

CANADA / JUDGMENT

A.J.B. v. J.M.

2020 BCSC 242

COURT

Supreme Court of British Columbia

DECIDED

26 February 2020

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2020 BCSC 242 A.J.B. v. J.M. IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: A.J.B. v. J.M., 2020 BCSC 242 Date: 20200226 Docket: E082273 Registry: Vancouver Between: A.J.B. Claimant And J.M. Respondent Before: The Honourable Madam Justice Sharma (In Chambers) Reasons for Judgment Counsel for the Claimant: P. Sheppard Counsel for the Respondent: S. Booth Place and Date of Hearing: Vancouver, B.C. November 6-7, 2019 Place and Date of Judgment: Vancouver, B.C. February 26, 2020 Table of Contents I. INTRODUCTION.. 3 II. THE PARTIES' FINANCIAL SITUATIONS. 4 III. RETROACTIVE CHILD SUPPORT. 6 A. Delay. 8 B. The Claimant's Conduct 10 C. The Child's Circumstances. 13 D. Hardship on the Claimant 17 E. Conclusion on Entitlement to Retroactive Support 18 F. Effective Date. 19 IV. QUANTIFYING CHILD SUPPORT. 20 A. Legal Principles. 21 B. Imputing Income. 24

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- [1] This is an application by the respondent to vary child support both retroactively and prospectively. The parties' child was born in April 2006. After a trial held in 2009, the court ordered shared custody of the child; the parties continue to share parenting time equally. Although they have a child together, the parties have never been spouses nor lived together. The child is now 13 years old. No parenting issues arose in this proceeding.

- [2] In addition to joint custody and guardianship, the trial judge held that the claimant pay \$1,000 per month in child support and that the "parties will exchange full financial information on an ongoing basis by June 1 of each year so that the child support payments can be adjusted with changes in income" (the "2009 Order"). The 2009 Order does not address s. 7 expenses. For some reason, it appears the 2009 Order was not entered after trial.
- [3] The support awarded was based, in part, on imputing an annual income to the claimant in the amount of \$227,949. The respondent's annual income was set at \$65,000. Child support was assessed pursuant to s. 9 of the Federal Child Support Guidelines, SOR/97-175 [Guidelines].
- [4] Despite the 2009 Order, the claimant did not disclose any financial information to the respondent until this application was first filed in February 2019 (an amended application was filed August 16, 2019). According to his tax returns, his income rose significantly in some years in the intervening period, although he also reported limited (in comparison) or no income in some other years. The claimant voluntarily increased child support to \$1,500 in July 2010. He increased payments again in March 2019 to \$4,000 and to \$5,000 in July 2019, but those increases were without prejudice to the position he could take in this application.
- [5] There is no dispute that the claimant has paid many discrete amounts over the years for the child's extracurricular activities and other expenses when requested by the respondent. He emphasized that there was no order requiring him to pay s. 7 or other expenses beyond child support. He estimates these payments have totalled \$126,096 since 2010.
- [6] The respondent seeks a retroactive variation of child support payable to her from January 1, 2010, forward. She also seeks further disclosure, taking the position the claimant has not fully complied with the 2009 Order or other orders granted in 2019 regarding financial disclosure.
- [7] In addition, the respondent seeks a prospective variation of child support based on income she submits should be imputed to the claimant.
- [8] The claimant's position is that given all the facts in this case, it is inappropriate to make a retroactive award for child support. He asserts the respondent has failed to demonstrate that the child's needs were not met over the years. In the alternative, if this Court were to order retroactive support, his income should not be averaged over a number of years and his annual income for child support purposes should be reduced in certain years to account for large non-recurring capital gains. The claimant also submits his imputed income should be no more than \$200,000 per year for the purpose of prospective child support. Finally, he submits that any order for retroactive support commence no earlier than 2015. II. THE PARTIES' FINANCIAL SITUATIONS

- [9] The claimant is 62 years old and is qualified as a lawyer. He is a sophisticated businessperson who manages a large number of investments, many of them related to mineral claims. He deposed that he historically earns income, including capital gains, by buying and selling business interests in mineral claims. He also collects antique vehicles. In addition, his total income often includes different combinations of professional, business and employment income.
- [10] The trial judge imputed \$227,949 annual income to the claimant. I note that amount is higher than what the claimant submits would be an appropriate amount to impute to him currently.
- [11] In her analysis on imputing income, the trial judge noted that the claimant historically enjoyed a high income. She accepted that the 2008 global economic crisis had hit him particularly hard because his legal practice was in securities and his clients were not active, or were not paying legal fees. She therefore accepted his evidence that he could not earn the same income he had historically and that he would have significant business and capital losses. However, she also stated his income would likely improve when the market rebounded.
- [12] A summary of some information from the claimant's tax returns for the years 2009 to 2018 is included in Appendix A. That information illustrates that there are large variations in the claimant's income from year to year as well as in the sources of his income and taxes paid. It is obvious that he has been able to arrange his financial affairs to take advantage of business losses to reduce the amount of income tax he paid, in some years to zero. I find there is no discernable pattern or constants in his income profile.
- [13] The respondent does not dispute that the claimant's income profile fluctuates. She submits however that his pattern of spending and expenses illuminates his true financial position. Specifically, she points out that his 2009 Form F8 revealed personal spending after taxes of just over \$27,600 per month. That figure is only slightly below the claimant's monthly expenses in his 2019 F8. As she points out, that level of spending roughly translates to over \$300,000 annually. Additionally, he grossed almost \$11 million from the sale of a corporation in 2017. He also has collector cars worth at least \$315,000. The respondent further points out that the claimant has shares in dozens of public companies, which cost over \$6.5 million, and interests in 46 private corporations, whose value is unknown because he has not disclosed any documents associated with those interests.
- [14] By contrast, the respondent submits that her financial situation is precarious. She works for the North Vancouver School District. After deducting union fees, she earned just over \$77,403.23 in 2018. The respondent says that her monthly expenses amount to approximately \$10,139, equalling annual expenses of \$121,670. She notes that with child support payments of \$1,500 per month, she experienced a shortfall of about \$26,000 annually.

[15] She deposed that her funds were depleted after the trial. She is only able to pay interest on her \$26,000 credit card debts and she has fully drawn out her unsecured line of credit, in the amount of \$50,000. While she has a pension, she has no RRSP savings. She carries the mortgage for the home she shares with her mother, and in which she has a half interest. She is responsible for the entire mortgage because her mother contributed all of the initial equity. Her outstanding balance is approximately \$605,000 and the home's total assessed value is \$1.64 million. She estimates her net worth to be about \$155,000. Until very recently she was self-represented, including conducting the trial on her own behalf.

[16] The respondent earns a salary and has no other sources of income. Her available tax information reveals the following income, after deducting union dues:

- a) 2012 - \$56,135.76
- b) 2013 - \$56,736.00
- c) 2014 - \$52,854.39
- d) 2015 - \$68,943.13
- e) 2016 - \$71,533.14
- f) 2017- \$77,155.82
- g) 2018 - \$77,403.23

III. RETROACTIVE CHILD SUPPORT

[17] The respondent emphasizes s. 152 of the Family Law Act, S.B.C. 2011, c. 25 [FLA], which states that support may be changed prospectively or retroactively if the court is satisfied that there has been a material change in circumstances as provided for in the Guidelines since the 2009 Order was made. Section 152 states:

- (1) On application, a court may change, suspend or terminate an order respecting child support, and may do so prospectively or retroactively.
- (2) Before making an order under subsection (1), the court must be satisfied that at least one of the following exists, and take it into consideration:
 - (a) a change in circumstances, as provided for in the child support guidelines, has occurred since the order respecting child support was made;
 - (b) evidence of a substantial nature that was not available during the previous hearing has become available; © evidence of a lack of financial disclosure by a party was discovered after the last order was made.

[18] Furthermore, she points to s. 14(a) of the Guidelines, which states that "any change in circumstances that would result in a different child support order" constitutes a change of circumstances if the initial order included a determination in accordance with an applicable table amount.

- [19] While the claimant does not dispute there has been a material change of circumstances, his position is that no retroactive award should be granted. In *D.B.S. v. S.R.G.; L.J.W. v. T.A.R.; Henry v. Henry; Hiemstra v. Hoekstra*, 2006 SCC 37 [D.B.S.], the Supreme Court of Canada set out the test for entitlement to retroactive support. At paras. 67-69, the Court stated that there is no presumption against a retroactive effect if the payor is paying under an existing order, even though the order itself is presumed valid. At paras. 100-116, the Court detailed four factors to be considered when addressing retroactive child support:
- a) any delay in making a claim for retroactive support;
 - b) the payor's conduct;
 - c) the child's circumstances; and,
 - d) hardship to the payor parent.
- [20] Since s. 152(1) of the FLA permits retroactive child support orders, D.B.S. has been applied in the FLA context: *Evanow v. Lannon*, 2016 BCSC 1871, aff'd 2018 BCCA 208. In addition, s. 150(1) of the FLA mandates that child support be determined in accordance with the Guidelines.
- [21] The respondent bears the burden of establishing, on a balance of probabilities, an entitlement to retroactive child support: *Evanow v. Lannon*, 2017 BCSC 725 at para. 31, aff'd 2018 BCCA 208 at para. 27. I address the entitlement issues first by turning to the four factors from D.B.S. A. Delay
- [22] At paras. 101-104 of D.B.S., the Supreme Court of Canada stated, among other things, the following about delay: 101 Delay in seeking child support is not presumptively justifiable. At the same time, courts must be sensitive to the practical concerns associated with a child support application. They should not hesitate to find a reasonable excuse where the recipient parent harboured justifiable fears that the payor parent would react vindictively to the application to the detriment of the family. Equally, absent any such an anticipated reaction on the part of the payor parent, a reasonable excuse may exist where the recipient parent lacked the financial or emotional means to bring an application, or was given inadequate legal advice: 102 Notably, the difference between a reasonable and unreasonable delay often is determined by the conduct of the payor parent. A payor parent who informs the recipient parent of income increases in a timely manner, and who does not pressure or intimidate him/her, will have gone a long way towards ensuring that any subsequent delay is characterized as unreasonable: 104 In deciding that unreasonable delay militates against a retroactive child support award, I am keeping in mind this Court's jurisprudence that child support is the right of the child and cannot be waived by the recipient parent: *Richardson*, at p. 869. In fact, I am not suggesting that unreasonable delay by the recipient parent has the effect of eliminating the payor parent's obligation. Rather, unreasonable delay by the recipient parent is merely a factor to consider in deciding whether a court should exercise its discretion in ordering a retroactive award. This factor gives judges the opportunity to

examine the balance between the payor parent's interest in certainty and fairness to his/her children, and to determine the most appropriate course of action on the facts.

- [23] The claimant submits there was no evidence to support a finding that the respondent believed that the claimant would react vindictively had she sought a court order increasing child support. In particular, he points out that except for three instances, he has always provided funds for the child when and in the amount requested by the respondent. He also submits the respondent has not established on the evidence that she lacked the financial or emotional means to bring an application.
- [24] I agree the evidence is insufficient to conclude the respondent was vulnerable or emotionally unable to pursue litigation. However, she submits that she lacked the financial means to pursue litigation and points to what she says is her precarious financial status. The claimant challenges that position based on his position as to when she sought a change to the amount of support.
- [25] There is a dispute in the evidence about how often and when the respondent sought financial disclosure from the claimant. The parties agree that he did inform her in 2010 that his income had increased since the trial, and he increased support to \$1,500 in July of that year. His position is that the respondent made no request for disclosure until 2015, despite her knowing his income had increased in 2010.
- [26] The respondent submits she made verbal requests for financial disclosure in 2012, 2013 and 2014; the claimant denies she made those requests to him. I find that the evidence is clear the respondent made a verbal request sometime in August 2015 because in an email dated September 29, 2015, the claimant confirmed she asked about support, and said he would provide his income tax and other financial statements soon, although he failed to do so.
- [27] In any event, he submits the respondent did not file this application until February 1, 2019, and therefore the previous verbal requests are not relevant to the issues before me. I cannot accede to that submissions because in D.B.S. the Court rejects the notion that the date of an application or formal notice are determinative as to the effective date for retroactive support (at para.120).
- [28] More generally, his position is that the claimant's failure to file an application sooner is indicative of her not needing more support. I find that submission is more properly addressed under a different topic (see below, paras. 66-73). He also submits she has provided no reasonable excuse for her delay in pursuing retroactive support. Alternately, he submits that if this Court finds she did have a reasonable excuse, it could not justify an award for retroactive support any earlier than 2015.
- [29] The claimant's primary submission that the respondent has no reasonable excuse for the delay does not sufficiently account for his lack of financial disclosure for almost 10 years. I find it would be contrary to the legislative scheme and underlying policy objectives to conclude the respondent must bear the entire responsibility for not seeking retroactive

support sooner in the face of the claimant's failure to abide by the 2009 Order. Accordingly, I conclude the respondent had a reasonable excuse for at least some portion of the delay. B.

The Claimant's Conduct

- [30] The respondent's position is the lack of financial disclosure in this case amounts to blameworthy conduct.
- [31] The claimant disagrees. Among others, he relies on D.B.S. at para. 108, where the Court stated that a payor parent who does not increase support payments is not necessarily engaging in blameworthy conduct. Instead, the Court stated that consideration should be given to whether the payor's conduct had the effect of fulfilling support obligations. For example, a parent who contributes to expenses beyond the statutory obligations may have met their child support obligations indirectly, which would be a factor not favouring an award for retroactive support. However, it also noted that the payor parent does not have "the right to choose how the money that should be going to child support is to be spent": D.B.S. at para. 109.
- [32] The test is a subjective one, and ranges on a scale from active deception to late disclosure that would otherwise have increased support: D.B.S. at paras. 106-108. At para. 108, the Court pointed out that a reasonably held belief that a person is meeting their obligations might be a good indicator as to whether that person is engaging in blameworthy conduct. In that context, a court might compare how much the payor parent should have been paying with how much they actually paid; generally, the closer the two amounts are, the more likely the belief was reasonable.
- [33] The difficulty in this case is that the claimant's earnings do not follow a pattern, nor fit a typical profile. Income was imputed to him not because he avoids earning income, but because the profile of his income is complicated. Among other things, he had the advantage of being able to claim nil, or limited, total net income for tax purposes in some years because of expenses and losses that reduced his net income in certain categories. In some years, this resulted in net negative income in certain categories. However, the non-payment of taxes does not accurately reflect his financial status, since income for the purpose of the Guidelines is not always the same as income for tax purposes: *Marquez v. Zapiola*, 2013 BCCA 433 at para. 49.
- [34] The claimant submits that after the trial, he was focussed on the parenting arrangements ordered by the judge and was unaware of his disclosure obligation. I do not accept that explanation. The claimant is a lawyer and a sophisticated businessperson and either was, or should have been, aware of his obligations as set out in the 2009 Order. Certainly, he was aware of the amount he was ordered to pay.

- [35] Even if I accepted that he was unaware of the disclosure obligation (a finding I explicitly do not make), ignorance is not an acceptable excuse. In any event, the claimant goes even further and asks that the respondent's failure to force the issue into litigation sooner ought to preclude a claim for retroactive child support. I do not accept that proposition.
- [36] However, the claimant also submits that he consistently paid directly to the respondent or to third parties, any amount of money requested by the respondent to cover the child's expenses. He submits that combined with the respondent's failure to pursue financial disclosure in court before this application, evinced her tacit satisfaction with the amount being paid. In light of both factors, he submits he believed that he was meeting his child support obligations and therefore his lack of financial disclosure ought not to amount to misconduct. There is some support for that position, although that was where there was an absence of effective notice of an issue regarding child support: *C.L.L. v. S.W.J.*, 2013 BCSC 917 at para. 62.
- [37] Although I have difficulty accepting the claimant's assertion that he was unaware of any responsibility to provide disclosure, I do accept that he believed his lack of disclosure was inconsequential because he always paid support, he voluntarily increased that amount and he paid for additional expenses. I find he had a genuine belief that the parties' child wanted for nothing.
- [38] The respondent submits those factors do not negate a finding of blameworthy conduct. She relies on *Evanow v. Lannon*, 2016 BCSC 1871 at para. 205, *aff'd* 2018 BCCA 208, where the trial judge stated that the payor parent engaged in blameworthy conduct by not informing the recipient parent of income increases and not increasing support payments. However, the Court of Appeal stated the following about this issue:
- [46] As in *Brown v. Kucher*, the misconduct alleged here is not at the high end of the blameworthiness spectrum. I am not persuaded that Mr. Evanow's failure to update his financial status is blameworthy conduct requiring the retroactivity claimed in the context before us. Importantly here, there was little or no contact between the parties over many years. Although the judge found that Mr. Evanow engaged in blameworthy conduct - beginning in 2007 - and there was no cross-appeal from that finding, the judge also found that the evidence was insufficient to prove a difference between the payments mandated by the order and Mr. Evanow's actual income.
- [39] The facts before me are different because the parties continually communicated. However, I find it significant that the claimant paid virtually any expense sought by the respondent for their child. He even provided the respondent with personal financial assistance (during a teacher's strike and paying veterinarian bills for her pet). In *Swiderski v. Dussault*, 2009 BCCA 461 at para. 7, the Court of Appeal said a court must consider a party's contribution to the child in balancing the D.B.S. factors. Although it may not change the ultimate conclusion with respect to the payor's conduct, or the D.B.S. analysis as a whole, the court must not completely disregard amounts that have been previously paid. Such payment may have the

effect of fulfilling their child support obligations indirectly: Swiderski at para. 32; D.B.S. at para. 109.

- [40] The claimant asserts that between 2012 and 2018, he paid an additional \$116,926.57 to the respondent directly or on her behalf to third parties for the child's expenses. The respondent referred to three occasions when the claimant did not agree with her requests for payment (and did not pay), but the claimant submits those are insignificant given the overall picture of how much he paid without complaint or objection. I agree with the claimant on this point.
- [41] The respondent also relies on what is said in D.B.S. at para. 109: although such payments may indicate that a payor parent has met their child support obligation, the payor parent does not have "the right to choose how money that should be going to support is to be spent". It is not clear to me that applies to the parties' situation. The claimant was responding to requests made by the respondent rather than him dictating how the money should be spent. Because he was paying 100% of the amounts requested, it lends credence to his position that he believed he was meeting his child support obligation. However, I find it more appropriate to address the significance of the amounts he paid beyond child support as part of the potential quantum.
- [42] Taking all these considerations into account, I do not find that the claimant's conduct was blameworthy in the sense that it was malicious. However, he could have done more to identify and inform the respondent that additional child support may have been warranted in previous years. In my view, this factor is neutral in the analysis. C. The Child's Circumstances
- [43] With respect to this factor, the parties disagree whether their lack of a spousal relationship and joint household affects the analysis.
- [44] The respondent submits the fact that the parties did not live together is not significant. She relies on s. 1(a) of the Guidelines, which states their objective is, in part, to "establish a fair standard of support for children that ensures that they continue to benefit from the financial means of both spouses after separation". In that context, she submits it is insignificant that the parties did not share a household.
- [45] The claimant disagrees. In assessing child support in cases of parents that have separated, the court often focuses on the comparison between the pre-separation standard of living the child enjoyed when the family was intact and the child's standard of living in each parent's household after separation. In this case, that comparison is unavailable because they have never lived together.
- [46] In D.B.S., the Court said a core principle of child support is that both parents "provide children with the same standard of living they enjoyed when their parents were together". The Court went on to discuss that the Guidelines have shifted the child support regime away from focusing on the needs of the child to the income of the payor (at paras. 38-45). If the

payor's income increases, the total amount of child support also increases (at para. 45). That does not mean, however, that the Court abandoned need-based considerations. It held they are still relevant in certain circumstances, such as the court's discretion under s. 4(b) (for income over \$150,000) and s. 9(c) (shared custody), both of which have some application in this case (at para. 46).

- [47] Thus, I agree with the claimant that the lack of a pre-existing standard of living is relevant to the analysis in this case. However, that factor has diminished weight when, since separation (or in this case, since the initial determination of the amount of support in the 2009 Order) there has been a significant passage of time and potentially there has been a significant increase in one parent's income: see D.B.S. at para. 74. As noted in *Plett v. Plett*, 2009 BCSC 227 at paras. 27-29, children are generally entitled to share in a parent's current income, regardless of their pre-separation standard of living.
- [48] Along the same vein are the Court of Appeal's comments in *B.P.E. v. A.E.*, 2016 BCCA 335 at paras. 38-41 (citing *R. v. R.* (2002), 58 O.R. (3d) 656 (Ont. C.A.)). Our Court of Appeal cautioned against over-emphasizing pre-separation patterns of expenditure in the face of an increase in the payor's income. Otherwise, the analysis may revert to a need-based approach, which the Court in D.B.S. rejected: B.P.E. at para. 41. In other words, pre-separation standard of living is one measure, but the court is not required to use it in every circumstance: *J.E.B. v. G.B.*, 2008 BCSC 528 at para. 69.
- [49] The preceding analysis aligns with what the Court in D.B.S. said was a core principle underpinning the Guidelines: the ultimate focus is on the payor's income. The Court stated that parents' child support obligation is commensurate with their income, and it can fluctuate: "a payor parent who does not increase his/her child support payments to correspond with his/her income will not have fulfilled his/her obligation to his/her children" (at para. 54).
- [50] The claimant also makes a different point, arguing that a child would not actually realize a benefit because she has enjoyed a high standard of living thus far. He relies on para. 111 in D.B.S. where the Court states a child who enjoys a high standard of living in both households will benefit less from a retroactive award. This returns to the point that the Court remarked that Parliament had moved away from a need-based perspective, but retained need as a consideration relevant to the exercise of discretion. The Court noted this is particularly relevant when dealing with s. 9©, among other sections of the Guidelines (at para. 112).
- [51] A court ought to consider what the child's needs were at the time that support should have been paid (at para. 113). In particular, if the child underwent hardship retroactive support should compensate for that. However, the Court also stated "the argument for retroactive support will be less convincing where the child already enjoyed all the advantages (s)he would have received had both parents been supporting him/her" (at para. 113). The Court continued to clarify that it was not suggesting that the payor's obligation would disappear simply because there was no strict need for support.

- [52] The claimant submits those comments apply, and the child's needs are, and were, fulfilled. He submits that a retroactive award is unwarranted based on his historic payment of the child's expenses (see above, paras. 5, 40). He also submits the respondent has adduced no evidence demonstrating any hardship the child has suffered over the years.
- [53] The respondent submits that she has struggled financially with an ongoing shortfall between her income and expenses. She submits that clearly affects the child. As illustrative, she deposed that she has not taken a holiday since 2017, and that she has no means by which to address her growing debt. She compared her situation to the claimant's ability to take their child and his other child on holidays. She also points out the claimant has invested a large sum (\$661,000) exclusively for the child's benefit.
- [54] The recipient parent's debt may favour a retroactive award, but only if it negatively impacts the child. There is no evidence before me of any deprivations to the child's lifestyle while living with the respondent except for the assertion that she has not taken a holiday since 2017. By holiday, I assume the respondent means she has not been able to travel out of town for a vacation with her daughter, since the respondent does not work over the summer and presumably is able to enjoy time with the child unburdened by work. It is not clear to me that the ability to travel out of town is a necessary element of a holiday, or that an inability to travel on a holiday is a hardship on the child.
- [55] While I can accept that her financial struggles undoubtedly cause the respondent stress, I am not satisfied on a balance of probabilities that she has adduced evidence as to how that has negatively affected the child. She has not deposed that the child has been deprived of any activity, clothing, equipment or anything else because of her financial struggles. As noted at para. 113 of D.B.S., "hardship suffered by other family members (like recipient parents forced to make additional sacrifices) are irrelevant in determining whether retroactive support should be owed to the child".
- [56] Given the sizable fund the claimant has been able to invest for the child's future, it is also difficult to conclude that the respondent's debt is necessarily to the child's detriment. Her financial situation may indicate that in the future, the respondent will face difficulty or perhaps be unable to financially support the child when the child becomes an adult, for instance by contributing to post-secondary education. However, that situation is in the future and there are a host of considerations that go into determining whether and to what extent parents are obliged to financially assist adult children. More importantly, that is a future consideration and not an issue before me.
- [57] Thus, I have difficulty accepting that the respondent adduced evidence to establish on a balance of probabilities that the child suffered any deprivation. However, the analysis is not so narrow as to only inquire into whether the child actually needed any particular item. This factor is more nuanced; it considers whether the child would benefit from the retroactive support, not merely whether there was an unfilled need: *Reid v. Reid*, 2017 BCCA 73 at para. 131. In the case of high-income payors, this should include "a large element of discretionary

spending": B.P.E. at para. 41, citing Tauber v. Tauber (2000), 48 O.R. (3d) 577 (Ont. C.A.). Therefore, meeting the child's needs is not sufficient to deny retroactive child support, a holistic approach is necessary: C.L.L. at para. 64.

- [58] It is clear that no one factor is determinative or even required (D.B.S at para. 99). Over-emphasizing this factor, especially in the unique circumstances of a high-income earner, may suggest high-income payors can skirt their support obligation if their income further increases. This would be inconsistent with the objectives of the Guidelines, and a fundamental underpinning of D.B.S. It would neither ensure children continue to benefit from the financial means of both parents (s. 1(a)), nor treat parents and children in similar circumstances consistently (s. 1(d)). Further, it ignores the important deterrent effect that a retroactive order legitimately provides: Swiderski at para. 42.
- [59] Taking all of the preceding analysis into account, based on the evidence adduced, I find this factor does not provide strong support in favour of a retroactive award. D. Hardship on the Claimant
- [60] The last factor is hardship to the payor. I did not understand the claimant to suggest this factor strongly supported his position.
- [61] I do not find on the evidence that the claimant would suffer any hardship by a retroactive award, given his level of income over the intervening years and the considerable flexibility he has to arrange his financial affairs to minimize taxes while still enjoying a large amount of discretionary spending. Among other things, despite his fluctuating income, the claimant has donated to charity a total sum of over \$330,000 since 2009. He has also been able to amass a large fund for the child despite his reported income.
- [62] Therefore, I agree this factor weighs in favour of the respondent's position. However, "courts should attempt to craft the retroactive award in a way that minimizes hardship": D.B.S. at para. 116. With this in mind, it is necessary to keep this factor in mind in determining the appropriate quantum and structure of a retroactive support order. E. Conclusion on Entitlement to Retroactive Support
- [63] Based on all the circumstances, I find the respondent has met the burden to establish entitlement to retroactive child support. None of the factors weigh strongly against a retroactive child support order. Although the claimant opposed any award for retroactive support, he conceded that there had been a material change in circumstances since the 2009 Order.
- [64] Although the claimant's conduct was not blameworthy in the sense that it was malicious, he did not meet his obligation to provide financial disclosure and that does weigh against his position to some degree. Additionally, the claimant offers no reason why, since promising to provide financial disclosure "shortly" in September 2015, he failed to do so until the claimant was successful in obtaining an order for disclosure on February 15, 2019.

- [65] Because the primary focus is on the payor's income, the additional payments the claimant made are a factor to the retroactive analysis, but only in so far as they were made. In my view, their amount is more appropriately considered in this case in determining quantum. In my view, that also tempers the impact of his belief that he was meeting the child's needs. Lastly, I am satisfied the claimant will not suffer any hardship by an award for retroactive support. F. Effective Date
- [66] Having concluded the respondent has established an entitlement to a retroactive support, I must now consider the date to which the child support should be retroactive, and following from that, the amount of support that would be adequate in the circumstances: D.B.S. at para. 117. The basic rule established in D.B.S is the retroactive period starts no more than three years before effective notice to the payor parent (at paras. 123, 125).
- [67] In D.B.S. at para. 121, the Court defined "effective notice" as: any indication by the recipient parent that child support should be paid, or if it already is, that the current amount of child support needs to be re-negotiated. Thus, effective notice does not require the recipient parent to take any legal action; all that is required is that the topic be broached.
- [68] The parties agree that the respondent's October 13, 2015 letter was her first written request for financial disclosure in accordance with the 2009 Order. In that letter to the claimant, the respondent suggested discussing the matter of child support. Specifically, she wrote: "The child support that you pay has not been adjusted in over 5 years. I have no way of ascertaining whether the amount of child support that you are paying is appropriate because I have not seen any financial information from you since the trial in 2009."
- [69] The respondent's letter came after an email from the claimant that indicated the respondent raised the issue of child support in August 2015, which is consistent with the respondent's affidavit evidence.
- [70] As noted above (para. 26), the respondent deposed that she began requesting financial disclosure in 2012, but the claimant denied this. Her evidence on this point is vague, and it is not clear that she sought to re-negotiate or re-assess the amount of child support. I add that I have accepted the claimant's genuine belief the child's needs were met and there is a reasonable basis for that belief in the amount of non-support payments he made. Accordingly, on the evidence before me, I am not satisfied on a balance of probabilities that the respondent broached the subject of child support before 2015.
- [71] The respondent submits, in the alternative, that if the effective date is in 2015, the start date for retroactive support should be 2012 based on the three-year rule in D.B.S.
- [72] The claimant's position is that 2015 should be the earliest date for the start of retroactive child support because the respondent by her own admission did not pursue the matter of financial disclosure for "a very long time". However, as noted in D.B.S. at para. 120, "courts must ensure that parents [and children] are not penalized for treating judicial recourse as a last resort." I have found that the respondent broached the subject of child support in the

context of requesting disclosure in August 2015. At that point, it was incumbent on the claimant to provide that disclosure so the respondent could assess how she should proceed.

- [73] Accordingly, I find that the claimant's September 29, 2015 email is proof that he had effective notice sometime in August 2015. Applying the three-year rule, the start date for retroactive support should be in 2012. For all those reasons, I find that retroactive child support is appropriate for the years 2012 to 2019, the first month being September 2012. IV.

QUANTIFYING CHILD SUPPORT

- [74] Given that the respondent has established an entitlement to retroactive child support, it is necessary to determine the quantum of the award. The respondent also seeks a prospective change to child support, which I consider after addressing the retroactive award.
- [75] In assessing the quantum of retroactive support, I am mindful that the determination of that amount affects some of the factors in the D.B.S. analysis; although I do not explicitly revisit those considerations in the following analysis, I confirm that I have incorporated my previous analysis as appropriate (see above, paras. 22-62).
- [76] The parties agree that s. 9 of the Guidelines applies because custody is shared equally by the parties. In other words, the child is with each parent not less than 40 percent of the time.
- [77] Section 9 provides a court broader discretion with respect to the quantum of child support than other approaches mandated by the Guidelines; there is no presumptive starting point: *Contino v. Leonelli-Contino*, 2005 SCC 63 at paras. 3, 24, 68, 71. In this case, the matter is more complicated because the claimant's income presents a difficult starting point as it relates to s. 9(a) of the Guidelines. A. Legal Principles
- [78] Section 9 of the Guidelines states: Where a spouse exercises a right of access to, or has physical custody of, a child for not less than 40 per cent of the time 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 custody arrangements; and
 - (c) the conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought.
- [79] The Supreme Court of Canada addressed the application of s. 9 in *Contino*. Section 9 is an entirely different formula for child support, with different guiding principles, from the general approach mandated by the Guidelines; s. 9 constitutes a complete system (at para. 3). Justice Bastarache, for the majority, established a number of principles with respect to s. 9, which I summarize as follows:
- a) Section 9 is only a different method of determining the amount of child support, it is not an automatic deviation from the Guidelines amount: at para. 30.

- b) There is no presumption in favour of awarding at least the Guidelines amount, nor is there a presumption in favour of awarding less: at para. 31.
 - c) The s. 9 regime emphasizes flexibility and fairness, the court must acknowledge the overall situation of the parents and the needs of the child: at para. 27.
 - d) The court must consider all the three factors: at paras. 48-49, 82, 92.
 - e) However, the weight attributed to each factor will vary according to the circumstance of the case: at para. 39.
 - f) The set-off amount (s. 9(a)) is a useful starting point, but it has no presumptive value; a court should depart from it or make adjustments to it if it is inappropriate in light of the other two factors and these must be examined: at paras. 41, 49.
 - g) The court retains the discretion to modify the set-off amount where, considering the financial realities of the parties, it would lead to a significant variation in the standard of living experienced by the child as between the two households, "something which Parliament did not intend": at para. 51.
 - h) Section 9(b) recognizes that shared custody may increase the overall costs of raising children, usually as a result of duplication of costs: at para. 52.
 - i) Section 9© gives the court "a broad discretion for conducting an analysis of the resources and needs of both the parents and the children": at para. 68.
- [80] The s. 9 regime suggests the table amounts determined under s. 9(a) would be the result of a strict application of s. 3(1)(a), which may require imputing income under ss. 17-20, but would not engage s. 4(b) even if one party's income exceeds \$150,000. This is consistent with the Court's analysis in *Contino*. The parties have intermingled case law related to s. 4(b) in their submissions on s. 9, but that is not the correct approach.
- [81] In my view, s. 4(b) has no application when dealing with s. 9(a) of the Guidelines. In *Contino*, the Court said the "first factor requires that the court take into account the financial situation of both parents" (at para. 40). Section 4(b) provides a court discretion to deviate from the table amount for calculating the amount of support to pay, but it is not a tool for assessing income. Further, s. 9(a) requires that a court consider "the amount set out in the applicable tables" for each spouse, not the appropriate amount of child support payable by each spouse. The appropriate amount of child support is determined only after applying the whole of s. 9.
- [82] However, this does not render the legal principles related to s. 4 irrelevant. In *B.P.E.* at para. 69, the Court of Appeal said: While it is not necessary under s. 9 to demonstrate unreasonableness to depart from the table set-off amounts, reference to the s. 4 cases where the table amount has been reduced because it results in inordinately high support payments may assist in guiding the exercise of the discretion under s. 9. In that regard I agree with the views expressed by Butler J. in *S.R.M. v. N.G.T.M.*, 2014 BCSC 442, and Griffin J. in *R.A.C. v.*

V.L.C., 2009 BCSC 1417, to the effect that while the s. 9 analysis is distinct from an analysis under s. 4, the principles for consideration under s. 4 specifically relating to the treatment of high income earners can be helpful in a s. 9 analysis.

[83] As a result, "when considering the question whether, and if so when, the high income of a payor should justify departure from the set-off under s. 9", the Court of Appeal, at para. 70 of B.P.E., adopted the following statement of principles summarized in Archibald v. Archibald, 2007 ABQB 486 at para. 27 (from Francis v. Baker, [1999] 3 S.C.R. 250):

1. High income earners are in a unique economic situation in that expenses which may in other situations be considered unreasonable, may, in a high income situation be reasonable. Therefore, in order to challenge budgets, payors in high income situations must demonstrate that budgeted expenses are so high as to exceed the generous ambit within which reasonable disagreement is possible.
2. In situations where the table amount is so excessive in comparison to the reasonable needs of the children that support under the table is no longer just child support but a de facto wealth transfer or spousal support, the table amount should be reduced. This is in keeping with s. 26.1(2) of the Divorce Act which dictates that maintenance of children, rather than household equalization or spousal support, is the object of support payments.
3. Child support payments will often produce an indirect benefit to the custodial parent and the court should not be too quick to find that Guideline figures enter the realm of wealth transfer or spousal support.
4. An award of discretionary expenses is not unreasonable and may be high in high income situations. See also: R.A.C. v. V.L.C., 2009 BCSC 1417 at para. 34. B. Imputing Income

[84] In this case, it is also necessary to consider the law as it relates to imputing income. The parties disagree on what is the appropriate amount to impute, as well as the appropriate approach.

[85] The respondent has proposed a rolling average incorporating an annual cap of \$1 million, whereas the claimant does not rely on averaging and submits his two highest income years should be capped at \$600,000 because most of his income in those years should be excluded under s. 17 as non-recurring capital gains.

1. Approaches to Imputing Income

[86] To determine the table amount, the starting point for determining the parties' income is s. 16 of the Guidelines. However, the court has discretion to adjust income based on ss. 17-20: Harras v. Lhotka, 2016 BCCA 246 at paras. 20-21, 23; Brown v. Brown, 2014 BCCA 152 at paras. 16, 23. Many of these sections of the Guidelines apply in this instance, but I reproduce two in aid of my analysis: 17 (1) If the court is of the opinion that the determination of a spouse's annual income under section 16 would not be the fairest determination of that income, the court may have regard to the spouse's income over the last three years and

determine an amount that is fair and reasonable in light of any pattern of income, fluctuation in income or receipt of a non-recurring amount during those years. 19 (1) The court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following:

- (h) the spouse derives a significant portion of income from dividends, capital gains or other sources that are taxed at a lower rate than employment or business income or that are exempt from tax;

[87] In Reid at para. 122, the Court of Appeal said that s. 17 offers the court "broad discretion to average income over a period of years , though this is generally used to smooth out fluctuating incomes rather than to account for extraordinary gains in a single year." Section 17 also permits a court to exclude income. Fairness, as referred to in s. 17(1), is "determined in accordance with the values inherent in the Guidelines as reflected in the objectives expressly set out in s. 1", in particular ss. 1(a) and (d): Brown at para. 29. The objectives (s. 1) of the Guidelines are:

- (a) to establish a fair standard of support for children that ensures that they continue to benefit from the financial means of both spouses after separation;
- (b) to reduce conflict and tension between spouses by making the calculation of child support orders more objective;
- (c) to improve the efficiency of the legal process by giving courts and spouses guidance in setting the levels of child support orders and encouraging settlement; and
- (d) to ensure consistent treatment of spouses and children who are in similar circumstances.

[88] In Harras at para. 24, the Court of Appeal noted that "fairness is unlikely to be achieved by the mechanical application of averaging" and adopted the following from Ewing v. Ewing, 2009 ABCA 227 at paras. 37-38: But we would point out, for future cases, that section 17 does not suggest that the way to establish fair income is to average. It merely directs the court to set a fair and reasonable amount taking into consideration the past three years' income and any patterns of income, fluctuations in income and non-recurring gains. The court has the discretion to elect the fairest method, and that could be done by averaging the three years prior to the gain, or a court could remove part, or all, of the non-recurring gains, or take whatever steps it determines are appropriate to arrive at an income figure that is fair for the purposes of support. although setting a fair income is highly discretionary, there should be a logical basis for the method chosen and averaging will not always be appropriate.

[89] The Court of Appeal summarized the approach to averaging income pursuant to s. 17 (Harras at para. 35): In summary, the averaging approach to income determination under s. 17 is very fact specific. Generally speaking, averaging will be applied where income fluctuates, or where the payor has not demonstrated a lasting decline in earnings. Ultimately, it depends on fairly calculating the amount of income reasonably available to pay child support. Depending on the reasons for a pattern of fluctuating income (or, as in

Grossi, declining income), averaging may be more or less appropriate. If, for example, a substantial increase in income in one of the three previous years is due to receipt of what might be fairly viewed as a non-recurring amount, averaging may be inappropriate. If, however, the nature of a payor's employment or business is such that wide fluctuations in income are normal and expected, averaging may be more appropriate. As the Court stated in Jakob at para. 46, "[w]here income has fluctuated in previous years, in the sense that it has increased and decreased over a fixed period of time, and it is anticipated that it will continue to fluctuate in that manner, it may be appropriate to take an average of fluctuating income for a fixed number of years" to determine current income. [Emphasis in original.]

- [90] Practically, in this case, whether relying solely on s. 9 and imputing income under ss. 17-20, or adjusting the child support amount with a view to the s. 4(b) principles, this is a matter of discretion. Ultimately, the amount of child support must be fair and appropriate as instructed by the Supreme Court of Canada in Francis and Contino.
- [91] Finally, because this child support analysis will inform retroactive support, the amount must be appropriate bearing in mind the factors outlined in D.B.S., see paras. 5-6, 64, 74; Reid at para. 108. I specifically rely on my earlier analysis (paras. 22-62) and will not repeat it.
- [92] The respondent submits relying on the claimant's line 150 income would not be the fairest determination and therefore it is fair and reasonable to impute income to him. I note that in 2009, the trial judge imputed income to the claimant in the amount of \$227,949. I am satisfied that the claimant's method of earning income continues to present a situation where relying exclusively on s. 16 of the Guidelines would not be the fairest approach to child support. In particular, looking at his income over the years the sources and amounts of his income have fluctuated significantly. I find based on the available evidence, the fluctuation in his income is probably going to continue.
- [93] Both parties have made submissions with respect to the claimant's highest income years (2014, total net income - \$1,944,033.08; and 2017, total net income - \$4,166,392.92). They suggest different approaches to the questions of whether the income in these years should be considered non-recurring and how it should be considered when determining the claimant's income for child support purposes.
- [94] When dealing with non-recurring income, as stated by Mr. Justice Harris, in J.M.D. v. R.M.J.D., 2011 BCSC 1295 at para. 24, "the ultimate question is whether a non-recurring capital gain should fairly be treated in substance as enhancing the income or financial means of a parent." The claimant is in the business of buying and selling capital assets year after year, contrary to the situation discussed in J.M.D. at paras. 26, 32, citing Ewing at para. 35. Although he reinvests some of these capital gains in some form, I am satisfied on the evidence that the claimant treats and is able to access some of this as income.

- [95] For both retroactive and prospective support, the claimant's income in this case is determined pursuant to the s. 9 analysis, so there is significant discretion with respect to the final quantum. Given the claimant's fluctuating sources and amounts of income, I conclude that, although imperfect, some form of averaging will produce the fairest determination of the claimant's income for the purpose of child support: *Laxton v. Coglon*, 2017 BCSC 1544 at para. 81.
- [96] The respondent is not suggesting that all of the claimant's capital gains in these years should be treated as income for the purpose of retroactive child support. As stated in *Ewing* at para. 37, and suggested by the respondent, I find it is appropriate to remove part of the claimant's income from his highest income years. I therefore cap his income for any year at \$1 million for the purpose of child support because I find the amount above that should be considered non-recurring capital gains.
- [97] The respondent did suggest capping the claimant's income at \$1 million, but in a different manner. She submitted first calculating a three-year rolling average to his income and then implementing a \$1 million cap. I do not find that approach is appropriate. It would effectively distribute non-recurring income among subsequent years for the purpose of child support. I find that is inconsistent with the notion that the income in those years was "non-recurring". In my view, that is not the fairest approach.
- [98] Also, because I have determined that s. 16 would not be the fairest way to determine the claimant's income, I have not adjusted his income in accordance with Schedule III of the Guidelines, and instead relied on the claimant's line 150 income.
- [99] In *K.A.M.R. v. W.H.G.*, 2014 BCSC 103 at para. 18, Mr. Justice Punnett said that retroactive child support "should be based on the retroactive year's claimed incomes". Although I agree with that in principle, the matter is not that simple in this case because the parties do not agree that the claimant's line 150 income accurately reflects his income for the purpose of child support.
- [100] I start by reiterating that there is significant discretion with respect to the final quantum. Also, I have found that the claimant's income has large fluctuations. In my view, adopting a year by year approach, when the calculation is in aid of a s. 9 analysis, would become overly complicated. Specifically, given the annual fluctuations in both the amount and sources of the claimant's income, absent averaging, one would have to embark on a detailed accounting of each tax year using consistent methods. It seems unlikely that the approach in *K.A.M.R.* would produce a fairer result, especially in light of the amount of time and money each party would have to invest in performing that examination. A simpler approach to the calculation is warranted remembering this is merely the starting point for the analysis, not the end result. The Court of Appeal made a similar comment, albeit in the context of s. 4(b), in *Reid* at para. 125.

[101] I add, more importantly, that neither party provided material (submissions or evidence) detailed enough to establish that the approach they promoted produced the fairest determination (both in terms of analysis and conclusion) of child support.

2. Conclusion on Imputing Income in this Case

[102] For the purpose of retroactive child support, which I have determined should cover 2012 to 2019, and pursuant to the court's discretion under s. 19 of the Guidelines, I conclude that averaging the claimant's income over the retroactive period is the most appropriate starting point for the s. 9 analysis. Although such an approach is rare (see Harras at paras. 36-37), the circumstances of this case, notably the nature of the claimant's income profile and the appropriate period of retroactive support, indicate such an approach is warranted.

[103] Applying the \$1 million cap, the claimant's income for these years for the purpose of establishing an average income to calculate child support is:

- a) 2012 - \$411,247.65
- b) 2013 - \$0
- c) 2014 - \$1,000,000.00 (capped)
- d) 2015 - \$327,515.29
- e) 2016 - \$268,018.99
- f) 2017 - \$1,000,000.00 (capped)
- g) 2018 - \$53,134.25

[104] The claimant's average income for that period is \$437,130.88.

[105] However, for the purpose of prospective child support, I find this approach is not appropriate. Although I still find averaging is necessary given the significant fluctuations in the claimant's income profile, such an average should focus on the three most recent tax years provided.

[106] As a result, pursuant to s. 17(1) of the Guidelines, I find that the fairest determination of the claimant's current income is to average the three-year period for which tax information is available. With the \$1 million cap, the claimant's income for these years for the purpose of establishing an average income to calculate child support prospectively is: 2016 - \$268,018.99; 2017 - \$1,000,000.00 (capped); and 2018 - \$53,134.25. The claimant's average annual income for 2016 to 2018 is \$440,384.41.

[107] In reaching these conclusions I have placed particular weight on the overriding importance of the objective of the Guidelines which is to ensure that the parent's financial means are to be available for child support: Brown at para. 30.

[108] The claimant submits income should be imputed to the respondent because she continued to work part-time until 2017. The evidence does not support a finding that she was intentionally under-employed pursuant to s. 19(1)(a). In addition, the claimant did not identify in his application response that he sought to impute income to her. It is not clear to me that the issue is properly before me. C. Applying s. 9 to Retroactive Support

1. Table Amounts - s. 9(a)

[109] Implementing the preceding analysis, based on the approach taken by respondent's counsel to her income and using the imputed income determined above for the claimant (see above, para. 104 - \$437,130.88), the applicable table amounts for the parties and set-offs would be (2017 is broken up due to a change in the table amount):

Year	Claimant Table Amount	Respondent s. 16 Income	Respondent Table Amount	Set-Off (owed to respondent)
Total for the Year 2012 (Sept. to Dec.)	\$3,447.77	\$56,135.76	\$518.36	\$2,929.41
2013	\$3,447.77	\$56,736.00	\$524.36	\$2,923.41
2014	\$3,447.77	\$52,854.39	\$486.54	\$2,961.23
2015	\$3,447.77	\$68,943.13	\$643.24	\$2,804.53
2016	\$3,447.77	\$71,533.14	\$668.12	\$2,779.65
2017 (to Nov.)	\$3,447.77	\$77,155.82	\$721.40	\$2,726.37
2017 (Dec.)	\$3,595.62	\$77,155.82	\$737.56	\$2,858.06
2018	\$3,595.62	\$77,403.23	\$740.03	\$2,855.59
2019	\$3,595.62	\$77,403.23	\$740.03	\$2,855.59
Total set-off amount during retroactive period:				\$250,725.77

2. Claimant's Additional Payments

[110] Before turning to the rest of the s. 9 analysis as it relates to retroactive support, I will consider the claimant's payments during this period. As noted earlier (paras. 41, 65), in my view this factor is most appropriately analyzed in determining the appropriate quantum of a retroactive award.

[111] In terms of what was explicitly referred to as child support, the claimant paid a total of \$156,000 comprised of:

- a) September 2012 to February 2019, the claimant was paying \$1,500 per month in child support, a total of \$117,000 (78 months).
- b) March 2019 to May 2019 and September 2019 to November 2019, the claimant was paying \$4,000 per month in child support, a total of \$24,000 (six months).
- c) June 2019 to August 2019, the claimant was paying \$5,000 per month in child support or \$15,000 for this period (three months).

[112] It is appropriate that the claimant receive 100% credit for these payments.

[113] Turning to other amounts, between 2012 and 2018 the claimant submits he paid an additional \$116,926.57, directly and indirectly to the respondent to cover costs associated with the child. As noted earlier, the 2009 Order did not address s. 7 expenses. On that basis, the claimant submits he had no legal obligation to pay those amounts.

- [114] The respondent does not contest the amount, but submits it should not be credited to the claimant in quantifying a retroactive award. Her position is that most of these payments are appropriately considered s. 7 expenses and ought not to change the child support obligation or the amount of the retroactive support award.
- [115] The claimant's position does not provide a complete answer to the respondent's position. Although there is no court order ordering payment of s. 7 expenses, it is probable that the respondent would have succeeded in obtaining an order with regard to at least some of the expenses (such as braces). It should not count against her that she did not force the issue into litigation.
- [116] At the same time, it is not fair to the claimant to ignore the additional amount of money he paid for the child's benefit. I note but for three minor instances, the claimant paid all amounts requested by the respondent. Also, generally s. 7 expenses are shared by the parents according to the percentage of each parent's income compared to their combined income.
- [117] The total amount the claimant paid for child support and additional expenses from September 2012 to December 2019 is \$22,200.80 more than the s. 9(a) set-off amount calculated above (para. 109). I understood the claimant's position to be all of the extra expenses should be accounted for, which in this case, would result in no award for retroactive support (he did not seek repayment of any possible overpayment). However, I am not satisfied on the evidence that all of the \$116,926.57 would necessarily qualify as amounts paid for the support of the child such that they should be credited against a retroactive award.
- [118] The amount of child support the respondent received was \$156,000, which is nearly \$100,000 less than the s. 9(a) set-off amount (see above, para. 109). In my view, it is the difference between these figures that is the most relevant in deciding whether any adjustment to the set-off is appropriate. So while I agree an adjustment should be made to account for the claimant's extra payments, it should be modest at best because of the almost \$100,000 difference between the assessed set-off and the child support he actually paid.

3. Costs of Custody Arrangements - s. 9(b)

- [119] Turning to ss. 9(b) and (c), in *Contino* at para. 51, the Court made the general statement: This is where discretion comes into play. The court retains the discretion to modify the set-off amount where, considering the financial realities of the parents, it would lead to a significant variation in the standard of living experienced by the children as they move from one household to another, something which Parliament did not intend. As I said in *Francis v. Baker*, one of the overall objectives of the Guidelines is, to the extent possible, to avoid great disparities between households. It is also necessary to compare the situation of the parents while living under one roof with the situation that avails for each of them when the order pursuant to s. 9 is sought. As far as possible, the child should not suffer a noticeable decline in his or her standard of living. Still, it is not a discretion that is meant to

set aside all rules and predictability. The court must not return to a time when there was no real method for determining child support (Paras v. Paras, [1971] 1 O.R. 130 (C.A.)).

- [120] With respect to the increased costs of shared custody, in Contino at para. 52, the Court said s. 9(b) "recognizes that the total cost of raising children in shared custody situations may be greater . Consequently, all of the payor parent's costs should be considered". The court needs to determine "whether shared custody has in effect resulted in increased costs globally", which "normally result from duplication resulting from the fact that the child is effectively being given two homes."
- [121] The court needs to examine what additional costs are the result of the shared custodial arrangement. Not all duplication is necessarily warranted. Moreover, the increased cost is to be "apportioned between the parents in accordance with their respective incomes": Contino at para. 53
- [122] The claimant's position is that any retroactive award must take into account the increased cost to him of the shared custody arrangement. His spouse and youngest child live in Victoria. He rents a house in North Vancouver in order to exercise his parenting time with the parties' child and he travels to and from Victoria. On that basis, he claims that increased costs in the amount of \$100,000 should be credited to him each year.
- [123] Comparing the claimant's written submission with his Form F8, he appears to break down that amount as follows (I note the total of the following amounts is more than \$100,000):
- a) \$4,795.64 monthly for rent and utilities, or \$57,548 annually;
 - b) \$1,800 monthly for food for him and the child, or \$21,600 annually;
 - c) \$2,128.12 monthly for the child's expenses, or \$25,537 annually; and,
 - d) \$1,250 monthly for ferries and gas, or \$15,000 annually.
- [124] The respondent disputes that the claimant has adduced evidence sufficient for the court to accept these amounts as credible and reliable. She also submits not all the items are appropriately included, and that the total amount claimed is unreasonable.
- [125] However, these parties have always been in the situation where they had to maintain a home separate from the other party to exercise parenting time with the child. They have never lived together, nor had a joint household. Therefore, it is not clear to me that shared parenting has resulted in any increased costs to either party.
- [126] Furthermore, the claimant relocated to Victoria knowing the child's home would remain in North Vancouver. Even though he had an important and valid reason to relocate, his living costs have increased because of that decision not because of any change in the custodial arrangements of the parties' child. In addition, the claimant still works in Vancouver and I find it highly improbable that all the travelling and living expenses could properly be attributed to his exercise of parenting time with the child.

[127] In any event, I also agree that the claimant has provided insufficient documentation verifying expenses. In particular, it is not clear to me what of the child's expenses, an amount of over \$25,000 annually, could be attributable to shared custody. The amount claimed for food is not appropriate since he would have to pay for food for him and the child no matter where he lived.

[128] I acknowledge it is to the child's benefit that the claimant maintains a home close to the respondent's, and that he travels frequently to live with the child. However, I assume his decision to live in Victoria was made in full knowledge both that he would have to maintain a residence in Vancouver to exercise shared parenting, and that he could afford to do that.

[129] In my view, this factor does not support adjustment to the set-off amount in favour of the claimant.

4. Conditions, Means, Needs and Other Circumstances - s. 9©

[130] I have canvassed some of these issues as part of the retroactive support analysis (see above, paras. 22-62), and will not repeat that here. However, I will consider the additional aspects this factor mandates. In *Contino* at paras. 68-71, the Court provided the following guidance on s. 9©: Section 9© vests the court a broad discretion for conducting an analysis of the resources and needs of both the parents and the children. As mentioned earlier, this suggests that the Table amounts used in the simple set-off are not presumptively applicable and that the assumptions they hold must be verified against the facts, since all three factors must be applied. Here again, it will be important to keep in mind the objectives of the Guidelines mentioned earlier, requiring a fair standard of support for the child and fair contributions from both parents. The court will be especially concerned here with the standard of living of the child in each household and the ability of each parent to absorb the costs required to maintain the appropriate standard of living in the circumstances. The Court of Appeal enumerates a number of factors to be considered under this subsection:

1. Actual spending patterns of the parents;
2. Ability of each parent to bear the increased costs of shared custody (which entails consideration of assets, liabilities, income levels and income disparities); and
3. Standard of living for the children in each household. The actual spending patterns of the parents have already been considered under s. 9(b). These factors are helpful, the last one being particularly useful for the exercise of discretion in a predictable manner. As I indicated above, financial statements and/or child expenses budgets are necessary for a proper evaluation of s. 9(c).

[131] The child's standard of living in each household differs, and it is clear that the claimant is in the more advantageous position financially. I did not understand him to contest that assertion. In my view, it is at this step that the respondent's submissions regarding her financial position (see above, paras. 14-15, 53-56) are most relevant because they speak to her standard of living.

[132] Keeping in mind the Supreme Court of Canada's comments that child support has moved away from a need-based model, this factor supports adjusting the set-off in favour of the respondent.

5. Conclusions on Quantum

[133] Having regard to the preceding discussion and analysis regarding applying s. 9 of the Guidelines, I agree with the respondent that the set-off should be adjusted in her favour. For simplicity, I exercise my discretion and award a lump sum.

[134] In doing so, I have considered the difference between the support the claimant paid and the set-off identified in the above table (paras. 109, 118). I also take into account a modest portion of the extra payments made by the claimant. Lastly, applying s. 9©, I conclude the set-off should be increased in favour of the respondent in light of the different standards of living in the parties' households and the parties' different financial situation. With those considerations in mind, I award \$50,000 to the respondent for retroactive child support. D. Applying s. 9 to Prospective Support

[135] For prospective child support (commencing January 2020), the starting point is the table amounts. Based on the claimant's income determined earlier (para. 106 - \$440,384.41), the claimant's table amount is \$3,621.00 and the respondent's table amount is \$740.03 (based on her 2018 income of \$77,403.23), resulting in a set-off amount of \$2,880.97 per month.

[136] For the reasons already discussed (paras. 119-129), I do not find any adjustment is appropriate pursuant to s. 9(b). With regard to s. 9(c), the factors discussed earlier are also relevant to prospective support.

[137] Taking into account all considerations, I conclude the set-off should be adjusted in favour of the respondent. I exercise my discretion and adjust the set-off amount such that the claimant pays child support prospectively in the amount of \$3,000 per month, starting January 2020.

[138] However, I do not find it appropriate to make this a final order. The respondent has sought financial disclosure of the claimant's private corporate interests, submitting that the claimant has still not fully complied with disclosure orders. To the extent anything does remain undisclosed, I do order its production within 30 day.

[139] Also, I am aware that the parties may still be litigating parenting time with the child. The resolution of both issues could affect the claimant's prospective child support obligation.

[140] Lastly, I am aware that the respondent may reconsider his past practice of paying for extra expenses upon request by the respondent in light of this judgment. The respondent had suggested the court could make an order regarding s. 7 and refer the assessment of those to the Registrar. That relief was not sought in her application, so it is not clear to me that I could make any order regarding s. 7.

[141] In any event, I think the better course is to allow both parties consider their position on how in the future they want to deal with what has previously been treated as "additional expenses" for the benefit of the child in light of these reasons for judgment. Ideally, they would come to an agreement on the issue. If they cannot agree, I would strongly urge them to consent to have the s. 7 expense issue considered together with any application to vary the interim support, or independently if no application to vary is made. I see no need to seize myself of such an application.

[142] Accordingly, I make an interim order for child support pursuant to s. 216(1) of the FLA in the amount of \$3,000 per month starting January 2020. V. SUMMARY OF CONCLUSIONS AND COSTS

[143] For all the reasons described in this judgment, I order the following:

- a) The claimant shall pay the respondent a lump sum of \$50,000 for retroactive child support;
 - b) The claimant shall pay interim child support starting in January 2020 in the amount of \$3,000 per month.
 - c) The claimant shall disclose any items that remain outstanding pursuant to the orders granted by Justice Mayer (May 28, 2019) and Master Harper (February 15, 2019).
 - d) Either party is at liberty to seek, in conjunction with or independent of any application to vary interim child support, an order regarding s. 7 expenses.
 - e) The respondent is entitled to her costs at Scale B. If there are circumstances of which I am unaware that are relevant to costs, the parties may seek a brief hearing before me so long as that request is made no later than 14 days from the date of this judgment. "Sharma J."
- APPENDIX "A" - INFORMATION FROM CLAIMANT'S TAX RETURNS 2009

1. Line 150 income - \$64,368.70, comprised of:
 - a. interest and investment income - \$4,862.34;
 - b. net professional income - \$109,882.12:
 - i. gross income - \$576,545.12, ii. total expenses - \$466,663.00;
 - c. net rental income loss - \$50,379.72:
 - i. gross rents - \$25,500.00, ii. total expenses - \$75,879.72.

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2. Schedule 3, net capital losses - \$31,292.71 (only publicly traded shares, mutual fund units, deferral of eligible small business corporation shares, and other share):
 - a. total proceeds of disposition - \$611,442.09,
 - b. total adjusted cost base - \$674,027.50,
 - c. total capital loss - \$62,585.41,
 - d. losses applied in 2009 - \$0.00,
 - e. carry forward losses - \$148,595.87.
 3. Non-capital losses - \$0.00:
 - a. applied in 2009 - \$49,279.23,
 - b. carry forward - \$438,839.64.
 4. Charitable donations - \$3,460.00;
 - a. applied in 2009 - \$0.00,
 - b. carry forward - \$16,600.00.
 5. Taxable income - \$12,438.60.
 6. Taxes paid - \$4,237.20. 2010
 7. Line 150 income - \$493,007.73, comprised of:
 - a. employment income - \$318,000.00;
 - b. interest and investment income - \$1,289.38;
 - c. net business income loss - \$104,895.15:
 - i. gross profit loss - \$104,895.15;
 - d. net professional income - \$287,425.11:
 - i. gross income - \$1,475,683.33, ii. total expenses - \$1,188,258.22;
 - e. net rental income loss - \$18,548.85:
 - i. gross rents - \$36,231.85, ii. total expenses - \$54,780.70;
 - f. taxable capital gains - \$9,737.24.
 8. Schedule 3, taxable capital gains - \$9,737.24 (only publicly traded shares, mutual fund units, deferral of eligible small business corporation shares, and other share):
 - a. total proceeds of disposition - \$19,474.48,
 - b. total capital gain - \$19,474.48,

- c. losses applied in 2010 - \$9,737.24,
- d. carry forward losses - \$139,900.47.
- 9. Non-capital losses - \$0.00:
 - a. applied in 2010 - \$149,511.19,
 - b. carry forward - \$284,988.03.
- 10. Charitable donations - \$225,840.00;
 - a. applied in 2010 - \$0.00,
 - b. carry forward - \$242,500.00.
- 11. Taxable income - \$13,396.15.
- 12. Taxes paid - \$4,326.30. 2011
- 13. Line 150 income - \$337,632.40, comprised of:
 - a. taxable amount of dividends from taxable Canadian corporations - \$388.69;
 - b. interest and investment income - \$2,939.11;
 - c. net professional income - \$201,332.22:
 - i. gross income - \$809,673.81, ii. total expenses - \$608,341.59;
 - d. net rental income - \$2,958.97:
 - i. gross rents - \$41,811.48, ii. total expenses - \$33,480.50;
 - e. taxable capital gains - \$130,013.22.
- 14. Schedule 3, taxable capital gains - \$130,013.22 (only publicly traded shares, mutual fund units, deferral of eligible small business corporation shares, and other share):
 - a. total proceeds of disposition - \$469,658.76,
 - b. total adjusted cost base - \$209,632.33,
 - c. total capital gain - \$260,026.43,
 - d. losses applied in 2011 - \$130,013.22,
 - e. carry forward losses - \$9,887.25.
- 15. Non-capital losses - \$0.00:
 - a. applied in 2011 - \$50,000.00,
 - b. carry forward - \$235,988.03.

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16. Charitable donations - \$3,940.00;
 - a. applied in 2011 - \$25,286.00,
 - b. carry forward - \$221,154.00.
 17. Taxable income - \$93,504.21.
 18. Taxes paid - \$4,435.20. 2012
 19. Line 150 income - \$411,247.65, comprised of:
 - a. interest and investment income - \$2,977.49;
 - b. net business income - \$195,739.28;
 - i. gross income - \$200,786.80, ii. gross profit loss - \$4,260.72;
 - c. net professional income - \$212,001.44:
 - i. gross income - \$563,847.99, ii. total expenses - \$351,846.55;
 - d. net rental income - \$529.44:
 - i. gross rents - \$36,586.97, ii. total expenses - \$31,759.92.
 20. Schedule 3, net capital losses - \$94,651.90 (only publicly traded shares, mutual fund units, deferral of eligible small business corporation shares, and other share):
 - a. total proceeds of disposition - \$507,144.63,
 - b. total adjusted cost base - \$696,448.43,
 - c. total capital loss - \$189,303.80,
 - d. losses applied in 2012 - \$0.00,
 - e. carry forward losses - \$111,423.53.
 21. Non-capital losses - \$0.00:
 - a. applied in 2012 - \$367,823.69,
 - b. carry forward - \$124,792.10.
 22. Charitable donations - \$68,095.00;
 - a. applied in 2012 - \$0.00,
 - b. carry forward - \$289,249.00.
 23. Taxable income - \$13,128.70.
 24. Taxes paid - \$4,613.40. 2013
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25. Line 150 income loss - \$2,351,057.15, comprised of:
- a. taxable amount of dividends from taxable Canadian corporations - \$779.56;
 - b. interest and investment income - \$2,346.15;
 - c. RRSP income - \$10,625.00
 - d. net business income loss - \$2,110,832.54;
 - i. gross income - \$92,000.00, ii. total expenses - \$1,702,971.32, iii. gross profit loss - \$499,861.22;
 - e. net professional income loss - \$242,228.16:
 - i. gross income - \$0.00, ii. total expenses - \$242,228.16;
 - f. net rental income loss - \$11,747.16:
 - i. gross rents - \$14,000.00, ii. total expenses - \$25,747.16;
26. Schedule 3, net capital losses - \$18,143.05 (only publicly traded shares, mutual fund units, deferral of eligible small business corporation shares, and other share):
- a. total proceeds of disposition - \$397,204.19,
 - b. total adjusted cost base - \$433,490.29,
 - c. total capital loss - \$36,286.10,
 - d. losses applied in 2013 - \$0.00,
 - e. carry forward losses - \$132,570.95.
27. Non-capital losses - \$2,360,540.21:
- a. applied in 2013 - \$0.00,
 - b. carry forward - \$2,459,165.47.
28. Charitable donations - \$1,214.00;
- a. applied in 2013 - \$0.00,
 - b. carry forward - \$290,463.00.
29. Taxable income - \$0.00.
30. Taxes paid - \$0.00. 2014
31. Line 150 income - \$1,944,003.08, comprised of:
- a. taxable amount of dividends from taxable Canadian corporations - \$2,275.54;
 - b. interest and investment income - \$46,492.58;

- c. net business income - \$1,783,506.81;
- i. gross income - \$3,600,000.00, ii. total expenses - \$1,816,493.19;
- d. net professional income - \$95,238.75:
- i. gross income - \$100,000.00, ii. total expenses - \$4,761.25;
- e. net rental income - \$16,489.40:
- i. gross rents - \$44,200.00, ii. total expenses - \$27,710.60;
- 32. Schedule 3, net capital losses - \$45,437.48 (only publicly traded shares, mutual fund units, deferral of eligible small business corporation shares, and other share):
 - a. total proceeds of disposition - \$42,324.53,
 - b. total adjusted cost base - \$132,764.49,
 - c. total capital loss - \$90,874.96,
 - d. losses applied in 2014 - \$0.00,
 - e. carry forward losses - \$178,008.43.
- 33. Non-capital losses - \$0.00:
 - a. applied in 2014 - \$1,867,913.67,
 - b. carry forward - \$591,251.80.
- 34. Charitable donations - \$1,258.00;
 - a. applied in 2014 - \$0.00,
 - b. carry forward - \$291,721.00.
- 35. Taxable income - \$15,842.03.
- 36. Taxes paid - \$4,851.00. 2015
- 37. Line 150 income - \$327,515.29, comprised of:
 - a. interest and investment income - \$6,005.88;
 - b. net business income - \$298,653.96;
 - i. gross income - \$471,650.00, ii. total expenses - \$172,996.04;
 - c. net rental income - \$22,855.45:
 - i. gross rents - \$50,400.00, ii. total expenses - \$27,544.55;
- 38. Schedule 3, net capital losses - \$48,173.17 (only publicly traded shares, mutual fund units, deferral of eligible small business corporation shares, and other share):

- a. total proceeds of disposition - \$186,644.89,
 - b. total adjusted cost base - \$282,991.23,
 - c. total capital loss - \$96,346.34,
 - d. losses applied in 2015 - \$0.00,
 - e. carry forward losses - \$216,293.86.
39. Non-capital losses - \$0.00:
- a. applied in 2015 - \$0.00,
 - b. carry forward - \$492,627.00.
40. Charitable donations - \$1,436.00;
- a. applied in 2015 - \$230,989.10,
 - b. carry forward - \$62,167.90.
41. Taxable income - \$307,985.47.
42. Taxes paid - \$8,482.48. 2016
43. Line 150 income - \$268,018.99, comprised of:
- a. interest and investment income - \$2,028.89;
 - b. net business income loss - \$55,974.04;
 - i. gross income - \$25,750.00, ii. total expenses - \$81,724.04;
 - c. net professional income loss - \$998.58:
 - i. gross income - \$0.00 ii. total expenses - \$998.58;
 - d. net rental income - \$5,943.02:
 - i. gross rents - \$50,400.00, ii. total expenses - \$41,018.89;
 - e. taxable capital gains - \$317,019.70.
44. Schedule 3, taxable capital gains - \$317,019.70 (only publicly traded shares, mutual fund units, deferral of eligible small business corporation shares, and other share):
- a. total proceeds of disposition - \$1,522,685.45,
 - b. total adjusted cost base - \$888,759.64,
 - c. total capital gain - \$633,925.81,
 - d. losses applied in 2016 - \$93,500.00,

- e. carry forward losses - \$122,793.69.
- 45. Non-capital losses - \$0.00:
 - a. applied in 2016 - \$0.00,
 - b. carry forward - \$492,627.00.
- 46. Charitable donations - \$1,436.00;
 - a. applied in 2016 - \$62,167.90,
 - b. carry forward - \$0.00.
- 47. Taxable income - \$106,686.28.
- 48. Taxes paid - \$0.00. 2017
- 49. Line 150 income - \$4,166,392.92, comprised of:
 - a. taxable amount of dividends from taxable Canadian corporations - \$69.00;
 - b. interest and investment income - \$3,293.85;
 - c. net business income loss - \$402.33;
 - i. gross income - \$92,029.15, ii. total expenses - \$92,431.48;
 - d. net professional income loss - \$4,895.22:
 - i. gross income - \$0.00, ii. total expenses - \$4,895.22;
 - e. net rental income - \$15,623.38:
 - i. gross rents - \$42,000.00, ii. total expenses - \$23,626.15;
 - f. taxable capital gains - \$4,152,704.24.
- 50. Schedule 3, taxable capital gains - \$4,152,704.24 (only publicly traded shares, mutual fund units, deferral of eligible small business corporation shares, and other share):
 - a. total proceeds of disposition - \$12,078,272.28,
 - b. total adjusted cost base - \$3,772,863.79,
 - c. total capital gain - \$8,305,408.49,
 - d. losses applied in 2017 - \$122,793.00,
 - e. carry forward losses - \$0.00.
- 51. Non-capital losses - \$0.00:
 - a. applied in 2017 - \$686,868.00,

- b. carry forward - \$0.00.
- 52. Charitable donations - \$12,352.25;
 - a. applied in 2017 - \$12,352.25,
 - b. carry forward - \$0.00.
- 53. Taxable income - \$2,592,347.24.
- 54. Taxes paid - \$1,200,975.69. 2018
- 55. Line 150 income - \$53,134.25, comprised of:
 - a. taxable amount of dividends from taxable Canadian corporations - \$276.00;
 - b. interest and investment income - \$6,900.78;
 - c. net business income - \$59,187.67;
 - i. gross income - \$83,000.00, ii. total expenses - \$23,812.33;
 - d. net professional income loss - \$3,318.18:
 - i. gross income - \$0.00, ii. total expenses - \$3,318.18;
 - e. net rental income loss - \$9,912.02:
 - i. gross rents - \$24,166.67, ii. total expenses - \$34,078.69;
- 56. Schedule 3, net capital losses - \$128,787.70 (only publicly traded shares, mutual fund units, deferral of eligible small business corporation shares, and other share):
 - a. total proceeds of disposition - \$2,640,407.23,
 - b. total adjusted cost base - \$2,897,982.63,
 - c. total capital loss - \$257,575.40,
 - d. losses applied in 2018 - \$128,067.50,
 - e. carry forward losses - \$720.89.
- 57. Non-capital losses - \$0.00:
 - a. applied in 2018 - \$0.00,
 - b. carry forward - \$0.00.
- 58. Charitable donations - \$13,004.00;
 - a. applied in 2018 - \$0.00,
 - b. carry forward - \$13,004.00.

59. Taxable income - \$0.00.

60. Taxes paid - \$5,184.85.

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Prepared on 25 October 2026 · Esheria