IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: *Zutter v. Power*, 2004 NSSF 116

Date: 2004 12 23
Docket: 1201-54083
Registry: Halifax

Between:

Marcia Nancy (Power) Zutter

Applicant

v.

James Arthur Power

Respondent

Judge: The Honourable Justice Deborah K. Smith

Heard: July 8, August 4, October 5, and October 13, 2004, in Halifax, Nova Scotia

Written Decision: December 23, 2004

Counsel: Angus Schurman appearing for Lynn Reierson, for the Applicant James Power, Respondent, on his own behalf

By the Court, Orally:

[1] This is the Zutter and Power matter. Mr. Schurman is here this afternoon on behalf of Ms. Reierson. Mr. Power is here on his own behalf.

[2] This case involves an Application by Marcia Zutter to vary the child support and spousal support provisions of a Corollary Relief Judgment issued March 26th, 2003. Ms. Zutter brings her Application pursuant to s. 17(1)(a) of the

Divorce Act.

[3] The parties to this Application were married on October 8th , 1977 and separated in August of 1999. They were divorced by a Divorce Judgment dated February 22nd , 2002.

[4] The parties have four children, two of whom were "children of the marriage" as defined by the **Divorce Act** at the time of the divorce. The two children that remained children of the marriage at that time were Tristan Arthur Power, who was born on […], 1983 and is presently 21 years of age and Jenna Nancy Claire Power, who was born on […], 1985 and is presently 19 years of age.

[5] The history surrounding Mr. Power's support obligations is somewhat convoluted. It appears from the file materials that a divorce trial was held before the Honourable Associate Chief Justice Michael MacDonald on February 5,6,8 and 9, 2001. According to A.C.J. MacDonald's decision, Mr. Power was unemployed at the time of that trial.

[6] A review of the trial decision was held on August 14, 2001 and on April 22, 2002 an initial Corollary Relief Judgment was issued. According to the recitals contained in that judgment, Mr. Power was, at that time, earning a salary of $90,000.00 per year with the possibility of a bonus at the end of the year. Based on that salary, Mr. Power was ordered to pay child support for Tristan and Jenna in the table amount of $1,133.00 per month, as well as section 7 expenses of $201.00 per month for a total child support payment of $1,334.00 per month. In addition, he was ordered to pay Ms. Zutter spousal support in the amount of $2,055.00 per month.

[7] Paragraph number 11 of the said Corollary Relief Judgment indicated that Mr. Power shall retroactively "top-up" the spousal support and child support payable pursuant to that Order. Mr. Power was ordered to provide Ms. Zutter with income documentation determining his actual income from all sources on a gross basis no later than May 1, 2002 to determine the appropriate "top-up" for 2001. In addition, he was ordered to provide Ms. Zutter with income documentation determining his actual income from all sources on a gross basis by the first day of May of each year.

[8] This Corollary Relief Judgment (dated April 22, 2002) was incorporated into a further Corollary Relief Judgment dated March 26, 2003. There is a recital on page 2 of this latter Corollary Relief Judgment which notes that while Mr. Power's income was estimated to be approximately $90,000.00 at the time of the review application held on August 14, 2001, he in fact had an income of $109,582.97 that year. Nevertheless, the terms of the April 22, 2002 Corollary Relief Judgment (including the child support and spousal support provisions) were incorporated into the March 25, 2003 Corollary Relief Judgment without change.

[9] In April of 2004, Ms. Zutter filed an Application with the Court seeking a variation of the child support and spousal support provisions of the Corollary Relief Judgment dated March 26, 2003. This application was heard July 8, August 4 and October 5, 2004. (I should indicate that it was heard portions of each of those days.) While I would have preferred to reserve further and give a more detailed analysis of the evidence that has been presented and full and complete reasons for my decision, both parties are anxious to receive my decision as soon as possible, and accordingly I am going to give a verbal decision this afternoon, reserving the

right to edit the decision for grammar, et cetera.

[10] In the pre-hearing memorandum filed with the Court on behalf of the Applicant, the following relief was requested:

(a) child support for Jenna for those months when Jenna resides with her mother;

(b) section 7 expenses relating to Jenna, including health-related expenses and post-secondary education expenses;

(c) an increase in Ms. Zutter's spousal support payments;

(d) lump sum spousal support for Ms. Zutter. In Ms. Zutter's pre-hearing memorandum, she seeks a lump sum payment to cover the cost of a course that she is enrolled in at the Grant MacEwan College in Edmonton, Alberta. In other material provided to the Court for summation, there is also reference to a lump sum payment for a gym membership and orthotics. In addition, Ms. Zutter is seeking lump sum support to pay the cost of an annulment study that she had done; and

(e) in the memorandum filed on behalf of the Applicant, the suggestion is made that Ms. Zutter may be seeking a "top-up" of support as provided for by paragraph number 11 of the April 22, 2002 Corollary Relief Judgment.

[11] In my view, it is appropriate to begin with the issue of child support and then deal with the issue of spousal support.

[12] Ms. Zutter is asking that support be varied from the date of the last Corollary Relief Judgment onward. Both parties to this Application acknowledge that Tristan ceased to be a "child of the marriage" on September 1, 2003 and that Mr. Power's child support obligations in relation to that child ceased on that date.

[13] Section 17(4) of the *Divorce Act* indicates that before the Court makes a variation Order in respect of a child support Order, the Court shall satisfy itself that a change of circumstances as provided for in the applicable guidelines has occurred since the making of the child support Order or the last variation Order made in respect of that Order. Section 14 of the *Federal Child Support Guidelines* sets out what will constitute a change of circumstances for the purposes of s. 17(4) of the *Divorce Act*.

[14] In this case, the fact that Tristan is no longer a child of the marriage as defined by the *Divorce Act*, the fact that there has been an increase in the income that Mr. Power's child support was based on and the fact that Jenna is no longer in high school and is now 19 years old, all constitute changes in circumstances that could warrant a variation of child support under s. 17 of the *Divorce Act.* There may well be additional factors that would warrant such variation, but it is not necessary for me to make further findings in this regard in light of the fact that I am satisfied that a change of circumstances as provided for in the *Federal Child Support Guidelines* has been established.

[15] As indicated previously, Ms. Zutter seeks a variation in child support for the period March 26, 2003 onward. In the Corollary Relief Judgment issued April 22, 2002 (subsequently incorporated into the second Corollary Relief Judgment dated March 26, 2003) table support was based on Mr. Power having an income of $90,000.00 per annum. According to his 2003 Notice of Assessment (which was filed in this proceeding) he had an actual income that year of $93,710.00. Mr. Power's table support on an income of $93,710.00 per annum would have been $1,173.00 per month for two children, rather than the $1,133.00 per month referred

to in the Corollary Relief Judgment. The Corollary Relief Judgments issued in this matter do allow for a retroactive "top-up" of spousal and child support. I am satisfied that for the period April of 2003 to and including August of 2003 both Tristan and Jenna remained children of the marriage as defined by the *Divorce Act* and that Mr. Power's table payments during that period should have been $1,173.00 per month rather than $1,133.00 per month. I hereby retroactively vary Mr. Power's table support payments for the period April, 2003 to and including August, 2003 to $1,173.00 per month. According to my calculations, this results in Mr. Power owing Ms. Zutter an additional sum of $200.00 for the period in question. Subject to a set-off which will be referred to below, these funds shall be paid by Mr. Power to Ms. Zutter on or before the 30th day of November, 2004.

[16] I should indicate that had the Corollary Relief Judgments not provided for a Atop-up" of child and spousal support, I would not have been inclined to vary child support for the period April of 2003 to August of 2003. While the *Divorce Act* gives the Court the authority to retroactively vary support, the most recent Corollary Relief Judgment was only issued in March of 2003 and it should be presumed to be valid for at least some period of time after the date it was issued. However, since the Corollary Relief Judgments allow for a "top-up" of support once Mr. Power's actual income is known, I have granted Ms. Zutter's application for a retroactive variation in this regard.

[17] As indicated previously, both parties to this application acknowledge that Tristan ceased to be a "child of the marriage" on September 1, 2003 and that Mr. Power's child support obligations in relation to that child ceased on that date. Accordingly, I hereby retroactively vary Mr. Power's table support for the period September 1, 2003 to December 31, 2003 to the sum of $731.00 per month, which

represents table support for Jenna alone, based on Mr. Power having an annual income of $93,710.00.

[18] It appears from the evidence presented that Mr. Power has been paying table support to Ms. Zutter in the amount of $740.00 per month from September 1, 2003 onward. Accordingly, he overpaid table support by $9.00 per month for the period September 1 2003 to December 31, 2003. According to my calculations, this results in Ms. Zutter owing Mr. Power the sum of $36.00. This sum shall be deducted from the $200.00 referred to above, with the result that Mr. Power shall pay to Ms. Zutter the sum of $164.00 on or before the 30th day of November, 2004.

[19] On […] 2004 Jenna turned 19 years old. Accordingly, she has now reached the age of majority in both Alberta (where she resides and where the age of majority is 18 years) and in Nova Scotia (where the age of majority is 19 years). The first question that the Court must answer is whether Jenna remains a "child of the marriage" as defined by the *Divorce Act*.

[20] The *Divorce Act* defines a "child of the marriage" as a child of two spouses or former spouses who at the material time is under the age of majority and who has not withdrawn from their charge, or is of the age of majority or over and under their charge but unable by reason of illness, disability or other cause to withdraw from their charge or to obtain the necessities of life. Since Jenna is now over the age of majority, the Court must consider whether she remains under the charge of her parents but is unable by reason of illness, disability or other cause to withdraw from their charge or to obtain the necessities of life.

[21] The evidence filed in support of Ms. Zutter's application indicates that

Jenna suffered from bulimia since 1998 and was diagnosed as being severely depressed in 2001. According to Ms. Zutter's oral evidence, Jenna has been Amessed up" and considered suicide a couple of times during the past three and one half years. Jenna has been involved in individual and family therapy since 2001 and her condition has apparently improved over time. According to a report of Dr. M. Blackman dated June 18, 2004, Jenna has done well in treatment and is presently in good remission, but her type of condition is often recurrent and Dr. Blackman expects that it is possible that there may be some exacerbation of Jenna's condition in the future.

[22] According to Ms. Zutter's evidence, this past year Jenna has taken a number of courses in an attempt to obtain her Grade 12. The previous year she was also registered in Grade 12 but only completed and passed one of her courses. At the time of the hearing on July 8, 2004, Ms. Zutter testified that Jenna has now completed the courses and exams necessary for her to obtain her Grade 12 but Ms. Zutter was not certain as to whether Jenna had actually passed these courses.

[23] Jenna is presently enrolled full-time at the John Paul II Bible School in Hinton, Alberta. According to the evidence presented, Jenna will be in residence at the school and will be taking a Diploma course in Sacred Studies. The school year runs from September, 2004 to June, 2005. It was not necessary for Jenna to pass Grade 12 in order to be accepted at Bible School.

[24] Ms. Zutter is hopeful that Bible School will help Jenna to become more "emotionally sound". She says that Bible School has given Jenna a reason to live and has given her motivation for the next year. Ms. Zutter testified that Jenna's plans for the period following Bible School are "very much up in the air" and are

"very sketchy", however she views this program as important and feels that it will help Jenna to remain healthy.

[25] Jenna has not had an extensive work history. According to Ms. Zutter's evidence, Jenna worked between 10 and 12 hours per week at Starbucks for four months in 2002 while attending Grade 11. In June of 2004, Jenna began working between four and eight hours a week answering telephones at her local parish. In addition, commencing July 1, 2004, Jenna started working a summer job at the concession stand at a private club known as the Royal Glenora Club. According to Ms. Zutter's evidence, Jenna was working at this job this past summer five days a week working six to eight hours a day providing that the weather was good. Jenna earned $8.50 per hour with this employment.

[26] I am satisfied that Jenna continues to be a child of the marriage as defined by the **Divorce Act**. As indicated previously, Jenna is presently registered in Bible School. While Ms. Zutter is uncertain about what Jenna plans to do in the future, Jenna's attendance at Bible School appears to be a positive move for her and I am satisfied that she will profit from this education. The diploma course that Jenna is taking is less than a year long. Ms. Zutter believes that this course will help Jenna remain healthy and hopefully will assist her in becoming more "emotionally sound". I am satisfied that Jenna is a *bona fide* student and that as a result of attending school she has been unable to withdraw and is unable to withdraw from the charge of her parents or obtain the necessities of life. Accordingly, she remains a child of the marriage as defined by the *Divorce Act*. Mr. Power himself acknowledged during summation that Jenna would continue to be a child of the marriage while registered for the Bible School program.

[27] For the period January 1, 2004 to August 31, 2004, Ms. Zutter's table support payments relating to Jenna are hereby retroactively varied to the sum of $755.00 per month, based on Mr. Power having an annual income of $97,200.00. The evidence indicates that Mr. Power has been paying Ms. Zutter table support in the amount of $740.00 per month during this period. Accordingly, Mr. Power owes Ms. Zutter the additional sum of $120.00, which represents additional table support of $15.00 per month for a period of eight months. Mr. Power shall pay Ms. Zutter this additional $120.00 on or before the 30th day of November, 2004.

[28] Ms. Zutter is seeking further table support for Jenna during the months that Jenna actually resides with her. As indicated previously, Jenna will be in residence while at Bible School. Ms. Reierson confirmed during her summation that Ms. Zutter is not seeking table support for Jenna for the months of September, 2004 to and including May of 2005. The question arises as to what should happen after May of 2005 when, hopefully, Jenna has completed her Bible School course.

[29] As indicated above, I am satisfied that at the present time Jenna remains a child of the marriage. How long she will retain this status is unknown. While I had contemplated ordering an automatic review of child support in June of 2005 (once Bible School has concluded) this may result in unnecessary expense to the parties. Since Jenna presently qualifies as a child of the marriage, I am satisfied that it is appropriate to order that commencing June 1, 2005 (the month that Jenna is scheduled to complete Bible School) and continuing on the 1st day of each month thereafter until further Order of the Court, Mr. Power shall pay table support to Ms. Zutter in the amount of $755.00 per month, provided that Jenna lives with Ms. Zutter on a full-time basis. This table support figure is based on Mr. Power having an annual income of $97,200.00.

[30] Communication between Ms. Zutter and Mr. Power appears extremely limited (if it exists at all). Accordingly, it will be very difficult for Mr. Power to know whether Jenna actually returns to live with her mother following the completion of Bible School. The Order that will issue as a result of my decision shall place an onus on Ms. Zutter to write to Mr. Power after Jenna finishes Bible School to advise whether Jenna is living with Ms. Zutter on a full-time basis. Mr. Power shall not be obliged to reinstate the table support relating to Jenna until he has received written confirmation from Ms. Zutter that Jenna is back living with her mother on a full-time basis.

[31] The Order shall also place an onus on Ms. Zutter to forthwith advise Mr. Power in writing in the event Jenna ceases to live with her mother full-time. I want to ensure that in the event that Jenna returns to live with her mother and then subsequently moves out of her mother's home, that Mr. Power is advised of this fact in a timely manner.

[32] In addition to the above, the entire issue of Jenna's child support will be subject to review (without the need of establishing a material change in circumstances) upon application by either party which application shall be heard on or after the 12th day of June, 2005 (which is the day that Jenna is scheduled to complete Bible School). By that time, Jenna should have a better understanding of what she intends to do in the future and the Court will then be able to decide whether she remains a child of the marriage following completion of Bible School. In light of the Court's docket delays, either party is free to apply for that review now, provided that the hearing is not scheduled to be heard prior to June 12, 2005.

[33] I appreciate that Jenna is now above the age of majority and accordingly, the Court need not grant the table amount of child support. I am satisfied that the table amount of support was appropriate for the period to August 31, 2004. In addition, I am satisfied that based on the information presently before the Court, full table support should re-commence on June 1, 2005 provided that Jenna lives with Ms. Zutter on a full-time basis. It must be noted, however, that by that date Jenna will be 20 years old and may or may not be planning to return to school. Should either party apply to review child support after Jenna completes Bible School the Court hearing the matter at that time will determine whether the table amount of support remains appropriate.

[34] In addition to table support, Ms. Zutter is seeking section 7 expenses relating to Jenna's tuition and other expenses while at Bible School. In Ms. Zutter's Affidavit sworn to on July 8, 2004, she estimates these expenses to be $7,800.00. In the materials provided by Ms. Reierson for summation, this figure is broken down as follows:

Tuition		$3,850.00
Room and Board		$2,050.00
Books		$100.00
Extras, entertainment, clothes, etc. ($200.00 per month " 9 months)		$1,800.00
TOTAL:	$7,800.00	

[35] The first question that the Court must answer is whether Bible School qualifies as "post-secondary education" so as to fall within section 7(1)(e) of the *Guidelines*.

[36] The term "post-secondary education" is not defined in the *Federal Child Support Guidelines*. Counsel has not referred me to any case law on this issue, nor have I been able to find any cases directly on point.

[37] It is notable that the *Guidelines* do not refer to "university" or "college" expenses in s. 7(1)(e), but rather refers to expenses for "post-secondary education". This is a broad term and should be interpreted as such by the Court. I am satisfied that Bible School can properly fit within the term "post-secondary education" as used in s. 7(1)(e) of the *Guidelines*.

[38] When considering a section 7 claim the Court must consider the necessity of the expense in relation to the child's best interests and the reasonableness of the expense having regard to the means of the spouses and those of the child and to the family's spending pattern prior to separation. In this case, subject to a qualifier which I will review momentarily, I am satisfied that the expenses that will be incurred for Jenna's tuition, room and board and books are necessary expenses, taking into account Jenna's best interests and are reasonable having regard to the means of the spouses and those of the child. The qualifier that I would make has to do with a $2,642.58 education fund which, pursuant to paragraph 12 of the Corollary Relief Judgment dated March 26, 2003, was paid to Jenna by Mr. Power from his share of the matrimonial home proceeds. Both parties agree that these funds were to be used for educational purposes. According to Ms. Zutter's testimony, Jenna used her share of these funds to go on a Mediterranean cruise.

Ms. Zutter called this trip an “educational Mediterranean cruise” and testified that the children that took the trip did some touring of major cities with “art specialists and historians”. The Court, however, was not provided with any documentation supporting the suggestion that this cruise was truly educational in nature.

[39] Ms. Zutter also testified that she agreed to Jenna taking this trip after discussing it with Jenna’s doctor. Both Ms. Zutter and Jenna’s physician may have thought that this cruise would be a positive event in Jenna’s life, but that does not answer the question of whether Jenna should have used the funds that her father gave her specifically for educational purposes - in order to take a Mediterranean cruise.

[40] I am not satisfied that the $2,642.58 given to Jenna by her father for educational purposes was actually used for educational purposes and, in my view, this sum should be deducted from that portion of the tuition, room and board and book expenses that Mr. Power would otherwise be ordered to pay.

[41] In addition, I am not satisfied that the $1,800.00 claimed by Ms. Zutter for “extras, entertainment and clothes” should be taken into account when calculating Jenna’s post-secondary education expenses. As a preliminary matter, these expenses do not relate directly to Jenna’s post-secondary education. In any event, these are expenses that, in my view, at the age of 19, can properly be paid for by Jenna. During the course of Ms. Zutter’s testimony I asked her whether she expected Jenna to make any contribution towards her Bible School expenses. She indicated that while she did not expect Jenna to contribute towards her “official education” she would like to see Jenna providing herself with boots, clothes and things of that nature. In my view, it is reasonable to expect Jenna to pay for her

extras, entertainment and clothes while at Bible School if her parents fund her tuition, room and board and books. Jenna can obtain the funds for these expenses either through employment (summer or otherwise) or through the inheritance that she presently has, which is referred to in paragraph number 13 of the Corollary Relief Judgment issued on April 22, 2002.

[42] According to Ms. Zutter's testimony and the written materials provided by Ms. Reierson (in summation) Jenna's tuition costs $3,850.00; her room and board is $2,050.00 and her books cost $100.00. That leaves a total figure for these expenses of $6,000.00. I am satisfied that it is appropriate to divide this figure of $6,000.00 between the parties in proportion to their respective incomes.

[43] Ms. Reierson has suggested to the Court that Ms. Zutter's present income for section 7 purposes is $34,150.27 subject to any recalculation that may have to be made depending on my decision relating to spousal support. This figure is calculated as follows: $8,015.00 per year in employment income; $1,475.27 per year in dividend, interest and other investment income and spousal support of $24,660.00. I accept that this is an appropriate figure to use for Ms. Zutter's income when calculating each party's proportionate share of the section 7 expenses relating to Jenna's post-secondary education.

[44] The evidence satisfies me that Mr. Power presently has an annual income of $97,200.00. From this sum must be deducted the amount of spousal support that he pays to Ms. Zutter (see s.3(2) of Schedule III to the *Federal Child Support Guidelines*). Mr. Power is presently paying the sum of $24,660.00 per year to Ms. Zutter in spousal support. Accordingly, subject to any variation that I may make in relation to spousal support, his present income for the purpose of section 7

expenses is $72,540.00. I obtained that figure by taking his income of $97,200.00, subtracting from it $24,660.00 and I am left with an income of $72,540.00.

[45] Based on these figures, Mr. Power's proportionate share of Jenna's $6,000.00 post-secondary education expense is $4,080.00. I calculated that figure by taking 68% of $6,000.00 ‘ $4,080.00. Ms. Zutter's proportionate share is $1,920.00. I calculated that by taking 32% of $6,000.00 ‘ $1,920.00.

[46] As indicated previously, Mr. Power has already paid Jenna $2,642.58 for educational purposes. This sum shall be deducted from Mr. Power's proportionate share of these expenses. Accordingly, he shall pay Ms. Zutter the sum of $1,437.42, which represents his proportionate share, being $4,080.00 minus the $2,642.58 that he has already provided to Jenna.

[47] Ms. Zutter shall forthwith provide Mr. Power with written confirmation that Jenna is presently attending Bible School and she shall also provide Mr. Power with receipts for the $6,000.00 in section 7 expenses referred to above. Mr. Power shall pay to Ms. Zutter section 7 expenses of $1,437.42 within 30 days of receiving this documentation.

[48] Mr. Power has made note of the fact that Jenna did not apply for any grants, scholarships or loans in relation to Bible School and he also notes that she has inheritance funds that she could apply towards her education.

[49] Ms. Zutter testified that Jenna only completed one course the first time that she took Grade 12, which was Biology. Jenna received a grade of 65% in that course. Apparently, Jenna passed another course earlier this year for which she

received a grade of 63%. In my view, it is unlikely that Jenna would have qualified for any scholarships in light of her marks.

[50] While the materials filed with the Court do indicate that Jenna could have applied for provincial grants and loans in relation to her Bible School expenses and while Jenna does have inheritance funds in her possession that she could use for these expenses, I am satisfied that for this year it is appropriate that Jenna's parents share her Bible School expenses in the manner that I have indicated and Jenna will be responsible for the $1,800.00 claimed by Ms. Zutter for Jenna's "extras, entertainment and clothes" while at Bible School. As indicated previously, Jenna can either obtain this money through employment or through the inheritance funds that she presently holds.

[51] There is one additional matter that I should deal with in relation to these section 7 expenses. It appears from the evidence presented that Jenna no longer communicates with her father. There is something paradoxical about an individual Jenna's age breaking off all communication with one of her parents and yet looking to that parent for support or assistance with post-secondary education expenses. There are a number of cases where the Court has terminated child support in circumstances where a mature child unilaterally ends a relationship with a parent without valid reason. The Courts have held that a child who expects to receive support should entertain some type of relationship with the paying parent in the absence of misconduct (see, for example, *Law v. Law* (1986), 2 R.F.L.(3d) 458 (Ont. S.C.) and *Anderson v. Anderson* (1997), 27 R.F.L.(4th) 323 (B.C.S.C.)).

[52] In this case, Mr. Power (who is self-represented) has not raised this issue as a basis upon which child support for Jenna should cease. In addition, I do not have

sufficient evidence before me to determine whether there was a valid reason for Jenna to terminate her relationship with her father. I raise this issue so that Jenna and her mother are both aware that if Jenna continues to refuse to communicate with Mr. Power this could affect both Jenna and her mother's ability to claim child support from Mr. Power in the future.

[53] In addition to section 7 expenses relating to Jenna's post-secondary education, Ms. Zutter is claiming retroactive section 7 expenses relating to Jenna's therapy. In materials provided to the Court by Ms. Reierson when the case began, these expenses were said to total $2,492.50. In further materials filed with the Court by Ms. Reierson on October 7, 2004, Ms. Zutter is said to be claiming retroactive section 7 expenses of $1,565.00 relating to Jenna's therapy costs. This figure apparently represents Jenna's therapy expenses from the date of the first Corollary Relief Judgment issued on April 22, 2002. Ms. Reierson advises that the therapy costs from the date of the second Corollary Relief Judgment are $1,185.00. Ms. Zutter testified that these expenses were not covered by her health care insurer.

[54] Mr. Power testified that he thought that a portion of the section 7 expenses that he was paying until September 1, 2003 related to Jenna's medical expenses. However, he did not have any specific evidence to offer in support of this suggestion.

[55] Mr. Power has provided the Court with documentation which indicates that Jenna is presently covered under Mr. Power's extended health, dental and drug plan provided by Atlantic Blue Cross. In addition, he testified that at the time of separation he agreed to continue to provide extended health and drug coverage for all of the children as well as Ms. Zutter. According to Mr. Power's evidence, Ms.

Zutter's name was removed from the coverage at the time of the divorce but the children continued to be covered under Mr. Power's plan. Mr. Power further testified that at the time of separation in 1999, he advised Ms. Zutter that health insurance was in effect for the children and he further testified that in relation to Jenna and Tristan he never advised Ms. Zutter that this coverage had ceased.

[56] Ms. Zutter testified that she was not aware that Jenna had been included on Mr. Power's extended drug and health insurance since the time of separation and further testified that she has never received any documentation in that regard.

[57] I am satisfied (based on Exhibit 22) that the section 7 expenses that Mr. Power paid until September 1, 2003 did not include any funds for the payment of Jenna's medical expenses.

[58] I am further satisfied that Jenna's counselling costs which exceeded the sum of $100.00 per annum are capable of being considered proper section 7 expenses under s. 7(1)(c) of the *Federal Child Support Guidelines*.

[59] I am concerned, however, about the fact that there does not appear to be any evidence that Ms. Zutter provided Mr. Power with copies of these receipts and requested a contribution towards these expenses prior to this proceeding being commenced. I think that it is reasonable to suggest that had this been done Ms. Zutter would have become aware of the fact that Mr. Power had Jenna covered under a health care plan. There is no evidence before the Court that these types of costs would have been covered under any of the plans that Mr. Power had, but providing Mr. Power with timely notice of these expenses would have at least allowed the opportunity to see if they could be paid in whole or in part by the

insurance that Mr. Power had for Jenna.

[60] As noted in the evidence, Mr. Power has held a number of different jobs since the time of separation and his insurance coverage was often provided through his employment. It is unlikely that Mr. Power will be able to retroactively claim these expenses against insurance companies that no longer cover Mr. Power or Jenna.

[61] Taking all matters into account, I am prepared to order that the parties share Jenna's counselling costs that exceed insurance reimbursement by the sum of $100.00 annually for the period January 1, 2004 to the date of this decision. Ms. Zutter shall forthwith provide Mr. Power with the original receipts for any counselling expenses that have been incurred this year in relation to Jenna. Within ten days of receiving the said receipts, Mr. Power shall claim these expenses from the insurer that presently covers Jenna. Any funds received by Mr. Power from this insurer relating to these expenses shall be forwarded to Ms. Zutter by Mr. Power upon receipt. Any counselling expenses (if any) which exceed insurance reimbursement by the sum of $100.00 or more shall be shared by the parties in proportion to their respective incomes. In particular, Ms. Zutter shall be responsible for 32% of these expenses and Mr. Power shall be responsible for 68% of the said expenses.

[62] Ms. Zutter's claim for retroactive section 7 expenses relating to Jenna's counselling for the period prior to January 1, 2004 is hereby dismissed.

[63] Ms. Zutter gave evidence that Jenna will have dental, counselling and prescription drug expenses in the future. She is asking that Mr. Power be ordered

to contribute towards these expenses. I hereby order that Ms. Zutter shall forthwith provide Mr. Power with receipts for any of Jenna's dental, counselling and prescription drug expenses incurred from the date of this decision onward for as long as Jenna remains a child of the marriage as defined by the *Divorce Act*. Within ten days of receiving the said receipts, Mr. Power shall claim these expenses from any insurance carrier that he has contracted with to provide coverage for Jenna. Any funds received by Mr. Power in relation to Jenna's dental, counselling and/or prescription drug expenses shall be forwarded to Ms. Zutter by Mr. Power upon receipt. Any of these expenses which exceed insurance reimbursement by the sum of $100.00 or more per annum shall be shared by the parties in proportion to their respective incomes at that time.

[64] In addition to the above, Ms. Zutter has requested further retroactive section 7 expenses relating to Jenna in the amount of $100.00 for tutoring and $454.75 for career counselling.

[65] Ms. Zutter has not satisfied me that the tutoring expense in the amount $100.00 constitutes an "extraordinary" expense for primary or secondary school education or for any other educational program that meets Jenna's particular needs as provided for by s. 7(1)(d) of the *Federal Child Support Guidelines*. Accordingly, her application in this regard is dismissed.

[66] Further, Ms. Zutter has not satisfied me that the $454.75 expense for career counselling for Jenna constitutes an "extraordinary" expense as provided for under s. 7(1)(d) or that it properly qualifies as an expense for post-secondary education under s. 7(1)(e) of the *Federal Child Support Guidelines*. Accordingly, her application in this regard is dismissed.

[67] In relation to spousal support, Ms. Zutter is seeking a retroactive increase in her periodic support payments from the date of the last Corollary Relief Judgment onward. In particular, she is asking the Court to retroactively vary her spousal support payments from the sum of $2,055.00 per month to $3,000.00 per month. Ms. Zutter's application to vary spousal support is also made under s. 17(1)(a) of the *Divorce Act*.

[68] Section 17(4.1) of the *Divorce Act* indicates that before the Court makes a variation Order with respect to spousal support it shall satisfy itself that a change in the condition, means, needs or other circumstances of either former spouse has occurred since the making of the spousal support Order or the last variation Order made in respect of that Order and in making the variation Order the Court shall take that change into consideration. It is well recognized that such a change must be material and cannot be trivial or insignificant. A material change is often said to be a change that, if known at the time the last order was entered into, would likely have resulted in different terms.

[69] In the Applicant's pre-hearing memorandum, it is submitted that the fact that child support is being revised constitutes a material change in circumstances. I accept that the fact that Mr. Power has ceased paying child support (including section 7 expenses) in relation to Tristan and the fact that his overall child support obligations in relation to Jenna have been reduced constitutes a material change in circumstances since the granting of the last Order. The issue that the Court needs to answer is whether the changes that have occurred since the granting of the last Order warrant a variation in the amount of spousal support that Ms. Zutter receives.

[70] I should begin by indicating that there are a number of changes that have occurred since the granting of the last Corollary Relief Judgment on March 26, 2003. As indicated previously, Ms. Zutter's child support payments have been reduced. As a corollary to this, her expenses relating to Tristan and Jenna should also go down. Neither child presently resides with Ms. Zutter, although Jenna may return to her mother's home following the completion of Bible School.

[71] Ms. Reierson submits that Mr. Power's income has materially increased since the granting of the last Order. It is difficult to determine whether such an increase has actually occurred. On page two of the Corollary Relief Judgment dated March 26, 2003 is a recital which states as follows:

> **AND UPON IT APPEARING** that at the time of the application of August 14, 2001, the Respondent's income was estimated to be approximately $90,000.00, but in fact the Respondent's income for 2001 was $109,582.97.

[72] I am satisfied from the terms of the March 26, 2003 Corollary Relief Judgment that Mr. Power's table support was based on an income of $90,000.00 per annum. Presumably, Ms. Zutter's spousal support payments were based on the same figure, although this is not exactly clear from the wording of the Judgment. We do know that when the most recent Corollary Relief Judgment was issued the child support and spousal support provisions of the April 22, 2002 Corollary Relief Judgment were incorporated despite the fact that Mr. Power's income for the year 2001 was said to be $109,582.97. Ms. Reierson was not counsel at the time the March 26, 2003 Corollary Relief Judgment was taken out and therefore could not explain to the Court why Mr. Power's child support and spousal support obligations remained the same despite the fact that Mr. Power appeared to have an

increase in his income.

[73] The evidence that has been presented to the Court indicates that Mr. Power's income for the year 2002 was $99,441.00 and his income for the year 2003 was $93,710.00. I am satisfied that for the year 2004, Mr. Power's income is $97,200.00. Ms. Zutter is seeking an increase in her spousal support payments from the date of the last Corollary Relief Judgment onward. That Judgment is dated March 26, 2003.

[74] Assuming that Mr. Power's spousal support payments under the March 26, 2003 Corollary Relief Judgment were based on him having an income of $90,000.00 per annum, then Mr. Power did receive a moderate increase in income that year. As indicated previously, his actual income for the year 2003 was $93,700.00. In addition, for the year 2004 his income has increased to $97,200.00.

[75] Ms. Zutter has also enjoyed an increase in her income since the time the last Corollary Relief Judgment was taken out. The Corollary Relief Judgment dated March 26, 2003 contains a recital which indicates that Ms. Zutter was not employed at the time this Judgment was taken out. According to Ms. Zutter's evidence, in September of 2003 she began working on a part-time basis in the deli area of an organic food store. According to Ms. Zutter's 2003 Income Tax Return she earned employment income that year of $2,756.69. Her total or line 150 income for 2003 was $28,979.79. In 2002 her total or line 150 income was $26,210.00.

[76] Accordingly, it appears that both Mr. Power and Ms. Zutter have enjoyed a small increase in their income in the year 2003. In Ms. Zutter's case her increase

was $2,769.79. In Mr. Power's case, assuming that his spousal support was based on an income of $90,000.00, then he enjoyed an increase in income that year of $3,710.00.

[77] It appears that both Ms. Zutter and Mr. Power will also enjoy further increases in their incomes for the year 2004. As indicated previously, Ms. Reierson estimated Ms. Zutter's employment income for 2004 to be $8,015.00 assuming that Ms. Zutter continued to work at the deli part-time. I have found that Mr. Power's income for 2004 will be $97,200.00. Accordingly, both of these parties are expected to receive a modest increase in their incomes this year. And I am referring in particular to their employment incomes.

[78] Ms. Zutter notes that Mr. Power is paying less in child support and accordingly, suggests that he has additional funds available to him to pay more in spousal support. She also notes that Mr. Power has re-married and is living with an individual who earns approximately $42,000.00 per annum. Ms. Reierson notes that the household income in Mr. Power's home is much greater than in Ms. Zutter's home.

[79] The evidence indicates that Mr. Power and his wife, Andrea Power, reside with Ms. Power's four children from a previous relationship. The evidence also establishes that Mr. Power and his present wife married on August 9, 2003. It is unclear from the evidence whether Mr. Power and Andrea Power were residing together at the time the Corollary Relief Judgment was taken out in March of 2003.

[80] Mr. Power submits in response to Ms. Zutter's arguments, that Ms. Zutter is not making a concerted effort to work towards self-sufficiency and he disputes Ms.

Zutter's request for an increase in the spousal support payments that she receives.

[81] Section 17(7) of the *Divorce Act* indicates that a Variation Order varying a Spousal Support Order should:

(a) Recognize any economic advantages or disadvantages to the former spouses arising from the marriage or its breakdown;
(b) Apportion between the former spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
(c) Relieve any economic hardship of the former spouses arising from the breakdown of the marriage; and
(d) In so far as practicable, promote the economic self-sufficiency of each former spouse within a reasonable period of time.

[82] The Supreme Court of Canada in *Moge v. Moge* made it clear that no one factor in s. 17(7) of the *Divorce Act* is paramount and all four factors must be taken into consideration in determining a variation to a spousal support award.

[83] Associate Chief Justice MacDonald dealt with some of these factors at the time of the parties' divorce hearing. At that time he would have been considering an initial application for spousal support under s. 15 of the *Divorce Act*. A.C.J. MacDonald stated at page 9 of his decision:

> Regarding spousal support I acknowledge that Ms. Zutter has been economically disadvantaged as a result of this marriage and correspondingly, Mr. Power has been economically advantaged. See *Moge v. Moge*, [1992] 3 S.C.R. 813 and *Bracklow v. Bracklow* (1999), 169 D.L.R. (4th) 577. Ms. Zutter ought to receive spousal support on an ongoing basis and in a manner that reflects this. I acknowledge and approve of the following reference from Mr. Ryan's brief to me on this issue:
>
> In light of *Moge* and *Bracklow*, *supra*, Ms. Zutter should be entitled to spousal support to compensate her for the economic disadvantages arising out of the breakdown of the marriage and throughout the marriage. As the parties have had a traditional long-term marriage, support should be indefinite and the quantum would be determined in light of

the income attributed to Mr. Power.

[84] In addition to these observations made by A.C.J. MacDonald, I would note the following: Ms. Zutter has, over the past few years, incurred additional financial consequences as a result of Jenna's health. I do not mean to suggest by this statement that I am satisfied that Ms. Zutter was prevented from working in any manner due to Jenna's health. However, I am satisfied that Jenna's mental health problems would have had some effect on Ms. Zutter's ability to work.

[85] Further, in relation to the issue of self-sufficiency, I note that these parties separated in August of 1999 when Ms. Zutter was 44 years of age. She is now 49 years of age and time is ticking on. Ms. Zutter presented to the Court as an articulate, bright and very capable individual. In her testimony she suggested that her health may prevent her from working on a full-time basis. While I accept that Ms. Zutter does have some health problems, there is no medical evidence to support her suggestion that her health problems affect her ability to work and I am not satisfied that Ms. Zutter is prevented from working on a full-time basis due to her health.

[86] Taking into account all four of the factors set out in s. 17(7) of the *Divorce Act* as well as the changes that have occurred since the granting of the last Corollary Relief Judgment, I have concluded that there shall be no variation in the amount of periodic spousal support that Ms. Zutter receives. I make this finding knowing that spousal support could be "topped-up" pursuant to section 11 of the April 22, 2002 Corollary Relief Judgment. Mr. Power shall continue to pay his wife the sum of $2,055.00 per month on the first day of each and every month until further Order of the Court.

[87] In addition to Ms. Zutter's request for an increase in her periodic support payments, she is also seeking lump sum support to cover the cost of a course that she is presently taking in order to qualify her as a special needs educational assistant. According to Ms. Zutter's Affidavit sworn to on July 8, 2004, this course commenced on September 7, 2004 and concludes on June 22, 2005. According to the same Affidavit, the approximate cost of tuition, books and other required fees for this course totals $4,595.00. In addition, Ms. Zutter took a supplementary course for which she is seeking an additional lump sum payment of $450.70.

[88] An individual claiming lump sum support to upgrade his or her education or to retrain should provide the Court with a clear plan including complete particulars of the educational program they wish to embark on (including all costs associated therewith) the reasons why upgrading or education is being suggested and the benefits that he or she expects to obtain as a result of this upgrading or retraining. The Court can then assess the reasonableness of the plan.

[89] Ms. Reierson submits that Ms. Zutter has selected a realistic course which will allow her to embark on a career as a teacher's assistant. Mr. Power submits that this course is not reasonable as it will not produce any more income for Ms. Zutter than she is presently earning.

[90] In Ms. Zutter's evidence given at the time of the hearing she testified that if she completed this one year program she expected to obtain part-time work earning a minimum of $12.00 per hour. I should state that when I say a one year program I realize that it is not 12 months, but I believe she described it as that in her evidence and I am referring to the program she's presently registered in. In any event, if she

completes that program she expected to obtain part-time work earning a minimum of $12.00 per hour. Further in the proceeding, Mr. Power asked Ms. Zutter what she anticipated her income level would be following this course. Ms. Zutter's response was "at $12.00 an hour - providing I'm getting a course for half days - three hours a day, ten months of the year." Ms. Zutter did testify that she hoped to be able to take additional courses and increase her level of knowledge as well as her pay cheque. However, she did not give any evidence as to how many additional courses would be required to move up from the basic level teacher's assistant, she did not indicate what type of time commitment these additional courses would involve or how much additional income she could realistically expect to receive if she took additional courses. Further, she testified that she did not know whether she would ever be able to get full-time work as a teacher's assistant.

[91] If Ms. Zutter works three hours a day, five days per week, for ten months of the year as a teacher's assistant she will work 649.5 hours per year at $12.00 per hour. That equals an annual gross income of $7,794.00. This assumes that Ms. Zutter will be working every day, Monday to Friday, for a full ten months. This is unlikely as there will be school holidays and the like during these ten months.

[92] In Ms. Zutter's evidence given at the time of the hearing on July 8, 2004, she testified that she was earning $8.50 per hour working part-time at the organic food store. As indicated previously, in documentation provided to the Court by Ms. Reierson she estimated that Ms. Zutter would earn $8,015.00 per annum working at the food store part-time.

[93] I do not mean to suggest by reviewing any of these calculations that Ms. Zutter should only be considering part-time work. In fact, the opposite is the case.

My point is that based on the evidence presented, Ms. Zutter will earn less as a teacher's assistant than she is presently earning at the organic food store. The Court must take this into account when considering the reasonableness of the plan and Ms. Zutter's request to have Mr. Power pay for this course.

[94] While Ms. Zutter did testify that there is a possibility that she could, with more courses, work her way up from a basic level teacher's assistant, she did not provide the Court with relevant details, such as how much additional income she could hope to receive, how many more courses she would require, et cetera.

[95] Ms. Reierson suggests that Ms. Zutter may get additional hours as a teacher's assistant or may get summer employment when school gets out, or alternatively may qualify for Employment Insurance. While these are all possibilities, the evidence on the income that this would produce was limited or non-existent and, in any event, I am not satisfied that any additional income that Ms. Zutter may earn in this regard will significantly alter the figures. Even if Ms. Zutter earns slightly more as a part-time teacher's assistant than she earns at the food store, it is still part-time work which will provide her with a very limited income. In other words, it does not appear, based on the evidence that has been provided to me, that this program will go a long way in helping to promote, so far as practicable, economic self-sufficiency for Ms. Zutter. Ms. Zutter has not satisfied me that this educational program should be paid for by Mr. Power and her application for lump sum support in this regard is hereby dismissed.

[96] In addition, I am not satisfied that it is appropriate to award lump sum spousal support to Ms. Zutter to pay for the annulment study that she had done, nor am I satisfied that her claim for lump sum support for a gym membership and

orthotics should be granted. These latter two types of expenses would normally form part of periodic support and in my view are not properly claimed as lump sum support.

[97] There is one additional matter that I should deal with. I am satisfied from the evidence presented that both Mr. Power and Ms. Zutter have failed to comply with certain terms of the Corollary Relief Judgments. Paragraph five of the Corollary Relief Judgment issued April 22, 2002 states as follows:

> The Petitioner shall provide the Respondent with regular monthly e-mail reports detailing the children's progress as it applies to their health, education (including report cards which will be mailed), their social life, their religion and their overall well-being. . . .

[98] Paragraph 12 of the said Corollary Relief Judgment reads as follows:

> The Respondent shall provide the Petitioner with income documentation determining the Respondent's actual income from all sources on a gross basis not later than the 1st day of May, 2002, and thereafter on a yearly basis on the 1st day of May.

[99] As indicated previously, the terms of the April 22, 2002 Corollary Relief Judgment were incorporated into the March 26, 2003 Corollary Relief Judgment.

[100] The evidence establishes that Ms. Zutter has failed to comply with paragraph five of the initial Corollary Relief Judgment requiring her to send monthly e-mails to Mr. Power concerning the children. Ms. Zutter testified that she has not complied with this paragraph at Jenna's request.

[101] The evidence further establishes that Mr. Power has failed to comply with paragraph 12 of the said Corollary Relief Judgment. He attempts to justify his actions by noting that Ms. Zutter has failed to comply with the Judgment. In other

words, he suggests that since Ms. Zutter has failed to provide him with the information that she was ordered to provide in relation to Jenna, he is justified in failing to provide his income information as ordered by the Court.

[102] Mr. Power and Ms. Zutter are both intelligent, educated individuals. It is hard to understand how either one of them could believe that they can simply choose to ignore an Order of the Court.

[103] Ms. Reierson has requested that I include a provision in my Order which will indicate that if Mr. Power fails to provide his financial information in a timely manner, there will be an automatic financial penalty to him. If I were inclined to include this provision, I would ensure that it applied to both parties so that if Ms. Zutter continues to fail to provide Mr. Power with regular monthly e-mails relating to Jenna, she too would face a financial penalty. I am not satisfied, however, that such a provision is appropriate. Both of the parties run the chance of being found in contempt of Court if they fail to comply with an Order of the Court. A finding of contempt can result in serious penalties and fines. Hopefully, this knowledge will help to ensure that both of the parties follow the Court's Orders in the future.

Smith, J.