

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

Citation: *Lutley v. McNish*, 2017 NSSC 362

**ENDORSEMENT**

Lutley v. McNish  
SFH-MCA 019437  
January 12, 2017

Deborah I. Conrad for Stephen Lutley  
Jennifer McNish on her own behalf

**The claims:**

Stephen Lutley applied to change the custody, access and child maintenance terms of a Consent Order dated June 18, 2014. Jennifer McNish applied to determine the issues of custody, access and special or extraordinary expenses.

**Decision:**

Stephen Lutley is owed the repayment of child support of \$419.19.

Jennifer McNish should have paid Stephen Lutley child support of \$604.00 in total for November and December 2014 (\$302.00 per month), pursuant to section 3 of the *Child Maintenance Guidelines*.

Jennifer McNish should have paid Stephen Lutley child support of \$2,988.00 in total for January through December 2015 (\$249.00 per month), pursuant to section 3 of the *Child Maintenance Guidelines*.

Jennifer McNish should have paid Stephen Lutley child support of \$164.42 in total for special health expenses in 2015, pursuant to section 7 of the *Child Maintenance Guidelines*.

Jennifer McNish should have paid Stephen Lutley child support of \$1,482.00 in total for January through June 2016 (\$247.00 per month), pursuant to section 3 of the *Child Maintenance Guidelines*.

Jennifer McNish should have paid Julia Lutley child support of \$1,482.00 in total for July through December 2016 (\$247.00 per month), pursuant to section 3 of the *Child Maintenance Guidelines*.

Stephen Lutley should have paid Julia Lutley child support of \$2,682.00 in total for July through December 2016 (\$447.00 per month), pursuant to section 3 of the *Child Maintenance Guidelines*.

Jennifer McNish should have paid Julia Lutley child support of \$1,299.96 in total for September, 2016 through April 2017, pursuant to section 7 of the *Child Maintenance Guidelines*.

Stephen Lutley should have paid Julia Lutley child support of \$2,311.04 in total for September, 2016 through April 2017, pursuant to section 7 of the *Child Maintenance Guidelines*.

All amounts owed shall be offset against amounts paid through the Maintenance Enforcement Program or payments otherwise noted in this Endorsement.

Payment by Ms. McNish to Mr. Lutley is due by January 31, 2017. Payment by Mr. Lutley to Julia is due by January 16, 2017.

There shall be no costs.

**Reasons:**

1. Julia Faith Lutley was born on September 25, 1998 and is 18 years old.
2. Julia began post-secondary studies at Dalhousie University in September 2016. Due to her age and the fact she has started university, I advised the parties at a pre-trial conference that custody and access would not be addressed. A person of Julia's age should not be dictated to, in terms of where she lives, the time she spends with each parent and appropriate decisions about her education, health, religion.

**Prospective child support**

3. Mr. Lutley's application was filed on November 25, 2014, so I start with child support payments looking forward from that date.

4. In November 2014, Julia was living with her father. This continued until end of 2014 and throughout 2015.
5. Mr. Lutley argues that I should impute income to Ms. McNish. She left work in 2013 and he says the circumstances of her unemployment entitle me to impute income to her. He says she is underemployed NOT for reasons relating to Julia's needs, or Ms. McNish's own educational or health needs.
6. Ms. McNish testified that she worked in an intense environment. She was a cardiac surgery nurse for 35 years and she also worked in an institutional setting with inmates that was pressured and dangerous. She says the circumstances eventually became too pressured for her. If I accept what Ms. McNish says, she is unable to work for health reasons.
7. Alternately, if I accept Mr. Lutley's description of Ms. McNish's actions – that she threatened to kill Julia, that she believed Julia's dental treatment was motivated by sexual activity, for example – then Ms. McNish is mentally unwell and unable to work in the critical health care environments where she worked until her retirement.
8. I find Ms. McNish is unable to work in her previously pressured work environments because of her health and decline to impute income to her. I accept as her income the amount she receives from her pension and the amount she has earned historically from her part-time casual work is an appropriate measure of her income for child support purposes. I find that she is able to work part-time in less pressured environments.
9. I decline to treat Ms. McNish's service award as income for the purpose of paying child support. The service award is not earnings and is a one time, non-recurring payment, never to be received again.

## **2014**

10. Ms. McNish's income in 2014 was \$35,998.86, after paying her union dues. Based on this amount, she would pay monthly child support of \$302.00 to Mr. Lutley for November and December, 2014. She owes \$604.00 for this period.

11. Mr. Lutley has made no claim for a contribution to special or extraordinary expenses in 2014, so the total that Ms. McNish owes him for 2014 is \$604.00.

## **2015**

12. Ms. McNish's income in 2015 was \$30,460.31. She paid union dues of \$813.16 so her total income for child support purposes was \$29,647.00. Based on this amount, she would pay monthly child support of \$249.00 to Mr. Lutley for all of 2015, equaling \$2,988.00. This amount is payable under section 3 of the *Guidelines*.

13. Mr. Lutley has claimed a contribution to special expenses for health of \$456.74 in 2015. These expenses are necessary in Julia's best interest and I find they are reasonable. The guiding principle is such expenses are to be shared in proportion to the parents' incomes. Ms. McNish's income is \$30,460.31 and Mr. Lutley's is \$54,866.07, after deducting his union dues. Ms. McNish's proportionate share of the health costs is 36% or \$164.42. This amount is payable under section 7 of the *Guidelines*.

14. Mr. Lutley also claimed a contribution to the cost of bus passes, graduation fees (including the graduation dance and a prom dress), the purchase of a computer, a trip to New York and membership at the Canada Games Centre. The *Guidelines* allow me to order a parent to contribute to expenses in addition to paying the amount required by the tables where the expense is special or extraordinary. These expenses are not special expenses (for health needs or post-secondary education), so they must be extraordinary expenses. Mr. Lutley has not discharged the burden of proving these costs are extraordinary under subsection 7(1.1) of the *Guidelines* and I dismiss this claim.

15. Ms. McNish owes Mr. Lutley \$3,152.42 in child support for 2015.

## **January – June 2016**

16. Until July 2016, Julia lived with her father. She then moved into an apartment of her own. Julia started university in September 2016. Because Julia's under the age of majority, I calculate child support under sections 3 and 7 of *Guidelines*, as directed by section subsection 3(1) of

the *Guidelines*.

17. I estimate Ms. McNish's income in 2016 is \$29,353.03, based on her Statement of Income and her 2015 income. On this amount, section 3 of the *Guidelines* dictates that she'd pay monthly child support of \$247.00 to Mr. Lutley for the first six months of 2016.

**July – December 2016: section 3**

18. Julia was living away from both of her parents by July 2016. As of July 1, 2016, I order that both Ms. McNish and Mr. Lutley make child support payments to Julia. Ms. McNish's monthly payments continue to be \$247.00. I estimate Mr. Lutley's 2016 income to be \$53,096.95 based on the paystubs he's provided. On this amount, section 3 of the *Guidelines* dictates that he pay monthly child support of \$447.00 to Julia. This amount will continue until further agreement of the parties or court order.

**July – December 2016: section 7**

19. In addition to the amount of child support owed under section 3 of the *Guidelines*, there is also the issue of the contribution to Julia's special or extraordinary expenses: her university costs are a special expense under clause 7(1)(e) of the *Guidelines*. Post-secondary education is in Julia's best interest and the cost, having regard to her parents' means and her own, is reasonable.

20. When determining the amount of the expense to be shared I am to consider the available tax credits, subsidies or benefits available: subsection 7(2) of the *Guidelines*.

21. Julia's anticipated university costs are approximately \$10,100.00 for the 2016-2017 academic year. For her first year she has a \$2,500.00 scholarship and bursaries of approximately \$513.00. In each following academic year there is the possibility that she will have a \$1,000.00 scholarship.

22. Julia is eligible for certain tax credits. The tuition tax credit is equal to fifteen percent of her tuition. This equates to \$864.00 for the 2016-2017 academic year. The textbook tax credit and education tax credits were

- eliminated at the end of 2016, so they provide Julia with only \$112.00 in tax relief: \$10.00 per month for textbooks and \$18.00 per month for education for the four months of 2016 when she was in university. In total, the tax credits will reduce her annual cost by in 2016-2017 by approximately \$976.00.
23. For the 2016 – 2017 academic year, the net cost of Julia’s post-secondary education is \$6,111.00.
24. I am also to consider Julia’s means to contribute to special expenses when deciding on the allocation of this cost. In 2015, Julia earned \$4,900.00 from her part-time work at Flip Burgers. She left that work to dedicate herself to her studies, which was and remains an appropriate decision. She has worked more recently at the Waegwoltic Club. I estimate that Julia could earn (and save) \$2,500.00 from summer employment to devote to her university costs.
25. Once I have considered Julia’s contribution of \$2,500.00, the unfunded university cost is \$3,611.00. At their current income rates, annually Mr. Lutley will pay \$2,311.04 to this expense and Ms. McNish will pay \$1,299.96.
26. In the 2016-2017 academic year, Ms. McNish has already paid \$3,914.96 toward Julia’s education cost. She has overpaid her proportionate share by \$2,615.00 and this overpayment shall be applied against the amount she owes Julia.
27. Mr. Lutley owes \$2,311.04 to Julia’s 2016-2017 academic costs and must pay this amount to her no later than January 13, 2017.
28. In upcoming years, there will be no tax credit for education or text books. Julia’s scholarship may be diminished by \$1,500.00 or may not be available at all. The amount of her tuition will be reduced by fifteen percent when calculating its cost and Julia is expected to contribute \$2,500.00 to her educational costs. Her parents will divide the remainder between them, with Mr. Lutley paying his sixty-four percent share to Julia before September 1 of the academic year for which it is owed. Ms. McNish must pay her thirty-six percent share to Julia before January 1 of the academic year for which it is owed. Ms. McNish is credited with \$1,315.04 of this payment for her overpayment noted in paragraph 26.

Each parent will continue to pay the table amount of child support to Julia.

### **Method of payment**

29. Mr. Lutley asks to pay Julia by way of deposit to a Tax-free Savings Account. He proposes that she secure a student loan to finance her education and repay this using the money deposited into the TFSA and the interest of the deposits. I am not persuaded that I have jurisdiction to order someone who is not a party to this action to incur a debt or to open a TFSA.

30. All payments must be paid through the Maintenance Enforcement Program to Julia. This order may not be withdrawn from the Maintenance Enforcement Program. Involvement with the Program ensures that Julia is not caught in a struggle between her parents or in a struggle with either parent.

### **Repayment of child support**

31. Mr. Lutley continued to pay child support to Ms. McNish after Julia came to live with him. He overpaid support by \$419.19 and Ms. McNish owes him this amount.

### **Costs**

32. Since the applications were filed the parties have appeared in court on # occasions. Initially, Mr. Lutley was self-represented. Ms. McNish has been self-represented throughout. As a result of their self-representation there have been various inefficiencies. This is to be expected where there are self-represented parties.

33. Each party has been somewhat successful in the claims. I decline to award costs as a result.

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