SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION

Citation: *Kulu v. Atuanya*, 2024 NSSC 2

Date: 20240102
Docket: *SFHMCA* No. 055484
Registry: Halifax

Between:

Emmanel Kulu

Applicant

v.

Casandra Atuanya

Respondent

Judge:	The Honourable Justice Theresa M Forgeron
Heard:	December 12, 2023, in Halifax, Nova Scotia
Oral Decision:	January 2, 2024
Written Decision:	January 9, 2024
Counsel:	Emmanuel Kulu, Self-Represented Cheryl Arnold, counsel for Casandra Atuanya

By the Court:

Introduction

[1] My decision concerns parenting and child support for Braxton who will be 17 years old in March. Braxton is the son of Emmanuel Kulu and Casandra Atuanya.

[2] Mr. Kulu seeks to enforce and vary his parenting time as outlined in the 2011 court order. He states that he wants a relationship with Braxton. Mr. Kulu blames Ms. Atuanya for the failed state of his relationship with Braxton. He states that Ms. Atuanya engaged in alienating conduct.

[3] For her part, Ms. Atuanya denies alienation. She notes that Mr. Kulu dropped out of Braxton's life over 12 years ago. At this stage, Braxton is simply not interested in forming a relationship with Mr. Kulu. Ms. Atuanya states, however, that she will support Braxton should he change his mind. Given his age, Ms. Atuanya submits that Braxton's wishes should be respected.

[4] In addition, Ms. Atuanya seeks to vary the child support provisions of the 2011 order so that maintenance is based on Mr. Kulu's current income. Mr. Kulu opposes this request. Instead, he pleads undue hardship and asks that child support, inclusive of arrears, be paid pursuant to the provisions of the most recent interim order.

Issues

[5] The following five issues will be determined:

- What is the cause of the failed relationship between Mr. Kulu and Braxton?
- Should Mr. Kulu's parenting time be enforced or varied?
- Did Mr. Kulu prove undue hardship?
- Should child support be varied?
- What costs, if any, should be granted?

Background Information

[6] Following a brief relationship, in March 2007, Braxton was born to the parties. Braxton has remained in his mother's primary care since birth. Ms. Atuanya and Braxton live in Nova Scotia while Mr. Kulu lives in the USA.

[7] In June 2011, after several court appearances, a final parenting and support order issued. According to the order, it was anticipated that Mr. Kulu would travel to Nova Scotia to exercise in-person, parenting time. Mr. Kulu's parenting time was to be supervised because Mr. Kulu hadn't seen Braxton in over two years. In addition, Mr. Kulu was granted web-cam parenting time once he obtained a web-cam. Further, monthly child support was set at the reduced amount of $135 in consideration of Mr. Kulu's anticipated access costs.

[8] Unfortunately, Mr. Kulu did not exercise parenting time with Braxton. Nor did he pay child support. In 2012, Mr. Kulu asked to fly Braxton to New York for a visit. Ms. Atuanya declined because Braxton was only five years old and had not seen his father since he was two years old. For ten years, Mr. Kulu made no further contact.

[9] In 2022, after years of nonpayment, the New York enforcement agency finally initiated measures to collect child support arrears, in excess of $18,000 USD, including garnishing Mr. Kulu's wages and seizing his passport. Immediately thereafter, in April 2022, Mr. Kulu contacted Braxton via Instagram. After some discussion, Braxton ended the conversation. There has been no further communication between Mr. Kulu and Braxton.

[10] In May 2022, Mr. Kulu applied to vary his child support obligation and to enforce and vary the parenting provisions of the 2011 order. In February 2023, Mr. Kulu applied for interim relief. Ms. Atuanya contested Mr. Kulu's application and motion. In June 2023, she filed her response.

[11] On April 28, 2023, the interim motion was heard. Mr. Kulu participated virtually. Each of the parties filed exhibits and were cross examined. I rendered an oral decision by declining to grant an undue hardship finding. Mr. Kulu was ordered to continue to pay child support pursuant to the 2011 order, plus an additional $250 towards the arrears, for a total monthly payment of $385 USD. Costs, payable in the cause, and in the amount of $1,500 were also ordered.

[12] The contested hearing was held on December 12, 2023. Mr. Kulu participated virtually. The parties filed various exhibits and were cross examined. Final submissions were received.

[13] The oral decision was rendered on January 2, 2024. Because Mr. Kulu said he didn't understand the result, I indicated a written decision would be forthcoming.

Analysis

[14] **What is the cause of the failed relationship between Mr. Kulu and Braxton?**

[15] Mr. Kulu acknowledges that he has no relationship with Braxton. Mr. Kulu blames Ms. Atuanya alleging that she engaged in alienating conduct. Ms. Atuanya states that she did nothing to interfere in Mr. Kulu's relationship with Braxton. It was Mr. Kulu who disappeared from Braxton's life.

[16] I agree with Ms. Atuanya. I find that Mr. Kulu is largely responsible for his lack of relationship with Braxton. Mr. Kulu was an absent parent. Mr. Kulu chose not to exercise parenting time after the 2011 order issued. His failure to do so was his personal decision. Because Mr. Kulu dropped out of Braxton's life, he has no relationship with Braxton. Ms. Atuanya did not engage in alienating conduct.

[17] **Should Mr. Kulu's parenting time be enforced or varied?**

[18] Section 40 of the *PSA* provides me with the discretionary authority to issue an enforcement order. I have applied the legal principles and burdens as reviewed in ***G S v A B***, 2023 NSSC 228 at paras 115 to 125.

[19] Mr. Kulu bears the burden of proving that he was denied the parenting time that he was awarded in 2011. He failed to do so. Mr. Kulu was an absent parent by his own choosing. Ms. Atuanya did not deny him the parenting time stated in the 2011 court order. I will therefore not issue an enforcement order as requested.

[20] I will now turn to the variation request. Section 37 of the *PSA* states that I can vary the parenting provisions of a previous court order if a material change in circumstances is proven. In ***Gordon v Goertz***, [1996] 2 SCR 27, the Supreme Court of Canada defined a material change as follows:

> [12] What suffices to establish a material change in the circumstances of the child? Change alone is not enough; **the change must have altered the child's needs or the ability of the parents to meet those needs in a fundamental way**: *Watson v. Watson* (1991), 35 R.F.L. (3d) 169 (B.C.S.C.). The question is **whether the previous order might have been different had the circumstances now existing prevailed earlier**: *MacCallum v. MacCallum* (1976), 30 R.F.L. 32 (P.E.I.S.C.). Moreover, the change should represent **a distinct departure from what the court could reasonably have anticipated in making the previous order**. "What the court is seeking to isolate are those factors which were not likely to occur at the time the proceedings took place": J. G. McLeod, *Child Custody Law and Practice* (1992), at p. 11-5.
>
> [13] It follows that before entering on the merits of an application to vary a custody order the judge must be satisfied of: (1) **a change in the condition, means, needs or circumstances of the child and/or the ability of the parents to meet the needs of the child** (2) **which materially affects the child**; and (3) **which was either not foreseen or could not have been reasonably contemplated by the judge who made the initial order**. [emphasis added]

[21] I find two material changes in circumstances since the granting of the last court order. First, Mr. Kulu did not exercise the parenting time envisaged in the 2011 court order. To the contrary, Mr. Kulu only reached out to Braxton in 2022 because maintenance enforcement measures were initiated. From Mr. Kulu's perspective, if maintenance was being enforced so too should the parenting provisions of the 2011 court order. Mr. Kulu's perspective is not child centric and confirms his lack of insight into Braxton's needs.

[22] Second, Braxton is soon to be 17 years old. He is at an age when he can decide if he wants contact with Mr. Kulu. Mr. Kulu states that Ms. Atuanya is interfering. I disagree. Braxton, a 17-year-old who has his own social media presence, will be able to connect with Mr. Kulu if he wants. Braxton did so previously and can do so again.

[23] I have determined that it is in Braxton's best interests to vary Mr. Kulu's parenting time from that outlined in the 2011 court order. Mr. Kulu's parenting time will be at Braxton's discretion and subject to Braxton's wishes. This variation is made in Braxton's best interests and is in keeping with s. 18 of the *PSA*. This variation ensures that Braxton's emotional, psychological, and social welfare needs are prioritized. This variation allows for parenting contact based on Braxton's discretion.

[24] Mr. Kulu, you likely will not be successful in forming a relationship with Braxton if you continue to blame Ms. Atuanya for your choices. Ms. Atuanya has exclusively parented Braxton for almost 17 years. Respect and not incriminations is in order.

[25] **Did Mr. Kulu prove undue hardship?**

[26] Mr. Kulu seeks to pay less than the table amount of child support based on a claim of undue hardship. He states that he cannot pay the table amount because he is currently paying off significant child support arrears. He asks me to make a finding of undue hardship pursuant to s. 10 of the *CSG.* Ms. Atuanya objects.

[27] In ***Reid v Faubert***, 2019 NSCA 42, Bourgeois JA reviewed the two-part process applicable to undue hardship claims:

> [45] Applying s. 10 engages a two-step process. Firstly, a payor seeking to rely on the provision must establish that the payment of support as otherwise directed by the Guidelines (ss. 3 to 5, 8 or 9) would create an undue hardship as a result of one of the non-exhaustive factors in s. 10(2). Only if the court is satisfied that an undue hardship exists, does it proceed to the second step, namely, a consideration of whether the payor's household standard of living is lower than the recipient's (s. 10(3)).

[28] In describing the second stage of the undue hardship test, Bourgeois JA stated:

> [49] The second step engages s. 10(3) which directs a court to consider the respective standards of living of the payor's and payee's households. If the payor enjoys a higher standard of living, then the claim of undue hardship must be denied. Section 10(4) indicates that a court "may" use the Comparison of Household Standards of Living Test in Schedule II. Although the permissive wording allows a court to use an alternative approach, the Schedule is most commonly used (*Stoddard v. Atwood*, 2001 NSCA 69 at para. 12).

[29] Bourgeois JA also reaffirmed the heavy burden on the parent who seeks an undue hardship finding, including proof of excessively hard living conditions arising from the payment of the *Guideline* amount: para 47, quoting ***Ellis v Ellis***, 1999 NSCA 31; or proof that the claimant's difficulty, suffering or pain will be excessive or disproportionate as a result of paying the *Guideline* amount: para 48, quoting ***Barrie v Barrie***, [1998] AJ No 460 (QB); or proof that the hardship is "exceptional", "excessive" or "disproportionate" in all of the circumstances: para 48, quoting ***Van Gool v Van Gool*** (1998), 166 DLR (4th) 528 (BCCA). Further,

Bourgeois JA confirmed that the claimant must lead cogent evidence to "establish why the table amount would cause undue hardship": para 48, quoting ***Van Gool v Van Gool***, *supra*.

[30] I find that Mr. Kulu did not meet the heavy burden of proving either part of the two-stage test. First, Mr. Kulu did not prove circumstances of undue hardship for the following reasons:

- Mr. Kulu's arrears payment cannot be used as a factor to support an undue hardship finding. Mr. Kulu should have paid child support as ordered. Instead, he chose not to pay. Mr. Kulu did not begin to pay child support until 11 years after the 2011 order issued. He did not pay voluntarily. Rather, maintenance enforcement finally started to garnish his wages. The arrears payment does not fit within any of the non-exhaustive s. 10 (2) circumstances, nor does it fall within an analogous category.

- Any financial difficulties that Mr. Kulu is experiencing are caused by is failure to prioritize his child support obligation.

- Mr. Kulu did not produce cogent evidence of his income and those of his spouse since the 2011 court order. He did not produce all necessary tax returns. He did not produce a property statement to confirm his family's asset and debt position.

- Mr. Kulu did not produce cogent evidence of his expenses or the expenses of his family. For the most part, details and proof of his actual expenses were not forthcoming.

- Mr. Kulu did not produce sufficient details about his other children and the impact they have on his overall budget. Only scant information was provided.

[31] In addition, Mr. Kulu did not prove the second stage of the s. 10 undue hardship test. He produced no household standard of living test.

[32] Given the above, I deny Mr. Kulu's application for undue hardship.

[33] **Should child support be varied?**

[34] I find that the 2011 child support obligation should be varied for two reasons. First, Mr. Kulu's income has increased. Second, Mr. Kulu did not exercise

access and thus did not incur the access expenses as contemplated in the 2011 order. Ms. Atuanya' application to vary is granted because she proved the necessary material change in circumstances.

[35] Ms. Atuanya asks that child support be varied from the date of her variation application. Thus, there is no retroactive application being sought. I grant the requested relief. The varied child support amount is payable as of July 1, 2023 and continuing on the 1st day of every month thereafter.

[36] Because Mr. Kulu lives in the state of New York, child support is payable based on the Nova Scotia table as is stated in s. 3 (b) of the *CSG* which provides:

> **(3)** The applicable table is
>
> …
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> (b) if the parent against whom an order is sought resides outside of Canada, … the table for the province where the other parent ordinarily resides at the time the application for the child support order or for a variation order in respect of a child support order is made.

[37] My interpretation is also confirmed by Julien Payne and Marilyn Payne in *Child Support Guidelines in Canada*, 2022, (Toronto: Irwin Law, 2021), at page 14 wherein the authors state:

> If the spouse or former spouse against whom an original or variation order for child support is sought resides outside of Canada at the time of the application or the calculation or recalculation of the amount pursuant to section 25.1 of the *Divorce Act*, or if the residence of the spouse is unknown, the applicable table is the table for the province where the recipient habitually resides.

[38] Mr. Kulu earns $40,000 USD per annum. This equates to a Canadian income of $52,800 based on an exchange rate of 1.32 %. Child support of $449 CD is due and payable. Arrears will be collected at a rate of $151 for a total monthly payment of $600 CD or $455.55 USD.

[39] **What costs, if any, should be payable?**

[40] Ms. Atuanya seeks a minimum of $5,000 costs at the high end of Tariff A for the following reasons:

- Mr. Kulu's application was devoid of merit.
- Mr. Kulu failed to file necessary documentation to perfect his application.
- Mr. Kulu was responsible for delays.
- Mr. Kulu's conduct increased the amount of time required to resolve the contested issues.

[41] Mr. Kulu objects noting Ms. Atuanya's refusal to participate in a settlement conference and his financial limitations.

[42] Costs are generally payable to the successful party. In ***Armoyan v Armoyan***, 2013 NSCA 136, Fichaud, JA reviewed relevant principles:

- The court's overall mandate is to "do justice between the parties": para 10.
- Unless otherwise ordered, party and party costs are quantified according to the tariffs. The court has discretion to raise or lower the tariffs, applying factors like those listed in Rule 77.07(2). These factors include unaccepted written settlement offers, and the conduct of the parties insofar as it affects the speed or expense of the proceeding: paras 12 and 13.
- The basic principle is that costs "should afford a substantial contribution to the party's reasonable fees and expenses." A substantial contribution not amounting to a complete indemnity means more than 50% and less than 100% of a lawyer's reasonable bill for services: para 16.

[43] I will employ tariff A and will use the amount for less than $25,000. I will use the basic scale and not scale 3 as was suggested by Ms. Atuanya. I find that scale 2, the basic scale, is more appropriate. I will not raise the tariff amount. In reaching this conclusion, I note the following:

- The hearing took a day. Only the parties testified.
- Although Mr. Kulu's applications were without merit, the hearing was not overly complex. For example, Ms. Atuanya used the same affidavit for the purpose of the interim and final hearings.

- The matter was important because it involved parenting and child support issues.

- Although Mr. Kulu has a compromised ability to pay, he is not shielded from a costs award in the absence of a timely Rule 77.04 motion and order.

[44] A costs award of $4,000 will do justice as between the parties.

[45] **Conclusion**

[46] My decision determines parenting, child support and costs issues.

[47] In relation to the parenting issues, I decided two matters. First, I denied Mr. Kulu's application for enforcement because Mr. Kulu chose not to exercise the parenting time that the 2011 order provided him. Second, I found that it was in Braxton's best interests to vary the 2011 parenting provisions such that Mr. Kulu's parenting time will be at Braxton's discretion and subject to Braxton's wishes.

[48] Second, I denied Mr. Kulu's undue hardship application but granted Ms. Atuanya's variation application. The varied table amount of child support is due as of July 1, 2023 and continuing monthly thereafter. The table amount of $449 CD is based on Mr. Kulu earning an income of $40,000 USD or $52,800 CD. In addition, Mr. Kulu will pay $151 CD towards the arrears until the arrears are paid in full.

[49] Third, costs of $4,000 are granted in addition to the previous $1,500 for the interim motion for a total costs payment of $5,500. Half of the costs award relates to the parenting issues. Half of the costs award relates to the child support issues.

[50] Ms. Arnold is to draft and circulate the order.

Forgeron, J