SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Bocaneala v. Bocaneala, 2014 NSSC 450

Date: 2014 - 12 - 29
Docket: 1201-058779; SFH-D 032780
Registry: Halifax

Between:

Carla Raffaella Bocaneala

Petitioner

v.

Florin Badiu Bocaneala

Respondent

Judge:	The Honourable Justice Elizabeth Jollimore
Heard:	November 12, 2014
Counsel:	Fergus Ford for Florin Bocaneala Carla Loshi on her own behalf

By the Court:

Introduction

[1] This is a variation application pursuant to clause 17(1)(a) of the *Divorce Act*, R.S.C. 1985 (2nd Supp.), c. 3.

Background

[2] In 2006, the Bocanealas were divorced. Their Corollary Relief Judgment provided that their children, Lorenzo and Armando, would have their primary residence with their mother, Ms. Loshi. The parents would have joint custody and Mr. Bocaneala would have access with the boys two afternoons each week and on alternate weekends. Mr. Bocaneala was ordered to pay monthly child support of $645.00 pursuant to the *Federal Child Support Guidelines*, SOR-97/175 and to contribute $127.00 each month to child care costs. As a result of a decision of Justice Williams, reported at 2006 NSSC 134, Mr. Bocaneala was required to pay retroactive child support of $5,761.00. According to the Corollary Relief Judgment, Mr. Bocaneala had an annual income of $47,306.00.

[3] The Corollary Relief Judgment did not identify the total cost for child care, the amount of Ms. Loshi's income or the proportion in which the child care costs were divided, if at all. Justice Williams' decision recorded Ms. Loshi's income as $34,800.00, but contained no detail of the child care expense.

[4] The Corollary Relief Judgment compelled each parent to provide financial disclosure, saying each must provide the other with a copy of his or her income tax return, completed and with all attachments, even if the return wasn't filed, along with all notices of assessment received from the Canada Revenue Agency on an annual basis, on or before June 30. Additionally, Ms. Loshi was ordered to provide Mr. Bocaneala with a statement of current child care costs every six months beginning on June 30, 2006.

The claims

[5] Mr. Bocaneala applied to vary the Corollary Relief Judgment on May 17, 2013. He wanted to vary custody, access and child support and he sought a Child's Wish Report. He said the boys had come to live with him: he wanted his own child support payments to terminate and Ms. Loshi to start paying him child support. Ms. Loshi filed a Response to Variation, asking that child support be varied retroactively to July, 2007. Mr. Bocaneala filed an interim motion in October 2013, seeking an order for interim custody. He also amended his variation application to seek a contribution to special or extraordinary expenses. Following a settlement conference, in August 2014 an order was granted providing that both boys would live with their father. The parents also agreed on the amount that Ms. Loshi would pay as prospective child support pursuant to section 3 of the *Guidelines*.

[6] The parties did not resolve their claims for retroactive child support or for prospective contribution to the boys' special or extraordinary expenses at the settlement conference.

[7] In his brief, Mr. Bocaneala said he was seeking retroactive child support, payment of the Canada Child Tax Benefit and reimbursement for his historic overpayment of child care costs. While he did not plead this relief, it is apparent that Ms. Loshi was aware of the claims because she addressed them in her affidavit. Accordingly, I will deal with them. First, I will address Mr. Bocaneala's request that I redress the payment of the Canada Child Tax Benefit.

[8] Mr. Bocaneala said that Ms. Loshi received monthly CCTB payments of $168.14 when he should have been receiving them. Eligibility to receive the Canada Child Tax Benefit is governed by section 122.6 of the *Income Tax Act*, R.S.C. 1985 (5th Supp.), c. 1. The Tax Court of Canada has jurisdiction to decide disputes over eligibility to receive this benefit, according to subsection 12(1) of the *Tax Court of Canada Act*, R.S.C. 1985, c T-2. My jurisdiction is defined by subsection 32A(1) of the *Judicature Act*, R.S.N.S. 1989, c. 240 and it does not include matters governed by the *Income Tax Act*.

The hearing and evidence

[9] Mr. Bocaneala was represented at the application and Ms. Loshi was not. When the hearing began, I explained how it would proceed. Because Ms. Loshi was without a lawyer, I was explicit that the evidence upon which I would make my decision would be restricted to the witnesses' testimony (the answers they gave to questions) and items admitted into evidence as exhibits. I explained to both parties that by relying only on those affidavits, documents and Statements admitted into evidence, each would know exactly what the other's evidence was and could ask questions and make submissions accordingly. As well, neither would worry that I was looking to or relying on other materials which were not entered into evidence.

[10] Mr. Bocaneala entered only his affidavit of October 28, 2014 into evidence. Ms. Loshi, too, entered only one affidavit (her affidavit of October 14, 2014) into evidence. She also relied on certain financial documents in her cross-examination of Mr. Bocaneala. These documents were marked as exhibits for identification purposes. In his submissions, Mr. Bocaneala objected to the admission of these documents on the basis that they weren't provided in Ms. Loshi's affidavit. In fact, two of the duplicate cheques that were part of Exhibit 3 were also exhibits to Ms. Loshi's affidavit and were admitted into evidence through her affidavit. Otherwise, I note that Mr. Bocaneala's affidavit was filed after Ms. Loshi's, so she would not have known its contents to anticipate the need to provide the receipts and health insurance reimbursement records that she used when questioning Mr. Bocaneala.

[11] In his affidavit, Mr. Bocaneala said "it [was his] position that the boys stopped going to child care in June 2010." He said that he had been paying the boys' soccer fees since 2007. He said that Ms. Loshi paid him inadequate child support from February 2013 until August 2014. He also identified payments he made for the boys' dental care and medications.

[12] In cross-examining Mr. Bocaneala, Ms. Loshi showed him copies of different documents purporting to be receipts for child care costs she paid in 2011 and 2012 (Exhibit 3); copies of her cheques reimbursing him for the boys' soccer registration (Exhibit 4); health insurance reimbursement records from 2008 to date (Exhibit 5); and copies of her cheques or electronic transfers of child support payments to him (Exhibit 6).

[13] After seeing the documents, Mr. Bocaneala acknowledged the child support payments (Exhibit 6) and he agreed that he received and cashed some of the cheques for the boys' soccer registration, Canada Games Centre membership and Lorenzo's driver training (Exhibit 4). These documents were identified by Mr. Bocaneala and accepted by him. They are admitted into evidence.

[14] The health insurance reimbursement records (Exhibit 5) did prompt Mr. Bocaneala to admit that he was aware Ms. Loshi maintained coverage for the boys though he wasn't able to identify the records. The other documents, except to the extent they were attached to Ms. Loshi's affidavit, which were marked for identification purposes, are not admitted into evidence. They were not identified by Mr. Bocaneala or by Ms. Loshi.

Approaching the issues

[15] Neither party has contested the existence of a change in circumstances sufficient to ground a variation application. The children lived in their mother's primary care at time of the 2006 Corollary Relief Judgment. The parents agree that the children now live with their father. This is a sufficient foundation for a variation of child support pursuant to section 14 of the *Federal Child Support Guidelines*.

[16] An award of retroactive child support is a discretionary award, while prospective child support is not. Accordingly, I will first consider the prospective claim. Knowing the obligations it creates for each parent, I will be better able to address the retroactive claim.

[17] In *Staples v. Callendar*, 2010 NSCA 49 at paragraph 43, Justice Bateman also said "Where the payor's resources so permit, and particularly where there is no prior support order, I would agree that a judge should consider backdating the order to the date of the application for support." Whether to do so is a matter of my discretion, particularly, as Her Ladyship noted, considering a payor's ability to pay. I will be able to consider this once I have some idea of the amount I would be ordering Ms. Loshi to pay.

Prospective child support

Section 3

[18] Mr. Bocaneala filed his application on May 17, 2013. The parents agreed that Ms. Loshi's monthly child support payment for the boys, pursuant to section 3 of the *Guidelines*, is $951.00 and she has paid this amount since July 2014.

[19] It's agreed that the boys moved to their father's home on Ms. Loshi's relocation to Ontario in February 2013. Ms. Loshi should have paid child support of $951.00 per month from March 2013 until June 2014.

[20] In his affidavit, Mr. Bocaneala says both that Ms. Loshi paid child support of $772.00 since February **2014** and that her payments of $772.00 started in February **2013.**

[21] Ms. Loshi provided copies of her cheques for child support, endorsed for deposit by Mr. Bocaneala, showing child support payments from late 2013 and early 2014. As a result of these, I accept that Ms. Loshi paid child support to Mr. Bocaneala starting in February 2013. Her initial child support payments to Mr. Bocaneala were $772.00 instead of $951.00. She paid this amount until July 2014. Accordingly, the shortfall in sixteen months' payments is $2,864.00.

Section 7: contribution to special or extraordinary expenses

[22] Section 7 of the *Federal Child Support Guidelines* empowers me to order a former spouse to contribute to certain enumerated expenses. The particular expenses are itemized in subsection 7(1). According to subsection 7(1), the amount of a claimed expense may be estimated.

[23] Before I can order that Ms. Loshi contribute, I must be satisfied that the cost is necessary in relation to each boy's best interests and reasonable in relation to the parents' means, the boy's means and the family's pre-separation spending pattern. According to Justice Roscoe (with whom Justices Saunders and Oland concurred), at paragraph 27 in *L.K.S. v. D.M.C.T.*, 2008 NSCA 61, it's "preferable to deal first with subsection 7(1) to determine whether the expenses are necessary in relation to the child's best interests and reasonable in relation to the means of the parents before dealing with the definition of extraordinary expenses in subsection 7(1A)." (Leave to appeal this decision to the Supreme Court of Canada was denied at *D.M.C.T. v. L.K.S.*, 2009 CanLII 1998 (SCC).) In that decision, the Court of Appeal was dealing with Nova Scotia's equivalent to the *Federal Child Support Guidelines*. Their language and analytic framework parallels the federal *Guidelines*, so I adopt the approach outlined by Justice Roscoe.

[24] Of the six categories of expense listed in section 7, two are categories of expenses which must be "extraordinary" in order to be the subject of an order for contribution. These two categories are expenses for secondary school education (clause 7(1)(d)) and expenses for extra-curricular activities (clause 7(1)(e)). So, if I consider these costs to be necessary and reasonable pursuant to subsection 7(1), I must then determine they are also extraordinary before I can order that Ms. Loshi share in their cost.

[25] *Civil Procedure Rule* 59.22(1) requires a parent who is claiming a contribution to special or extraordinary expenses to file a Statement of Special or Extraordinary Expenses. None was before me. Mr. Bocaneala hadn't made any of the calculations that are required of that Statement, showing the tax credits or deductions that are available for the boys' expenses.

[26] Mr. Bocaneala's affidavit did contain details of some costs. He didn't differentiate between past or current costs and it appears that there are duplicate documents relating to the same cost, such as a receipt and a cheque, though they aren't identified as relating to the same expense.

[27] The 2014 costs he identified are itemized below.

- a Patient Medical Expense Report for Mr. Bocaneala showing uninsured prescription costs of $48.60
- prescription receipts for Lorenzo showing uninsured prescription costs of $153.28
- prescription receipts for Armando showing uninsured prescription costs of $76.07
- a September 2014 "school fees" receipt for $30.00 for Armando
- September 15, 2014 cheques for soccer registration (winter 2014 – 2015) in the total amount of $1,150.00
- 2014 expenses for the boys' participation in out of province soccer tournaments
- 2014 Rogers invoice for three cell phones. Mr. Bocaneala says two are used by the boys and he asks to share their cost
- 2014 expenses for Lorenzo's driver education, license testing, fees and Lorenzo's portion of the car insurance; and
- Canada Games Centre membership for Mr. Bocaneala and the boys. He seeks to equally share two-thirds of the total cost, notionally attributing one-third of the cost to himself

[28] The boys' 2013 soccer registration was approximately $2,000.00.

Cellphones, driver training and Canada Games Centre membership

[29] Mr. Bocaneala has provided details of expenses for the boys' cellphones, Lorenzo's driver training and car insurance, and the family's membership in the Canada Games Centre. I have no information which suggests that these expenses fall into any of the categories listed in subsection 7(1), so I dismiss his claim for a contribution to these expenses. Even if I did not dismiss this claim, I note that Ms. Loshi provided evidence, accepted by Mr. Bocaneala, that she contributed $360.00 to Lorenzo's driver training, paying one-half of its total cost of $718.75. Similarly, Ms. Loshi provided evidence, accepted by Mr. Bocaneala, that she contributed $1,298.00 toward the boys' 2014 soccer registration and their Canada Games Centre membership. Again, based on Mr. Bocaneala's evidence, this is approximately one-half of these costs.

[30] The remaining expenses for health costs, school fees and extra-curricular activities are contained in subsection 7(1).

Health expenses

[31] It isn't necessary that health expenses be extraordinary. According to clause 7(1)(c), I may order a parent to contribute to "health-related expenses that exceed insurance reimbursement by at least $100 annually" where I've concluded that the costs are necessary in relation to each boy's best interests and reasonable in relation to the parents' means, the boy's means and the family's pre-separation spending pattern. The identified costs are for uninsured prescriptions and for dental care. Health and dental care is necessary in relation to the boys' best interests. I don't have any evidence of these expenses prior to the parents' separation.

[32] Turning to the reasonableness of the expenses, I have information about prescriptions for Mr. Bocaneala and ledgers showing the boys' dental care costs. Obviously, Mr. Bocaneala's costs aren't eligible for any contribution. The ledger for the boys' dental expenses shows that all have been covered by their Atlantic Blue Cross coverage, so there is no amount for me to consider. In terms of prescriptions, there are no eligible costs for Armando, since his prescriptions cost only $76.00 more than the insurance reimbursement. In contrast Lorenzo's uninsured prescriptions cost $53.28 more than the annual threshold of $100.00. Mr. Bocaneala's and Ms. Loshi's incomes are approximately $95,000.00 and $64,000.00 respectively). These expenses are reasonable in the context of the parents' incomes.

Extraordinary expenses

Secondary school education

[33] Subsection 7(1) does not compel me to order a contribution to every expense that falls within the listed categories. Rather, I must be satisfied that the cost is necessary in relation to each boy's best interests and reasonable in relation to the parents' means, the boy's means and the family's pre-separation spending pattern before I can order a contribution. Mr. Bocaneala addressed no evidence to the questions of the boys' best interests, the reasonableness of the expenses or the family's pre-separation spending pattern with regard to expenses for secondary school education or extra-curricular activities. So, the foundation for claiming a contribution to secondary school education costs and the costs of extra-curricular activities hasn't been laid.

[34] Further, I may only order a contribution to "extraordinary expenses" for secondary school education and extra-curricular activities. Whether an expense is extraordinary is determined having regard to subsection 7(1.1) of the *Guidelines*. Mr. Bocaneala didn't offer any evidence to address this.

[35] With regard to secondary school education costs, Mr. Bocaneala provided a September 2014 receipt for $30.00 for "school fees" for Armando. In his affidavit, he said that the boys had school fees totaling $220.00 over the past two years. The receipts for school expenses contain notations which say "school fees" (on the 2014 receipt) and "fees and locker" (on the 2013 receipt). Even accepting that these costs were necessary in relation to each boy's best interests and reasonable in relation to the parents' means, the boy's means and the family's pre-separation spending pattern (on which points Mr. Bocaneala offered no evidence), I do not accept that they

exceed what Mr. Bocaneala can reasonably cover (as required by clause 7(1.1)(a) of the *Guidelines*) or that they fall within clause 7(1.1)(b). I dismiss his request for a contribution to the boys' school fees: they are not an extraordinary education expense.

Extra-curricular activities

[36] This leaves the boys' soccer costs. These include costs for registration and tournament travel. Mr. Bocaneala provided various receipts, cheques and letters estimating trip costs without any explanation for them.

[37] Mr. Bocaneala didn't adduce any evidence that soccer costs were necessary in relation to each boy's best interests and reasonable in relation to the parents' means, the boy's means and the family's pre-separation spending pattern. In his affidavit, Mr. Bocaneala simply recited the expenses, said that he paid them and claimed reimbursement for them. What he said was true enough: he paid the expense. However, it was not the complete truth.

[38] When Ms. Loshi asked whether they shared soccer and swimming costs, Mr. Bocaneala initially said he was responsible for **all** the expenses and that he paid them **all**. When Ms. Loshi presented him with her cancelled cheques he said he received "partial" payment. When pressed, he admitted that her "partial" payment was one-half of the boys' costs for their soccer program. Ms. Loshi's income is less than Mr. Bocaneala's, so her "partial" payment was a disproportionate share of the expense. This is quite different from Mr. Bocaneala's initial evidence that he paid all the soccer and swimming costs.

[39] Mr. Bocaneala's evidence that he paid all costs (true in word but not in deed) raises concern that the absence of evidence about the necessity and reasonableness of extra-curricular activity expenses is not a mere oversight.

[40] Based on the documentation that he has provided, the boys' soccer costs have been approximately $2,250.00 in each of 2013 and 2014. This is not an exact figure, but one estimated, as I am permitted to do by subsection 7(1) of the *Guidelines*.

[41] I'm to deduct from these costs any available tax credits according to subsection 7(3) of the *Guidelines*. Both boys were under the age of sixteen at the beginning of this year and therefore eligible for the Children's Fitness Credit of $500.00 annually. At his marginal tax rate of forty-three percent, the Credit would save Mr. Bocaneala $430.00 each year ($215.00 per child), reducing the $2,250.00 cost to $1,820.00.

[42] According to subsection 7(2), the guiding principle for sharing expenses is that they be shared in proportion to the parents' incomes. In each year, the after-tax cost of the boys' soccer was $1,820.00. Mr. Bocaneala's income in 2013 was $95,265.00. Ms. Loshi's income is approximately $64,000.00. I wasn't told the amount of her income but this figure corresponds to the amount of child support she pays based on the tables. Proportionately sharing the boys' soccer cost would result in Mr. Bocaneala paying sixty percent and Ms. Loshi paying forty percent: Ms. Loshi would contribute $728.00 per year to the soccer cost.

[43] Mr. Bocaneala admitted that Ms. Loshi paid him one-half of the 2014 registration costs of $1,995.00, so she has overpaid her 2014 contribution by $269.50. She has also contributed to costs, such as membership in the Canada Games Centre and for driver training, which I am not persuaded are special or extraordinary costs that she would be required to pay. As a result, I find that she owes no additional sums for the boys' 2013 soccer expenses, nor does she need to reimburse Mr. Bocaneala for the $22.00 that would be her proportionate share of Lorenzo's uninsured prescriptions.

[44] Ms. Loshi's contribution to these costs does not defray the shortfall of $2,864.00 in her payment of child support pursuant to section 3 of the *Guidelines*.

[45] With regard to special or extraordinary expenses in the future, I find that the boys' school costs, Canada Games Centre membership, driver training (and associated costs) and their cellphones are not expenses to which Ms. Loshi is required to contribute.

[46] The parents now know that each has a health insurance program for the boys. All medical and dental expenses must be claimed on each insurance program. This will minimize the uninsured expense. If Mr. Bocaneala believes there is any expense which Ms. Loshi must pay to him for health expenses, he must provide her with the receipts, insurance details and a copy of his most recent income tax return before she can consider his request.

[47] With regard to the boys' soccer costs, I have noted already, at paragraph 37, that Mr. Bocaneala hasn't provided any evidence to prove that these are expenses the parents should share. Even if he had met the requirements of subsection 7(1), he does not meet the requirements of subsection 7(1.1). The annual costs are approximately $1,820.00 after tax. His annual income is approximately $95,000.00 and he will be receiving $11,412.00 in child support from Ms. Loshi. The soccer expenses are ones he can reasonably cover given his means and, in the alternative, having regard to the boys' activities, abilities and expenses as they have been revealed to me in the evidence, they are not extraordinary.

Retroactive variation of child support

[48] There are two claims for retroactive variation of the boys' support payments. Ms. Loshi said that child support payments hadn't been adjusted since the Corollary Relief Judgment was granted in 2006 and Mr. Bocaneala owed her additional support. Mr. Bocaneala claimed he overpaid child support by paying for child care until March 2013 though he believed Armando, the couple's younger son, had stopped attending day care in June 2010, when he was ten years old. Mr. Bocaneala wanted to be repaid for these payments.

[49] As I did in *Poirier*, 2013 NSSC 314, I find that the framework for analyzing these claims is the same. This framework was laid out by the Supreme Court of Canada in *D.B.S. v. S.R.G.; L.J.W. v. T.A.R.; Henry v. Henry; Hiemstra v. Hiemstra*, 2006 SCC 37. In that case, Justice Bastarache, writing for the majority of the Court at paragraph 97, said that retroactive awards are not exceptional. Equally, they are not automatic and merely stating a desire to have support varied on a retroactive basis is not a sufficient basis for such an award. A retroactive variation is

a discretionary award and I am to vary support retroactively when doing so resonates with the purposes of child support, according to Justice Bastarache at paragraph 95. My discretion must be exercised on a principled basis, considering the relevant evidence.

[50] At paragraphs 99 to 116 in *D.B.S. v. S.R.G.; L.J.W. v. T.A.R.; Henry v. Henry; Hiemstra v. Hiemstra*, 2006 SCC 37, His Lordship discussed the factors I should consider before awarding support retroactively. The analysis requires each parent making a claim to offer evidence of the reason for their delay in advancing his or her retroactive claim, any blameworthy conduct on the other parent's part, the children's past and current circumstances and whether a retroactive award would cause the paying parent undue hardship. I am to balance these factors in the context of certainty and fairness. As Justice Bastarache wrote at paragraph 96 in *D.B.S. v. S.R.G.; L.J.W. v. T.A.R.; Henry v. Henry; Hiemstra v. Hiemstra*, 2006 SCC 37, "As situations evolve, fairness demands that obligations change to meet them. Yet, when obligations appear to be settled, fairness also demands that they not be gratuitously disrupted."

[51] Since Ms. Loshi filed her claim first, I will consider it first.

Ms. Loshi's claim

[52] In her response to Mr. Bocaneala's variation application Ms. Loshi claimed a variation retroactive to July 2007, approximately one year after the couple divorced. In her affidavit, she said "Due to the lack of information provided by Mr. Bocaneala to me regarding income information I am now seeking retroactive child support from July 2006 to March 1, 2013, in addition to extraordinary expenses." July 2006 is the month when the parties' Corollary Relief Order was granted.

[53] Her retroactive claim includes a contribution to special or extraordinary expenses. Ms. Loshi said she alone paid for musical instruments, school fees, and school supplies for the boys until March 2013.

Ms. Loshi's delay

[54] Ms. Loshi said that despite the Corollary Relief Judgment's requirement that each party provide the other with a copy of his or her completed tax return, with attachments, and notices of assessment, Mr. Bocaneala didn't provide her with any income tax documents until this variation application began. The obligation to provide annual disclosure existed for both parents. I was not told whether Ms. Loshi provided her tax documents and notices of assessment, though I was told that she did not meet her obligation to disclose child care costs on a semi-annual basis.

[55] Ms. Loshi offered no other explanation for her delay in seeking to vary child support. From the parties' testimony, it was apparent that the boys continued to exercise access with their father from 2006 until Ms. Loshi moved to Ontario, so Mr. Bocaneala's whereabouts would have been known to Ms. Loshi.

[56] According to the majority reasons at paragraph 103 in *D.B.S. v. S.R.G.; L.J.W. v. T.A.R.; Henry v. Henry; Hiemstra v. Hiemstra*, 2006 SCC 37, recipient parents must act promptly and responsibly in monitoring the amount of support paid. Ms. Loshi hasn't offered a reasonable explanation of her delay in seeking to adjust child support payments from the time of the divorce in 2006 until Mr. Bocaneala applied to vary the Corollary Relief Judgment in 2013. Absent Mr. Bocaneala's variation application, she took no steps to ensure the children received the support to which they were entitled.

Mr. Bocaneala's conduct

[57] Mr. Bocaneala failed to disclose his tax returns and notices of assessment as required by the Corollary Relief Judgment.

[58] The parties' divorce followed a contested hearing. At paragraph 42 of his decision, reported at 2006 NSSC 134, Justice Williams retroactively ordered Mr. Bocaneala to pay child support and identified Mr. Bocaneala's failure to make timely disclosure as one of the considerations he had in making this award.

[59] Ms. Loshi attached a summary of Mr. Bocaneala's income information to her affidavit. This shows that his income has been greater than that stated in the Corollary Relief Judgment in every year since that Judgment was granted in 2006. His annual income has exceeded the amount stated in that Judgment by at least $8,900.00 and by as much as $47,965.00. On average, Mr. Bocaneala's annual income has been approximately $29,150.00 greater than the income on which his child support payments were based. His income history is in the table below. The Corollary Relief Judgment was granted in 2006.

Year	Income
2006	47,306.00
2007	63,493.00
2008	56,170.00
2009	62,134.00
2010	92,224.00
2011	84,904.00
2012	80,945.00
2013	95,265.00

[60] Even though his annual income always exceeded the amount stated in the Corollary Relief Judgment, Mr. Bocaneala did not adjust his child support payments. The majority reasons in *D.B.S. v. S.R.G.; L.J.W. v. T.A.R.; Henry v. Henry; Hiemstra v. Hiemstra*, 2006 SCC 37 make clear, at paragraph 124, that "Not disclosing a material change in circumstances – including an increase in income that one would expect to alter the amount of child support payable – is itself blameworthy conduct."

[61] According to Ms. Loshi, the parents equally divided the boys' sports costs and she, alone, paid for their musical instrument rental and school trips. She said that when she asked Mr. Bocaneala for help with expenses, "Mr. Bocaneala has always stated he paid the child support and that included everything."

[62] It is unclear how long Armando continued to attend child care. Ms. Loshi's evidence was that he continued to attend child care until June 2012 **and** until September 4, 2012. Regardless, she continued to receive Mr. Bocaneala's monthly contribution of $127.00 to this expense until the boys moved to their father's home in February 2013.

[63] By failing to adjust his child support payments as his income increased, Mr. Bocaneala put his interests ahead of his sons'.

The boys' circumstances

[64] From the parents' affidavits, I have evidence that the boys have been active in swimming and soccer since separation. They've had music lessons, as well.

[65] According to Ms. Loshi, she and Mr. Bocaneala shared the boys' extra-curricular sports expenses until May 2014. She said she "always paid half of any expense Mr. Bocaneala has paid" but he has not reimbursed her for the expenses she paid, telling her that his child support "included everything". Ms. Loshi said that she, alone, paid for their musical instruments, school fees, school trips and school supplies while the boys lived with her. Mr. Bocaneala initially said that he paid all the boys' soccer fees since 2007, along with their costs for soccer tournaments and swimming lessons. When cross-examined, he admitted that he paid the expense to the organization initially and Ms. Loshi reimbursed him for one-half the cost.

[66] Mr. Bocaneala has paid for Lorenzo's driver education and cell phone and for the family's memberships at the Canada Games Centre.

[67] The boys have received medical and dental treatment and have been covered by two health insurance policies. Each parent had a policy and neither made claims against the other's.

[68] There is no indication that the boys have gone without at any point since their parents separated. They remain active with current expenses for activities, team travel and school trips.

Whether a retroactive award would cause Mr. Bocaneala undue hardship

[69] Lastly, there is the question of whether there would be any hardship caused to Mr. Bocaneala if a retroactive award was made. Mr. Bocaneala has not offered any evidence about his inability to respond to a retroactive award.

Conclusion with regard to Ms. Loshi's retroactive claim

[70] In deciding whether to make a retroactive award, I'm to balance the principles of certainty (reflected by relying on the existing order) and fairness (reflected in varying the order), having regard to the fundamental principles of child support. These principles recognize that child support is children's right; it survives the breakdown of the parents' relationship; it should, as much as possible, perpetuate the standard of living the children had before the parents' relationship ended; and the amount of support varies, based upon the parent's income.

[71] At paragraph 125 in *D.B.S. v. S.R.G.; L.J.W. v. T.A.R.; Henry v. Henry; Hiemstra v. Hiemstra*, 2006 SCC 37, Justice Bastarache summarized the proper approach to retroactive claims:

> . . . payor parents will have their interest in certainty protected only up to the point when that interest becomes unreasonable. In the majority of circumstances, that interest will be reasonable up to the point when the recipient parent broaches the subject, up to three years in the past. However, in order **to avoid having the presumptive date of retroactivity set prior to the date of effective notice, the payor parent must act responsibly: (s)he must disclose the material change in circumstances to the recipient parent. Where the payor parent does not do so, and thus engages in blameworthy behaviour, I see no reason to continue to protect his/her interest in certainty beyond the date when circumstances changed materially**. A payor parent should not be permitted to profit from his/her wrongdoing. [emphasis added]

[72] Ms. Loshi has not diligently monitored child support. Mr. Bocaneala has favoured his own interests over paying the proper amount of child support, though his income has increased and, in 2010, was almost double the amount upon which his support payments were based. The boys would benefit from additional support, in light of their activities. Mr. Bocaneala has not shown that he will suffer any hardship from a retroactive award. In these circumstances, it is appropriate to vary child support retroactively.

Mr. Bocaneala's claim

[73] After Ms. Loshi applied to vary child support retroactively, Mr. Bocaneala claimed a retroactive variation of his contribution to Armando's child care costs. Mr. Bocaneala said that he had been paying $127.00 each month for child care until March 2013, though Armando stopped attending day care in June 2010, when he was ten.

[74] If I had not granted Ms. Loshi's request for a retroactive variation, I would apply the same analysis (from *D.B.S. v. S.R.G.; L.J.W. v. T.A.R.; Henry v. Henry; Hiemstra v. Hiemstra*, 2006 SCC 37) to Mr. Bocaneala's retroactive claim. I don't do that here, however. At paragraph 127 in *D.B.S. v. S.R.G.; L.J.W. v. T.A.R.; Henry v. Henry; Hiemstra v. Hiemstra*, 2006 SCC 37,

the majority decision instructs me that where the date of a retroactive award is after the *Federal Child Support Guidelines* came into force, the *Guidelines* must be followed in determining the amount of child support owed. As a result, my calculation of quantum will consider Mr. Bocaneala's claim that he has made too great a contribution to child care expenses.

Calculating the retroactive award

[75] There are two elements to fixing the amount of the retroactive award. I must decide the date to which the award should be retroactive and I must decide the amount that would adequately quantify Mr. Bocaneala's deficient obligations.

Date of retroactivity

[76] Ms. Loshi sought a retroactive award to the date of the divorce. Mr. Bocaneala said any retroactive award should date no earlier than May 2010.

[77] At paragraph 121 in *D.B.S. v. S.R.G.; L.J.W. v. T.A.R.; Henry v. Henry; Hiemstra v. Hiemstra*, 2006 SCC 37, Justice Bastarache identified the date of effective notice as the "default option" date for a retroactive award. This was modified at paragraph 124, where he said that it is sometimes more appropriate to date the retroactive award from the date when increased support should have been paid. He said that this "situation can most notably arise where the payor parent engages in blameworthy conduct" and specifically said that this will be the case where the payor parent "withholds information":

> Not disclosing a material change in circumstances – including an increase in income that one would expect to alter the amount of child support payable – is itself blameworthy conduct. The presence of such blameworthy conduct will move the presumptive date of retroactivity back to the time when circumstances changed materially.

[78] Mr. Bocaneala's income in 2007 was $16,189.00 more than it was the previous year when he was ordered to pay child support. He did not disclose this increase or any other increase in his income, despite being ordered to do so and despite his experience of being ordered to pay retroactive child support after failing to disclose his income in 2006. I find that his interest in the certainty of the Corollary Relief Judgment ought not be protected beyond 2007 and that child support should be varied retroactively to that date.

Quantum of the retroactive award

[79] I'm to determine the award's quantum by applying the *Guidelines*. The *Guidelines* have two elements: the table amount (section 3) and the contribution, if any, to special or extraordinary expenses (section 7).

[80] Returning to the chart at paragraph 59, I have modified it below to show the amount Mr. Bocaneala should have paid based on his income, and the shortfall between what he actually paid and what he should have paid. In each year until 2012, I have calculated what he paid as the amount of his table payment ($645.00) and the amount of his contribution to child care costs ($127.00), multiplied by twelve. In each year, he paid $9,264.00. For 2012, I have calculated his contribution to child care costs for six months and for 2013, I have calculated his table amount of support for two months.

Year	Income	Guidelines Amount	Shortfall
2007	63,493.00	(897 x 12) + (127 x 12) = 12,288	12,288 - 9,264 = **3,024**
2008	56,170.00	(799 x 12) + (127 x 12) = 11,112	11,112 - 9,264 = **1,848**
2009	62,134.00	(878 x 12) + (127 x 12) = 12,060	12,060 - 9,264 = **2,796**
2010	92,224.00	(1,253 x 12) + (127 x 12) = 16,560	16,560 - 9,264 = **7,296**
2011	84,904.00	(1,165 x 12) + (127 x 12) = 15,504	15,504 - 9,264 = **6,240**
2012	80,945.00	(1,114 x 12) + (127 x 6) = 14,130	14,130 - 9,264 = **4,866**
2013	95,265.00	1,293 x 2 = 2,586	2,586 - 1,544 = **1,042**
Total owed			**27,112.00**

[81] In this exercise, I can't calculate a proportionate sharing of the boys' child care cost. I don't know Ms. Loshi's annual income and I don't know the total cost of the child care. I don't know what child care cost, after the child care deduction was claimed on Ms. Loshi's tax return. In the absence of this information, I use $127.00 as an appropriate estimate of Mr. Bocaneala's contribution to this cost.

[82] Ms. Loshi testified that Armando completed grade six in 2012. She said that periodically he would go to his grandparents' home for lunch or after school but that she was required to continue to pay the full day care cost so he could attend when he wasn't at his grandparents. In her affidavit she claims that child care expenses ended in June 2012 **and** in September 2012. Her receipt (Exhibit D to her affidavit) shows payment to the end of June, so I use that date as the date when child care expenses ended in calculating Mr. Bocaneala's 2012 payment. In 2013, I calculate no amount owed for child care costs.

[83] Based on the evidence I heard, I do not add any amount for a retroactive contribution to the boys' special or extraordinary expenses. I have addressed whether the expenses qualify for contribution in the context of the prospective child support claim.

[84] As I said at paragraph 69, Mr. Bocaneala didn't provide any evidence addressing whether a retroactive award would create undue hardship for him. Even without that evidence, I do consider the point, now that I have calculated the amount of the retroactive award at $27,112.00. I recognize that I am permitted to craft a retroactive award so as to minimize hardship.

[85] The circumstances before me offer an unusual opportunity to effect payment of the retroactive award. The boys now live with their father and it is Ms. Loshi who is to pay prospective child support. I have already calculated, at paragraph 21, that Ms. Loshi owes Mr.

Bocaneala $2,864.00 for her underpayment of child support from March 2013 until July 2014. She need not pay this amount, which will reduce Mr. Bocaneala's debt to her from $27,112.00 to $24,248.00.

[86] I further order that, effective January 1, 2015, Ms. Loshi's monthly child support payments of $951.00 be offset against the debt that Mr. Bocaneala owes to her. At the current rate of $951.00, her child support obligation will be "paid" by Mr. Bocaneala's retroactive award over twenty-five months and that she would pay $473.00 in the twenty-sixth month before payments of the full table amount would commence. This arrangement is predicated on there being no change to Ms. Loshi's annual income, the child support tables and the boys' custodial arrangement. Accordingly it is incumbent on both parents to exchange tax returns annually so that they can monitor Mr. Bocaneala's payment of the retroactive award vis-à-vis Ms. Loshi's ongoing obligation. I order them to exchange completed copies of their tax returns (with all schedules and attachments) by May 15 of each year, starting on May 15, 2015 and to exchange copies of their notices of assessment or re-assessment received from the Canada Revenue Agency within two weeks of their receipt.

[87] Mr. Ford shall prepare the order.

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

Halifax, Nova Scotia