

**SUPREME COURT OF NOVA SCOTIA**  
**FAMILY DIVISION**

**Citation:** *Best v. MacKay*, 2021 NSSC 124

**Date:** 2021-04-13

**Docket:** SFHMCA No. 036611

**Registry:** Halifax

**Between:**

Paula Best

Applicant

v.

Gregory MacKay

Respondent

Judge: The Honourable Justice Theresa M. Forgeron

Heard: March 25 and April 9, 2021, in Halifax, Nova Scotia

Decision: April 13, 2021

Counsel: Hanna Garson for the Applicant, Paula Best  
Laura McCarthy for the Respondent, Gregory MacKay

**By the Court:**

**Introduction**

[1] Paula Best seeks a retroactive and prospective variation of child support for the parties' two dependent teenage sons. Although the children's father, Gregory MacKay acknowledges an obligation to pay the table amount prospectively, he nevertheless objects to paying the retroactive award sought by Ms. Best.

[2] Ms. Best states that Mr. MacKay should pay retroactive child support of about \$68,000 for two reasons. First, the children need the support. Ms. Best states that she and the children made many sacrifices to live within their means. This was difficult for the boys and would not have been possible but for the support of her mother. Second, Ms. Best states that Mr. MacKay acted in a blameworthy fashion by refusing to disclose his income information even though he was ordered to disclose and even though she requested annual disclosure. Ms. Best asks that the retroactive award be paid by garnishment and based on a specified repayment schedule.

[3] In contrast, Mr. MacKay states that a retroactive award should be limited to the last three years and no more than \$15,000. Mr. MacKay grounds his position on four factors, as follows:

- He denies acting in a blameworthy fashion. Mr. MacKay said that he didn't know that he had to disclose his income tax returns every year. He notes that he provided disclosure once this variation application was processed. Further, Mr. MacKay said that in addition to paying maintenance, from time to time, he also gave money to Ms. Best. These sums were not factored into the MEP calculations.
- He said that he continued to pay for childcare expenses well after the expense was no longer necessary.
- He does not have an ability to pay the large retroactive sum sought by Ms. Best. He has no savings or investments. His expenses are not extravagant.
- He experiences undue hardship because of the cost of access and the fact that he has another child to support.

[4] In summary, Mr. MacKay states that the retroactive award sought by Ms. Best is an impossible number that he cannot possibly afford given his income and reasonable expenses. Mr. MacKay does however consent to the continuation of the garnishment.

## **Issues**

[5] The only issue which I must decide concerns the amount of retroactive child support outstanding. Before addressing this issue, I will review background information to provide context.

## **Background Information**

[6] Ms. Best and Mr. MacKay were previously in a long term relationship and have two children together – Caylem born in October 2003 and Cohen born in April 2005.

[7] After their separation, a 2007 consent order issued which outlined the parties' maintenance and parenting obligations. Ms. Best was the designated primary care parent. Mr. MacKay was ordered to pay the table amount of child support at a rate of \$522 per month based on an employment income of \$34,500, together with a monthly payment of \$290 for childcare expenses. Arrears were set at \$2,000. In addition, Mr. MacKay was to maintain medical and dental coverage for the children. Further, Mr. MacKay was ordered to provide Ms. Best with a copy of his income tax return on June 1<sup>st</sup> of every year.

[8] Mr. MacKay's income changed after the consent order issued because he joined the Canadian Forces. A sizable pay increase followed. Despite earning substantially more income, Mr. MacKay did not increase his child support payments. Further, Ms. Best states that Mr. MacKay refused to supply a copy of his income tax returns – an allegation denied by Mr. MacKay.

[9] Ms. Best states that she was frustrated because Mr. MacKay refused to disclose what he earned. She had no choice but to hire a lawyer in 2015. Unfortunately, the lawyer did not move the matter forward. In 2018, Ms. Best's current lawyer assumed carriage of the file. In August 2018, an application to vary was filed.

[10] Mr. MacKay did not disclose his income information when the variation application was filed. Mr. MacKay did not cooperate with the process. Therefore, on January 24, 2019, Justice Jollimore ordered Mr. MacKay to pay costs of \$250. On May 31, 2019, Mr. MacKay filed a Response and an Undue Hardship Application together with other disclosure.

[11] The parties attempted to resolve the issues by participating in a settlement conference. Settlement negotiations were not fruitful.

[12] According to the records of MEP, Mr. MacKay had child support arrears of \$15,016.15 by the time of trial.

[13] The case was next scheduled for a contested hearing on Monday, March 15, 2021. The matter did not proceed as scheduled because of Mr. MacKay's late adjournment request which was communicated in the afternoon of Friday, March 12, 2021. The adjournment was granted, together with an order for costs in the amount of \$1,300. Costs were to be paid by the new trial date of March 25, 2021. Mr. MacKay did not pay the costs as ordered. He stated that he had no ability to pay.

[14] The contested hearing proceeded on March 25, 2021. Initially, Mr. MacKay sought to avoid paying both the table amount and a retroactive award because of his claimed undue hardship application. At the conclusion of the hearing, however, Mr. MacKay agreed to pay the table amount and asked to reduce the quantum of the retroactive award because of hardship considerations.

[15] During the hearing, both parties testified and were cross-examined. Neither party elected to call other witnesses. Oral submissions were provided at the conclusion of the hearing. In addition, on March 29, 2021, counsel for Ms. Best filed a revised table containing her retroactive child support calculations. Counsel for Mr. MacKay chose not to file additional materials.

[16] My oral decision was adjourned to Friday, April 9, 2021. The hearing could not proceed because Mr. MacKay's counsel was unexpectedly detained. As a result, the decision is published in written form.

### **Analysis**

#### **[17] What amount of retroactive child support is outstanding?**

##### *Position of Ms. Best*

[18] Ms. Best seeks \$68,872 in retroactive child support. This figure includes the \$15,016.35 arrears MEP records as outstanding. Ms. Best relies on the following to support her claim:

- Mr. MacKay acted in a blameworthy fashion.
- In keeping with the 2007 court order, Ms. Best repeatedly asked Mr. MacKay to provide her with his income tax returns. She felt Mr. MacKay's income likely increased after he changed employment. Ms. Best wanted to adjust the amount of child support. Her efforts were stymied because Mr. MacKay refused to provide her with his tax returns as mandated in the 2007 court order.

- Ms. Best retained a lawyer in 2015 to obtain disclosure and to vary child support. Her lawyer did not process the file as instructed. Her application languished. After Ms. Best's current lawyer assumed carriage of the file, her variation application was filed in August 2018.
- Mr. MacKay still did not cooperate in disclosing his tax returns; a costs order issued against him. Mr. MacKay eventually filed his income information. After reviewing his disclosure, Ms. Best realized how woefully inadequate Mr. MacKay's maintenance payments were.
- Mr. MacKay should not be rewarded for failing to disclose his income and for failing to increase his child support payments.
- The children should not be punished because Mr. MacKay hid his true income and avoided paying the proper amount of child support.
- Ms. Best and the children need the retroactive child support. Mr. MacKay's failure to pay led to immeasurable stress. Ms. Best and the children sacrificed because of the insufficient payment of child support. The children had to accept a lesser standard of living. For example, Ms. Best and the children always lived with her mother because she cannot afford a place of her own. The children did not enroll in expensive activities, such as hockey. The children didn't eat out or attend movies or purchase the type of clothes that they wanted. Ms. Best and the children lived frugally. Ms. Best couldn't afford more than the bare necessities because she did not receive the proper amount of support.
- Any hardship that Mr. MacKay experiences is self-induced. Mr. MacKay knowingly hid his income and knowingly underpaid support for many years.

*Position of Mr. MacKay*

[19] Mr. MacKay states that the retroactive award should be limited to no more than \$15,181 for the following reasons:

- Ms. Best did not ask him for his tax returns until after she filed the variation application.
- He did not understand that he was obligated to disclose his income tax returns under the terms of the 2007 court order. The order does not contain his signature.

- He did not act in a blameworthy fashion. He provided Ms. Best with money outside the MEP regime. He continues to supply one of the children with a cell phone.
- His claim of undue hardship is valid and genuine. His claim is based on three factors. First, he has another child to support. Second, he paid and continues to pay access expenses. At one point, he lived in Ontario and travelled to New Brunswick and Nova Scotia to visit his children. Third, his financial circumstances are dismal. His expenses are reasonable. He has no savings and no investments. He will have no ability to pay the table amount of child support if he has to pay a large retroactive award.

### *Law*

[20] Section 8 of the *Parenting and Support Act, 2015, c.44, s.2* codifies the common law duty of a parent to provide for the reasonable needs of their underage child. Further, s. 37(1) of the *Act* provides the court with the discretionary authority to vary, prospectively or retroactively, a child support order upon proof of a material change in circumstances.

[21] In determining how I should exercise my discretion, I apply legal principles. The Supreme Court of Canada recently reviewed retroactive child support principles in *Michel v. Graydon*, 2020 SCC 24. This case centered on whether the court had jurisdiction to award retroactive child support if the child was an independent adult at the time of the application. Although jurisdictional concerns are not an issue in this case, the Supreme Court of Canada discussed broader legal principles which are relevant, and which include the following:

- “The purpose and promise of child support is to protect financial entitlements due to children by their parents”: para 38.
- “Unmet child support obligations, whether they are in the form of arrears or have not yet been judicially recognized, are ‘a valid debt that must be paid, similar to any other financial obligation’, regardless of whether the quantum is significant”: para 78.
- “Gender roles, divorce, separation, and lone parenthood contribute to child poverty and place a disproportionate burden on women”: para 90. “Women still bear the bulk of childcare and custody obligations and earn less money than men, so women’s poverty remains inextricably linked to child poverty”: para 94.

- “Family law’s holistic approach demands consideration of the interconnected nature of issues of child support, child poverty, and the consequent feminization of poverty”: para 100.

[22] When assessing the four *DBS*<sup>i</sup> factors, the Supreme Court of Canada said that courts should consider the following:

- There are many reasons why a parent might delay in making an application, including fear of reprisal/violence, fear of litigation and litigation costs, lack of information or misinformation about the payor’s income, inability to contact the payor, illness of the child or the parent, lack of emotional means, concerns about the child’s relationship with the payor, attempts at reconciliation, mediation, or settlement, or the payor’s deliberate delay: para 85. When focusing on the reason for the delay, the court must take into account “a generous appreciation of the social context in which the claimant’s decision was made”: para 113.
- Blameworthy conduct is “anything that privileges the payor parent’s own interests over their children’s right to an appropriate amount of support”. “The failure to disclose actual income, a fact within the knowledge of the payor, is a failure of a significant obligation and is often the root cause of a delayed application”: para 116. The payor’s intention is rarely relevant: para 118.
- The needs of the child are a relevant consideration. Hardship experienced during childhood or a present need of funds weighs in favour of a retroactive award and extending the temporal reach of the award: para 120. A retroactive award may be appropriate if a recipient parent suffered hardship by sacrificing to meet the needs of the child: para 123.
- Undue hardship “takes into account the ease with which the payor might be able to pay the award.” “[I]f other factors do not militate against it, this factor may weigh against an award or affect its temporal scope”. Blameworthy conduct may lead the court to disregard undue hardship: para 124.
- Undue hardship “can only be assessed after taking into account the hardship caused to the child and recipient parent from not ordering the unpaid sums owing”: para 125.
- Effective knowledge “goes well beyond actual knowledge of a filed variation.” Certainty is provided by the Child Support Guidelines. Payors

are aware that they are to pay based on their actual income and will be held accountable for missed payments and underpayments of support: para 130.

### *Decision*

[23] My review of each of the four ***DBS*** factors informs my decision on the issue of retroactivity.

#### **Reason for Delay**

[24] Ms. Best provided three understandable reasons as to why she delayed filing a variation application. First and foremost, Mr. MacKay was hiding his income. Mr. MacKay did not disclose his income even after Ms. Best asked him to send her copies of his income tax returns. Ms. Best was therefore unable to assess the merits of a variation application.

[25] Second, Ms. Best's challenging financial circumstances and parenting responsibilities negatively impacted her ability to seek redress. Ms. Best was struggling financially. She had to delay educational opportunities because of her financial responsibilities for Caylem and Cohen. In addition, Ms. Best was a single mother and Mr. MacKay spent little time with the children. Ms. Best therefore assumed an even greater parenting role. Ms. Best's emotional and financial resources were being expended on the children – not litigation.

[26] Third, Ms. Best's attempts were also negatively impacted when she met with a lawyer in 2015 and he did not process her claim in an expeditious fashion. Once her current lawyer assumed carriage of the file, Ms. Best's application was filed immediately.

#### **Blameworthy Conduct**

[27] Mr. MacKay acted in a blameworthy fashion by prioritizing his own needs over the needs of his children. I will provide two examples to illustrate this conclusion. First, the 2007 court order stated that Mr. MacKay had to provide Ms. Best with a copy of his income tax return on June 1<sup>st</sup> of each year. Despite this order and despite Ms. Best repeatedly asking him to disclose, Mr. MacKay refused to comply.

[28] Second, Mr. MacKay knew that his income had increased since the granting of the 2007 order. Mr. MacKay knew that child support was based on the payor's income given that the *Child Support Guidelines* were used to determine the 2007 order. Mr. MacKay hid his income because he didn't want to pay the table amount



of child support based on his actual income. Mr. MacKay sacrificed the children's needs by prioritizing his own needs.

[29] In reaching this conclusion, I find Ms. Best credible and Mr. MacKay not credible. Further, where there is a conflict in the evidence, I prefer the evidence of Ms. Best rather than the evidence of Mr. MacKay.

#### **Needs of the Children**

[30] The children and Ms. Best suffered because Mr. MacKay did not pay the appropriate amount of child support. Ms. Best and the children lived on a frugal budget which met their basic necessities but little else. Their reduced standard of living was only made possible because of Ms. Best's mother who subsidized and who continues to subsidize them. For example, Ms. Best's mother only charges Ms. Best \$500 per month rent. Further, Caylem and Cohen did without many extras for many years because Mr. MacKay did not pay the appropriate amount of child support. Such an outcome is troubling and inappropriate.

[31] I also accept Ms. Best's evidence when she states that Mr. MacKay only provided her with cash on one occasion after the 2007 court order. I do not accept Mr. MacKay's evidence of other cash payments.

#### **Hardship**

[32] Hardship factors are not fatal to Ms. Best's application for the following reasons:

- Although Mr. MacKay will likely experience some hardship in paying a retroactive award in the \$59,000 range, his hardship was self-induced. Mr. MacKay should not be rewarded for hiding his income and for paying woefully inadequate child support for over ten years.
- Caylem, Cohen, and Ms. Best experienced and will continue to experience significant hardship because Mr. MacKay did not pay approximately \$59,000 in child support as it was due. Being deprived of about \$59,000 in child support created significant and continuing hardship for Caylem, Cohen and Ms. Best.
- Ms. Best earns considerably less than Mr. MacKay and has five children to support. Mr. MacKay earns more income than Ms. Best and has three children, including Caylem and Cohen, to support.
- Ms. Best is shouldering current s. 7 expenses without contribution from Mr. MacKay.

- Mr. MacKay can reduce his expenses by spending less on housing and transportation. He does not require a four bedroom apartment. His access expenses are not significant given that he spends little time with the children. Public transit is likely a better and more affordable transportation option.
- Caylem, Cohen and Ms. Best will suffer more hardship if they are deprived of the retroactive award than will Mr. MacKay if he is ordered to pay.
- Although Mr. MacKay does not have investments, the lump sum can be paid over time at a rate of \$300 per month. This amount will increase as each child becomes independent and Mr. MacKay's prospective table amount obligation decreases.

### *Summary*

[33] After balancing the four ***DBS*** factors, I order Mr. MacKay to pay retroactive child support to Ms. Best based on what he should have paid since 2008. Five points are noted. First, as I am uncertain as to which years Mr. MacKay lived in Ontario, I used Nova Scotia Tables. Second, I used the 2011 Tables for the years prior to 2017 and the 2017 Tables for the current years. Third, I discontinued the childcare expense in 2017. Fourth, I used the amount of \$290 for childcare. Fifth, as of February 23, 2021, MEP indicated that Mr. MacKay had paid \$103,464.42 in child support. Mr. MacKay is being garnished at a rate of \$704.70. He therefore would have paid an additional \$1,409.40 in child support for a total payment of \$104,873.82.

[34] MEP is directed to recalculate child support based on the following schedule and to provide Mr. MacKay with credit for all payments made:

<b>Year</b>	<b>Income</b>	<b>Table</b>	<b>Child Care</b>	<b>Annual Total</b>
2008	\$21,235	\$300	\$290	\$7,080
2009	\$26,823	\$390	\$290	\$8,160
2010	\$40,336	\$570	\$290	\$10,320
2011	\$48,270	\$676	\$290	\$11,592
2012	\$52,000	\$728	\$290	\$12,216
2013	\$59,579	\$830	\$290	\$13,440
2014	\$70,760	\$978	\$290	\$15,216

2015	\$72,956	\$1,008	\$290	\$15,576
2016	\$66,448	\$921	\$290	\$14,532
2017	\$80,586	\$1,124	N/A	\$13,488
2018	\$72,108	\$1,016	N/A	\$12,192
2019	\$72,956	\$1,016	N/A	\$12,192
2020	\$80,563	\$1,124	N/A	\$13,488
2021	\$80,563	\$1,124	N/A (4 Months)	\$4,496
Total Due				\$ 163,988
Total Paid				\$104,874.82
<b>Total Outstanding</b>				<b>\$59,113.18</b>

### **Conclusion**

[35] Mr. MacKay must pay Ms. Best the table amount of support given Mr. MacKay's actual income of \$80,563 which equates to a monthly amount of \$1,124. This amount is subject to automatic yearly recalculation based on Mr. MacKay's prior year's income. Recalculation will commence in May 2022.

[36] Further, Mr. MacKay must pay Ms. Best retroactive child support of \$59,113.18 at a minimum rate of \$300 per month, and continuing monthly thereafter until the retroactive award is paid in full. This monthly payment will be increased as each child becomes independent and child support is no longer payable for that child.

[37] Mr. MacKay must disclose to Ms. Best and to the Recalculation Program proof of his annual income by March 1 of each year. Further, Mr. MacKay must provide Ms. Best with a true copy of his income tax return together with all Notices of Assessment and Reassessment by June 1 of each year commencing on June 1, 2021.

[38] Ms. Garson is to draft the order. Costs submissions are due in three weeks from Ms. Garson and six weeks in response from Ms. McCarthy.

Forgeron, J.

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<sup>i</sup> (*D.B.S. v. S.R.G.*; *L.J.W. v. T.A.R.*; *Henry v. Henry*; *Hiemstra v. Hiemstra*, 2006 SCC 37)