SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: *S.T v. B.L*, 2021 NSSC 58

Date: 20210218
Docket: 094407
Registry: Sydney, NS

Between:

S.T

Applicant

v.

B.L

Respondent

LIBRARY HEADING

Judge: The Honourable Justice Pamela A. Marche

Heard: February 12, 2021 in Sydney, Nova Scotia

Written Decision: February 19, 2021

Subject: ***Parenting and Support Act*** **s. 40; wrongful denial of parenting time and appropriate remedy; reversal of primary care; imputation of income based on intentional under-employment; determination of prospective and retroactive child support**

Summary: ST claims he has been wrongfully denied parenting time and seeks a reversal of primary care of the children as remedy. BT refutes ST's parenting claims and asks the Court to impute income to ST on the basis that he is intentionally under-employed. ST cites health challenges as the reason for his employment status.

Issues:

(1) Does the Interim Consent Order of February 2020 preclude ST from raising parenting issues?

(2) Has ST been wrongfully denied parenting time? If so, what is an appropriate remedy?

(3) Should income be imputed to ST? What amount of child support is payable for the children?

Result: There has been a denial of ST's parenting time but not wrongful to the extent put forth by ST. It is not in the best interests of the children to reverse their primary care parent at this time. ST awarded additional parenting time including overnight visits. BL ordered to bear the responsibility and cost of transporting the children for ST's parenting time. Health challenges experienced by ST do not prevent him from earning additional income and income imputed to ST on the basis of intentional under-employment.

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Written Release:	February 19, 2021
Counsel:	Jeffrey Columbus for the Applicant Nicholas Burke for the Respondent

By the Court:

Overview

[1] Dad ST and Mom BL have five children: KL, age 12, LL, age 10, RTL age 8, TTL age 6 and HTL age 5. ST is the biological father of the three younger children and both parents agree that ST has stood in the place of a parent for the two older children.

[2] ST claims that he has been wrongfully denied parenting time. He seeks a reversal of parenting roles so that the children are in his primary care.

[3] BL asserts that ST has failed to exercise parenting time. BL further claims ST is intentionally under-employed and asks that income be imputed to ST for the purpose of determining the table amount for five children.

[4] ST does not agree that income should imputed to him. He cites health challenges as limiting his ability to earn more income.

Background and Procedural Facts

[5] ST and BL separated in December 2014. In 2014, there was an incident of domestic violence between BL and ST which resulted in several criminal charges against ST. ST pled guilty and received a probation sentence.

[6] Since they have separated, ST and BL have been before the court multiple times. There has been an open court file between these two parties almost consistently since 2014. Four Interim Orders were issued in 2015 and a further Interim Order was issued in June 2016. Pursuant to these orders, the children were placed in the primary care of BL and ST had supervised access. ST was ordered to pay $100 per month in child support in March 2015 and this child support obligation was confirmed in June 2016.

[7] A comprehensive Consent Order was issued on May 9, 2018. ST was found to have a gross annual income of $4,895 for 2017. No child support was ordered, and arrears were set at nil. BL continued to have primary care and final decision-making authority and ST's parenting time remained supervised. The parties agreed

to use a communication book to discuss the children, limit the involvement of new partners and to keep parenting time child focused.

[8] On February 14, 2019, another Consent Order was issued. This time the parties agreed to joint custody with BL continuing to have primary care and final decision-making authority. ST's parenting time with the children was no longer supervised and was specified to occur every Saturday and Sunday from noon to 5 pm, with such other parenting time as the parties might agree upon. Based on his income, ST was not obliged to pay child support. Communication between the parties remained an issue and it was agreed that communication should be facilitated by a third party and limited to matters involving the children.

[9] On June 12, 2019, ST applied to vary the Consent Order that had been granted four months prior. ST sought custody of the five children. BL filed a response on February 6, 2020 seeking child support, including retroactive child support, and a variation of parenting arrangements.

[10] The parties participated in a Settlement Conference in February 2020 resulting in an Interim Consent Order being issued on March 3, 2020. The Interim Consent Order dealt with all parenting issues and deferred a determination of child support to a further Settlement Conference that did not get scheduled.

[11] Pursuant to the February 2020 Interim Consent Order, the parties agreed to joint custody with BL continuing to have primary care and final decision-making authority. ST was to continue to have unsupervised parenting time every Saturday and Sunday from noon to 5 pm, along with such other parenting time as the parties might agree upon. A specified third party, AK, was to transport the children for parenting, using BL's vehicle, and ST was to e-transfer BL $40 to compensate to transportation costs for each week that he exercised parenting time. Communication was to be facilitated through Our Family Wizard and be limited to matters involving the children. BL was to keep ST apprised of important updates related to the children and to make up any parenting time ST lost due to unforeseen circumstances.

[12] A half-day hearing was held to finalize all issues. The parties agreed that the matter could be determined by cross-examination of affidavit evidence. The Court was asked to consider three affidavits: Affidavit of ST dated February 5, 2021, Response Affidavit of BL dated February 9, 2021 and Affidavit of GK, the third-party access facilitator, dated February 9, 2021.

Position of the Parties:

[13] ST put forth the following:

- He has been in a common law relationship with SC for four years and they live in Sydney. They share a house with 4 bedrooms. SC has three children and the youngest resides with them. They have 2 vacant bedrooms equipped with 2 sets of bunk beds and a single bed. ST believes his home can accommodate the children being in his primary care but would also be prepared to get his own place, if necessary. He testified that his children are well integrated with SC's children and grandchildren.

- He acknowledged that the children would need to change schools if they were to be in his primary care. He says he lives near an elementary school and the children would be able to adjust. He says BL has caused the children to change schools multiple times.

- He acknowledged he does not own a vehicle but says he can borrow a friend's truck to transport the children to medical appointments and extracurricular activities. When challenged about the feasibility of this plan given the small size of the truck and the lack of car seats, he said he could make multiple trips and borrow car seats.

- He says his partner, SC, and her family are prepared to assist with childcare when he is working. He says he has lots of help.

- ST says he has always been an involved parent. He testified about playing spotlight and other outdoor games with the children.

- When asked about the children's extra-curricular activities, he knew KL played basketball but otherwise complained that BL did not provide him information about what the children were doing. ST says he cannot attend the children's appointments or activities if he does not know about them.

- ST acknowledges that he has criminal convictions resulting from a violent incident with BL in 2014. He says that BL jumped on him while he was holding their baby and he pushed her in response. ST says BL had him

breached on a no contact provision when he responded to her call to assist the children in getting ready for school. ST says this happened six years ago and he has taken responsibility for the incident by pleading guilty to the charges and taking programs such as Anger Management.

- ST acknowledged that he used drugs as a teenager but attached a series of drug tests to his affidavit as proof that he does not have any current addiction issues. He also attached a certificate to demonstrate successful completion of a co-parenting course in April 2020.

- ST asserts that BL fails to comply with the Interim Consent Order reached following the Settlement Conference in February 2020. He says he has only seen his children five times in the past year and that BL has been alienating the children from him.

- ST claims that BL has frustrated his parenting time with the children. He acknowledged a letter from counsel for BL, dated July 6, 2020, proposing an alternate schedule for parenting time. ST feels this proposal was not feasible because of work and school schedules.

- ST asserts that BL has failed to utilize Our Family Wizard app as directed in the February 2020 Interim Consent Order.

- ST claims BL has unstable housing, and he has safety concerns about the children while in their mother's care. He says BL's sister had a boyfriend who was convicted in relation to an incident involving the children. ST says that he has pictures of the children with bruises and black eyes and that Children's Aid has been involved.

- ST has several medical issues including Type 1 Diabetes, asthma, and high blood pressure. He estimates his prescription costs to be approximately $700 per month. He says he will die if he does not take his medication.

- ST is employed seasonally and claims he is unable to work year-round because of his health challenges. He says his current employer accommodates his health needs.

- ST earned approximately $12,000 in 2019 through seasonal employment and Employment Insurance. He admitted he could work all year around but feels there were no full-time jobs available in Cape Breton. He testified that he had worked at Tim Horton's but full time hours there only total 32-35 hours per week and he was garnished to the point that he had very little take-home pay and was unable to afford his medication.

[14] BL put forth the following:

- BL takes the position that all the parenting issues were resolved at the Settlement Conference and the only issue now properly before the Court is child support.

- BL says that she has always had primary care of the children and ST has never had overnight access with the children, despite her offer of same.

- BL adamantly denies that she had been frustrating ST's parenting time. BL points to the fact that she has allowed the use of her van to transport the children as indicative of her willingness to facilitate parenting time.

- BL says she has difficulty communicating with ST because of the incident of violence between them. She does not believe that ST has accepted responsibility for his actions.

- BL denies that she deleted the Our Family Wizard app. She testified that she "took a break" from using the app because communicating with ST was causing her stress.

- BL acknowledges that she does not advise ST about the children's health appointments or extracurricular activities but counters that ST does not ask for this information.

- BL says she did not allow ST weekend parenting time beginning in March 2020 due to her health concerns about Covid19. BL says she did not feel it was safe for the parenting time to occur and she says ST agreed with her on this point.

- In early July, 2020, counsel for BL advised ST that BL's vehicle could no longer be utilized for facilitating ST's parenting time on weekends because BL had accepted an employment position that required her to work on weekends. BL proposed that ST could either find his own transportation for weekends or she would allow the use of her van during weekdays. BL says ST did not respond to her proposal.

- BL denies housing insecurity. A plan to move in with a boyfriend fell through and she and the children continue to reside in the same house in Glace Bay. The children did not change schools.

- BL admitted that her sister's boyfriend was charged with assault in relation to an incident involving her children and agrees that Children's Aid was involved. BL advised that her sister's boyfriend has moved out of the province and is no longer involved in the lives of BL's children.

- BL acknowledged that she has not claimed and does not receive child support from either of the biological fathers of her two oldest children.

- BL is currently unemployed.

Issues

1. Does the Interim Consent Order of February 2020 preclude ST from raising parenting issues?

2. Has ST been wrongfully denied parenting time? If so, what is an appropriate remedy?

3. Should income be imputed to ST? What is amount of child support is payable for the children?

Applicable Law

Best Interest Test

[15] The applicable legislation is the *Parenting and Support Act*, 1989 RSNS c. 160. The paramount consideration in the analysis of any parenting issue is the best

interests of the child (s. 18(5) of the Act). Section 18(6) states that the Court shall consider all relevant circumstances when determining the best interests of the child, including:

> (6) In determining the best interests of the child, the court shall consider all relevant circumstances, including
>
> > a. the child's physical, emotional, social and educational needs, including the child's need for stability and safety, taking into account the child's age and stage of development;
> >
> > b. each parent's or guardian's willingness to support the development and maintenance of the child's relationship with the other parent or guardian;
> >
> > c. the history of care for the child, having regard to the child's physical, emotional, social and educational needs;
> >
> > d. the plans proposed for the child's care and upbringing, having regard to the child's physical, emotional, social and educational needs;
> >
> > e. the child's cultural, linguistic, religious and spiritual upbringing and heritage;
> >
> > f. the child's views and preferences, if the court considers it necessary and appropriate to ascertain them given the child's age and stage of development and if the views and preferences can reasonably be ascertained;
> >
> > g. the nature, strength and stability of the relationship between the child and each parent or guardian;
> >
> > h. the nature, strength and stability of the relationship between the child and each sibling, grandparent and other significant person in the child's life;
> >
> > i. the ability of each parent, guardian or other person in respect of whom the order would apply to communicate and cooperate on issues affecting the child;
> >
> > j. the impact of any family violence, abuse or intimidation, regardless of whether the child has been directly exposed, including any impact on:
> >
> > > (i) the ability of the person causing the family violence, abuse or intimidation to care for and meet the needs of the child, and
> > >
> > > (ii) the appropriateness of an arrangement that would require co-operation on issues affecting the child, including whether requiring such co-operation would threaten the safety or security of the child or of any other person.

[16] The list is non-exhaustive but largely codifies the body of case law analyzing factors to be considered when determining what is in a child's best interest. The weight to be attached to any particular factor varies from case to case, as each factor must be considered in relation to all the other factors that are relevant in any particular case. **Foley v. Foley**, (1993) 124 NSR (2d) 198.

[17] In *Burgoyne v. Kenny*, 2009 NSCA 34, Justice Bateman said this about the list of factors enumerated in **Foley**, *supra,* at para 25:

> [25] The list does not purport to be exhaustive nor will all the factors be relevant in every case. Each case must be decided on the evidence presented. Nor is determining a child's best interests simply a matter of scoring each parent on a generic list of factors.

Denial of Parenting Time

[18] Section 40(1) of the *Parenting and Support Act* directs that a person who has been denied parenting as set out in a Court Order may make an application to address the denial.

> 40 (1) Where a person who has parenting time, contact time or interaction under an agreement registered under this Act or a court order is denied that time or interaction, the person may make an application to address the denial.
>
> (2) The application must be filed no more than twelve months from the date the applicant was denied the parenting time, contact time or interaction.

[19] Section 40(3) directs the Court to consider all the relevant circumstances when determining whether a denial of contact was wrongful, including the following:

> (4) In determining whether a denial of parenting time, contact time or interaction was wrongful, the court shall consider all relevant circumstances, including whether there was:
>
> a. a reasonable belief that the child would suffer family violence, abuse or intimidation if the parenting time, contact time or interaction was to be exercised;
>
> b. a reasonable belief that the applicant was impaired by drugs or alcohol at the time the parenting time, contact time or interaction was to be exercised;

c. repeated failure, without reasonable notice or excuse, by the applicant to exercise parenting time, contact time or interaction in the twelve months immediately prior to the denial; or

d. a failure by the applicant to give notice of when parenting time, contact time or interaction would be reinstated following advance notice that the time would not be exercised.

(5) Where the court finds that the parenting time, contact time or interaction has been denied, but not wrongfully denied, the court may order that the applicant have compensatory parenting time, contact time or interaction with the child.

(6) Upon finding that the applicant was wrongfully denied the parenting time, contact time or interaction, the court may order:

a. that any of the parties to the application or the child attend counselling or a specified program or obtain a specified service, and which parties must pay for the counselling, program or service;

b. that the applicant have compensatory parenting time, contact time or interaction;

c. that the respondent reimburse the applicant for expenses incurred as a result of the respondent's denial of the parenting time, contact time or interaction;

d. that the transfer of the child for parenting time or contact time be supervised, and which parties must pay for the costs associated with the supervision;

e. that parenting time, contact time or interaction be supervised, and which parties must pay for the costs associated with the supervision;

f. the payment of costs for the application by one or more of the parties;

g. that the parties appear for the making of an additional order; and

h. the payment of no more than five thousand dollars to the applicant or to the applicant in trust for the child.

(7) A finding that the parenting time, contact time or interaction was wrongfully denied constitutes a material change in circumstances for the purpose of a variation order regarding custody, parenting time, contact time or interaction.

[20] I have considered these legislative factors. I have also considered the cases of **AU v. TC,** [2018] NSJ No 32, and **AM v. CH,** 2019 ONCA 764, submitted by counsel for ST.

Imputation of Income

[21] Section 19(1) of the Provincial Child Support guidelines made under s. 55 of the *Parenting and Support Act* directs that a Court may impute income to a parent for the purpose of calculating child support in certain circumstances.

> **19 (1)** The court may impute such amount of income to a parent as it considers appropriate in the circumstances, which circumstances include the following:
>
> a. the parent is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child to whom the order relates or any child under the age of majority or by the reasonable educational or health needs of the parent;

[22] Justice Forgeron in **Standing v. MacInnis**, 2020 NSSC 304, reviewed and summarized the law around imputation of income as follows:

> [21] In **Parsons v. Parsons,** 2012 NSSC 239, this Court reviewed legal principles that apply when underemployment is alleged. Paragraph 32 states in part as follows:
>
> [32] Section 19 of the Guidelines provides the court with the discretion to impute income in specified circumstances. The following principles are distilled from case law:

a. The discretionary authority found in s. 19 must be exercised judicially, and in accordance with rules of reason and justice, not arbitrary. A rational and solid evidentiary foundation, grounded in fairness and reasonableness, must be shown before a court can impute income: **Coadic v. Coadic**, 2005 NSSC 291.

b. The goal of imputation is to arrive at a fair estimate of income, not to arbitrarily punish the payor: **Staples v. Callender**, 2010 NSCA 49

c. The burden of establishing that income should be imputed rests upon the party making the claim, however, the evidentiary burden shifts if the payor assets that his/her capacity is compromised by ill health: **MacDonald v. MacDonald**, 2010 NSCA 34; **MacGillivary v. Ross**, 2008 NSSC 339.

d. The court is not restricted to actual income earned, but rather, may look to income earning capacity, having regard to subjective factors such as the payor's age, health, education, skills, employment history, and other relevant factors in determining what is reasonable and fair in the circumstances: **Smith v. Helppi**, 2011 NSCA 65; **Van Gool v. Van Gool** (1998), 113 B.C.A.C. 200; **Hanson v. Hanson**, [1999] B.C.J. No. 2532; **Saunders-Roberts v. Roberts**, 2002 NWTSC 11; and **Duffy v. Duffy**, 2009 NLCA 48.

e. A party's decision to remain in a unremunerative employment situation, may entitle a court to impute income where the party has a greater income early capacity. A party cannot avoid support obligations by a self-induced reduction in income: **Duffy v. Duffy**, *supra;* and **Marshall v. Marshall**, 2008 NSSC 11.

[23] In **Smith v. Helppi**, *supra* at paragraph 22, the NS Court of Appeal confirmed the factors to be balanced when assessing income earning capacity:

> [22] … Factors which should be considered when assessing a parent's capacity to earn an income were succinctly stated by Madam Justice Martinson of the British Columbia Supreme Court, in **Hanson v. Hanson**, [1999] B.C.J. No 2532, as follows:

> 1. There is a duty to seek employment in a case where a parent is healthy and there is no reason why the parent cannot work. It is "no answer for a person liable to support a child to say he is unemployed and does not intend to seek work or that his potential to earn income is an irrelevant factor".
>
> 2. When imputing income on the basis of intentional under-employment, a court must consider what is reasonable under the circumstances. The age, education, experience, skills and health of the parent are factors to be considered in addition to such matters as availability to work, freedom to relocate and other obligations.
>
> 3. A parent's limited work experience and job skills do not justify a failure to pursue employment that does not require significant skills, or employment in which the necessary skills can be learned on the job. While this may mean that job availability will be at a lower end of the wage scale, courts have never sanctioned the refusal of a parent to take reasonable steps to support his or her children simply because the parent cannot obtain interesting or highly paid employment.
>
> 4. Persistence in unremunerative employment may entitle the court to impute income.
>
> 5. A parent cannot be excused from his or her child support obligations in furtherance of unrealistic or unproductive career aspirations.
>
> 6. As a general rule, a parent cannot avoid child support obligations by a self-induced reduction of income.

[24] As also noted, in Nova Scotia the test to be applied when determining whether a person is intentionally under-employed is reasonableness, which does not require proof of a specific intention to undermine or avoid a support obligation: **Smith v. Helppi**, 2011 NSCA 65.

Retroactive Child Support

[25] Section 37(1) of the *Parenting and Support Act* authorizes the Court to make a retroactive order for support:

> 37 (1) The court, on application, may make an order varying, rescinding or suspending, prospectively or retroactively, a support order or an order for custody, parenting arrangements, parenting time, contact time or interaction where there has been a change in circumstances since the making of the order or the last variation order

[26] The Supreme Court of Canada in **S.(D.B.) v. G.(S.R.),** 2006 SCC 37, recently considered in **Michel v. Graydon**, 2020 SCC 24, addressed the issue of retroactive child support. Justice Forgeron in **Corbett v. McEachern**, 2017 NSSC 108, summarized the findings in *DBS* as follows:

> [33] In **S.(D.B.) v. G.(S.R.)**, 2006 SCC 37, the Supreme Court of Canada confirmed the legal test to be applied when retroactive child support is sought. Bastarache J. stated as follows:
>
> - Child support is the right of the child and such right survives the breakdown of the relationship of the child's parents [para 3]
> - The child loses when one parent fails to pay the correct amount of child support [para 45].
> - Parents have an obligation to support their child according to their income and this obligation exists independent of any statute or court order [para 54].
> - The payment of a retroactive award is not an exceptional remedy [para 97].
> - A retroactive maintenance award should be payable from the date the custodial parent gave effective notice to the non-custodial parent [para 118]. It is generally inappropriate to make a retroactive award more than three years prior to the date when formal notice was provided to the non-custodial parent [para 123].
> - The quantum of a retroactive award must be tailored to fit the circumstance of the case [para 128].
> - The court must examine and balance four factors when determining the issue of retroactivity.
> - The first factor concerns the reasonableness of the custodial parent's excuse for failing to make a timely application in the face of the nonpayment of child support, or in the face of an insufficient payment of child support: paras 101 and 104.

- The second factor relates to the conduct of the non-custodial parent. If the non-custodial parent engages in blameworthy conduct, then the issuance of a retroactive award is usually appropriate. The determination of blameworthy conduct is a subjective one based upon objective indicators [para 108] and the court should take an expansive view as to what constitutes blameworthy conduct in the face of the nonpayment or insufficient payment of child support: paras106 and 107.
- The third factor to be balanced focuses on the circumstances, past and present [para 110] of the child, and not of the parent [para 113], and include an examination of the child's standard of living [para 111].
- The fourth factor requires the court to examine the hardship which may accrue to the non-custodial parent as a result of the non-custodial parent's current financial circumstances and financial obligations [para 115], although hardship factors are less significant if the non-custodial parent engaged in blameworthy conduct [para 116].

Child Support Payable Standing in the Place of a Parent

[27] When a person stands in the place of a parent, the Court has discretion in determining the appropriate amount of child support payable for those children, having regard to the *Provincial Child Support Guidelines* **O.I.C. 2017-143, N.S. Reg. 83/2017** and any other parent’s legal duty to support the child.

[28] Section 5 of the *Guidelines* states:

> **5** Where a person against whom a child support order is sought stands in the place of a parent for a child, the amount of a child support order is, in respect of that person, such amount as the court considers appropriate, having regard to these Guidelines and any other parent's legal duty to support the child.

<u>Decision</u>

Issue One: Does the Interim Consent Order of February 2020 preclude ST from raising parenting issues?

[29] BL argues that all parenting issues were resolved at the Settlement Conference of February 2020 as reflected in the Interim Consent Order of March 3, 2020 and that the issue of custody ought not to be considered by the Court.

[30] I am satisfied that by March 2020 the terms of Interim Consent Order, not yet a month old, were not being followed:

- BL testified that she would not allow ST parenting time because she did not think it was safe. She acknowledged there was a directive from Dr. Strang that Court Orders related to parenting were to be followed. BL responded that she felt she should maintain a bubble with her children and that ST agreed with her on this point.

- In correspondence of July 6, 2020, counsel for BL advised ST that BL could no longer comply with the transportation provisions in the Interim Consent Order due to work commitments.

- BL admitted in her testimony that she did not use the Our Family Wizard app as agreed upon in the Interim Consent Order.

[31] If BL is not in compliance with the Interim Consent Order, she cannot relay on the Interim Consent Order as evidence that the parenting issue have been dealt with fully. I will consider ST's claims in relation to parenting issues.

Issue Two: Has ST been wrongfully denied parenting time? If so, what is an appropriate remedy?

[32] Whether or not ST was wrongfully denied parenting time before February 2020 is not before the Court. Although denial of parenting time was the primary ground for ST's Application to Vary filed June 12, 2019, the parties appear to have resolved this issue at the settlement conference of February 2020. The evidence presented to the Court related primarily to the time frame subsequent to February 2020 and counsel confirmed that the scope of evidence was limited to the three affidavits filed and the cross-examination of the affiants.

[33] As discussed previously, s. 40(3) of the *Parenting and Support Act* directs the Court to consider all the relevant circumstances when determining whether a denial of contact was wrongful.

[34] The onslaught of a global pandemic is relevant. The spring of 2020 was a scary and confusing time with a fair amount of uncertainty. However, the unchallenged evidence of ST is that he exercised parenting time with the children in April or May 2020, at a birthday party held in his home for his partner's grandchildren. The provincial health directives did not preclude ST's parenting time then or on Father's Day in June 2020. It is problematic to cite Covid19 and safety related concerns as a reason why ST's parenting did not regularly occur during

March through June 2020. I reject BL's suggestion that safety concerns justify the denial of ST's parenting time during this period.

[35] I accept that beginning in July 2020, BL's work placement prevented her from complying with the transportation component of the Interim Consent Order. Her approach to addressing this issue is relevant and was reasonable. She offered that ST could make his own arrangements for transportation on the weekends or her vehicle could be used to transport the children two days during the week. ST did not respond to this proposal.

[36] Furthermore, ST was adamant in his evidence that he could arrange for transportation of the children if he were the primary care parent. It is difficult to reconcile how transportation is not an issue now but has been for the past seven months to the extent that ST could not visit his children since July, apart from one visit over Christmas.

[37] I do find that BL has wrongfully failed to comply with the communication provisions in the Interim Consent Order. Communication in this case directly relates to the exercise of ST's parenting time because the Interim Consent Order directs that BL provide ST with information through Our Family Wizard regarding special events in which the children are involved, presumably so ST could attend. The Court Order provides that the parties were to communicate through Our Family Wizard. BL testified that she "took a break" and "did not open the app." She said she did this to avoid stress.

[38] The use of Our Family Wizard is meant to reduce conflict and provide a record of communication exchanges between the parties. No record of exchanges was provided to the Court for consideration. There is no evidence that would support BL's failure to utilize Our Family Wizard as being reasonable.

[39] I do, however, find BL had a legitimate issue that preventing her from complying with the transportation component of the Interim Consent Order. She needed to use her van to attend at her work placement and her response to this issue was reasonable: ST could either obtain his own transportation on weekends or exercise parenting time during the week. ST cannot on the one hand testify that transportation is not an issue for him and on the other hand claim he was wrongfully denied parenting time by BL because her vehicle was not available for transport. ST has not demonstrated that BL has wrongfully denied him parenting time by failing to comply with the transportation clause.

[40] ST bears the onus of proving on a balance of probabilities that BL has wrongfully denied him parenting time. The reference to Covid19 is problematic and does not justify why parenting time was not regularly occurring during March to June 2020. I find that ST was wrongfully denied parenting time during this time. Furthermore, failure of BL to utilize Our Family Wizard is without valid reason, constitutes a failure to comply with the February 2020 Interim Consent Order and contributes to a wrongful denial of ST's parenting time.

[41] Having found that ST has been denied parenting time and certain components of that denial has been wrongful, I must now consider an appropriate remedy. ST claims the appropriate remedy would be to place the children in his primary care.

[42] Any remedy ordered in response to a denial of parenting time must accord with what is in the best interests of the children. This is the paramount consideration that I must apply when determining this question and any other parenting issue, including what parent should have primary care of the children. Any response must be child focused. Children can not be expected to bear the burden of their parent's poor behaviour. Keeping in mind the scope and nature of the parenting time denial, I must look more broadly at the circumstances of the children to determine an appropriate remedy and what parenting arrangement is in their best interests.

[43] ST testified to concerns he has about the stability and safety of the children. Reference was made to involvement by Children's Aid and to pictures of marks on the children. ST voiced concerns about boyfriends of BL and BL's sister. However, ST did not tender any evidence such as police records, ICM notes, photographs etc., nor did he call any witnesses, to substantiate these concerns.

[44] The children have been in the primary care of BL since birth. ST's access to the children was supervised until February 2019. ST has never had an overnight visit with the children. ST acknowledges that he has only seen the children five times since February 2020. While some of his parenting time has been wrongfully denied, ST hold some responsibility for the lack of contact with his children.

[45] This history of care is such that a reversal of primary care would create complete upheaval in the lives of these children and totally undermine any sense of stability and security they have. It would be to the children's detriment to experience such a drastic change and it is not in their best interest to be in the primary care of their father at this time, given these circumstances.

[46] In response to the claims of the respective parties in relation to parenting time, and keeping in mind the best interests of the children, I find that it is appropriate in this case to award compensatory parenting time. BL testified that she has no objection to overnight parenting time for ST, Overnight parenting time would permit ST to expand his parenting role in the lives of his children. I find that parenting time for ST should expand to include overnight access and that BL shall be responsible for arranging transportation for STs parenting time.

[47] BL and ST will have joint custody of the children who will remain in the primary care of BL. BL must consult with ST in relation to major issues involving the children. This would include matters related to education, residency and health of the children. BL will have final decision-making authority if the parties are unable to agree.

[48] ST will have unsupervised parenting time with all five children every Saturday from 12:00 pm to Sunday at 5 pm. Additional parenting time may be provided as mutually agreed upon by the parties.

[49] BL, or a third party of her choosing, will be responsible for transporting the children to and from visits. ST is not expected to pay BL for costs associated with transportation.

[50] Should BL not be able to arrange for transportation due to work obligations, she must provide ST 24 hours notice and ST has the right make alternate arrangements for transportation for the children. ST must ensure the children are safely transported with the necessary licence, insurance, and car seats in place.

[51] The visits will occur at the residence of ST unless the parties mutually agree otherwise. Should ST 's parenting time be missed, BL will ensure that the parenting time is made up without delay.

[52] All communication between the parties will take place through Our Family Wizard unless an emergency requires, in which case contact may be made by telephone. All communication is to be limited to matters involving the children including important updates with respect to the children. The app may be used to arrange phone calls or Face Time between ST and the children during the week.

[53] Neither party will discuss adult issues with the children. Both parties will ensure no third party discusses adult issues with the children or makes negative comments about the other party.

Issue Three: Should income be imputed to ST? What amount of child support is payable for the children?

[54] ST has been employed as a seasonal worker for several years. Both parties agree ST's income for 2019 and 2020 falls below the threshold for child support obligation. In response to BL's claim that he is intentionally under-employed, ST claims his reasonable health needs prevent him from working more than he does.

[55] ST has Type 1 Diabetes and Asthma. He must inject insulin and use a steroid puffer each four times a day. He must test his blood sugar levels several times a day. He is prescribed blood thinner, blood pressure and cholesterol medication. His says his current employer accommodates his health conditions, specifically his need to attend doctor and hospital visits frequently.

[56] In cross-examination, however, ST acknowledged that his health needs do not prevent him from working full-time, year-round. ST claims there are simply no full-time times jobs to be had in CBRM and that Covid19 has made this situation worse. ST says full-time is not actually 40 hours, citing full-time at Tim Horton's to be 32-35 hours a week. ST reported that he worked two jobs, year-round, once before but that did not work out because his income was garnished.

[57] I am not satisfied, therefore, that health needs of ST have limited his current employment status. I am persuaded that it is reasonable that ST could be earning additional income and that minimum wage is an objectively fair evidentiary basis of how that income should be assessed. Considering ST′s age, health, and employment history, I find it reasonable that ST should be able to procure at least 30 hours a week of minimum wage work, allowing some accommodation for ST to attend to his health needs, and I am prepared to impute income to ST in the amount of $19,578 accordingly.

[58] ST sought a reversal of custody. In the alternate, he argued that no income should be imputed to him. ST did not advance an undue hardship argument and I do not have sufficient evidence before me to conduct such an analysis. I am satisfied that ST has prescription costs that average $700 per month. The only challenge that BL presented to this aspect of ST's evidence is that there might be prescription cost subsidies available to ST.

[59] ST acknowledges an obligation to pay support for all five children. The table amount for five children when payor has an income of $19,578 in Nova Scotia is $339.00 per month.

[60] When asked about the biological fathers of her two eldest children, BL acknowledges that she receives child support from neither of them. When asked why, she responded with: “It’s my choice.” When pressed, BL said: “They are not doing anything to me, where ST has.” This is deeply concerning. Child support is the right of the child. Child support should not be used as punishment or an incentive.

[61] BL claims a retroactive support claim of $12,822,72. I am satisfied that an order for retroactive child support would cause a significant hardship to SL given his income and his monthly prescription and health related costs. Based on the financial circumstances of both parties, I decline to order retroactive child support. On a go forward basis, commencing March 1, 2021 and continuing every month thereafter, ST is to pay BL $339 per month for the support of the five children.

Conclusion

[62] The over-arching challenge for this family is each parent holds the other parent responsible for issues and takes very little responsibility for their own. I want to make it clear to both ST and BL that you are each 100% responsible for contributing to your children having a positive relationship with both parents. May this decision help serve as a turning point.

Marche, Pamela A., J.