
CANADA / JUDGMENT

A.C.S. v. C.J.S.

2021 BCSC 1193

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Supreme Court of British Columbia

DECIDED

17 June 2021

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2021 BCSC 1193 A.C.S. v. C.J.S.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

A.C.S. v. C.J.S.,

2021 BCSC 1193

Date: 20210617

Docket: E210569

Registry: Vancouver

Between:

A.C.S. also known as A.C.M.

Claimant

And

C.J.S.

Respondent

Before: The Honourable Mr. Justice Milman

Reasons for Judgment

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Place and Dates of Hearing:

Vancouver, B.C.

May 25 and June 1-2, 2021

Place and Date of Judgment:

Vancouver, B.C.

June 17, 2021

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I. Introduction

[1] This is an application by the claimant, A.C.M., for three items of relief.

[2] First, she seeks an order under s. 148(3) of the Family Law Act, S.B.C. 2011, c. 25 [FLA], to vary the terms of the parties' separation agreement dealing with child support so as to require:

- a) that the parties share s.7 expenses in proportion to their current incomes (rather than 50/50, as the agreement currently provides); and
- b) that the respondent, C.J.S., pay A.C.M. child support in accordance with the Federal Child Support Guidelines, SOR/97-175 (the agreement currently makes no provision for payment of child support by either party).

- [3] A.C.M. seeks that relief on the basis that circumstances have changed since the agreement was made. At that time, the parties were earning similar incomes from their employment with the family business. She says that since then, she has left, or been made to leave, the family business and has been earning a much lower income than she did before, while C.J.S.'s income from the family business has increased.
- [4] Second, A.C.M. seeks to have C.J.S. pay child support, calculated on the basis of their current incomes, retroactively from February 1, 2021.
- [5] C.J.S. opposes this aspect of the application on the basis that it is premature. He says that the family business is in such dire financial circumstances that he was forced to defer payment of his salary from April 2021 onward, with the result that the parties have received similar incomes so far this year. He says that this aspect of the application should be revisited a few months from now, when the parties' incomes are likely to be clearer. If payment of child support is to be ordered now, both parties seek to impute additional income to the other.
- [6] The third aspect of the application relates to the net proceeds from the sale of the parties' former family home, which are currently being held in trust by their lawyers. A.C.M. seeks to have those funds distributed to the parties equally. Initially, C.J.S. opposed this aspect of the application on the basis that the court lacked the requisite jurisdiction to entertain it. During the hearing, however, A.C.M. adduced additional authority making it clear that the court does indeed have that jurisdiction. C.J.S. now argues that this issue too should be adjourned because he has not had a proper opportunity to respond.
- [7] For the reasons that follow, I have concluded that the application should be allowed in part.

II. Issue 1: Should the separation agreement be varied, and if so, how?

A. The Background Facts

- [8] The parties were married on February 8, 2003, and separated in October 2017. They have four children, born in 2007, 2009, 2011 and 2013. Since separating, the parties have been sharing parenting time with the children equally.
- [9] Until recently, the parties earned essentially all of their income from their jointly-owned business, to which I will refer as the "Family Company" or "FC". FC itself owns and operates seven retail locations, through which it sells its own proprietary products and associated services. It also distributes its products online and through five franchise locations that are jointly owned by a subsidiary and its American distribution partner. In 2020, FC had 75 employees and gross revenue of approximately \$5.5 million.
- [10] The parties own, directly or indirectly through a holding company, 84.5% of FC's shares. The remaining shares are owned by third parties.

- [11] C.J.S. originally founded FC with a partner in 2001. He bought out that partner in 2003, soon after the parties were married. During the marriage the parties appear to have managed FC together. A.C.M. replaced C.J.S. as FC's CEO in 2015.
- [12] On February 8, 2019, when the parties signed the separation agreement, they were both earning approximately \$150,000 per year as managers of FC. Because their incomes were similar, the separation agreement made no provision for child support and allocated responsibility to share the cost of the children's s.7 expenses equally.
- [13] Later in 2019, FC entered into an agreement with an American partner to form a new entity that I will call "FC Franchise" with the intention of further developing FC's franchise business, primarily in the United States. The agreement called for FC to contribute US \$100,000 and the American partner US \$50,000 as start-up capital in exchange for a 2/3 and 1/3 stake respectively in the new venture.
- [14] C.J.S. says that he was able to borrow the US \$100,000 from a family member who was prepared to lend the money only if A.C.M. ceased to be an employee of FC. A.C.M. was offered and accepted a full-time position as CEO of FC Franchise, at a salary of US \$250,000. At about the same time, C.J.S. became the CEO of FC in A.C.M.'s place, with an increased salary of \$275,000. A.C.M. retained her position as chief innovation officer at FC, but at only a nominal salary.
- [15] FC Franchise was only the latest of FC's attempts to expand into the American market. Those attempts appear to have been less successful than hoped and left FC overextended. By 2014, in order to meet its growing capital needs, FC had to take out a loan of approximately \$500,000 from a private lender. In 2017, that loan was replaced by a new \$550,000 loan provided by another company to which I will refer as the "Lender", whose principal is D.M. D.M. has been a friend of C.J.S. since they were in university together, although the closeness of their friendship currently is disputed by the parties. By the end of 2017, FC's indebtedness to the Lender had increased to \$1.95 million, of which \$1.8 million still remains outstanding. Interest accrues on that debt at the rate of 14%, or \$21,000 per month.
- [16] In addition, C.J.S. says that FC's business has been adversely impacted by the current pandemic. It has been forced to close several of its locations on a temporary basis, and at one point had laid off more than 50 of its employees.
- [17] C.J.S. says that because of those financial challenges, FC was unable to continue making capital contributions to FC Franchise, or even to repay C.J.S. on the personal loan he had to take out to enable FC to make its initial capital contribution to FC Franchise.
- [18] A.C.M. has a different view of these events. According to her, C.J.S. deliberately withheld FC's capital contributions to FC Franchise in order to starve it of cash. Because it was short of cash, FC Franchise had to reduce A.C.M.'s salary to US \$200,000 between March and July 2020 and eventually stopped paying her altogether, although she appears to have resumed earning US \$250,000 again between August 2020 and January 2021.

- [19] A.C.M.'s departure was part of an agreement that was reached on January 31, 2021, among the parties, FC and the American partner. The terms of that agreement saw A.C.M. paid her salary in full through to January 31, 2021, in exchange for her resignation from her employment positions at both FC and FC Franchise and her abandonment of any severance claim she might have had. In addition, among other things, FC surrendered its 2/3 interest in the venture in exchange for a release from its obligation to make further capital contributions.
- [20] On January 20, 2021, just days before that agreement was reached, A.C.M.'s counsel wrote to C.J.S.'s counsel seeking, among other things, payment of child support. At that time, A.C.M. asserted that she was receiving no salary from FC Franchise. A.C.M.'s counsel sent a similar letter on February 5, 2021, less than a week after the agreement was reached, with updated information concerning her financial situation and reiterating the requests in the previous letter, including the request for payment of child support. C.J.S.'s counsel responded to both letters on February 12, 2021, disputing the assertions in them as to A.C.M.'s income. A.C.M. filed this application in its original form on April 8, 2021.
- [21] A.C.M. has since secured one temporary engagement through her own personal consulting company. It calls for 16 hours of work per week and pays US \$4,500 per month, with the possibility for further work to be done.
- [22] A.C.M. says that she had been demanding that C.J.S. reduce his salary for many months in order to ease FC's cash flow difficulties. He refused to do so. On April 23, 2021, however, FC's controller sent C.J.S. an email attaching a cash flow analysis showing that FC's payables were projected to exceed its income for the next several months. When he met with her in person on April 27, 2021, he says, she suggested to him that FC could meet its near term payables if he deferred taking his salary, and he agreed to do so. He says he has not received his salary since April 8, 2021, and is unlikely to resume doing so again before August, given FC's projected cash flow constraints over the next several months.
- [23] Meanwhile, the principal amount of the Lender's loan was supposed to be due initially on January 30, 2021, but the Lender agreed to extend the deadline to April 30, 2021. In March and April 2021, the Lender offered to renew the loan again on terms that would have seen C.J.S.'s salary reduced to zero and A.C.M. resigning from FC's board. The parties rejected that offer and other offers to refinance. On April 30, the Lender dropped its demand that C.J.S. reduce his salary to zero but insisted that the parties both resign from the board. Initially, A.C.M. refused. On May 6, 2021, however, the Lender's counsel formally demanded repayment of the full amount owing on the loan, threatening to realise on its security.
- [24] On May 13, 2021, an agreement was reached pursuant to which the Lender agreed to extend the repayment deadline for a further three months, with an option for a further three-month extension after that. In exchange, FC was required to pay a fee and \$20,712.33 in interest outstanding from 2020. Both of the parties were required to resign from FC's board, to be replaced by three of the minority shareholders.

[25] C.J.S. says it is the newly constituted board that will decide when and how much he will be paid, which is likely to depend on FC's financial performance over the next few months and its ability to secure new financing. In the meantime, he says, he has been borrowing the money he needs to meet his expenses.

B. The Legal Framework

[26] A.C.M. seeks an order to vary the parties' separation agreement with respect to child support, relying on s. 148(3) of the FLA. That provision states as follows:

On application by a party, the court may set aside or replace with an order made under this Division all or part of an agreement respecting child support if the court would make a different order on consideration of the matters set out in section 150.

[27] Pursuant to s. 150 of the FLA, the amount of child support payable must generally be determined in accordance with the Federal Child Support Guidelines (the "Guidelines").

[28] Because the parties share parenting time equally, the governing provision in the Guidelines is s. 9, which states as follows:

Shared parenting time

9 If each spouse exercises not less than 40% of parenting time with a child over the course of a year, the amount of the child support order must be determined by taking into account

- (a) the amounts set out in the applicable tables for each of the spouses;
- (b) the increased costs of shared parenting time arrangements; and
- (c) the conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought.

[29] In determining the amount of child support payable pursuant to that provision, the analysis begins with s. 9(a) by calculating the amount of child support payable by offsetting the parties' respective obligations under the Guidelines: *B.P.E. v. A.E.*, 2016 BCCA 335, at para. 34. Next, consideration should be given to the relevant factors set out in ss. 9(b) and (c).

[30] In this case, the parties have advanced arguments invoking the considerations set out in ss. 9(a) and (c), focusing primarily on the limitations of their own situations and the need to impute additional income to the other party. The outcome of this aspect of the application therefore turns to a large degree on how the parties' respective incomes are calculated.

[31] Where, as here, those incomes are paid from corporations that they control (or have until recently controlled), determining their respective obligations under the Guidelines is more complicated. In *Wiebe v. Treissman*, 2017 BCSC 1523, Justice Kent conveniently summarised the provisions of the Guidelines that may assist in these circumstances:

- [87] The calculation of a spouse's income for purposes of child support is governed by sections 16-20 of the Federal Child Support Guidelines, SOR/97-175 (the "Guidelines"). The starting point is provided by s. 16, namely the "total income" set out on line 150 of the spouse's income tax return. That amount is then to be adjusted in accordance with Schedule III of the Guidelines which, among other things, deals with deduction of certain employment expenses, deduction of spousal support and universal child care benefits, capital cost allowance for real property, et cetera.
- [88] Section 18 of the Guidelines addresses situations where a spouse is a shareholder, director or officer of a corporation. If such a spouse's annual income as determined under s. 16 (i.e., his line 150 income, as adjusted) "does not fairly reflect all the money available to the spouse of the payment of child support", the court can review corporate pre-tax income and impute all or part of that income to the spouse for child support purposes.
- [89] Section 21 of the Guidelines requires a spouse who controls a corporation to disclose the financial statements of the corporation and its subsidiaries as well as a "statement" of all amounts or benefits paid to persons who were not "at arm's length" to the corporation. Section 18(2) of the Guidelines requires all such non-arm's-length payments to be added back to corporate pre-tax income unless the spouse "establishes that the payments were reasonable in the circumstances".
- [90] One of the "benefits" enjoyed by a spouse who is able to structure his financial affairs through a wholly-owned corporation is the ability not only to "income-split" with third parties, and to distribute income by way of a mixture of salary and dividends, but also to have what are essentially personal expenses paid by the corporation. To the extent such expenses are personal and not bona fide corporate expenses, they are properly "added back" to the corporation's pre-tax income, all or part of which can then be imputed to the spouse for Guideline income purposes.
- [91] Section 19 of the Guidelines also permits the court to impute income to a spouse for child support purposes in a wide variety of circumstances. Among other things, this section permits adjustments where a spouse has derived tax advantages by structuring his or her affairs to attract a lower overall tax rate than the rate contemplated by the Guidelines. For example, subsections 19(1)(g) and (h) include situations where a spouse has unreasonably deducted expenses from income and/or where a spouse derives a significant portion of income from dividends, capital gains or other sources which are either exempt from tax or taxed at a lower rate.
- [32] With those principals in mind, I turn next to the calculation of the parties' incomes under the Guidelines.

C. C.J.S.'s Income

- [33] A.C.M. urges me to impute an income of \$275,000 to C.J.S. on the grounds that that is the amount he was earning until he voluntarily chose to defer receiving his salary. She says that FC has faced similar cash flow constraints in recent months, leading her and others to demand that he reduce his salary, but on each of those earlier occasions he refused to do so. What changed in April 2021 was not FC's financial situation, she says, but rather the fact that she was now seeking an order from the court to compel him to pay child support.
- [34] I agree with A.C.M. that the timing of C.J.S.'s salary deferral is highly suspicious. The concern is compounded by the selective nature of the information that C.J.S. has chosen to produce to demonstrate FC's financial circumstances. On the other hand, there is no evidence supporting A.C.M.'s related allegation that C.J.S. has co-opted D.M. to create an artificial crisis at FC with a view to defeating her claim for child support. Rather, the evidence supports C.J.S.'s contention that FC is facing a real and escalating liquidity crisis due to the size of its cumulative debt load and that, at least for the present, it cannot afford to continue paying him at the level that it did before April 2021.
- [35] I am satisfied, nevertheless, that it was unreasonable for C.J.S. to defer receiving any salary at all. Although it will usually be laudable for the owner of a business facing such cash flow constraints to forego receiving a salary so that, for example, other employees can be paid, in this case C.J.S. was required to consider not only his own personal situation but also his obligation to his children. In the absence of adequate evidence to demonstrate precisely what FC can afford, I have concluded that the appropriate level of income for C.J.S. is the amount that he was paid historically before FC began overextending itself, or \$150,000.
- [36] For those reasons, I am imputing an income of \$150,000 to C.J.S.

D. A.C.M.'s Income

- [37] A.C.M. says that her 2021 income will be \$25,865.55, calculated as follows:
- a) gross revenues of \$77,507.15 that she expects to receive in 2021 through her consulting company (comprised of the payment of her last month of salary from FC Franchise for January 2021 in the amount of CDN \$26,629.07 and nine months of consulting for the period from April to December at US \$4,500 or CDN \$5,653.12 per month); less
 - b) corporate expenses of \$51,641.60.
- [38] C.J.S. says that A.C.M.'s income, properly calculated under the Guidelines, is much higher than that, for the following reasons:
- a) she actually received a total of US \$52,083.35, or CDN \$66,572.68, from FC Franchise in January 2021, if one includes the back pay that she received for the period between November 15 and December 31, 2020;
 - b) she has made inadequate efforts to obtain other work; and

c) she has overstated her corporate expenses.

- [39] With respect to the first point, I agree with A.C.M. that it is only the actual salary that she received for January 2021 (\$26,629.07) that ought to be included in the calculation of her present income for support purposes. The larger sum includes, as well, unpaid wages carried forward from 2020. The "extra" income that the parties received in January 2021 (in the case of A.C.M.) and between January and April 2021 (in the case of C.J.S.) is more properly seen as a holdover from a previous era when the parties had similar incomes but were both being paid far more than either of them can reasonably expect to be paid today. Although I have chosen not to include the "extra" income that each received in those months in calculating their current incomes, it remains relevant under the rubric of s. 9(c), insofar as it may shed light on the "conditions, means, needs and other circumstances of each spouse".
- [40] With respect to A.C.M.'s efforts to find other work, C.J.S. must show that she has not behaved reasonably, having regard to her capacity to earn additional income in light of her age, education, health, work history and work availability: *Marquez v. Zapiola*, 2013 BCCA 433, at para. 37.
- [41] I am not persuaded that C.J.S. has met his burden in that regard. A.C.M. has spent much of her career employed with the family business. In January 2021, after losing that position, she consulted with a head-hunter and followed the advice she received, which was to focus on contract work because more permanent positions in her field are less likely to become available during the pandemic. She has attended job interviews, although so far without success. She sought the advice of a mentor in February 2021 and has been taking reasonable steps since then to procure other work. Moreover, I accept that the closure of the American border and associated COVID-19 travel restrictions have made trips to the United States, and hence her networking opportunities, more scarce.
- [42] In summary, I decline to impute any additional income to A.C.M. on the grounds that she is intentionally underemployed.
- [43] I have reached a different conclusion with respect to A.C.M.'s corporate expenses, however. In *R.E.Q. v. G.J.K.*, 2019 BCSC 1116 (reversed in part on other grounds: 2020 BCCA 254), Justice Kelleher had occasion to consider a similar issue. In deciding whether deductions against income were properly made by the payor parent in that case, the following principles were said to apply:
- a) the burden of proving the reasonableness of deductions from business income lies with the spouse making the deduction;
 - b) it is the obligation of that spouse to fully disclose the financial information and documentation relied upon to justify the deduction of each expense;

- c) if a spouse does not establish the reasonableness of payments or benefits from a corporation to a non-arm's length person, they must be added back to the corporation's net income (this includes corporate expenses that have a personal component or are part of the spouse's ordinary living expenses); and
 - d) where rental expense charged to a business for use of a home office effectively reimburses a party for a portion of that party's ordinary household expenses, it should be added back to income even if such a deduction may be reasonable for income tax purposes.
- [44] C.J.S. relies on each of these principles in questioning the legitimacy of A.C.M.'s claimed expenses. Overall, they total \$51,641.60, which is more than 66% of her company's anticipated gross earnings for the year. The largest single item in dispute (\$26,400, or more than half of the total) is rent that A.C.M. pays to herself for the use of a home office in the house where she resides. In particular, her company pays monthly rent to her of \$2,200, which is 38% of the \$5,800 in monthly rent that she pays to her landlord for the entire house.
- [45] More generally, C.J.S. argues that the expenses should not be considered in calculating A.C.M.'s income under the Guidelines, for the following reasons:
- a) not all of them are supported by receipts (although this appears to be a minor component);
 - b) many lack adequate explanation or connection to specified business activity;
 - c) some appear to be one-time expenses that will not recur; and
 - d) many appear to cover personal benefits in whole or in part, and in such cases, are not properly prorated to account for that element.
- [46] I agree with C.J.S. that these complaints find at least some support in the evidence. Accounting for that factor, I have calculated A.C.M.'s Guidelines income at \$77,507.15 less half of the expenses claimed ($\$51,641.60 / 2 = \$25,820.80$), for a total of \$51,686.35.

E. Conclusion on Issue 1

- [47] I have found the parties' current incomes to be \$150,000 and \$51,686.35, respectively. A.C.M.'s income, and its source, have changed significantly since the separation agreement was signed. I agree with her that its terms respecting child support must therefore be revisited now, rather than in another few months, so that the imbalance that has emerged of late can be addressed.
- [48] In determining what order should replace those terms, the starting point of the analysis is the table setoff amount under s. 9(a), which is $\$3,328 - \$1,270.37 = \$2,057.63$.
- [49] Both parties have advanced competing arguments invoking the considerations set out in s. 9(c) concerning their respective financial circumstances.

- [50] C.J.S. says that there is no urgent need for payment of child support at present because the parties have received similar amounts of income thus far in 2021. Moreover, he says, A.C.M. appears to have access to over \$100,000 in retained earnings that she has chosen to leave in her company, whereas he has been left having to borrow from family members in order to meet his current expenses.
- [51] The difficulty I have with that submission is that the parties were earning similar incomes until the end of January 2021. After that, their circumstances diverged sharply. A.C.M.'s income from FC and its affiliates ended abruptly and permanently at that time. Unless she is able to find equally remunerative work elsewhere, she will have to continue drawing down her final payout in order to maintain her current standard of living with the children. If she is not, that buffer will soon be exhausted.
- [52] On the other hand, between February and April, C.J.S. continued to receive his usual salary. Although he has not been paid since April, he remains entitled to receive that income, which has merely been deferred. I appreciate that FC's financial situation is precarious and therefore that payment of his former salary may never resume, but there is at least as good a chance that the situation will stabilise to the point that his salary can resume, if not where it had been until April, then at least at some lower but still comparable level.
- [53] There is indeed cause to be optimistic about the prospects of improvement in both parties' businesses as the economy emerges from the pandemic in the coming months. Nevertheless, for the reasons set out above, it appears that A.C.M. will continue to be in the more vulnerable position for the foreseeable future.
- [54] Although C.J.S. says that he has been forced into debt as a result of his salary deferral, he has adduced no evidence to elucidate the terms of the loan or its impact on his lifestyle, if any. Indeed, the parties adduced little evidence to assist me in evaluating the relative standards of living in their respective households. A.C.M. says that C.J.S. is living rent-free with a new partner in a home that she owns. C.J.S. has adduced no evidence in response to that particular assertion. The impact of a new relationship on a paying parent's standard of living can be a relevant factor in the analysis: B.P.E. at para. 52.
- [55] In light of that evidence, slim though it is, I am satisfied that there is an imbalance in the parties' respective circumstances requiring adjustment to the amount of child support to be paid, having regard to the factors set out in s. 9(c). In order to account for that need, I am ordering that C.J.S. pay A.C.M. monthly child support of \$2,400.
- [56] Finally, I accept C.J.S.'s submission that the current situation is volatile and may change significantly over the next several months. Given that uncertainty, my order will be that the amount of child support payable will be subject to review after six months. In the meantime, the parties' are to share s. 7 expenses in proportion to their respective incomes as I have found them to be.

III. Issue 2: Should child support be payable retroactively?

- [57] A.C.M. seeks to have the order for payment of child support made retroactive to February 1, 2021.
- [58] In *Colucci v. Colucci*, 2021 SCC 24, the Supreme Court of Canada very recently had occasion to reiterate the principles to be applied in considering, among other things, whether an increase in child support should be ordered payable retroactively. Justice Martin, writing for the Court, summarised those principles as follows at para. 114:
- [114] It is also helpful to summarize the principles which now apply to cases in which the recipient applies under s. 17 [of the Divorce Act] to retroactively increase child support:
- a) The recipient must meet the threshold of establishing a past material change in circumstances. While the onus is on the recipient to show a material increase in income, any failure by the payor to disclose relevant financial information allows the court to impute income, strike pleadings, draw adverse inferences, and award costs. There is no need for the recipient to make multiple court applications for disclosure before a court has these powers.
 - b) Once a material change in circumstances is established, a presumption arises in favour of retroactively increasing child support to the date the recipient gave the payor effective notice of the request for an increase, up to three years before formal notice of the application to vary. In the increase context, because of informational asymmetry, effective notice requires only that the recipient broached the subject of an increase with the payor.
 - c) Where no effective notice is given by the recipient parent, child support should generally be increased back to the date of formal notice.
 - d) The court retains discretion to depart from the presumptive date of retroactivity where the result would otherwise be unfair. The D.B.S. factors continue to guide this exercise of discretion, as described in *Michel*. If the payor has failed to disclose a material increase in income, that failure qualifies as blameworthy conduct and the date of retroactivity will generally be the date of the increase in income.
 - e) Once the court has determined that support should be retroactively increased to a particular date, the increase must be quantified. The proper amount of support for each year since the date of retroactivity must be calculated in accordance with the Guidelines.
- [59] A.C.M.'s counsel first wrote to C.J.S.'s counsel on January 20, 2021, seeking to vary the separation agreement to provide for payment of child support in light of the change in her employment status that was taking place at the end of that month. C.J.S. was not prepared to do so.
- [60] I agree that it is appropriate in these circumstances that my order apply retroactively from February 1, 2021 onward.

IV. Issue 3: Should the net proceeds of sale of the former family home be ordered to be distributed equally to the parties?

- [61] The separation agreement contemplated that C.J.S. would continue to reside in the former family home but that it would be listed for sale by March 2019. Each party was given the option to buy the other out for 50% of their shared net equity. Pending the sale, they were to share ongoing ownership costs equally. C.J.S. was to be responsible for any repairs over \$250 unless A.C.M. approved the expenditure in advance.
- [62] The parties amended the separation agreement on June 10, 2020. The amendment contemplated that C.J.S. would buy out A.C.M.'s interest but, as it turned out, he was unable to secure the requisite financing. The parties eventually agreed to put the property on the market and it finally sold on September 8, 2020.
- [63] A.C.M. wanted to split the net proceeds of sale equally between them, but C.J.S. believed that he was entitled to an unequal division in his favour for various reasons. By agreement, their respective solicitors both hold \$119,105.86 in trust, pending resolution of this issue.
- [64] In her original notice of application filed April 8, 2021, A.C.M. sought an order for an immediate distribution of those funds to the parties equally. In his response filed April 16, 2021, C.J.S. asserted that the court did not have jurisdiction to make that order, given how A.C.M. had commenced this proceeding. He did not address the substance of the dispute and, in particular, adduced no evidence to substantiate his contention that he was entitled to a greater than equal share of the proceeds of sale. In the event that the court concluded that it did have jurisdiction to make the order sought, he sought an adjournment to respond substantively.
- [65] Over a month later, on May 20, 2021, A.C.M. filed and served an amended version of her notice application in which she updated the factual and legal basis supporting her claim for child support, but added nothing in response to C.J.S.'s jurisdictional objection to her application for distribution of the proceeds of sale.
- [66] So matters stood until the hearing before me. After C.J.S.'s counsel had concluded her submissions in response to the application, A.C.M.'s counsel found and sought to rely on two new authorities that were not cited in her amended notice of application. C.J.S.'s counsel acknowledged that those authorities establish that the court does indeed have the requisite jurisdiction to make the order sought in relation to the sale proceeds, but reiterated the request for an adjournment.
- [67] Regardless of the jurisdictional objection he had raised, C.J.S. should have responded to the application in its entirety. Had it not been for the failure on the part of A.C.M. to include in her amended notice of application all of the authorities upon which she would be relying in support of it, I would have been inclined to rule on the entire application now, as she asks. But in light of that failure, I have concluded that the more appropriate order is to adjourn that aspect of the application on certain terms. Those terms are as follows:
- a) the retroactive component of the child support order I have made is to be paid forthwith to A.C.M. from C.J.S.'s share of the sale proceeds held in trust by his counsel;

- b) within 21 days of the release of this decision, C.J.S. is to file and deliver to A.C.M.'s counsel whatever evidence and legal argument he intends to rely upon in opposing A.C.M.'s application for an equal distribution of the sale proceeds;
- c) within 14 days of receipt of those materials, A.C.M. is to respond by filing and delivering her evidence and argument in reply; and
- d) thereafter, the parties will confer about the length of the hearing required to resolve the remaining issues on the application, including costs, and then schedule a supplemental hearing before me for that purpose.

V. Summary and Disposition

[68] The application is allowed in part.

[69] The separation agreement is varied to require that C.J.S. pay A.C.M. child support in the amount of \$2,400 per month, retroactively from February 1, 2021. The amount of child support payable will be subject to review after six months. The parties are to share s. 7 expenses incurred from and after February 1, 2021, in proportion to their incomes as I have found them to be.

[70] The application to have the proceeds of sale of the former family home distributed to the parties equally is adjourned on the terms set out above.

"Milman J."

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Prepared on 29 October 2026 · Esheria