
CANADA / JUDGMENT

Bennett v. Bennett

2015 BCSC 699

COURT

Supreme Court of British Columbia

DECIDED

30 April 2015

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2015 BCSC 699 Bennett v. Bennett

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Bennett v. Bennett,

2015 BCSC 699

Date: 20150430

Docket: E131803

Registry: Vancouver

Between:

Britta Catherine Bennett

aka Britta Wingenroth, aka Britta Curkovic

Claimant

And

Russell Warren Bennett

Respondent

Before: The Honourable Mr. Justice Kent

Reasons for Judgment

Counsel for the Claimant:

Shawna L. Specht

Respondent Russell Warren Bennett:

Appearing in person

on his own behalf

Place and Dates of Hearing:

Vancouver, B.C.

April 13 and 14, 2015

Place and Date of Judgment:

Vancouver, B.C.

April 30, 2015

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INTRODUCTION

- [1] This divorce action was filed on June 18, 2013. All parenting issues were settled pursuant to a mediation held May 20, 2014 and a consent order issued on July 24, 2014.

- [2] The parties have been unable to settle the remaining issues respecting child support as well as certain other amounts claimed pursuant to a Separation Agreement dated June 1, 2008. Accordingly, the claimant wife now makes application for summary trial of these remaining issues.

SUITABLE FOR SUMMARY TRIAL?

- [3] Supreme Court Family Rule 11-3 permits a party to apply for judgment in accordance with a summary trial procedure. On the hearing of any summary trial application, the court can grant judgment, either on an issue or generally, unless either:
1. the court is unable, on the whole of the evidence presented, to find the facts necessary to decide the issues in dispute; or
 2. for some other reason, it would be unjust to decide the issues on the application.
- [4] Initially I had concerns about the suitability or fairness of the proposed summary trial procedure, mostly due to problems with the presentation of the respondent husband's evidence. He is not currently represented by legal counsel. As is often the case in such situations, the presentation of his evidence was not in proper form. While he was prepared and determined to argue the facts of the case, he made no submissions regarding the law and displayed only a vague understanding of the legal issues.
- [5] The respondent submitted four affidavits in response to this application sworn April 1, 9, 10 and 14, 2015 respectively. The last such affidavit was sworn on the second morning of oral argument and counsel for the claimant objected to its admission into the record of this proceeding.
- [6] Each affidavit attaches "exhibits". The bodies of the affidavits contain no text but simply list the exhibits without identification, e.g. "Exhibit A", "Exhibit B", etc. In three of the affidavits, one of the exhibits is a form of argument which does contain some assertions of fact. None of the material is proper testimony under oath as to either the facts of the case or establishing the identity and admissibility of the documents marked as exhibits.
- [7] One of the exhibits attached to the respondent's affidavit sworn March 31, 2015 is a report from his chartered accountant, Mr. Campbell Stafford, dated March 30, 2015. It purports to summarize the income and retained earnings/deficits of three corporations in which the respondent has a direct or indirect interest as a shareholder. The report does not comply with either the content or timing requirements stipulated in Supreme Court Family Rule 13-6.
- [8] The claimant argues, with some justification, that the respondent has persistently failed to make full disclosure of financial information over the years and that the self-imposed inadequacies of the respondent's evidence ought not be the basis for postponing judgment day. The claimant has spent considerable time, effort and money on court applications compelling disclosure and ultimately seeking judgment by way of summary trial and, she

submits, both parties need final resolution of the child support issues so they can get on with their lives and put this litigation behind them. She points out the Court can draw an adverse inference against and impute income to any spouse in such amount as it considers appropriate where such spouse has failed to make full financial disclosure of the sort required by either the Rules or the Federal Child Support Guidelines (the "Guidelines").

- [9] In my view it would not be unjust to decide the issues of fact and law in this case by way of a summary trial. There are admittedly serious deficiencies in the respondent's evidence but on the whole of the materials provided to the Court, and giving some weight to those portions of the exhibits attached to the respondent's affidavits which recount fact and not argument or accusation, I am able to find the facts necessary to decide this case and will proceed to do so.

FACTUAL BACKGROUND

- [10] The claimant is 43 years old. She is a managing partner of Aroma Web Design, a legal partnership with her current spouse, Mr. Dobrisa Curkovic.
- [11] The respondent is 52 years old. He is a shareholder, officer, director and/or employee of various corporations which own and operate two cruise boats in connection with a charter boat business located in False Creek, Vancouver.
- [12] The companies include Vancouvercruises.com Charters Ltd., Queen of Diamonds Cruises Ltd., Beach Construction Ltd. and RAP Holdings Ltd. He owns 50% of the shares in Beach Construction Ltd. and is a 28% shareholder of RAP Holdings Ltd. and Vancouvercruises.com Charters Ltd. The latter company owns 100% of the shares of Queen of Diamonds Cruises Ltd. This is a family owned business. The respondent's father is the majority shareholder. He is 80 years old, spends his winters in Arizona, but still helps out with the business during the summer. The respondent is the general manager and admits he has been effectively in charge of the business for the past 10 years.
- [13] The parties met in late 1999 or early 2000 and were married on March 17, 2001. They separated on May 15, 2007.
- [14] The parties have two children, namely: Adon Christopher Bennett, born January 17, 2002 (currently 13 years old); and Athena Catherine Bennett, born May 30, 2005 (currently 9 years old).
- [15] At the time the parties separated, they were residing in West Vancouver. The wife operated a website design business called "West Coast Web", which she had started in 2000. Her new spouse, Mr. Dobrisa Curkovic, became an employee of West Coast Web in 2005. He is a Senior Software Architect who has a Diploma as a Programmer System Analyst and has been working in the IT industry for 20 years.

[16] The parties executed a "Final Settlement and Separation Agreement" dated for reference June 1, 2008. Both parties acknowledge that the Agreement was negotiated and executed with the benefit of independent legal advice from competent legal counsel of his or her own selection.

[17] The Separation Agreement included the following provisions:

- division of property which saw all interest in the charter boat business being transferred to and vested in the husband and all interest in the West Coast Web business being transferred to and vested in the wife;
- a "property compensation payment" in the amount of \$3,704.47 to be paid by the husband to the wife;
- an agreement that the living arrangements made with respect to the children would entail shared custody within the meaning of the Guidelines, i.e. that the children would live with each party not less than 40% of the time;
- a declaration that the husband's Guideline income for the 12-month period ending November 30, 2009 would be \$83,220 (an amount which included a \$5,000 automobile benefit received from the boating business) and that the wife's Guideline income for the same period would be \$64,000;
- an obligation on the part of the husband to pay to the wife \$258 per month as child support and \$2,540 on account of a child support shortfall for the 2008 year;
- an agreement to share special or extraordinary expenses within the meaning of s. 7 of the Guidelines in proportion to their respective Guideline incomes (57%-43% at the time) and that such expenses would include childcare, medical/dental, education, counselling/therapy, and "extracurricular activities agreed upon by the parties";
- the s. 7 expenses were to be reconciled each month and any reimbursement made at that time; and
- child support would be reviewed by July 1 of each year and would include an exchange of tax returns and the corporate financial statements.

[18] Following execution of the Separation Agreement and despite numerous demands for same, the husband failed to pay either the lump sums or the monthly child support required by the Agreement. Similarly, he refused to provide any financial disclosure, although in mid-December 2011 he did email the wife a portion of his 2009 and 2010 income tax assessments. No corporate financial statements were supplied until court orders were made in the present action.

[19] Mr. Curkovic and the wife became romantically involved by 2008. The husband also re-partnered at the same time and, indeed, has since had another child with his new spouse.

- [20] Mr. Curkovic quit working for West Coast Web in September 2008 and started his own business called Fulcrum Web Development. He continued to support the wife in her attempted expansion of West Coast Web and agreed to co-sign on the office lease for her business. When the business began to fail in 2009-2010, the lease was abandoned resulting in litigation and substantial personal debt.
- [21] In 2009 the claimant and Mr. Curkovic had to sell their home in North Vancouver and move to Pitt Meadows. They again moved to Port Moody in 2010 where they have since been living in a rental townhouse.
- [22] In late 2010 the claimant and Mr. Curkovic made a Consumer Proposal under the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3. The Proposal was accepted and the couple have continued to make payments to their creditors pursuant to same.
- [23] Upon the failure of the West Coast Web business, the claimant and Mr. Curkovic started a new partnership in early 2011 called Aroma Web Design. They are equal partners and distribute profits annually on an equal basis. The business appears to have flourished.
- [24] In the years since 2009, the respondent has received remuneration from the charter boat business by way of employment income, dividends, and "management fees" paid to and through a sole proprietorship. The claimant's revenues derived from her businesses are fully declared on her income tax returns. Their respective pre-tax income set out on line 150 of their income tax returns is as follows:

Husband

Wife

2009

\$84,377

\$59,850

2010

\$78,417

\$52,898

2011

\$84,531

\$65,663

2012

\$116,042

\$74,285

2013

\$104,014

\$82,662

[25] The wife's line 150 net income on her 2014 income tax return is \$78,217. The husband says that his income tax return for 2014 is not yet prepared but he produced a T4 slip during the hearing of the application issued by Vancouvercruises.com Charters Ltd. reflecting employment income for that year of \$78,640. He claimed at the hearing that he had received neither dividends nor management fees in 2014.

PREVIOUS SUPPORT ORDERS

[26] This action was filed June 18, 2013. A response and counterclaim was filed July 17, 2013.

[27] As indicated earlier, parenting issues have been resolved. On April 9, 2014, Master Baker dismissed an application by the husband to change the then status quo of parenting arrangements. On July 24, 2014, the consent order was issued by this Court formalizing a detailed parenting regime which remains in place today.

[28] On May 6, 2014, the wife applied for an order respecting the payment of child support and special/extraordinary expenses. She sought judgment for arrears and a determination of the amounts to be paid from that point forward.

[29] In support of that application, the wife filed an affidavit containing a meticulous accounting of the amounts incurred and paid by each party in respect of special or extraordinary expenses in the period following the execution of the Separation Agreement. It also detailed the amounts of basic child support she claims should have been paid over that period of time based on the parties' respective incomes.

[30] In the negotiations leading up to the Separation Agreement the parties acknowledged that the sum of \$5,000 per annum would be added to the respondent's pre-tax income set out on line 150 of his tax return in recognition of the value of the automobile benefit he received through the cruise boat business. For the calculation of basic child support for the years 2009 through 2012, incorporating the \$5,000 benefit value into the equation and using the "set-off" basis of calculation for shared custody child support pursuant to s. 9(a) of the Federal Child Support Guidelines, the wife provided the following information to the Court:

Husband

Wife

Monthly

Annual

2009

\$90,123

\$85,123

\$413

\$4,956

2010

\$83,417

\$52,898

\$428

\$5,136

2011

\$89,531

\$65,663

\$317

\$3,804

2012

\$121,042

\$74,285

\$623

\$7,476

2013

\$121,042

(estimated, no ITR)

\$82,662.25

\$501

\$6,012

\$27,384

- [31] The Separation Agreement, which was executed in 2009 but dated for reference June 1, 2008, provided that for the year 2008 the child support amount payable by the husband would be \$258 per month, the arrears/shortfall of which amounted to \$2,540 up to November 30, 2008. Hence, for 2008, the husband was supposed to have paid the aggregate sum of \$2,820 on account of basic child support.
- [32] In her affidavit the wife testified the husband had not made a single child support payment to her over the years. She anticipated, correctly, the husband would claim he had substantially overpaid his proportionate share of special or extraordinary expenses for the children over the years thereby reducing or eliminating his "arrears". She acknowledged that such "overpayment" did in fact occur for the first few years after the Separation Agreement had been signed, especially when the children were in daycare, and that the s. 7 expenses were quite substantial. She claimed, however, that the s. 7 expenses had since decreased, that the husband was no longer "overpaying", and that, once all of the accounting was done, the husband was in significant arrears.
- [33] The Separation Agreement also required the husband to pay the sum of \$2,211.72 to the wife in respect of a child tax benefit overpayment that had been made in 2006. As well, he was to pay a "division of property compensation payment" to the wife of \$3,704.47. None of these sums have been paid and they form part of the wife's current claim on this summary trial.
- [34] Both in the May 2014 application and in the present summary trial application, the wife has provided detailed spreadsheets and supporting documentation respecting special or extraordinary expenses incurred and paid by one or the other parent since the Separation Agreement. Her evidence is impressive in detail and, in the absence of any coherent evidence from the husband on the point, I find as a fact that the following expenses in respect of the children were incurred and paid over the years as follows:

Wife

Husband

TOTAL

2008-2009

\$543.47

\$15,173.39

\$15,716.86

2010

\$1,685.03

\$6,361.83

\$8,046.86

2011

\$2,168.09

\$8,608.14

\$10,776.23

2012

\$821.52

\$6,229.06

\$7,050.58

2013

\$5,955.93

\$2,987.81

\$8,943.74

2014

\$6,081.55

\$1,555.63

\$7,637.18

Jan-April

2015

\$1,693.03

\$515.43

\$2,208.46

\$18,948.62

\$41,431.29

\$60,379.91

[35] In the application before Master Muir in May 2014, the wife made it clear that the arrears being sought at that time represented the amounts which could be calculated based on the respondent's income tax return income together with the imputed "vehicle allowance" value (\$5,000 per annum). The numbers did not include any monies available to the husband for the payment of child support by way of imputed income or benefits from the various

corporations comprising the charter boat business in which he was a shareholder. She said she was "reserving the right" to seek further assessment of retroactive child support and special/extraordinary expenses once financial disclosure was made by the husband and the appropriate numbers/ratios could be recalculated.

[36] In any event, Master Muir issued the following order on May 13, 2014:

- on an "interim without prejudice basis", the wife has a Guideline annual income of \$69,000 and the husband has an annual Guideline income of \$116,000 (with liberty to re-argue the amounts at trial);
- for the period January 1, 2014 to April 30, 2014, the basic child support payable by the husband for the children was \$636 per month, resulting in a lump sum of \$2,544 to be paid by May 30, 2014;
- for the period January 1, 2014 to April 30, 2014, the wife would be responsible for 37% of the children's special and extraordinary expenses and the husband would be responsible for 63%;
- commencing May 1, 2014 and again on an "interim without prejudice basis" with liberty to re-argue at trial, the wife was declared to have an annual Guideline income of \$82,662 and the husband \$109,013;
- from that day forward the husband would pay to the wife as child support for the children the sum of \$282 per month payable on the first day of each month;
- on an interim basis, the parties would each pay the s. 7 special and extraordinary expenses of the children, 44% by the wife and 56% by the husband; and
- the wife's application for retroactive child support was adjourned generally.

[37] The consent order of July 24, 2014 also addressed the procedure for information exchange as follows:

Commencing in June 2014, each of the Claimant and the Respondent will email the other party any receipts related to the agreed upon Children's Special and Extraordinary Expenses for the proceeding (sic) month by the 30th day of each month. The Claimant will prepare a spreadsheet for receipted Special and Extraordinary expenses and will email the spreadsheet to the Respondent on or before the 15th day of the next month. Any payments to be made to the other party regarding the agreed upon Children's Special and Extraordinary Expenses will be made on or before the 30th day of each month by way of electronic funds transfer and the receiving parent will send a text or email confirming receipt of payment.

[38] The husband made one payment of child support in May 2014. He made no payments in June, July or August 2014. Counsel for the wife advises the husband has since paid all of the amounts required by the order of Master Muir on account of basic child support but has not made any payments to the wife on account of special or extraordinary expenses incurred in the interim.

GENERAL PRINCIPLES OF CHILD SUPPORT

[39] Mr. Bennett is not represented by counsel. He has little or no understanding of the case law advocated on behalf of the wife in support of her claim. Accordingly, in order that he might have some understanding of the basis for the orders being granted in this judgment, I start with a simple and non-exhaustive summary of basic legal principles applicable to the awarding of child support by the courts.

Obligation to Pay Child Support

[40] Three fundamental principles apply to all child support applications:

1. parents have a joint and ongoing legal obligation to support their children;
2. it is the children, not the custodial parent, who have the right to support; and
3. support payments are based on earning capacity and not just on what a parent actually earns; as a result, a parent has a legal obligation to earn as much as he or she is reasonably capable of earning so the children can receive an appropriate level of support.

[41] The court has jurisdiction under both the federal Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), and the provincial Family Law Act, S.B.C. 2011, c. 25, to award support. Subject to certain exceptions, both Acts require that the amount of child support in any given case be governed by the Guidelines. These Guidelines are regulations which have been made under the Divorce Act. They include tables setting the amount of child support based on the incomes of the parents. They also provide for payment of "special or extraordinary expenses", undue hardship, variation of support orders, how a parent's income is determined, imputation of income in certain circumstances, and exchange of financial information.

[42] The terms of any separation agreement relating to child support will not necessarily be determinative of the issue. While the court may give some deference to agreements between parents, the latter cannot bargain away a child's right to support. In each instance, the court will determine the appropriate amount of weight to be given to the agreement between the parents.

[43] The court can issue orders requiring the payment of child support prospectively or retroactively. It also has the power to vary, rescind or suspend orders that have already been made, although the circumstances warranting any variation will be governed by the Guidelines.

[44] When exercising its discretion to make a retroactive child support order, the court will consider various factors including:

- the circumstances surrounding any delay in seeking a court order for support;
- whether the parent has engaged in blameworthy conduct;

- the past and present circumstances of the children, including their needs and standard of living; and
- whether any hardship would be caused by a retroactive award.

[45] Generally speaking, the child support obligation fluctuates with the level of income available to the parents. The latter have an obligation to support their children in a way that is commensurate with their income. A payor parent who does not increase child support payments to correspond with increased income does not fulfill his or her obligation to the children.

[46] Parents are obliged to fully and honestly disclose income information and documentation. At a minimum, this includes tax returns, notices of assessment/reassessment, statements of earnings, financial statements for self-employment, partnership or incorporated enterprises, and the like. Failure to provide disclosure can result in adverse inferences against, and the imputation of income to, the non-disclosing parent as the court considers appropriate.

Determining Income

[47] The Guidelines set out specific procedures to determine the annual income of a parent. The starting point is the parent's "total income" disclosed in his or her income tax return. Schedule III of the Guidelines then sets out various adjustments that can be made to that figure, whether as deductions or add-backs.

[48] If there has been fluctuation in income or non-recurring receipts/expenses in the previous three years such that the number referred to above might not be the fairest determination of a parent's income, the court has a discretion to determine an annual amount that would be fair and reasonable in the circumstances.

[49] Where a parent is a shareholder, director or officer of a corporation and the court is of the opinion that the parent's annual income set out on his or her tax return does not fairly reflect all the money available to that person for the payment of child support, the court has the discretion to include all or part of the corporation's pre-tax income in the analysis. Unreasonable payments or benefits paid to "non-arm's-length" persons dealing with the corporation can be added back to that pre-tax income.

[50] Lastly, the court has the ability to impute income to a parent in a wide variety of circumstances. These include such things as intentional underemployment or unemployment, diversion of income to affect the level of child support, unreasonable deduction of expenses, failure to provide income information, and the like.

Determining Quantum in Shared Custody Cases

- [51] Very often one parent will have custody of the children for most of the time. In such situations, the focus is on the income of the other "payor" parent and the amount he or she is required to pay to the "custodial" parent in accordance with the Guidelines.
- [52] In cases of "split custody" where each parent has custody of one or more children, the amount of a child support order is the difference between the amount each parent would otherwise pay if a child support order was sought against each of the parents (s. 8 of the Guidelines).
- [53] Sometimes parents have "shared custody", which is defined by s. 9 of the Guidelines to mean each parent having access to/custody of a child for at least 40% of the time over the course of a year. This is the situation in the present case, i.e. shared custody. In such cases, s. 9 of the Guidelines requires any child support order to take into account:
- (a) the amount set out in the applicable Guideline tables for each of the parents (i.e., essentially determining a "set-off" figure);
 - (b) the increased cost 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.
- [54] These factors emphasize flexibility and fairness. The "set-off" of each parent's income is simply a starting point and is not the end of the inquiry. The factors identified in (b) and (c) are equally important elements. They provide flexibility to ensure that the economic reality and particular circumstances of each family are accounted for and that the level of child support is fair.
- [55] The words "conditions, means, needs and other circumstances" import expansive inquiry. Thus far, there has been no definitive ruling from the Court of Appeal or the Supreme Court of Canada on whether they require or permit the taking into account of income earned by a parent's new partner. The decisions of the trial court vary in this regard. While there is no legal obligation for any such new partner to relieve the other parent's support obligation, any significant variation in the standard of living of children when they move from one home to the other can be a relevant consideration.
- [56] The "basic" or "table" amount of support under the Guidelines is designed to provide contribution towards basic expenses for children such as food, housing, transportation, clothing, personal care, allowances, and vacation. However, the court also has the power to provide additional support amounts to cover certain identified "special or extraordinary expenses".
- [57] "Special" expenses include things like necessary childcare, healthcare costs, and post-secondary education.

- [58] Section 7 of the Guidelines also identifies two types of "extraordinary expenses". One category is for primary/secondary school education or for any other educational programs that meet the children's particular needs. The other is for "extracurricular activities".
- [59] The term "extraordinary expense" is defined by the Guidelines. It includes expenses which the parent cannot reasonably cover having regard to his or her income and the basic child support payment. It also includes other expenses appropriate to such things as the special needs and talents of the children, the nature of the program/activities, overall cost, and the like.
- [60] There are two overriding factors to be considered in determining whether an expense qualifies for additional support under s. 7 of the Guidelines, namely, that the expense be:
1. necessary in relation to the child's best interests; and
 2. reasonable in relation to the means of the parents and to the family's spending pattern before separation.
- [61] With respect to all such special or extraordinary expenses, the general guiding principle is that they are to be shared by the parents in proportion to their respective incomes after deducting any contribution from the child.

DETERMINATION OF ISSUES

- [62] It is clear that the husband has been in flagrant breach of the Separation Agreement since day one. He has been nonresponsive, obstructive and combatant throughout the years. His failure to make timely production of tax returns and financial statements for both himself and the various corporations through which he has been conducting business is inexcusable. He has become so caught up in the litigation with his wife, he seems to have lost sight that the claim is for the benefit of his children and not his former spouse.
- [63] The husband attempts to defend this summary trial application by, among other things:
- repeatedly asserting that his former spouse is "mentally ill";
 - accusing his former spouse of "fraudulent bankruptcy" to avoid her child support obligations;
 - characterizing his former spouse's current business venture as an improper transfer of valuable assets to her unworthy and unskilled partner so as to reduce her declared income and avoid paying child support;
 - accusing the wife and her new spouse of "sabotaging" his charter boat business by technological subterfuge including "email bombing";
 - claiming poverty to such an extent that he can only afford to buy his children candy as Christmas presents and cannot afford to pay for any of their special expenses; and

· denying liability for the expense claim in any event on the basis that he never agreed upon same with his former spouse beforehand.

[64] None of these accusations were in the least bit substantiated in the evidence. Most are absurd and illogical. They do not speak well of Mr. Bennett's character.

Determining Income

The wife's income

[65] I accept and find as a fact that the wife's income over the years is properly and accurately set out in her income tax returns and is in the amounts described above in paras. 24 and 25 of this judgment.

[66] The husband submits the wife's income should be adjusted upwards to account for salary "overpayments" made to her new husband, Mr. Curkovic. The argument has two prongs. First, it is suggested that Mr. Curkovic's qualifications are such that he did not warrant the salary levels he was paid. Second, it is argued the wife essentially abandoned valuable assets in West Coast Web which were then wrongfully transferred to the new business, Aroma Web Design, in 2011. The purpose and result, claims the husband, was to permit the wife to reduce her own income and thereby increase the level of child support she might be entitled to claim from the husband.

[67] These arguments have no merit whatever. Firstly, Mr. Curkovic was not employed by West Coast Web in the latter years of that company's existence and hence did not receive any salary. Next, the evidence clearly establishes the financial difficulties in which the wife and Mr. Curkovic found themselves and the necessity of their consumer proposal under the Bankruptcy and Insolvency Act on April 21, 2011. In making such proposal, both individuals committed to payments of \$30,000 each by way of instalments spanning five years. They have met their obligations, albeit with some difficulty. It is simply absurd to suggest that the perpetuation of (reduced) debt by way of a consumer proposal could be a stratagem designed to increase child support payments by the debtor's former spouse.

[68] I have reviewed the statement of business activities forming part of the wife's 2014 income tax return which was attached to her March 31, 2015 sworn financial statement. The Aroma Web Design partnership generated gross business income that year of approximately \$293,000. A review of the expenses discloses no charges or outlays that might be characterized as personal in nature and which would warrant any add-back. The partnership's net income was approximately \$156,000 in 2014 and the entirety of that income was disbursed equally to the two partners in the amount of approximately \$78,000 each.

[69] The income of the business steadily grew in the first three years but declined somewhat in 2014. The business is now well-established. Averaging the wife's partnership income over the past two fiscal years generates the figure of approximately \$80,000 which would be a fair amount to use for the purposes of any set-off calculation pursuant to s. 9(a) of the

Guidelines.

The husband's income

- [70] While the wife does not dispute the accuracy of the total income reported on the husband's tax returns through 2013, she claims significant upward adjustment should be made pursuant to s. 18 of the Guidelines to include a portion of the pre-tax income of the various corporations involved in the husband's charter boat business and in respect of which he is a direct or indirect shareholder.
- [71] The wife also claims that the husband has persistently failed to make full and proper disclosure of the corporate financial records and this should trigger an adverse inference pursuant to s. 23 of the Guidelines and the imputation of income to the husband in an amount higher than the sums disclosed on his tax returns.
- [72] The wife claims the husband has received various personal benefits from the corporations which should be added back to the corporations' pre-tax income before increasing the husband's annual income to include a portion of that pre-tax income equal to his percentage shareholdings. These benefits include personal use of a corporate vehicle (\$5,000 claimed), the value of medical benefits paid on his behalf (\$1,680), unreported cash removed from the business (\$10,000), and the full amount of the so-called "management fees" paid by the business to the husband's sole proprietorship "Anchorage Investments", the latter being a vehicle pursuant to which the husband deducted additional personal expenses for tax purposes (a portion of the rent on the family home, and the like).
- [73] For his part, the husband claims that, whatever might have been the past financial history of the companies, the charter boat business is now in distress due to a reduction in business, substantial unexpected repair costs for one boat and anticipated future repair costs for the other. He claims that the business has aggregate negative retained earnings and that significant working capital is required to keep the business afloat. He denies taking any cash out of the business and presents his 2014 T4 form from VancouverCruises.com Charters Ltd. in the amount of \$78,640 as his only income in that year and likely to be received in the current year as well.
- [74] The husband also claims he no longer uses the sole proprietorship as a means of receiving management fees from the corporations and writing off personal expenses. He claims that the corporate vehicle made available for his use is used predominantly for business purposes.
- [75] The husband has (belatedly) produced unaudited financial statements for each of Queen of Diamonds Cruises Ltd., Beach Construction Ltd. and VancouverCruises.com Charters Ltd. for the fiscal years 2009-2014. The fiscal year-end for each of these entities is September 30 of each year. It should be noted there is a fourth corporation in the mix, RAP Holdings Inc., and that the husband is a 28% shareholder in that company. He advised during the course of the hearing that this entity owns one of the two boats, "Abitibi", which has a value of

approximately \$800,000. He says all operating expenses and revenues for this boat are paid/received through VancouverCruises.com Charters Ltd. None of this information was provided by way of sworn testimony nor, indeed, has there been any disclosure of any corporate or financial records pertaining to RAP Holdings.

[76] I have reviewed the corporate financial statements put into evidence. The pre-tax income for the three corporations in question over the fiscal years 2009-2014 is disclosed as follows:

Company

2009

2010

2011

2012

2013

2014

VancouverCruises

(353,399)

(65,357)

(55,656)

49,042

(93,366)

(768,925)

Queen of Diamonds

524,076

252,872

(32,853)

255,947

219,431

183,249

Beach Construction

(239)

(2,006)

2,112

625

(6,111)

13,081

[77] The financial statements of the three companies disclosed retained earnings (deficits) as follows over the years:

Company

2009

2010

2011

2012

2013

2014

VancouverCruises

(376,128)

(561,495)

(617,151)

(620,213)

(713,579)

(1,532,504)

Queen of Diamonds

(992,341)

(739,469)

(772,322)

(566,012)

(352,332)

(187,745)

Beach Construction

410,399

408,387

410,499

411,092

404,987

417,122

- [78] There is no information before the Court respecting the corporations' historic working capital requirements or dividend distribution policy. In each of 2013 and 2014, however, the husband received \$14,000 in dividends from VancouverCruises.com Charters Ltd.
- [79] The most significant difference between fiscal year 2013 and 2014 for VancouverCruises.com was an increase in repairs and maintenance expenses of some \$525,000. The husband advised the Court that the two passenger vessels owned by the corporations are required to dry dock every four years for Transport Canada inspections. In fiscal year 2014, VancouverCruises.com incurred substantial dry dock expenses for the vessel Abitibi. He said that retained earnings for the company were used up to cover those additional expenses and that the company is now in a deficit. As a result of these financial pressures, he says the company has worked out payment plans for creditors and large expenditures such as insurance, laid off staff, and delayed the payment of bonuses.
- [80] The husband says that the four-year dry docking expenses for the vessel Queen of Diamonds will be incurred in fiscal year 2015. The expenses related to engine replacement for the Abitibi vessel were approximately \$500,000 and he expects that the cost for the Queen of Diamonds' engines will be less than \$200,000.
- [81] The husband is of course only a minority shareholder in VancouverCruises.com and RAP Holdings Ltd. Generally speaking, s. 18 of the Child Support Guidelines will not be applied as against minority shareholders unless there is evidence that they can influence the amounts paid out notwithstanding a minority interest: *Kowalewich v. Kowalewich*, 2001 BCCA 450 at paras. 51-52; *Chapman v. Summer*, 2010 BCCA 237; *E.M.M. v. J.I.M.*, 2012 BCSC 372 at para. 23.
- [82] In this instance, however, the husband admits that he has been running the business for the past ten years. He consults regularly with his father, who is the majority shareholder, but he plays a significant role in directing the financial affairs of the companies. Hence s. 18 all of the Guidelines can have application in this case should the circumstances warrant same.
- [83] It should be noted the onus is on the shareholder child support payor to provide the necessary evidence that the corporate pre-tax income is not available to him or her for the payment of child support: *Hausmann v. Klukas*, 2009 BCCA 32 at paras. 51-52. In that regard,

the Court should consider evidence of legitimate business needs to determine the appropriate amount of pre-tax corporate income, if any, to be included in the shareholders Guidelines income. Monies needed as working capital or to maintain the enterprise as a going concern will not generally be available for support purposes.

- [84] It is apparent from the financial statements that VancouverCruises.com is not as profitable as its subsidiary, Queen of Diamonds Cruises Ltd. The latter generates fairly significant pre-tax income each year, with the exception of a loss in the year 2011. VancouverCruises.com, on the other hand, has had positive pre-tax income in only one of the past six years, namely 2012. On a consolidated basis, however, it is clear that, with the exception of fiscal year 2014, most years have generated positive pre-tax income which, based on a 28% "entitlement", would on a purely arithmetical basis see additional income allocated to the husband ranging from a low of \$35,000 to a high of \$85,000.
- [85] In the circumstances, it would be appropriate to assess the husband's annual income available for the payment of child support in the years 2009 to 2013 as including \$10,000 of the corporate pre-tax income in addition to the income disclosed on his tax returns.
- [86] For the year 2014 and at the present time, it is clear that the husband's cruise boat enterprise is under some financial strain due primarily to substantial expenses incurred for engine replacement. In the case of VancouverCruises.com, that has been a one-time expense of some \$500,000 but there is no reason to believe the company will not improve profitability to historic levels in due course.
- [87] With respect to Queen of Diamonds Cruises Ltd., the husband made representations during the hearing that the \$200,000 cost of replacing the engines on the Queen of Diamonds vessel will not be incurred for another seven years should their life expectancy hold true, but he argues that earnings must nonetheless be retained to deal with unexpected failures and normal seasonal fluctuations. At the present time, however, there is no reason to believe that Queen of Diamonds Cruises Ltd. will not continue to generate significant pre-tax income at historic levels of at least \$200,000 a year.
- [88] The simple fact of the matter, however, is that the consolidated pre-tax income for the husband's boat business is in fact negative for 2014 and there is no proper evidentiary basis for imputing additional income to him for that year pursuant to s. 18 of the Guidelines. Even if one were to add-back to the corporate pre-tax income the non-arm's-length payments or benefits suspected by the wife to have been made to the husband, the consolidated corporate income would still be negative. The only evidence in front of me respecting the husband's income in 2014 is the VancouverCruises.com T4 form in the amount of \$78,640 together with speculation on the part of the wife based on dated past practices that the husband is extracting unreported cash from the enterprise. None of the evidence tendered is sufficient to displace the evidence that the boating business enterprise currently has markedly reduced net income with a concomitant reduction in the husband's income.

[89] However, that is not the end of the analysis; s. 17 of the Guidelines allows the court to determine a child support obligation with regard to a parent's income over a previous three-year period if such an approach is fair and reasonable in light of income fluctuation or "one-off", non-recurring events affecting income. Such an event occurred in 2014 with respect to the unexpected engine replacement on the vessel Abitibi. It is not likely to recur for several years.

[90] Excluding consideration of imputed pre-tax corporate income, the husband's total income for the past three calendar years has been \$112,542, \$100,514 and \$78,760 respectively. The average is \$97,000 per annum and, in my opinion, this would be the fair and reasonable amount to use for the purposes of determining the husband's child support obligation in the year 2014 as well as at the present time.

The Amount of Child Support Obligation

[91] In order to determine the amount of child support, I must take into account not only the income set-off calculation pursuant to s. 9(a) of the Guidelines but also:

- the increased costs of shared custody arrangement; and
- the conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought.

[92] The submissions made by the wife in support of present and retroactive awards are based solely on line 150 income "calculations", alternatively with and without "add-ons" to reflect pre-tax corporate income and the value of "benefits". Neither party made submissions or produced evidence expressly addressing the increased costs they have incurred as a result of the shared custody arrangements that have been adopted.

[93] Both parties did, to varying degrees, address their respective budgets and lifestyles.

[94] Without expressly addressing the contribution to household income by her new spouse, the wife testified in her affidavits as to the significant differences in the standard of living between her household and that of the husband. Among other things, she points out:

- the husband's financial statement indicates essentially no debt and a net worth in the vicinity of \$950,000; the wife, on the other hand, has financial assets of only \$15,000 and debts in excess of \$75,000 (including her ongoing payment obligations pursuant to the Consumer Proposal);
- neither party owns any real estate but the wife lives in a rented townhome in Port Moody whereas the husband is renting a substantial six bedroom home in West Vancouver;
- the wife's new spouse works full-time in the family business whereas the husband's new spouse has not worked although she is attributed some income from VancouverCruises.com;
- the husband has access to two vehicles (one his corporate vehicle), whereas the wife and her new spouse have only one vehicle, the expenses of which they do not write off;

· in addition to the corporate vehicle, the husband has his family's MSP paid for by his corporations and also enjoys extended health benefits; the wife has no such corporate benefits available to her.

- [95] While these observations have basis in fact, it must be noted that the husband's net worth mostly comprises his business interests which are stated in his financial statement to have a value of \$950,000. The businesses have not actually been valued by any business valuator.
- [96] Further, it must be noted that while the wife does indeed have significantly larger debt than the husband, her current annual household income is more than \$150,000, an amount that substantially exceeds the husband's current household income.
- [97] The income set-off approach to calculating child support based on the husband's income of \$97,000 and the wife's income of \$80,000 generates a monthly child support obligation on the part of the father in the amount of \$229. In my view neither of the s. 9(b) or 9(c) factors militate in favour of any further adjustment to this sum. Accordingly, I fix this amount as the sum to be paid by the husband to the wife for the support of the children at the present time.
- [98] The same figure should be used for any retroactive adjustment in respect of arrears calculations for the period 2014 to date.
- [99] I recognize that this determination is in effect a variation of the order made by Master Muir on May 13, 2014. That order was made on an "interim without prejudice basis" and expressly contemplated adjustment of the relevant numbers depending upon the outcome of the trial.
- [100] I deal with the question of retroactivity a little later in this judgment. Suffice it to say that any negative impact arising from the present adjustment will be ameliorated to some degree by the retroactive increase of support payable in the years 2009 to 2013 and the resulting adjustment of arrears for that period.

Special or Extraordinary Expenses

- [101] As indicated earlier, the provision in a child support order for an amount to cover special or extraordinary expenses is made after taking into account both the necessity of the expense in relation to the child's best interests and the reasonableness of the expense in relation to the means of the spouses and the family's spending pattern before separation.
- [102] The Separation Agreement provided for pro rata sharing of these expenses and expressly included childcare costs, medical/dental expenses, educational costs, and counselling and therapy expenses for the children. With respect to extracurricular activities, the Separation Agreement did contemplate that the same had to be "agreed upon by the parties".
- [103] In the first years following separation there was no dispute as to either the amount of the expenses or the nature of the activities or procedures which generated same. Since the institution of this litigation, however, the husband has refused to pay for any special or extraordinary expenses that were incurred by the wife. With respect to expenses incurred

for extracurricular activities, the husband takes the position that the same were never "agreed upon" and that, in any event, he can no longer afford to pay for "fancy private lessons".

- [104] Before litigation was instituted, the parties did not insist upon prior agreement before including the cost of various activities in reconciliation calculations. There has never been any disagreement with respect to the necessity or propriety of special expenses such as childcare and health related treatments. These are and remain both necessary and reasonable.
- [105] With respect to recreational activities, neither of the parents took exception to same on the basis they were not in the best interests of their children. Indeed, both parents have been supportive of the children's participation in music, dance, gymnastics, swimming and sailing, as well as attendance at summer camps.
- [106] Athena is currently involved in guitar lessons. She appears to have considerable natural ability. She is also involved in gymnastics and an advanced girls program designed for ages 8 to 15.
- [107] Adon is active in sailing and has previously been involved in swimming and rock climbing.
- [108] It is not disputed these sorts of activities are in the best interests of the children and indeed neither parent has objected in the past to the nature of the activities.
- [109] In the early years following separation, the husband willingly paid greater sums on daycare and recreational activities than he is prepared to pay now, even though his income has increased to some degree. He now simply refuses to pay his proportionate share of the expenses on the basis that he can no longer afford it.
- [110] I have already found that the husband has experienced a reduction in income in 2014 and into 2015, primarily as a result of some substantial, non-recurring repair expenses incurred by VancouverCruise.com. I have also concluded that the drop in income is likely temporary and that the pre-tax corporate income of the husband's cruising boat business will likely improve. In my view, both the husband and the wife have the means to pay for the expenses of the children's current recreational activities and I conclude that those expenses are not only in the children's best interests but are reasonably incurred in the circumstances.
- [111] The wife has provided meticulous detail of all special and extraordinary expenses incurred since 2008. This is set forth in her affidavit of April 7, 2015, along with a reconciliation of the amounts paid by each of the parents for the period December 2008 to April 2015. I accept this evidence in its entirety as being both truthful and accurate. As set out in para. 34 of this judgment, these s. 7 expenses have totalled \$60,379.91 and to date they have been paid by the husband to the extent of \$41,431.29 and by the wife to the extent of \$18,948.62.
- [112] Responsibility for these expenses is to be borne by the parties pro rata to their annual incomes as determined earlier in this judgment.

[113] Going forward, unless a significant change in circumstances occurs, I direct that each of the parties will pay, pro rata to their income set forth above, their proportion of the following expenses:

- (a) all medical and dental expenses, including but not limited to MSP, prescriptions, eyeglasses and contacts, counselling, medical and psychological assessments, occupational therapy, speech therapy, physiotherapy, hearing aids, orthodontic expenses and any other similar expenses related to the children's physical, emotional or mental health;
- (b) school-related expenses such as tutoring recommended by teachers, school field trips and specialty school supplies requested by the school;
- (c) extracurricular activities as follows, unless otherwise expressly agreed between the parties in writing:
 - (i) summer camps to a maximum of \$1,000 per child per year;
 - (ii) enrolment for each child in sports or activity programs at a cost of not more than \$2,500 per child, per household each year; and
 - (iii) enrolment for each child for musical or artistic programs at a total combined cost of not more than \$2,000 per child, per household each year;

the equipment costs related to any of the above activities are not to be treated as separate expenses but are to be included in the totals referred to above.

[114] I also direct that the parties provide an accounting and reconciliation of all special or extraordinary expenses incurred by them every six months on April 1 and October 1 of each year and, in that regard, each party shall provide the other their respective receipts for same on or before March 1 and September 1 of each year. Thereafter, the parties will make whatever reimbursement is required to the other to account for any overpayment or underpayment of the expenses in question, which reimbursement shall be made within 30 days of the reconciliation being delivered.

Retroactivity

[115] There is no doubt that this is a case where retroactive award and adjustment of child support is warranted. The husband has been on notice since the Separation Agreement of the wife's demands for child support, demands which have been repeated on many occasions since that date. The husband's conduct in steadfastly refusing to disclose financial documentation and, indeed, to make any payments on account of child support until a court order was issued is reprehensible. The evidence also discloses various threats he has made to his wife in respect of custody of the children as a response to her demands for payment of child support. None of this does the husband any credit.

- [116] The husband has, however, paid the basic child support required by the order of Master Muir made May 13, 2014. Those payments must, of course, be taken into account in carrying out a retroactive reconciliation of both basic child support arrears and the special or extraordinary expenses incurred since the Separation Agreement. In light of the husband's compliance with the court order, and in the expectation that he will also comply with the order that will arise from these reasons for judgment, I decline the wife's application for an order imposing pre-set fines in the event of future non-payment of support.
- [117] Lastly, the wife is also entitled to judgment for the amounts owed to her pursuant to para. 4.7 of the Separation Agreement, being the principal sum of \$7,046.17 as per the reconciliation set out in Exhibit B of her affidavit sworn April 22, 2014.
- [118] Since the husband is not represented by counsel, I direct counsel for the wife, in her capacity as an officer of the court, to prepare a detailed reconciliation of all amounts due to the wife on account of the arrears for child support, including special and extraordinary expenses, to be calculated retroactively and in accordance with the findings as to income made in this judgment. That reconciliation shall be provided to the husband forthwith upon its completion along with a formal order granting judgment for the said arrears and setting out the other directions made in this judgment.
- [119] In the event the husband disagrees with the reconciliation or refuses to consent to the form of the final order presented, the parties will be at liberty to appear before me for additional directions in that regard.
- [120] Costs will follow the event and are awarded to the claimant.
- "The Honourable Mr. Justice N. Kent"

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