15] The standards of review are well settled. As explained in *Laframboise v. Millington*, 2019 NSCA 43:

> [14] The standards of appellate review in cases such as this are so well-known as to hardly require elaboration. Questions of law are reviewed on a standard of correctness. When interpreting and applying the law the judge must be right. On questions of fact, or inferences based on accepted facts, or questions of mixed law and fact where the legal point is not readily extricable, a trial judge's factual findings will only be disturbed if they evince palpable and overriding error. "Palpable" means obvious. "Overriding" means dispositive; a mistake so serious as to have likely influenced the outcome. In appeals from a trial judge's exercise of discretion, deference is owed. We will only intervene if we are satisfied that in the exercise of that discretion the judge erred in law or the outcome is patently unjust. Unless an appellant can persuade us that the trial judge either erred in law, or erred in fact, or erred in the exercise of discretion in the ways I have just described, the appeal will fail. See generally, *Housen v. Nikolaisen*, 2002 SCC 33 at ¶8 *ff.*; *Gwynne-Timothy v. McPhee*, 2005 NSCA 80 at ¶31-34; *Laushway v. Messervey*, 2014 NSCA 7 at ¶27-29;

[16] Further, the Supreme Court of Canada in *Hickey v. Hickey*, [1999] 2 S.C.R. 518, said this regarding the discretionary nature of support determinations:

> 10 When family law legislation gives judges the power to decide on support obligations based on certain objectives, values, factors, and criteria, determining whether support will be awarded or varied, and if so, the amount of the order, involves the exercise of considerable discretion by trial judges. They must balance

> the objectives and factors set out in the *Divorce Act* or in provincial support statutes with an appreciation of the particular facts of the case. It is a difficult but important determination, which is critical to the lives of the parties and to their children. Because of its fact-based and discretionary nature, trial judges must be given considerable deference by appellate courts when such decisions are reviewed.
>
> […]
>
> 12 There are strong reasons for the significant deference that must be given to trial judges in relation to support orders. This standard of appellate review recognizes that the discretion involved in making a support order is best exercised by the judge who has heard the parties directly. It avoids giving parties an incentive to appeal judgments and incur added expenses in the hope that the appeal court will have a different appreciation of the relevant factors and evidence. This approach promotes finality in family law litigation and recognizes the importance of the appreciation of the facts by the trial judge. Though an appeal court must intervene when there is a material error, a serious misapprehension of the evidence, or an error in law, it is not entitled to overturn a support order simply because it would have made a different decision or balanced the factors differently.

*Bias*

[17] Mr. White bears the burden of establishing a reasonable apprehension of bias or actual bias. The burden is onerous. There is a strong presumption of judicial impartiality he must overcome. We assess the bias allegation through the lens of whether a reasonable and informed person would think the judge's conduct demonstrated a pre-judgment of the issues and/or a bias such that the hearing was unfair. (See *Stanton v. Inglis*, 2022 NSCA 60 at para. 4 and *Wewaykum Indian Band v. Canada*, 2003 SCC 45 at para. 60).

*Costs*

[18] Costs awards are within a judge's discretion. This Court defers to that discretion, absent an error in law or where the award results in an injustice. (See *Ward v. Murphy*, 2022 NSCA 20 at para. 28 and *Donner v. Donner*, 2021 NSCA 30 at para. 60.)

## Analysis

> *Ground 1: Did the judge err in finding T had his primary home with Mr. White since May of 2020?*

*Ground 2: Did the judge err by not awarding Mr. White retroactive child support from February 2020?*

[19] These issues relate to the payment of retroactive child support during a specific time frame (February-April 2020) and can be reviewed together.

[20] Mr. White asks this Court to review the evidence and find T was in his primary care as of February 1, 2020, not May 1, 2020 as the judge determined. He says the evidence before the judge supports this contention and the judge's finding was in error. Further, if we were to determine the effective date is February 1st, it should follow that he would receive retroactive child support for T beginning February 1, 2020; not May 1, 2020 as the judge found.

[21] The judge's factual findings are afforded deference. To persuade this Court to intervene Mr. White must establish the judge made a palpable and overriding error when she determined the effective date T moved in with Mr. White.

[22] Contrary to Mr. White's submissions, the record does not support his view. Rather, there was conflicting evidence from a number of witnesses as to where T lived from February to May 2020. Even T himself acknowledged on cross-examination that he lived with his girlfriend "for a month or two" during this period.

[23] The judge's decision makes clear she considered and weighed the conflicting evidence. After doing so, she accepted that T was primarily living with Mr. White by May, 2020 (para. 47).

[24] I am satisfied the judge's determination of the effective date was not in error. The record supports her determination. In the absence of any error, it is not our role to re-weigh and reconsider the contradictory evidence. Appeals are not retrials.

[25] I would dismiss the first ground of appeal. In light of this, I need not address the second ground of appeal as it is tied to Mr. White's success on the first ground.

*Ground 3: Did the judge err in finding T was employed on a full-time basis?*
*Ground 4: Did the judge err in finding that T graduated in February 2022?*
*Ground 5: Did the judge err by not awarding Mr. White prospective child support from October 2022 and continuing until T completes any post secondary education?*

> *Ground: 9. Did the judge err by not awarding Mr. White prospective child support of 50% of T's post secondary education costs and expenses.*

[26] These issues relate to the judge's determination of prospective child support and can be addressed together.

[27] The short answer is no, the judge did not fall into error as Mr. White contends.

[28] As explained earlier, Mr. White must persuade us the judge erred, either in her identification and/or application of relevant legal principles or that her factual findings reveal palpable and overriding error.

[29] Mr. White complains the judge "erroneously interpreted" evidence, engaged in an "incomplete analysis" of the facts surrounding T's employment status, and pursued "selectively narrow avenues of questioning" when she sought clarification of T's employment status and future educational plans.

[30] The judge found T had completed high school as of February 2022 and had been employed full-time since February 2022. The record provides a foundation for these factual findings, most notably, the evidence from T himself.

[31] Mr. White's affidavit evidence tendered at the hearing did not address T's educational or employment status. Rather, the judge posed relevant and clarifying questions of T during his oral testimony. The exchange between the judge and T makes clear that as of February 2022, T was working full time with Killam Properties and was not enrolled in any education program. T mentioned he was considering going to community college sometime in the future to study carpentry but he had no concrete plans.

[32] After the judge posed questions to T, she provided the opportunity to both Mr. White and Ms. Bradley to ask any additional questions of T to clarify the record. Mr. White asked some additional questions; however, they did not change T's evidence before the court.

[33] It is not enough to make assertions of error. Mr. White must identify something in the record or the judge's decision that supports his contentions. He has not. I would dismiss the third and forth grounds of appeal.

[34] The remaining grounds in this grouping (5 and 9) are tainted by the dismissal of grounds 3 and 4. As of October 31, 2022, T turned 19. As noted, he

was not in school. He was employed and had no clear plan for future educational pursuits. Further, Mr. White did not file a statement of special or extraordinary expenses nor did he offer other evidence detailing the anticipated cost of any post secondary education.

[35] In light of the foregoing, Mr. White cannot advance a valid claim for prospective child support nor any contribution to post secondary expenses for T. Should circumstances change materially in the future, Mr. White has the option to revisit this issue. Accordingly, on this record, grounds 5 and 9 must be dismissed.

*Ground 6. Did the judge err in imputing income of $49,086 to Ms. Bradley?*

[36] The judge's reasons for imputing income of $49,086 to Ms. Bradley are set out in paras. 26-35 of her decision. In short, Ms. Bradley changed jobs, contending her new employment opportunity might be more profitable in the future. It did not pan out that way, at least at the time of the hearing. In fact, her income dropped considerably—estimated to be between $16,000 and $20,000 for 2022—down significantly from the prior three years where she earned $49,086, $49,689 and $48,593. Ms. Bradley had never earned an income in the range of $67,000 as Mr. White now suggests. The judge determined she was underemployed and imputed income of $49,086—the same amount she earned in 2021.

[37] Mr. White's submissions on this point are thin and unpersuasive:

> 20. The Court calculated some potential income amounts arising in connection with Bradley's job change. The Court assigned Bradley an imputed income of $49,086 based on her 2021 income. At the new pay rate of $35/hour, Bradley could have been making $67,200 at full employment of 40 hours/week, working 48 weeks/year. The Court should have used the higher amount in calculating Bradley's imputed income.

[38] I would dismiss this ground. This is a discretionary decision. Mr. White did not identify any error, be that an error of law or a palpable and overriding error in the judge's factual findings. Nor is any error apparent on this record. Mr. White simply prefers a higher imputation but fails to identify any error in the judge's reasoning path.

[39] That is sufficient to dismiss this ground. However, it is worth noting that the judge's quantum of child support is not under appeal. Furthermore, Mr. White did not plead or argue the issue of imputation of income in the court below.

Nevertheless, the imputed income was to Mr. White's benefit when determining the amount of child support payable to him.

*Ground 7. Did the judge err by not awarding Mr. White retroactive payment of 50% of T's medical expenses incurred between February 2020 - October 2022?*

[40] Mr. White's submissions on this ground are also lean:

> 22. In the Conference Brief provided by White, he requested that he receive repayment for [T's] medical expenses incurred between February 2020 and October 2022. The Court did not address this request although, as a matter of law, it is well within the Court's jurisdiction to make such an order and such an order would have been correct in this instance.

[41] The reference to "Conference Brief" is Mr. White's pre-hearing brief which is all of 17 lines. The only mention he makes of this issue is that he is seeking "Repayment of any of [T's] medical bills while he resides in my primary care."

[42] Mr. White offered no evidence respecting T's medical expenses. While the judge did not specifically address the issue of medical expenses in her decision, in these circumstances, she cannot be faulted for not doing so. A bare request for relief is insufficient. Mr. White had to establish the evidentiary basis for his claim. He did not.

[43] I would dismiss this ground.

*Ground 8. Did the judge err by not ordering Ms. Bradley to repay child support she received during the period January 2020 - October 2022?*

[44] This ground suffers from the same shortcomings as ground 7. In his pre-hearing brief Mr. White asked to be "Repaid any and all over payment of any child support for the time [T] resided in my primary care." However, Mr. White did not tender evidence respecting what child support payments were made or received by either party or what the status of his child support arrears might be, if any.

[45] Ms. Bradley's affidavit evidence included some very limited information respecting Mr. White's child support arrears (which would presumably be relevant to his request for repayment). In short, Mr. White did not provide an evidentiary basis for the judge to adjudicate his request.

[46] When Mr. White asked the judge about this issue after she rendered her oral decision, she explained why she did not address it.

[47] Given the absence of a sufficient record, this Court is similarly in no position to address any repayment request/calculation. That said, Mr. White is not without a remedy. As the respondent submits:

> 72. … the Trial Judge was not in a position to make a decision about payments to be returned to Mr. White. Rather, her decision was clear about when child support was payable by either party. With the Judge's clear decision on these points, the parties can themselves discern whether over or under payments have been made, and seek enforcement through the Maintenance Enforcement Program on the basis of the Trial Judge's order.

[48] I can appreciate Mr. White is anxious to resolve any repayment issue; however, that is for another day in another forum. That said, I would encourage the parties to work together with Maintenance Enforcement to resolve this issue in a timely manner.

*Issue 10. Did the judge err by not awarding Mr. White costs for filing fees or amounts for lost wages?*

[49] Mr. White was self-represented in the court below. In his pre-hearing brief, Mr. White requested *"Reimbursement for all filing fees for court documentation and lost wages for time missed at work due to court proceedings"*.

[50] His appeal submissions on this issue are also limited:

> 26. In the Conference Brief provided by White, he requested that he receive reimbursement for filing fees and lost wages. The Court did not address this request although, as a matter of law, it is well within the Court's jurisdiction to make such an order and such an order would have been correct in this instance.

[51] There are a number of problems with Mr. White's assertion that the judge erred by not awarding him any costs. First, (and putting aside whether the judge would have entertained his wage loss claim), he led no evidence of what his lost wages were nor what he incurred in filing fees. Further, in his direct testimony he said *"... right now I am on EI and I'm also working.... there is a lack of work, so I might work ... one week in the run of a month and then collect EI for the remaining time of the month..."* Second, neither party raised the issue of costs after the judge

delivered her decision, which is typically the time one would expect submissions on costs to be made.

[52] Given the above, one can hardly fault the judge for not addressing the issue of costs in her merits decision. I would dismiss this ground of appeal.

*Issue 11. Did the judge demonstrate bias towards Mr. White?*

[53] Mr. White alleges the judge was biased towards him and this negatively impacted his success during the proceedings in the court below:

> 27. Throughout the proceeding, there were multiple examples where Justice Jollimore conducted the trial, resolved ambiguities and exercised discretion in a manner adverse to White and beneficial to Bradley. …
>
> …
>
> 35. In each case where Justice Jollimore could ascertain facts or direct the flow of the trial, she sought out a position favourable to Bradley at the expense of White. Subjective or ambiguous elements of the factual record were generously interpreted and consistently resolved by Justice Jollimore so as to minimize any costs to Bradley, while limiting any benefits to White. The benefit of the doubt was continually applied in favour of Bradley, yet White was given no quarter. The systemic pattern of bias led to a decision that shortchanged White of his legal and equitable entitlements.

[54] It is apparent from his submissions, Mr. White views the determinations which did not go his way or at least not to the degree he had hoped, as being the result of judicial bias. In an attempt to support his allegation of bias, Mr. White suggests the judge did the following:

> 27. … in determining when to start the order for child support, Justice Jollimore only explored the relevant factual matters enough to justify a delay in awarding White child support, …
>
> 28. Similarly, Justice Jollimore explored the factual record just enough to justify an early termination of the child support obligations owed to White. …
>
> …
>
> 31. …Justice Jollimore abdicated responsibility for ordering the repayment of amounts paid by White to Bradley… Conversely, in addressing the possibility of Bradley being owed any amounts by White, Justice Jollimore went so far as to expressly state in the Decision that any such amounts would be offset against the amount owed by Bradley to White. The difference in the way Justice Jollimore

> treated White contrasted against the way she treated Bradley … illustrates Justice Jollimore's bias against White and favouritism towards Bradley.
>
> 32. …White requested that the Court order payment for [T']s medical bills and prospective payment of post-secondary education amounts. White also requested reimbursement for filing fees and amounts for lost wages. …The willful blindness towards requests for which White had a strong equitable and legal entitlement demonstrates another example of Justice Jollimore exercising discretion to White's detriment.
>
> …
>
> 34. In addition to the bias against White, Justice Jollimore also acted impartially by showing favouritism of Bradley. For example, Justice Jollimore took the initiative to advance and justify the early termination of child support prior to [T] turning 19, …

The foregoing is not an exhaustive list of every purported bias example Mr. White raises but sufficiently captures the substance of his concerns.

[55] Earlier, I addressed the merits of these complaints when assessing the impugned determinations under the various grounds of appeal. Having found no error in law or in the judge's factual findings, Mr. White's complaints of error were rejected.

[56] As explained earlier, the determinations the judge made were available to her on this record. Further, although her decision was silent on some subjects Mr. White raised in his pre-trial brief, it is understandable why they were not expressly addressed. In other words, the examples Mr. White claims demonstrate bias have already been analyzed and rejected. There is no need to repeat that exercise under this ground.

[57] I agree with the respondent's submissions:

> 81. Mr. White's claim of bias has no merit. A claim for a reasonable apprehension of bias or actual bias on the part of the judge requires Mr. White to present cogent evidence establishing a serious claim. He has not.
>
> …
>
> 83. … As this Court found in *Green* a judge accepting one party's evidence and deciding several issues in their favour is not in and of itself indicative of bias or partiality.

[58] I would dismiss this ground.

**Disposition**

[59] I would dismiss the appeal and order Mr. White to pay costs to Ms. Bradley in the amount of $2,000 inclusive of disbursements.

Van den Eynden, J.A.

Concurred in:

Farrar, J.A.

Scanlan, J.A.