
CANADA / JUDGMENT

A.R.J. v. Z.S.H.

2021 BCSC 274

COURT

Supreme Court of British Columbia

DECIDED

22 February 2021

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2021 BCSC 274 A.R.J. v. Z.S.H.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

A.R.J. v. Z.S.H.,

2021 BCSC 274

Date: 20210222

Docket: E080419

Registry: Vancouver

Between:

A.R.J. also known as A.J.

Claimant

And

Z.S.H. also known as Z.A.J.

Respondent

Before: The Honourable Madam Justice Horsman

In Chambers

Reasons for Judgment

Counsel for the Claimant:

A. Swabuk-Moe

Counsel for the Respondent:

J. Werb

Place and Date of Hearing:

Vancouver, B.C.

January 19-20, 2021

Place and Date of Judgment:

Vancouver, B.C.

February 22, 2021

Table of Contents

OVERVIEW.. 3

PROCEDURAL HISTORY. 6

The 2009 Order 6

The 2015 Order 7

EVIDENCE OF THE PARTIES' CURRENT CIRCUMSTANCES. 9

The claimant 9

The respondent 11

Circumstances of the children. 12

ANALYSIS. 14

Preliminary issues. 14

i. Variation or review. 14

ii. Objections to the affidavits. 15

Issue 1: Determination of income. 17

The claimant's income. 17

Should principal debt repayments be included as income?. 17

Ms. Daum's estimate of the claimant's 2020 income. 19

Should the claimant's income be based on a three-year average?. 20

Summary of findings on the claimant's income. 22

The respondent's income. 24

The position of the parties. 24

Determination of the respondent's Guidelines income.	25
Issue 2: Retroactive child support	26
Issue 3: Ongoing child support	29
Table amount v. needs of the children and parties' resources.	29
Monthly amount of child support	33
The RESP funds.	34
Issue 4: Section 7 expenses.	36
REVIEW OF CHILD SUPPORT.	37
CONCLUSION/ORDERS.	38

OVERVIEW

- [1] The claimant applies to vary his child support obligations under an Order of Mr. Justice Leask, issued December 10, 2015 (the "2015 Order"), which in turn varied the Final Order of December 31, 2009 (the "2009 Order"). The claimant says his income has steadily declined since 2017 while the respondent's income has steadily increased, and therefore his child support obligations should be adjusted. He seeks a variation of his ongoing child support obligations, and reimbursement of retroactive child support from January 1, 2019.
- [2] The parties separated in 2008 following a 16-year marriage. There are two children of the marriage. The oldest child ("AN") will turn 21 this month, and the youngest ("AS") will turn 19 in March of this year. Both children are enrolled in post-secondary education programs at the University of British Columbia ("UBC"). They live full-time with the respondent, and have minimal contact with the claimant.
- [3] The claimant is a surgeon. He has always earned a very high income. His Guidelines income under the 2015 Order was determined to be \$725,000. He seeks a reduction to \$680,000.
- [4] The respondent is trained as a pharmacist, but she stopped working outside of the home after the youngest child was born. The respondent wishes to pursue a career in food and nutrition. She received a degree from UBC in the spring of 2020 but has not yet found employment in her new field. In recent years, the respondent has earned significant investment income. In 2019, her income was close to \$200,000.
- [5] In short, the parties have significant resources. The children have always been well provided for financially.

- [6] The 2015 Order requires the respondent to pay monthly child support in the amount of \$10,000, consisting of base Table support under the Federal Child Support Guidelines, SOR/97-175 [Guidelines], plus a payment towards the children's expenses. The claimant has also made monthly contributions to the children's Registered Education Savings Plan ("RESP") since the 2009 Order.
- [7] The claimant says his child support obligations should be varied to reflect his reduced income, the claimant's increased income, and the children's changed circumstances since the 2015 Order. The claimant says that support should be based on the children's conditions, means, and needs, and the financial resources of the parties, as permitted under the Guidelines where a child is over the age of majority (s.3(2)(b)), or the income of the payor spouse exceeds \$150,000 (s.4(b)).
- [8] The claimant says he is committed to continuing his financial contribution towards the children, including contribution towards their post-secondary expenses. However, he believes that their living expenses should now be financed from the substantial funds that have accumulated in the children's RESP. He proposes that, commencing April 2021, a sum of \$5,000 be paid from the RESP directly to each of the children per semester to cover their food and housing costs until the funds in the RESP are exhausted. These payments should, in the claimant's submission, be sufficient to address the actual financial needs of the children. The claimant's proposal anticipates that the RESP funds would entirely replace his monthly child support obligation once AS turns 19 years old in March 2021.
- [9] The respondent opposes all of the relief sought by the claimant. She disputes that the claimant's income has declined. The respondent says she incurs child-related expenses on a monthly basis because both children continue to live with her full-time. If the form of order sought by the claimant is granted, he would not be required to contribute to those costs. The respondent says the claimant's proposal for a \$15,000 annual payment to each of the children from the RESP as a replacement for child support is simply an indirect attempt by the claimant to terminate child support. The claimant says the RESP funds were always intended to ensure that the children's post-secondary tuition costs were covered through under-graduate degree and post-graduate degrees. The respondent objects to the claimant's proposal to deplete the RESP funds to cover costs that should be covered by child support.
- [10] Accordingly, the following issues arise for determination on this application:
- i. What are the respective Guidelines incomes of the parties?
 - ii. Is the claimant entitled to reimbursement in relation to a retroactive variation of child support to January 1, 2019, and if so in what amount?
 - iii. What is the appropriate amount of ongoing child support, and should it be paid out of the children's RESP?
 - iv. How should ongoing s. 7 expenses be paid?

- [11] There are, additionally, two preliminary issues. First, the claimant objects to consideration of two late-filed affidavits. Second, there is an issue as to whether the court orders to date provide for a review of child support, and, if not, whether the claimant has established a material change of circumstances justifying a variation of the existing child support order.
- [12] The history of conflict between the parties was evident on this application. The respondent deeply distrusts the claimant, and she is critical of his attempt to reduce his monthly child support. This is despite the fact that the claimant has paid a significant portion of his income to the respondent since the parties' separation by way of monthly spousal and child support payments. The claimant has never been in arrears in his support payments. He provided extensive financial disclosure in support of his application to vary child support to align with his current income and the needs of the children.
- [13] For the reasons that follow, I am satisfied that there should be a variation of the previous court orders in light of the changed circumstances, although not on the conditions sought by the claimant. While I agree that the change in circumstances warrants a reduction in child support, I do not agree that funds in the RESP should be used as a replacement for the claimant's monthly support payments. Given the significant uncertainties associated with the parties' future incomes, and the children's future educational programs, my orders on this application will include a term permitting either party to seek a review of child support after two years.

PROCEDURAL HISTORY

The 2009 Order

- [14] The parties married in August 1992, separated in 2008, and divorced on January 11, 2010. The claimant is now 56 years old and the respondent is 48. The claimant has worked as a sinus surgeon since the parties' separation. As noted, the respondent worked as a pharmacist until the parties' second child, AS, was born, and thereafter has not worked outside the home.
- [15] The claimant commenced this proceeding under the Family Relations Act, RSBC 1996, c. 128 [FRA], in February 2008. There was a high level of conflict between the parties, specifically in relation to parenting issues. The claimant deposes that reports prepared pursuant to s. 15 of the FRA in 2008 and 2009 concluded that the respondent was alienating the children from the claimant. The respondent disputes the claimant's evidence regarding this history. The s. 15 reports are not in evidence. It is not necessary to resolve the question of what happened in 2008 and 2009 with respect to parenting arrangements for the children in order to decide the issues raised on the present application.
- [16] In 2009, on the eve of trial, the parties reached a comprehensive settlement of the issues following a settlement conference before Mr. Justice Leask. The parties' agreement was reflected in the 2009 Order. The 2009 Order included the following relevant terms:

- a) there would be a shared parenting arrangement, on a week on/week off basis;
 - b) the claimant's income for child support purposes was determined to be between \$800,000 and \$840,000, and the respondent's income was between nil and \$25,000;
 - c) the claimant would pay the respondent child support of \$9,500 per month, consisting of a base Guidelines amount of \$9,000, and \$500 towards the children's activity costs (which totalled \$800/month at the time);
 - d) child support would be reviewed annually, with liberty to apply to Mr. Justice Leask if necessary;
 - e) the claimant would continue to pay the entirety of certain expenses of the children, including their private school tuition and contributions to the children's RESP in the monthly amount of \$666;
 - f) additional s. 7 expenses in excess of \$1,500, as agreed to in advance in writing, would be shared on a two-thirds (claimant), one-third (respondent) division;
 - g) the claimant would pay the respondent \$17,000 per month in spousal support for a period of five years, with a further review of spousal support to be conducted by Mr. Justice Leask in January 2015.
- [17] At the time of the settlement conference in 2009, the respondent was not working as a pharmacist and did not intend to return to that field of employment. Instead, the respondent indicated her intention to pursue a degree in nutrition.

The 2015 Order

- [18] In January 2015, the claimant filed an application for a review of child and spousal support on the basis that he was not earning the income imputed to him in the 2009 Order. By this time, the claimant's relationship with the children had deteriorated, and the children and were residing full-time with the respondent. The parties' efforts to negotiate a resolution of the issues, including through a settlement conference before Mr. Justice Leask, were unsuccessful.
- [19] The claimant's application was finally heard on December 1 and 10, 2015. Mr. Justice Leask allowed the application, at least in part, and varied the 2009 Order as follows:
- a) the claimant's Guidelines income was determined to be \$725,000, and the respondent's income \$75,000;
 - b) the claimant would pay the respondent \$10,000 per month in child support, consisting of \$9,250 as base support and \$750 per month as contribution to the children's activities and tutoring;

- c) the monthly child support payments would continue "pending further Order or written agreement of the parties";
- d) the claimant would pay the respondent monthly spousal support of \$12,000, continuing until July 1, 2020, when spousal support would terminate.

[20] The 2015 Order was issued on December 10, 2015, the final day of the application hearing. The parties disagree as to the Court's rationale for imputing income of \$75,000 to the respondent, and in particular whether the imputed income consisted of employment income, investment income, or a combination of the two. It does not appear that reasons for judgment can be located which might illuminate the rationale for the variation.

[21] In her Affidavit #22, made June 10, 2015, the respondent deposed that as of the time of the 2015 variation application, she was still working towards a degree in nutrition, and could only take courses part-time due to parenting demands. She stated:

Having said all that, I enjoy my current program in International food nutrition and the opportunities for a financially rewarding and satisfying career are enormous and I am really excited about my prospects.

[22] As anticipated by the 2015 Order, the claimant's spousal support payments to the respondent ceased as of July 2020. He has continued to pay child support at the level set by the 2015 Order (\$10,000 per month) in addition to covering the other expenses required by the 2009 Order.

EVIDENCE OF THE PARTIES' CURRENT CIRCUMSTANCES

The claimant

[23] The claimant continues to work as a sinus surgeon. He is the sole shareholder of companies referred to in the material as "Medco" and "3A Holdings". The claimant provides medical and surgical services through Medco, which is wholly owned by 3A Holdings. Medco's main source of revenue is professional fees. 3A Holdings is in the business of leasing residential buildings and dwellings. 3A Holdings currently owns one property which is being rented out, with such rent included in the revenues of 3A Holdings. The claimant also owns rental property jointly with his current spouse. The property is rented out and the rent is included in the claimant's personal income tax returns.

[24] The claimant's evidence is that his income has steadily declined since 2017 due to factors that include:

- i. COVID-19 related income loss and rental increases in 2020. The claimant derives 50% of his revenue from elective surgeries, and the other 50% from seeing patients in his clinic. Both sources of revenue were negatively impacted by COVID-19 restrictions because:

- elective surgeries were cancelled between March and June, 2020, resulting in a significant income reduction; and
- the claimant cannot see patients in his clinic with the same speed or efficiency due to new social distancing and hygiene regulations.

The claimant previously paid himself a salary of \$48,000 per month, but reduced this to \$21,000 in April 2020. In addition, the claimant has been required to rent space for his clinics due to COVID-19 related impacts on the time allocated to him in the hospital clinic, which does not require him to pay rent. The additional rental payments total \$4,500 per month.

ii. The income the claimant receives through his rental property declined in 2020 as his tenants left and the claimant undertook a major renovation to the unit.

iii. The claimant pays \$3,000 per month on a line of credit that relates to a Medical Services Commission ("MSC") liability. The claimant says the liability was incurred during the parties' marriage but was not identified until after the parties had separated and thus was not accounted for in the division of property and debt.

iv. The claimant's age. The claimant is now 56 years old. The claimant deposes that he cannot continue to work at the same pace as he did when he was younger. Prior to COVID-19, the claimant says he worked 12-hour days in addition to teaching and research commitments. These hours take a toll on his physical and mental health. The claimant anticipates retiring at the age of 65 and he expects his income will continue to decline until then.

[25] Both parties submitted Guideline Income Reports to determine the claimant's income for child support purposes.

[26] The claimant relies on the reports prepared by Patti Daum, a Chartered Professional Accountant and Chartered Business Valuator. Ms. Daum prepared two reports, one dated July 17, 2020, and an updated report dated November 13, 2020. In her first report, Ms. Daum forecasted the claimant's income for 2020 at \$472,299. Ms. Daum revised this estimate after receiving updated financial information from the claimant. In her November 2020 report, Ms. Daum determined the claimant's income as follows:

2017 \$754,000

2018 \$723,000

2019 \$680,000

2020 (est.) \$679,000

[27] In estimating the claimant's 2020 income, Ms. Daum used actual revenues earned by Medco to September 30, 2020, and then estimated revenues for October, November and December based on earnings in the same months in 2019.

[28] The respondent relies on the October 27, 2020 report of Gary Mynett, a Chartered Accountant and Chartered Business Valuator. Mr. Mynett determined the claimant's income in the years 2017-2019 as follows:

2017 \$819,000

2018 \$796,000

2019 \$728,000

[29] Mr. Mynett declined to provide an estimate of the claimant's income for 2020 because complete information was not yet available.

[30] As noted in Mr. Mynett's report, the difference in the income calculations of the two experts is primarily explained by the fact that Ms. Daum assumed that principal debt repayments by Medco and 3A Holdings should be deducted from the income available for support purposes. The debt repayments consisted of mortgage principal repayments by 3A Holdings and principal repayments by Medco on what is described in Ms. Daum's report as "long-term debt". Mr. Mynett opines that it is not appropriate to treat the principal debt repayments as unavailable income as the payments are not a company expense but rather a use to which income was put. Mr. Mynett suggests that the question of whether the debt repayments should be included as available income is "ultimately a legal matter".

The respondent

[31] The respondent lives in a townhouse in West Vancouver with the children. She purchased the townhouse in July 2020 for \$1.8 million after selling the former family home for \$3.7 million in April 2020. The respondent retained the former family home in the division of family property under the 2009 Order. The respondent's affidavit material does not explain what she did with the \$1.9 million profit on the sale of the former family home following her purchase of the townhome.

[32] The respondent remains unemployed. She received her Bachelor of Science degree in Food and Nutrition from UBC in the spring of 2020. The respondent deposes that she has applied for several jobs and has had some job interviews but has not received any offers. She believes that there are fewer jobs available due to COVID-19. She says the only well-paying jobs presently available to her in her field are outside of the Lower Mainland. The respondent's affidavit material does not include any supporting documentation to evidence her job searches, job applications, or the impact of COVID-19 on available job opportunities in her field.

[33] The respondent's income tax returns from 2017, 2018 and 2019, reflect that she earned the following investment income in those years:

2017 \$70,821

2018 \$159,168

2019 \$198,433

[34] The respondent has not provided an income tax return for 2020. She deposes to her belief that her investment income will be much lower in 2020, due in part to COVID-19. She believes that some of the companies she has invested in are on the verge of bankruptcy. The respondent's affidavit material does not include any supporting documents evidencing the investment income she received in 2020. The only income documentation she has provided are her income tax returns and notices of assessment for the years 2017, 2018, and 2019. She says she cannot estimate what her income will be in 2020, she just expects it to be lower.

Circumstances of the children

- [35] AN graduated from high school in June 2018. She is now enrolled in post-secondary studies at UBC, working towards a Bachelor of Science degree. Enrollment records reflect that AN has been enrolled in full-time studies in every semester since September 2018 except for the summer semester of 2019 when she took less than a full-time course load.
- [36] AS graduated from high school in June 2020. In September 2020, she commenced a full-time Bachelor of Arts program at UBC. AS will continue her studies through the summer semester this year.
- [37] The children's post-secondary tuition and books are paid for from funds in the RESP. The value of the RESP on September 30, 2020 was \$161,427. The respondent says that she pays over \$2,000 per month towards tutoring fees for the children and receives no reimbursement for that expense from the claimant. The claimant says he was never advised that the children were receiving tutoring, and the respondent has never provided him with any invoices related to tutoring. The respondent's affidavit material does not include any receipts, or other documentation, to evidence the tutoring expenses she claims.
- [38] The respondent deposes that both children wish to pursue post-graduate programs of study. AN's goal is to attend medical school. She plans to take the Medical College Admission Test this summer. AS wishes to eventually enroll in law school. Both children volunteer at BC Children's Hospital and BC Cancer Research. AN also volunteers as a pharmacy assistant and AS volunteers for a local Member of Parliament. The respondent says that the children have chosen volunteer opportunities that will assist them in future educational opportunities. It appears that neither of the children have yet worked at a paying job. The respondent says they do not have time to work given the demands of their study and volunteer schedules.

- [39] The children are currently estranged from the claimant. The reasons for the estrangement are disputed. The claimant deposes that the respondent has interfered with and obstructed his relationship with the children. He says he has tried to maintain a relationship with them. Until AN's high school graduation, he called the children every week and on their birthdays. Since June 2018, there has been minimal contact. The claimant says he only hears from the children when they require financial assistance from him.
- [40] The respondent, by contrast, says that the claimant has always had a difficult relationship with the children and stopped making any effort to have a real relationship with them a long time ago. She says the children have tried to see and spend time with the claimant, and it is the claimant who has failed to reciprocate. AN's affidavit evidence is consistent with the claimant's evidence. AN says that she and her sister have made efforts over the years to spend time with their father, but the claimant has not responded.

ANALYSIS

Preliminary issues

i. Variation or review

- [41] The claimant submits that the child support term in the 2009 Order, providing for annual review of child support, remains operative notwithstanding that the term was varied by the 2015 Order. As such, the claimant says this application constitutes a review, which means he is not required to show a material change in circumstances in order to have child support adjusted. Alternatively, the claimant casts his application as a variation application pursuant to s. 17(1) of the Divorce Act, RSC 1995, c.3 (2nd Supp.). He says the changes to the parties' incomes since 2015 and the children's graduation from high school collectively constitute a material change in circumstance that justify revisiting the current level of child support.
- [42] The respondent did not directly address the question of whether this is a review or a variation application, either in her application response or written argument for the hearing. As I set out below, the respondent concedes that her income has increased since 2015, and does not oppose a variation of the income determined for her in the 2015 Order. She does oppose any reduction in the claimant's child support payments. She says the claimant's income has not decreased, other than perhaps a temporary decrease due to COVID-19 impacts.
- [43] In my view, the claimant's application is properly viewed as an application to vary child support pursuant to s. 17(1) of the Divorce Act, rather than a review of child support. Term 7 of the 2009 Order, which contained the provision for annual review of child support, was varied by Term 3 of the 2015 Order. Term 3 of the 2015 Order does not contain a provision for annual review but rather says that the claimant will pay monthly child support in the amount of \$10,000 "pending further Order or written agreement between the parties". For the reasons set out below, I conclude that there has been a material change in circumstances that warrants a variation of the 2015 Order pursuant to s. 17(1) of the Divorce

Act.

ii. Objections to the affidavits

- [44] The claimant objects to the admissibility of two affidavits that were filed and served by the respondent on January 14, 2021, less than one week before the hearing of this application: the Affidavit #25 of the respondent, and the Affidavit #2 of Sandy Waldie, a paralegal employed by the firm representing the respondent. The respondent's Affidavit #25 provides a detailed factual response to various assertions in the claimant's response material. Affidavit #25 is primarily directed at two subjects: (i) the claimant's relationship with the children, and (ii) the claimant's allegation that the respondent has failed to disclose relevant financial records. Ms. Waldie's Affidavit #2 simply appends various documents that the respondent wishes to have in evidence, including documents said to evidence the children's grades at UBC, admission criteria for the UBC Faculty of Medicine, and documents provided by claimant's counsel in January 2021 in response to requests for production.
- [45] The claimant points out that R. 10-6(13) of the Supreme Court Family Rules, B.C. Reg. 169/2009, provides that a party must not serve additional affidavits beyond those served under subrules (6), (8) and (12) unless all parties consent or the court otherwise orders. These subrules provide for the service of: application material (6); material from the application respondent (8); and the applicant's response to the respondent's material (12). The disputed affidavits were not served under any of these subrules. As the claimant does not consent to the affidavits forming part of the application record, the respondent requires leave of the court to tender them.
- [46] In *Quigg v. Quigg*, 2019 BCSC 628, Madam Justice Choi held that in determining whether to grant leave to a party to tender additional affidavits, the court should balance such factors as: (i) prejudice to the other party, (ii) the importance of the evidence to a proper determination of the case on the merits, and (iii) the interests of justice.
- [47] Applying those factors to the present case, I find there is prejudice to the claimant in the late delivery of this material as he had no opportunity to respond, short of requesting an adjournment of this application. Much of the material in the disputed affidavits appears to me to be irrelevant, repetitive, or inadmissible hearsay. The conflict between the parties over the reasons for the breakdown of the claimant's relationship with the children is well-canvassed in the previously filed affidavits. The respondent's belated explanations for her failure to provide requested financial documentation regarding her income and expenses do not fill the existing evidentiary gaps. Ms. Waldie's Affidavit #2 appends documents that she cannot authenticate, and the body of her affidavit purports to provide additional context for the documents that is clearly outside her direct knowledge.
- [48] In my view, with limited exceptions, the interests of justice weigh against the admission of the disputed affidavits. The late delivery of the material prejudices the claimant, and the material is, in any event, of limited relevance to the issues raised on this application. The exceptions are Exhibits "H", "I" and "J" to the Affidavit #2 of Ms. Waldie. Exhibits "H" and "I"

are spreadsheets recording the claimant's travel expenses from 2018 to 2020. The documents are relevant to the respondent's argument that the claimant's business travel expense deductions are overstated. The claimant provided the spreadsheets to the respondent on January 12, 2021, so there was no earlier opportunity to put them in evidence. Exhibit "J" is a property assessment of the claimant's current residence. While I accept that the assessment could have been provided earlier, the assessed value of the claimant's home should not be a controversial topic.

- [49] For these reasons, I conclude that the Affidavit #25 of the respondent and the Affidavit #2 of Ms. Waldie will not form part of the record on this application, with the exception of Exhibits "H", "I", and "J" of Ms. Waldie's Affidavit #2.

Issue 1: Determination of income

The claimant's income

- [50] As the claimant is the sole shareholder of Medco and 3A Holdings, it is not contentious that s. 18 of the Guidelines is relevant to the determination of his income. Section 18(1)(a) permits the court to find that the income available to the payor spouse includes all or part of the pre-tax income of a corporation in which the spouse is a shareholder, director or officer.
- [51] The respondent takes issue with Ms. Daum's calculation of the claimant's income. The respondent says that Mr. Mynett's opinion should be preferred on the question of whether principal debt repayments by Medco and 3A Holdings should be deducted from income. She also objects Ms. Daum's determination of the claimant's income in 2020 on the grounds that Ms. Daum overstated the claimant's business travel expenses and failed to include a COVID-19 subsidy as income. There is also dispute between the parties as to whether the claimant's income for support purposes should be based on his 2020 income, as argued by the claimant based on Ms. Daum's estimate, or an average of his income in 2017, 2018, and 2019, as argued by the respondent. I will address issue of these issues in turn.

Should principal debt repayments be included as income?

- [52] The respondent says that money used to make principal debt repayments are part of the pre-tax income of the claimant's companies, and therefore should be considered to be money available to the claimant for child support pursuant to s. 18(1)(a) of the Guidelines. She says the claimant has not provided sufficient evidence to establish that the debt repayments were required in order to maintain the businesses as a going concern. Further, she says, the financial records evidence that both Medco and 3A Holdings increased their retained earnings in 2017, 2018, and 2019, and therefore the debts could have been paid off in full with the companies' retained earnings.
- [53] The claimant says that principal debt reduction payments were legitimate expenditures made by the companies in the ordinary course of business and should not be included in the claimant's income for support purposes. The claimant relies on the decision of the Court of

Appeal in *Mackenzie v. Mackenzie*, 2014 BCCA 381 [Mackenzie], which considered a similar issue of whether a company's mortgage principal repayments should be considered as income available for support. The question to be addressed in such a case, as framed in *Mackenzie*, is whether the payor spouse has provided clear evidence that the payments were "necessary to sustain the company as a viable enterprise" and therefore not available to pay support: *Mackenzie* at para. 99.

- [54] On the facts in *Mackenzie*, the Court of Appeal held that the payor spouse had established that the payments towards mortgage principal were necessary to sustain the company:
- [101] Both the property holdings and the mortgages were long-standing, and there is no suggestion that the company acquired the properties or entered into the mortgages as part of a scheme to manipulate amounts that might be available for support purposes. The principal payments were obligatory--they were ordinary payments made under mortgage contracts and were not the result of any decision to accelerate the retirement of the mortgages.
- [55] The Court in *Mackenzie* also noted that the onus on the payor spouse to demonstrate that corporate income is not available for tax purposes must not be interpreted to mean that the payor spouse must demonstrate that the business could not be run in a manner that would generate more income: *Mackenzie* at para. 102.
- [56] In the present case, the claimant's companies similarly used income to pay down long-term debt, including mortgage debt, in the ordinary course of business. As in *Mackenzie*, there is no evidence here that the companies acquired the debt or entered into the mortgages as part of a scheme to manipulate the claimant's income for support purposes. There is no indication that the payments were the result of a decision to accelerate debt repayment.
- [57] The respondent suggests that 3A Holdings and Medco could have used their retained earnings to retire the debt as opposed to using income to pay it down. There is no evidence before me of the consequences to the companies, including tax consequences, of withdrawing retained earnings by way of dividends in order to retire the debt. Furthermore, as held in *Mackenzie*, the claimant does not have the onus of demonstrating that the companies could not be run in a manner that would generate more income.
- [58] I find that the claimant has met the onus on him to establish that the principal debt repayments that Ms. Daum excluded from income were necessary to sustain the companies as viable enterprises. It is not income available for child support purposes. I therefore prefer Ms. Daum's income calculations for the years 2017 to 2019 over Mr. Mynett's income calculations.

Ms. Daum's estimate of the claimant's 2020 income

- [59] The respondent raises three criticisms of Ms. Daum's estimate of the respondent's 2020 income.

- [60] First, the respondent says that Ms. Daum overstated the claimant's expected business travel expense deductions for 2020. Ms. Daum assumed the claimant's business travel expenses in 2020 would be \$25,512, based on information available as of June 30, 2020. The claimant says Ms. Daum should have assumed that the claimant's travel would be severely restricted in the latter half of 2020, rather than assuming the expenses would be evenly distributed through the year. The respondent says that the travel expense deduction for 2020 should be limited to the travel expenses the claimant had actually incurred as of June 30, 2020, as evidenced in the spreadsheets appended as Exhibits "H" and "I" to Ms. Waldie's Affidavit #2, which is \$12,588.
- [61] I am not persuaded that the respondent's assumption that the claimant would not incur any travel expenses in the second half of 2020 is any more reliable than Ms. Daum's assumption that the expenses would be evenly distributed through the year. It is undoubtedly the case that the claimant travelled less for business purposes in 2020 than he did in previous years as a result of COVID-19. However, there is no basis to conclude that the restrictions on the claimant's business travel applied unevenly as between the first half of 2020 and the second half. In my view, Ms. Daum's assumption is a reasonable one.
- [62] The claimant's second criticism relates to Ms. Daum's decision not to include the \$22,189 in Canada Emergency Wage Subsidy ("CEWS") received by Medco in her income calculation for 2020 because it is a non-recurring benefit. I am also not persuaded that this criticism is legitimate. The CEWS was, as the name suggests, an emergency wage subsidy that is outside the scope of the income ordinarily earned by the claimant. Ms. Daum's decision to exclude the CEWS payment as income for support purposes seems a reasonable one to me.
- [63] Finally, the respondent takes issue with Ms. Daum's projection of the \$12,600 in rental income received by 3A Holdings in 2020. Ms. Daum assumed that the rental income would be the same as it had been in 2019. As I understand the respondent's argument, she says that the rental income in 2019 significantly decreased from the rental income in 2018 (\$21,120), and in the absence of any explanation for the decline Ms. Daum should have used the 2018 rental income.
- [64] I also do not agree with this criticism. The 2019 rental income was the most current information available to Ms. Daum. It is not clear to me why the respondent insists that Ms. Daum ought to have relied on rental income information from 2018 to make her assumptions rather than more recent information, other than the fact that this would result in a higher income for child support purposes.
- [65] I therefore accept the opinion of Ms. Daum, as set out in her November 2020 report, of the claimant's estimated income for 2020.

Should the claimant's income be based on a three-year average?

- [66] The final point of contention between the parties is whether the claimant's income for child support purposes should be based on his 2020 income, as the claimant maintains, or on the basis of a three-year average from 2017 to 2019, as the respondent maintains. If a three-year average over the years 2017-2019 is used then, based on Ms. Daum's income calculations, the respondent's income for support purposes would be \$719,000. The claimant says his income should be determined to be \$680,000, which is consistent with Ms. Daum's estimate of his income in 2020.
- [67] As I understand the respondent's argument, she says that Ms. Daum's estimated income for the claimant in 2020 should not be relied on in the determination of his income, and that Mr. Mynett's figures for the years 2017, 2018, and 2019 should be averaged. Alternatively, she says that if Ms. Daum's estimate is to be used, then it must be adjusted upward to reflect that the principal debt repayments and the CWES subsidy are included income, and the claimant's business travel expenses are overstated. The respondent says that the claimant's pattern of income, outside of the temporary disruption due to COVID-19, shows that he can continue to earn an annual income of over \$750,000.
- [68] I have already explained why I reject the respondent's criticisms of Ms. Daum's estimate of the claimant's 2020 income. I see no basis on which to exclude Ms. Daum's estimate of 2020 income in determining the claimant's income for support purposes. As the claimant points out, s. 2(3) of the Guidelines requires that the determination of a spouse's income should be based on the most current income information. If a three-year average is used to determine the claimant's income, as permitted by s. 17(1) of the Guidelines, then the three-year average for 2018, 2019, and 2020, based on Ms. Daum's numbers, is \$694,000.
- [69] In my view, it would not be fair and reasonable to use a three-year average in light of the fact that the claimant's income has consistently declined over the past three years. I acknowledge the respondent's concern that the decline is at least partly the result of the impact of COVID-19, which she says I should assume to be temporary. The difficulty is that there is no way to assess at this time how long the "temporary" impacts of COVID-19 will continue to affect the claimant's surgical practice. For the reasons set out below (at paras. 125-127), given the many uncertainties associated with the parties' current circumstances, I am making an order that either party can seek a review of support after two years. The potential for a future review addresses the respondent's concern with a support order based on a decline in income that may prove to be temporary.
- [70] The respondent also argues that the claimant has not adequately explained the reasons for his declining income in recent years, other than the COVID-19 related disruptions. She invites me to conclude that the claimant has been deliberately underemployed. I do not agree that the claimant's decline in income is unexplained. The claimant has provided an explanation of reasons for the decline in his income which include not only COVID-19 impacts, but also his MSC liability and his advancing age. The fact that the claimant may not be capable, at the age of 56, of routinely working the 70-hour weeks that he did when he was younger is not, in my view, deliberate unemployment. The claimant nevertheless makes a

very high income. There is no indication that the children's needs will not be met if the respondent's income is determined to be what he actually earned in 2020.

Summary of findings on the claimant's income

- [71] For the foregoing reasons, I conclude that the claimant's Guidelines income is \$680,000.
- [72] Before concluding on the issue of the claimant's income, I will address some underlying themes of the respondent's evidence and submissions. The respondent is critical of the claimant for bringing this application. She argues that the claimant has an established pattern of attempting to avoid his child support obligations by seeking unjustified redeterminations of his Guidelines income. She accuses him of being less than forthright in his disclosure of financial information on this application, and being intentionally underemployed in order to reduce his income for support purposes.
- [73] The respondent's criticisms are unjustified. The reality is that the claimant has paid a significant portion of his income to the respondent towards child and spousal support since 2009. Between 2009 and 2015, the claimant paid the respondent \$26,500 per month in combined child and spousal support. Between 2015 and June 2020, the monthly support payments totalled \$22,000. During the years that both of the children were enrolled in private school, the claimant also paid \$48,000 annually towards their tuition and school uniforms. Following AN's graduation from high school in June 2018, the claimant continued to pay \$24,000 annually towards AS's tuition and school uniform until her graduation in June 2020. Pursuant to the 2009 Order, the claimant has also paid approximately \$20,000 annually to cover orthodontics, RESP contributions, and life insurance premiums for the children.
- [74] Accordingly, between 2009 and June 2020, the claimant has paid between \$308,000 and \$386,000 annually towards the support of the respondent and the children, including s. 7 expenses. In many years, the support paid by the claimant has been close to 50% of his Guidelines income. There is no suggestion in the record that the claimant has ever refused to fulfill his support obligations, or that the respondent has had to pursue arrears. The respondent says the claimant only paid these amounts because of a court order. However, it must be noted that the primary source of the claimant's support obligations, the 2009 Order, is a consent order that reflected a negotiated resolution.
- [75] It appears from the record before me that the only time the claimant has previously applied to redetermine the parties' income was in 2015. This application was successful. The claimant's Guidelines income was reduced by approximately \$100,000, and the respondent's was increased by at least \$50,000. In any event, and more importantly, it is not unreasonable for the claimant to wish to have support set at a level that reflects the parties' actual incomes.
- [76] I am satisfied that the claimant has fully disclosed the financial information required to determine his income on this application. He retained a reputable expert, Ms. Daum, to analyze the financial disclosure in order to prepare a Guideline Income Report for the court.

He ensured that Ms. Daum had access to updated financial information after her first report was prepared, even if that meant her income estimate for 2020 was adjusted upward. By contrast, the respondent produced no income information for 2020 beyond her bare assertion that she expects her income to decline.

The respondent's income

The position of the parties

- [77] The respondent initially took the position that there should be no variation of the determination of her Guidelines income in the 2015 Order (\$75,000), despite the fact that she earned approximately \$200,000 in investment income in 2019 and has now completed her nutrition degree. As noted, the respondent's evidence on the question of her current income consisted of the bare assertions that she expects her income to decline in 2020, and she has been unable to find a job in her field. She has provided no supporting documentation for either assertion.
- [78] In the course of submissions at the hearing of the application, the respondent revised her position and suggested that her Guidelines income should be determined as \$142,000, based on a three-year average of her investment income in 2017, 2018, and 2019. The respondent says that her investment income fluctuates and therefore it would be unfair to use her 2019 income as the basis for a determination of her Guidelines income. She says that no employment income should be imputed to her because she only recently graduated from UBC and has not yet found employment in her new field of work. She suggests that it would be reasonable to give her some period of time to establish herself in her new field before employment income is imputed to her.
- [79] The claimant argues that there is no basis to assume that the respondent's investment income will decrease in 2020, given the substantial increase in income between 2017 and 2019. The claimant says there must have been documents available to the respondent by the end of 2020 to evidence her investment earnings in 2020. He asks the court to draw an adverse inference from the respondent's failure to produce them.
- [80] The claimant further submits that the respondent is capable of earning an annual employment income of \$98,000, which is the average annual earnings of pharmacists working in British Columbia. He says the income of \$75,000 imputed to the respondent in the 2015 Order is at least partly comprised of her potential earnings as a pharmacist. Alternatively, the claimant says the respondent should be able to earn at least that level of income through her new field of nutrition. He points out that her rationale for pursuing a career in nutrition, as detailed in her affidavit evidence on the 2015 variation application, was the lucrative opportunities that would be available once she had her degree.

- [81] The claimant thus argues that there is a basis in the evidence for imputing \$280,000 in annual income to the respondent, including both investment and employment income. However, for the purpose of this application, the claimant says that annual income of at least \$200,000 should be imputed to the respondent based on her 2019 tax return, which is the most recent financial information she has provided.

Determination of the respondent's Guidelines income

- [82] The respondent's failure to produce income information for 2020 presents difficulty in determining her Guidelines income. I agree with the claimant that the respondent's failure to disclose relevant and current income information should not work to her advantage. Section 19(1)(f) of the Guidelines allows the court, in imputing income, to consider if the spouse has failed to provide income information when under a legal obligation to do so. The respondent says her obligation is limited to producing a copy of her personal tax return for the three most recent years, which she has done. She does not yet have a 2020 tax return, and says, therefore, that she cannot be faulted for failing to provide it.
- [83] The respondent's argument might be more persuasive if she were content to rely on the tax information provided in her 2019 return. Instead, the respondent argues that her 2019 tax return should not determine her income because she anticipates that her investment income will significantly decrease in 2020. The respondent's proposal for a three-year averaging of her income is dependent on the assertion that the trend of a steady rise in her investment income between 2017 and 2019 will not continue in 2020. The respondent has thus directly put her 2020 income in issue while simultaneously failing to provide any financial disclosure that would allow her assertions to be tested.
- [84] I find it implausible that the respondent is unable to produce any financial records to evidence the investment income she received in 2020. Records such as bank statements, investment account statements, or her T5 slip ought to have been readily available. If the respondent invested all or a portion of the \$1.9 million profit she received out of the sale of the former family home in the summer of 2020, one would expect her investment income to increase rather than decrease in 2020. However, she has also produced no financial records to evidence what happened to the \$1.9 million. I infer that the respondent failed to provide such financial disclosure because it would not have supported her assertions that her investment income will be much lower in 2020 than it was in previous years.
- [85] In my view, the fair and reasonable method to determine the claimant's Guidelines income in these circumstances is to base her income on her 2019 tax return. In the absence of full disclosure of financial information from the respondent, I will assume that her income in 2020 will be at least equal to her income in 2019. Given that my order on this application will provide for a review of child support after two years, I will not impute employment income to the respondent at this time. The respondent says she requires a reasonable opportunity following her graduation from UBC to establish herself in her new field. I did not understand the claimant to suggest that this was unreasonable.

[86] For these reasons, I conclude that the respondent's Guidelines income is \$200,000.

Issue 2: Retroactive child support

[87] The claimant argues that the redetermination of his income should be applied retroactively to January 1, 2019, to reflect the fact that his income decreased to \$680,000 as of 2019. He seeks the difference between base support under the 2015 Order (\$9,250/month), and Table support on an income of \$680,000 (\$8,413/month) between January 1, 2019 and December 30, 2020. In that period of time, the claimant says he has overpaid child support in the approximate amount of \$20,000. He seeks an order that the respondent reimburse him that amount on a lump sum basis or, alternatively, that the overpayment be deducted from the claimant's ongoing child support payments.

[88] As a preliminary objection, the respondent argues that the claimant has not, in his notice of application, provided any legal basis for his application to vary child support retroactively. She says that parties are required to particularize the legal authority on which they rely for the orders sought so as to give clear warning to the other side.

[89] I do not agree that the claimant's notice of application is deficient in failing to sufficiently particularize the legal basis for his request for reimbursement of retroactive child support. The claimant's notice of application expressly cites to s. 17(1) of the Divorce Act, which authorizes the retroactive variation of a support order.

[90] The factors to be considered by the court in deciding whether a variation in child support should be retroactive are set out in the judgment of the Supreme Court of Canada in *D.B.S. v. S.R.G.*, 2006 SCC 37 [D.B.S.]. *D.B.S.* concerned an application to retroactively increase child support, but the same considerations arise whether the variation is sought as a result of an increase in the income of the payor spouse or a decrease: *Janmohamed v. Janmohamed*, 2020 BCSC 432 at para. 64. The considerations on such an application are: (i) the reasons for the applicant's delay; (ii) the payor parent's conduct; (iii) the children's circumstances; and (iv) any hardship caused by a retroactive support order. The effective date of a retroactive award is the date when effective notice was given to the other parent that a change in child support is sought, unless the other parent has engaged in blameworthy conduct that warrants an earlier effective date: *D.B.S.* at para. 134.

[91] I accept that the reduction in the claimant's Guidelines income by \$45,000 constitutes a material change in circumstances that warrants a variation of the child support provisions in the 2015 Order. The question is whether the circumstances justify a retroactive variation, and if so to what date.

[92] I will begin with the question of the effective date of retroactivity as this influences consideration of the *D.B.S.* factors in this case. The claimant served Ms. Daum's first income report on the respondent's counsel in August 2020. The claimant's notice of application was filed on November 16, 2020. The application record does not evidence any communication between the claimant and the respondent prior to August 2020 regarding the need to

renegotiate child support. I find that the service of Ms. Daum's report in August 2020 can be taken as effective notice that the claimant disputed the level of child support he was paying. However, there is no basis setting the effective date of retroactivity prior to the delivery of Ms. Daum's report August 2020. The delay in the claimant seeking a variation of child support was a function of the timing of his discovery of his income for 2019; it was not the result of any blameworthy conduct by the respondent.

- [93] In my view, an order varying child support terms of the 2015 Order retroactive to September 1, 2020, is justified in the circumstances. As of August 2020, the respondent was on notice of the claimant's wish to revisit the issue of child support. The respondent cannot say that she relied on the status quo after that date. There is no evidence that the respondent will suffer hardship from such an order, or that the children's needs will not be met if the claimant receives reimbursement of retroactive child support.
- [94] The claimant has proposed a series of complex transitional terms pursuant to which reimbursement for retroactive support would be calculated to December 2020, AN's expenses would be paid from the RESP as of January 1, 2021, and AS's expenses paid from the RESP as of April 1, 2021, with Table support paid for AS in the interim. For the reasons set out below, I am not prepared to order that child support be paid from the RESP. Instead, I am ordering the claimant to pay ongoing monthly child support. In the interests of simplicity, I will therefore deal with the variation application in two stages: (i) retroactive support between September 1, 2020 and the time of judgment, (ii) ongoing child support as of March 1, 2021.
- [95] Taking all circumstances into account, I am satisfied that the claimant's child support obligation should be retroactively adjusted to September 1, 2020. That is, the claimant is entitled to reimbursement on the difference between the base amount owed under the 2015 Order on an income of \$725,000 and the Table amount on an income of \$680,000, from September 1, 2020 to the date of judgment. The respondent shall reimburse the claimant for the overpayment, or, alternatively, the claimant is entitled to deduct the overpayment from future child support payments.

Issue 3: Ongoing child support

- [96] The claimant says that ongoing child support for both children should not be Table support once AS turns 19 next month. The claimant says that the Table amount of child support is out of proportion to the children's reasonable needs. He invokes the court's discretion to determine child support based on a consideration of the condition, means, needs and other circumstances of the children and the financial resources of the parties pursuant to ss. 3(2) (b) and 4(b) of the Guidelines. He also seeks to have child support paid out of the funds currently in the RESP.
- [97] The questions of ongoing child support therefore raises three issues:

- i. should support be determined by reference to the Table amount or on consideration of the needs of the children and means of the parties?;
- ii. if Table support is no longer appropriate, what is an appropriate amount of monthly child support?; and,
- iii. should child support be paid from funds in the RESP?

Table amount v. needs of the children and parties' resources

[98] Section 3(1) of the Guidelines establishes the presumptive rule that the amount of support for a child under the age of majority is the amount determined in the applicable Table based on the income of the payor spouse. Section 3(2) of the Guidelines provides that where a child is the age of majority or over, the amount of the child support order is:

- (a) the amount determined by applying these Guidelines as if the child were under the age of majority; or
- (b) if the court considers that approach to be inappropriate, the amount that it considers appropriate, having regard to the condition, means, needs and other circumstances of the child and the financial ability of each spouse to contribute to the support of the child.

[99] The underlying assumptions that typically apply to a child under the age of majority include: the child resides with one or both parents, the child is not earning income, and the child is dependent on his or her parents. The more closely the circumstances of an adult child resemble those of a minor child living at home, the less likely it is that the approach in s. 3(2)(a) will be found to be inappropriate: *Tome v. Furtado*, 2018 BCSC 2280 at para. 65 [Tome]. While each case must be assessed on its facts, support for an adult child attending a post-secondary institution should generally be determined in accordance with s. 3(2)(b) of the Guidelines. An important consideration is that adult children have an obligation to make a reasonable contribution to their own education: *Tome* at paras. 67-68.

[100] Section 4 of the Guidelines provides that where the income of the payor spouse is over \$150,000, the amount of the child support order is:

- (a) the amount determined under section 3; or
- (b) if the court considers that amount to be inappropriate,
 - (i) in respect of the first \$150,000 of the spouse's income, the amount set out in the applicable Table for the number of children under the age of majority to whom the order relates;
 - (ii) in respect of the balance of the spouse's income, the amount that the court considers appropriate, having regard to the condition, means, needs and other circumstances of the children who are entitled to support and the financial ability of each spouse to contribute to the support of the children; and

(iii) the amount, if any, determined under section 7.

[101] The court must examine all of the circumstances listed in s. 4(b)(ii) before determining whether Table amounts are inappropriate. The unique economic situation of high income earners must be considered. The payor spouse must show that the child care expenses claimed by the other parent is so high "as to exceed the generous ambit within which reasonable disagreement is possible": *Metzner v. Metzner*, 2000 BCCA 474 at para. 30 [Metzner]. *Hathaway v. Hathaway*, 2014 BCCA 310 at para. 28

[102] The claimant says that the age and circumstances of the children, including their enrollment in post-secondary studies, combined with the respondent's significant increase in income and resources since the 2015 Order, render it inappropriate to use the Table to determine child support. He argues that a continuing requirement that he pay child support at Table amounts would constitute an inappropriate wealth transfer to the respondent.

[103] The respondent did not provide a budget for the children's expenses. The best evidence I have before me of the children's condition, means, needs and other circumstances is the respondent's statement of expenses in her Form 8 Financial Statement that was filed on this application. The statement of expenses lists monthly expenses for the respondent totalling \$31,195. The claimant says that the respondent's statement of expenses is inflated and that many claimed expenses, in any event, relate to her personal needs rather than those of the children.

[104] In the course of the hearing, her counsel advised that the respondent had mistakenly included a monthly expense of \$5,500 towards car insurance, when in fact this is the yearly insurance. Other expenses listed by the respondent clearly relate to her personal needs rather than those of the children. For example, the respondent claims she spends \$2,375 on her personal care items, \$3,000 per month on legal fees, \$3,000 per month on vacations, and \$3,000 per month towards a line of credit for which she provides no particulars. The respondent also claims expenses of \$1,333 per month towards school fees, which are covered through the RESP funds, and \$2,167 in monthly tutoring expenses, despite having never produced a receipt to support the payment of tutors.

[105] The claimant says the respondent's statement of expenses suggests that she incurs expenses of approximately \$4,000 per month in providing for the children, if one includes the children's proportionate share of housing, utilities and food. This, the claimant's says, in itself evidences that Table child support, \$8,413 per month on his income of \$680,000, is inappropriate.

[106] In the circumstances, I consider that an order for child support at a Table amount to be inappropriate for a number of reasons. First, the only reason for the children's continued dependence, given that AN is about to turn 21 and AS is about to turn 19, is their enrollment in a post-secondary program. While I acknowledge that both children continue to live with the respondent, they are also in the process of becoming independent adults. Both children

are capable of working part-time and contributing to their own education and expenses. I acknowledge that the unique position of high income earning spouses must be accounted for in setting the level of child support. However, I do not understand the case law to suggest that the adult children of high income earners are entitled to assume that their dependence will continue indefinitely as a result. These children, at the ages of 21 and 19, should be encouraged in the direction of independence notwithstanding the relative wealth of their parents.

[107] Second, there is not the same income disparity between the claimant and the respondent as existed at the time of the 2015 Order. The claimant earns a significant annual investment income. She has graduated from university and is on the brink of pursuing a career in nutrition that she expects will be "satisfying" and "financially rewarding". As the claimant points out, the Guidelines are based on the principle that the parties have a joint financial obligation to maintain the children of the marriage in accordance with their relative abilities to contribute to the performance of that obligation: Divorce Act, s. 26(2). The respondent's financial ability to contribute to the maintenance of the children has much improved since the 2015 Order.

[108] Finally, in considering the conditions, means and circumstances of the children, it appears to me that monthly Table support in the amount of \$8,413 would significantly exceed their actual needs. The children's university tuition and books are covered by the funds in the RESP. The claimant proposes that the parties should share any additional ongoing s. 7 expenses in proportion to their income. This would ensure that any future special or extraordinary expense for the children would also be covered. The children both live with the respondent rent-free, and the respondent does not have a mortgage on the home. Table support would significantly exceed the children's actual financial needs.

[109] In my view, accordingly, it would be inappropriate to use the Table amounts to determine the claimant's ongoing obligation to pay monthly child support.

Monthly amount of child support

[110] This brings me the question of the appropriate level of monthly child support, having regard to the condition, needs, means and other circumstances of the children and the financial ability of the parties.

[111] The respondent's statement of expenses lists \$7,500 in monthly costs associated with housing, utilities, household expenses, and transportation. If the entirety of these costs are proportionately allocated to the children, this results in monthly living expenses for the children of \$5,000. The monthly expenses that the respondent estimates for the children's personal care (hair care, clothing, entertainment, etc.) is approximately \$1,500. This does not include the \$1,333 monthly expense related to "school fees and supplies", which are already covered through the RESP, or the \$2,167 in tutoring costs which are not substantiated and will be shared s. 7 expenses in any event.

- [112] Based on the respondent's statement of expenses, therefore, the children's estimated monthly expenses are approximately \$6,500. The claimant objects to the inclusion of many of the expenses claimed by the respondent as part of a monthly budget for the children. For example, the claimant objects to the inclusion of the respondent's claimed monthly expenses for meals outside the home (\$750), housecleaning (\$650), home furnishings (\$500), gifts bought by the children (\$150), and transportation costs (approximately \$1,000 once the car insurance error is corrected). However, such expenses do not appear to me to be so high "as to exceed the generous ambit within which reasonable disagreement is possible" (Metzner at para. 30), particularly given the financial resources of this family.
- [113] I accept that the respondent's statement of expenses is not a precise budget, although that cuts both ways, and that the respondent may face unexpected expenses as a result of having the children living with her. However, I also accept that the claimant's monthly child support obligation should account for the age of the children, their ability to financially contribute to their own expenses, and the respondent's financial ability to contribute to the children's support. Having regard to all circumstances, in my view it would be fair and reasonable to require the claimant to pay the respondent monthly child support of \$6,000 on an ongoing basis.

The RESP funds

- [114] The final issue in relation to ongoing child support is whether the claimant's support obligation should be satisfied, in whole or part, out of the funds in the children's RESP. As noted, the claimant's proposal is that he pay each of the children the sum of \$5,000 per semester, or \$15,000 per year, towards their living and housing expenses until the funds in the RESP are exhausted. The claimant says that the children are unlikely to pursue post-graduate programs in medicine or law given the competitive admissions criteria. If the children do pursue post-graduate programs, the claimant is committed to financing the programs. However, he believes that it is reasonable to maximize the use of the RESP funds now in the event that either child does not continue with their education.
- [115] As a starting point, I observe that the proposed payments to the children out of the RESP total less than half of the monthly support that I have determined the claimant should pay based on a consideration of the factors listed in ss. 3(2)(b) and 4(b) of the Guidelines. As I understand the claimant's argument, he suggests that a reduced level of support is warranted on consideration of the factors identified in *Farden v. Farden* (1993), 48 RFL (3d) 60 (BCSC) [Farden], and *Nordeen v. Nordeen*, 2013 BCCA 178 at paras. 16-17 [Nordeen]. The claimant says that the children have chosen to end their relationship with him, beyond accepting his financial support, and this should lead the court to conclude that support should be reduced.
- [116] *Farden* and *Nordeen* both address the question of whether the pursuit of post-secondary education is a valid reason for a finding that a child who has reached the age of majority nevertheless remains a child of the marriage due to their continued dependence. Among

the factors listed as relevant to this question is whether the child has unilaterally terminated a relationship with the payor parent: Nordeen at paras. 16-17. Subsequent cases have clarified that estrangement between a child and payor spouse is generally not determinative of entitlement to child support other than in "truly egregious cases of misconduct by a child against a parent": Shaw v. Arndt, 2016 BCCA 78 at para. 29.

- [117] The relevance of Farden and Nordeen is not entirely clear to me. The claimant, as he repeatedly asserted during the application, is not attempting to terminate child support. He does not seek a declaration that either of the children are no longer a child of the marriage. The claimant did not refer me to any authority in support of the proposition that the factors listed in Farden and Nordeen are also relevant to the question of the appropriate quantum of child support once entitlement to support is established, or, as in this case, conceded.
- [118] In any event, I do not consider that the evidence in this case establishes that the children have engaged in truly egregious misconduct against the respondent that would warrant a reduction in support, even if it was open to me to reduce support on that basis. While the children's relationship with their father has historically been a troubled one, they have managed to maintain some communication, however sporadic. The children believe that the claimant has been emotionally unavailable to them, which is an allegation the claimant disputes. The roots of the dysfunction in the relationship are deep and would likely be difficult to untangle if it were necessary to do so. It is not necessary to do so for the purposes of resolving this application.
- [119] This leaves, finally, the question of whether funds from the RESP should be used to pay child support, even if it is in a higher amount than the claimant's proposal anticipated. I accept the logic in the claimant's argument that the parties should not leave \$161,000 sitting in an RESP account without some assurance that the money will eventually be needed for educational purposes. However, this is not a case in which the parties are of limited resources such that it is a hardship to them not to have access to the funds. The parties can afford to leave the funds in the RESP to ensure the payment of future educational expenses that will be incurred if children enroll in post-graduate programs.
- [120] There was a vigorous contest between the parties on this application as to the likelihood that AN and AS will eventually succeed in securing admission to medical school and law school, respectively. I also do not find it necessary to attempt to resolve this dispute. Once again, the issue on this application is not whether child support should be terminated, but rather the quantum at which it should be set and how it should be paid. The children should, of course, be encouraged to pursue their educational goals. If one or both children do enrol in a post-graduate program, as both parties say is their hope, then the money in the RESP should be available to cover the educational costs, as the parties have always intended.

[121] In my view, it is not appropriate to make the order sought by the claimant and have child support paid directly to the children from the funds in the RESP. The claimant is financially capable of making monthly child support payments, and he indicates his commitment to continuing his financial support to the children. The question of what happens to the funds in the RESP can be revisited at a future review when the children's educational paths may be clearer.

Issue 4: Section 7 expenses

[122] In his written argument on the application, the claimant requested an order that the children's health care premiums be covered, on an ongoing basis, in proportion to the parties' incomes. The claimant proposes that ongoing s. 7 expenses otherwise be paid out of the RESP.

[123] I note that this is not a form of relief listed in Part 1 of the claimant's notice of application. The notice of application does not say anything at all about ongoing s. 7 expenses, beyond the claimant's position that all of the children's future expenses should be paid from the RESP. However, the respondent did have notice of the order sought by the claimant by way of his written argument. She did not expressly respond to it beyond her general objection any variation of the respondent's obligation to pay child support.

[124] I see no principled basis for refusing the relief sought by the claimant in relation to s. 7 expenses. The guiding principle in determining s. 7 expenses is that a spouse should cover the costs in accordance with their proportionate income: Guidelines, s. 7(2). The health care premiums are one such expense that ought properly to be shared between the parties. Another s. 7 expense that may legitimately be incurred, and shared, is tutoring costs for the children, provided the costs are justified by the provision of receipts.

REVIEW OF CHILD SUPPORT

[125] All members of this family are in a state of transition. The children are in the midst of pursuing undergraduate degrees that may or may not lead to graduate programs. The claimant's income has reduced due to the COVID-19 pandemic, the impacts of which may or may not prove to be temporary. The respondent has just graduated from university, and is establishing herself in a new career. The parties' submissions on this application invite me to anticipate future outcomes that are exceedingly difficult to predict at this juncture.

[126] In these circumstances, I conclude that it is appropriate to include a provision in the order for a review of child support after two years, when the current uncertainties may be more clear. I realize that a review term has the potential to invite more litigation in a family proceeding that has already been characterized by a high degree of conflict. However, this appears unavoidable to me. Neither party offers a more suitable alternative. The claimant's position, that the funds in the RESP should be exhausted in anticipation that the children will not pursue post-graduate programs, also invites future dispute. The respondent's

position, that child support should continue to be governed by Orders issued in 2009 and 2015, does not reflect the reality of the parties' changed circumstances.

[127] For these reasons, I will order that either party may request a review of child support after March 31, 2023. This is without prejudice to the ability of either party to apply for a variation of this order at an earlier date pursuant to s. 17 of the Divorce Act in the event of changed circumstances.

CONCLUSION/ORDERS

[128] In summary, I make the following orders:

- a) the claimant's Guidelines income is \$680,000;
- b) the respondent's Guidelines income is \$200,000;
- c) Term 3 of the 2015 Order and Terms 6 and 8 of the 2009 Order are varied as follows:
 - i. Pursuant to the Divorce Act (Canada) the claimant shall pay the respondent support for the children in the amount of \$6,000 per month, commencing on March 1, 2021, and continuing on the first day of each month thereafter until the children cease to be children of the marriage or until further order of the court;
 - ii. The respondent shall reimburse the claimant the difference between the Table amount of child support he paid between September 1, 2020, and February 1, 2021, and the Table amount that would have been owed on a Guidelines income of \$680,000;
 - iii. Commencing March 1, 2021, the parties will share the costs of the following s. 7 expenses in proportion to their income, with the claimant paying 75% and the respondent paying 25%, providing the claimed expenses are accompanied by a receipt:
 - (1) the children's health care premiums;
 - (2) tutoring costs; and
 - (3) any other expenses agreed to by the parties or ordered by the court.
- d) The parties will exchange all income and tax records as required by the Guidelines on an annual basis;
- e) Either party may request a review of child support after March 31, 2023.
- f) BY CONSENT: The respondent will provide the claimant with the following information on an ongoing basis:
 - i. the children's school records, including registration deadlines;
 - ii. the children's grades;
 - iii. details with respect to all scholarships or bursaries applied for and/or received;

iv. the children's earnings, if any.

[129] In the event that agreement cannot be reached on an appropriate costs award, the parties are at liberty to submit a request to Supreme Court Scheduling within 30 days of the date of this judgment for a further hearing before me on costs. If both parties agree, the further hearing on costs may be by way of written submission.

"Horsman J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/21/02/2021BCSC0274.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/a-r-j-v-z-s-h-2021>

Prepared on 26 October 2026 · Esheria