

CANADA / JUDGMENT

Berlando v. Berlando

2024 BCSC 11

COURT

Supreme Court of British Columbia

DECIDED

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2024 BCSC 11 *Berlando v. Berlando* IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: *Berlando v. Berlando*, 2024 BCSC 11 Date: 20240103 Docket: E8320 Registry: Chilliwack Between: Loretta Lynn Berlando Claimant And Robert Francis Berlando Respondent Before: The Honourable Madam Justice Forth Reasons for Judgment Counsel for the Claimant: K.K. Seikhon Counsel for the Respondent: M.L. Sagert Place and Date of Hearing: Abbotsford, B.C. October 19, 2023 Place and Date of Judgment: Chilliwack, B.C. January 3, 2024 Introduction.. 2 Background Facts.. 3 Litigation Background.. 6 Issue 1: Is a fine pursuant to s. 213 of the FLA warranted in the circumstances of the case?.. 7 Legal Principles. 7 Positions of the Parties. 8 Position of the Claimant 8 Position of the Respondent 9 Analysis. 11 Issue 2: Should an order for retroactive child support be made? 12 Legal Principles. 12 Relevant legislation.. 12 Case law.. 13 Positions of the Parties. 14 Position of the Claimant 14 Position of the Respondent 15 Analysis. 15 Issue 3: What amount of retroactive child support should be paid? 16 Issue 4: What amount of ongoing child support should be paid?.. 19 Conclusion.. 22

Introduction

- [1] The claimant sought relief pursuant to two notices of application. The first application was filed on October 13, 2022 for a fine pursuant to s. 213 of the Family Law Act, S.B.C. 2011, c. 25 [FLA] for non-disclosure of information as required by an order made on March 14, 2022 (the "October 2022 Application"). The second application was filed on September 15, 2023 for a payment of retroactive child support and ongoing s. 7 expenses for a child of the marriage D.P.B. (the "September 2023 Application").
- [2] There was a procedural objection made by the respondent respecting paragraph 11 of affidavit #15 of the claimant in that it was filed after the responsive materials had been filed and is not responding to the responding materials. The respondent argues that the information in paragraph 11 and the referenced emails at Exhibit "D" were in the possession of the claimant at the time the initial application was made and should have been disclosed at that time. The respondent did not have an opportunity to respond to this material.

- [3] Having reviewed the application record, I find it unnecessary to rely on paragraph 11 of affidavit #15 of the claimant and the various emails referenced as Exhibit "D" in order to determine the issues. Background Facts
- [4] I make the following findings of facts based on the affidavit material before me.
- [5] The parties were married on July 11, 1987, and separated on July 28, 2007.
- [6] There were three children of the marriage, but at the time the Separation Agreement was entered into, only two remained children of the marriage: a son, R.J.B, born in 1992, and a daughter, D.P.B., born in 2002. D.P.B. is currently attending the University of Fraser Valley on a full-time basis. She is in her second year of a program to become a teacher. She resides with the claimant.
- [7] On March 4, 2011, the parties entered into a Separation Agreement in which the respondent, who was residing in Calgary, agreed to pay child support on a guideline income of \$92,000, being the sum of \$1,317 per month.
- [8] Clause 6.5 of the Separation Agreement provided: 6.5 Notwithstanding anything provided for in the Separation Agreement to the contrary, each party acknowledges and agrees that the quantum of monies payable to the other party by himself or herself for the monthly maintenance of and/or special expenses incurred to and for the benefit of [R.J.B.] and/or [D.P.B.] shall be reviewed annually and adjusted, if necessary, based upon his or her gross annual guideline income for the preceding year pursuant to the Matrimonial Legislation and, specifically the Federal Child Support Guidelines. For the purposes of conducting such annual review, each party shall apply proper regard for the joint custody arrangement provided for in the Separation Agreement and he or she will provide to the other party the following:
- (a) a copy of his Individual Income Tax and Benefit Return by no later than May 30 of each year; and
 - (b) a copy of any Notice of Assessment or Notice of Re-Assessment issued by Canada Revenue Agency to himself or herself with SEVEN (7) DAYS of receiving same.
- [9] The respondent paid the child support until April 2012, when R.J.B. was no longer a child of the marriage, and the child support was reduced to \$809 based on the Alberta table.
- [10] The claimant asserts that after entering into the Separation Agreement, the respondent did not disclose his income tax returns annually and a review of child support has never taken place. The respondent disputes this and says that he mailed original copies of his financial disclosure to the claimant every year. However, he did not make copies of what he sent.
- [11] The claimant says she did not receive any financial disclosure until she applied and obtained the March 14, 2022 order from Master Keighley ("Keighley Order"), which provided:

- 1) Within 14 days of the date of the order the Respondent shall provide to counsel for the Claimant copies of the following documents and records:
 - a) Complete copies of the Respondent's Personal Income Tax Returns, including schedules and Notices of Assessment for the years 2017, 2018, 2019, 2020 and 2021;
 - b) Copies of the Respondent's T-4 slips that were issued to him in 2021;
 - c) Copies of the Respondent's three most recent pay statements from Les Industries Polykar Inc.;
 - 2) Each party will each bear their own costs of this application.
- [12] The respondent did not provide full disclosure of all documents as required in the Keighley Order by the March 28, 2022 deadline. The following documents were missing as of that deadline: · Complete copies of the respondent's personal income tax returns, including schedules, for the years 2017, 2018, 2019, 2020 and 2021; and · Notice of assessment for the year 2021.
- [13] The respondent does not dispute that he failed to provide all of the documents but says that he provided on: · March 14, 2022: 2019 Tax Return, 2020 Assessment, 2021 T4, pay stubs, and letter of employment; · March 23, 2022: 2017 and 2018 notices of assessment; · August 17, 2022: 2021 notice of assessment; · September 23, 2022: 2017 tax return summary, 2018 tax return summary, 2021 tax return, with schedules; · November 5, 2022: 2020 tax return; and · November 14, 2022: 2017 and 2018 full tax returns;
- [14] The respondent says that ultimately, he has disclosed everything except the schedules to his 2019 tax return which he cannot locate. Instead, he provided his bank statements that showed the rent being deposited. The claimant says that the complete tax returns are needed to show what rental income was claimed and the expenses deducted so a determination can be made on whether the deductions are legitimate.
- [15] The respondent made a voluntary adjustment to the child support on January 24, 2022 seeking to adjust the child support paid from \$809 to \$947. The claimant did not accept this adjustment on the basis that she had not received full disclosure to confirm what the adjustment should be. Litigation Background
- [16] The action was started by way of a writ of summons and statement of claim filed July 9, 2009.
- [17] The Separation Agreement was filed in Court on April 13, 2011.
- [18] On October 13, 2022, the October 2022 Application was filed and a hearing was scheduled for October 27, 2022. The respondent was served, but no response or responding affidavits were filed. Edward Gale, the respondent's then-counsel, sought an adjournment on October 27, 2022. Master Nielsen granted the adjournment on the condition that it be set to a new date in consultation with counsel for the respondent but with counsel for the claimant's availability and that the respondent will file and serve his responding materials by November 3, 2022.

The claimant was awarded her costs of the appearance in any event of the cause.

- [19] As a result of new counsel being retained by the respondent, the claimant granted an extension to November 8, 2022 for responding materials. The application response to the October 2022 Application was filed on November 7, 2022.
- [20] The October 2022 application was rescheduled to be heard on December 14, 2022. It was not heard due to insufficient court time.
- [21] The parties agreed that the hearing of the October 2022 Application would be heard at the same time as the main application for retroactive variation of child support.
- [22] On September 15, 2023, the September 2023 Application was filed and set for hearing during the assize week of October 16, 2023. Issue 1: Is a fine pursuant to s. 213 of the FLA warranted in the circumstances of the case? Legal Principles
- [23] Section 213 of the FLA provides the court with tools which can be used to secure proper disclosure in a timely and cost-efficient way. Under s. 213(2)(d), the court has the authority to:
- (d) make an order requiring the person described in subsection (1) to pay
 - (i) a party for all or part of the expenses reasonably and necessarily incurred as a result of the non-disclosure of information or the incomplete, false or misleading disclosure, including fees and expenses related to family dispute resolution, (ii) an amount not exceeding \$5 000 to or for the benefit of a party, or a spouse or child whose interests were affected by the non-disclosure of information or the incomplete, false or misleading disclosure, or (iii) a fine not exceeding \$5 000;
- [24] The guiding principles for application of s. 213 of the FLA is set out in *J.D.G. v. J.J.V.*, 2013 BCSC 1274:
- [25] The goal of proper disclosure is to enable the parties to resolve their dispute. In my opinion s. 213 is to be used to secure proper disclosure in a timely and cost efficient way. It therefore requires a robust application to accomplish that end. That should increase the awareness of the importance of timely and complete disclosure and over time lead to fewer applications. In [other] words, punishment per se is not the end, but rather the means, as the information is required to resolve matters in a just manner. Section 213 provides a mixture of tools to be applied creatively in a manner sensitive to the issues of a particular case. For example where implementation of a payment or a fine may be ineffective the drawing of an adverse inference or a requirement for security may be effective. In addition its application should recognize the increased level of judicial case management inherent in the FLA and in particular the obligation imposed on the court under s. 199:

- [27] While an application to hold a party in contempt is still available, presumably in all but the most egregious cases an application under s. 213 should be made initially. This recognizes the seriousness of a contempt application with its more onerous procedural and evidentiary requirements. It also recognizes that the FLA adds to the arsenal for enforcement available to the courts rather than subtracting from the court's remedies.
- [28] Both the issue of non-disclosure and the severity of any order made under s. 213 will, as was the case under s. 92 of the FRA, depend on the facts. It should depend on the circumstances of the case, the degree of non-disclosure, the reasons for the late disclosure and when it is made. Likewise the need for the information in order to resolve the matter may be a factor. In addition, while in most cases disclosure may not be either complex or onerous there will be such cases where disclosure is. That should be recognized as well.
- [29] If for example an application is brought under s. 213 and the responding party makes disclosure prior to the hearing that may justify a lesser penalty. That said, the fact that the applicant had to bring the application should, notwithstanding the late production, be addressed both because of the expense incurred but as well the delay itself. The latter impedes the timely resolution of proceedings. In such a case the remedy brought might be a fine. If however production does not occur until after an application then an order for costs thrown away may be appropriate and depending on the circumstances, imposition of a penalty as well.
- [30] The court in my view should approach the application of the rule so that the significance of timely disclosure is brought home. It should not be taken lightly. Proper and timely disclosure will be enforced.
- [25] The test to establish a breach of a court order is set out in *T.A.O. v. D.J.M.*, 2021 BCSC 1724:
- [48] In order to establish a breach of a court order, the respondent must show that: (1) the order was clear and unequivocal regarding what should or should not be done; (2) the claimant had actual notice of the order; and (3) the breach was intentional. These are the same elements required for a finding of contempt, except that in the case of contempt, the standard of proof is proof beyond a reasonable doubt: *Carey v. Laiken*, 2015 SCC 17 at paras. 33-35. Positions of the Parties Position of the Claimant
- [26] The claimant says that the Keighley Order was clear and unequivocal in requiring the disclosure of the complete copies of the respondent's personal tax returns, including schedules for the years 2017 to 2021, within 14 days of March 14, 2022. The claimant submits that the respondent was aware of the order, given his counsel was present when it was made and he did comply with parts of it. The claimant contends that the breach was intentional in that the respondent provided some documents but not others and no explanation was provided until the October 2022 Application was filed. The explanations provided are unsatisfactory since he claimed to have provided original copies of his tax returns by mail to the claimant, and yet, the tax returns that have been provided had been prepared electronically. The respondent further claimed that he filed his own tax returns and yet the

2017 and 2018 Statements of Real Estate Rentals were prepared by H&R Block.

- [27] The claimant submits that the only step taken by the respondent was to request the documents from the CRA after the October 2022 Application was filed. Since the CRA did not provide any documents, there has been no explanation given how he obtained the documents he did disclose.
- [28] The respondent continues to be in breach of the Keighley Order since he has not provided a full copy of his 2019 income tax return. Position of the Respondent
- [29] The respondent says that he has produced the following income documents:
- a. 2017 Tax return summary;
 - b. 2017 Complete Tax Return;
 - c. 2017 Notice of assessment;
 - d. 2018 Tax return summary;
 - e. 2018 Complete Tax Return;
 - f. 2018 Notice of assessment;
 - g. 2019 Complete Tax Return;
 - h. 2019 Notice of assessment;
 - i. 2020 Complete Tax Return;
 - j. 2020 Notice of assessment;
 - k. 2021 T4 of Polykar Inc.
 - l. 2021 Complete Tax Return
 - m. 2021 Notice of Assessment;
 - n. Paystubs of Polykar Inc. dated:
 - i. January 13, 2022; ii. January 27, 2022; iii. February 10, 2022
 - o. A letter from Polykar Inc. dated January 12, 2022 which sets out his job title and annual compensation.
 - p. Paystubs of Polykar Inc. dated:
 - i. October 6, 2022; ii. October 20, 2022; iii. November 3, 2022.
- [30] The respondent says that he has retrieved all documents available to him through his CRA portal and produced those documents to the claimant. He submits that a fine is not justified where the document disclosure has largely been complied with and the remaining document is not in his possession. He further argues that the Keighley Order was not clear

and unequivocal that production of all schedules to the income tax returns was required. The respondent submits he has endeavoured to produce the documents to the best of his ability

- [31] The respondent argues that he has not flagrantly disregarded the court process or his disclosure obligations.

Analysis

- [32] Whether to impose a fine under s. 213 of the FLA is a fact-specific inquiry: J.D.G. at para. 28. Having considered the circumstances of the case, including the degree of non-disclosure, and the lack of any satisfactory explanation for the late disclosure, I am satisfied that a fine is appropriate. I am not persuaded that the fine should be the maximum that can be imposed.
- [33] The respondent was required to produce his complete tax returns under the terms of the Separation Agreement. I accept that the claimant did not receive the complete copies of the respondent's tax returns on an annual basis. I note that on October 8, 2021, when the claimant emailed the respondent and asked for his tax returns and notices of assessment back to 2012, the respondent states on October 22, 2021: I have an idea what sparked this and shake my head. We have two months until year end and can look at it then. I prefer to wait as the year is almost over.
- [34] On December 23, 2021, the respondent replied to a request made by the claimant's counsel for the production of copies of his income tax returns and notices of assessment for the years 2017 to 2020, inclusive. At that time, he did not assert that he had already provided this information. The respondent does not raise that he has already provided to the claimant his original tax returns by mail to the claimant nor to her lawyer. One would have expected him to do so if he had provided the financial disclosure that the claimant and her lawyer were now requesting.
- [35] In an email from Mr. Gale dated August 17, 2022, over half a year after the December exchange and for the first time, the respondent's counsel claims that the respondent has already mailed the information to the claimant. The respondent in his affidavit #1 made on October 25, 2022, responding to the October 2022 Application, stated that he mailed his financial disclosure each year. I am not persuaded that he did so.
- [36] Under s. 44(3) of the FLA, a written agreement respecting parenting arrangements that is filed in court is enforceable under the FLA as if it were an order of the court.
- [37] It is not clear to me why the respondent took so long to comply with the majority of the Keighley Order. His explanation was that he did his own tax returns and did not have an accountant he could contact to receive copies of the schedules. At least in 2017 and 2018, he had H & R Block Canada assist in preparing the Statement of Real Estate Rentals forms.

- [38] Given the respondent's breach of the Separation Agreement and the lengthy delays, up to 226 days, in producing the ordered financial information, I conclude that the respondent should pay to the claimant a fine of \$1,000, within 30 days of the making of this order. This amount is reasonable given the nature of the non-compliance and the parties' financial circumstances. Issue 2: Should an order for retroactive child support be made? Legal Principles Relevant legislation
- [39] Section 148(2) of the FLA sets out that a written agreement respecting child support that is filed in Court is enforceable under the FLA as if it were an order of the Court. Section 148(3) of the FLA sets out that on application of a party, the court may set aside or replace with an order under this Division, all or part of an agreement respecting child support if the court would make a different order in consideration of the matters sets out in s. 150.
- [40] Section 152 of the FLA provides: 152(1) On application, a court may change, suspend or terminate an order respecting child support, and may do so prospectively or retroactively.
- (2) Before making an order under subsection (1), the court must be satisfied that at least one of the following exists, and take it into consideration:
- (a) a change in circumstances, as provided for in the child support guidelines, has occurred since the order respecting child support was made;
 - (b) evidence of a substantial nature that was not available during the previous hearing has become available;
 - (c) evidence of a lack of financial disclosure by a party was discovered after the last order was made.
- [41] Section 14 of the Federal Child Support Guidelines, SOR/97-175 [Guidelines] provides: 14 For the purposes of subsection 17(4) of the Act, any one of the following constitutes a change of circumstances that gives rise to the making of a variation order in respect of a child support order:
- (a) in the case where the child support includes a determinate made in accordance with the applicable table, any change in circumstances that would result in a different child support order or any provision thereof.
- [42] Section 17 of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) provides that, on application, a court "may make an order varying, rescinding, or suspending, retroactively or prospectively, a support order of any provision of one". Case law
- [43] The Supreme Court of Canada recognized in *D.B.S. v. S.R.G.*, 2006 SCC 37, that retroactive child support orders are neither "rare" nor "exceptional": at paras. 5, 37. An assessment of retroactive child support is based on an analysis of four factors: the reasonable excuse for why support was not sought earlier, the conduct of the payor parent, the circumstances of the child, and the potential hardship occasioned by a retroactive award: *D.B.S.* at paras. 94-116. However, "none of these factors is decisive" and the court maintains significant

discretion in determining retroactive child support: D.B.S. at para. 99.

- [44] The Court in D.B.S. also provided that if a recipient is entitled to a retroactive award, the general rule is that the award should go back to the date that the recipient party provided effective notice to the payor, but no more than three years prior to formal notice being given, unless the payor had engaged in blameworthy conduct: at paras. 118-132. Notice does not require the recipient to take legal action; all that is required is that the topic be broached: at para. 121.
- [45] The Supreme Court of Canada in *Michel v. Graydon*, 2020 SCC 24 at para 10 reaffirmed the following principles, set out in D.B.S., as being fundamental in child support law:
1. Child support is the right of the child and cannot be bargained away by a recipient parent;
 2. Retroactive or historical child support orders hold the payor to their existing (and unfulfilled) legal obligations and thus are not truly retroactive in the strictly legal sense;
 3. Retroactive or historical child support orders should not be exceptional;
 4. The threshold for blameworthy conduct by the payor parent is low and exists when they fail to pay the appropriate amount of child support in accordance with their income;
 5. The recipient's reason for delay in seeking the court's assistance earlier will be expansively interpreted and may take into account the recipient's fear of reprisal and the desire to insulate children from conflict, intimate partner violence, and the prohibitive cost of litigation; and
 6. The date of effective notice, which would normally be the date an award would be retroactive to, is not particularly relevant when the payor parent has engaged in blameworthy conduct (irrespective of the degree of blameworthiness).
- [46] The Guidelines and s. 17 of the Divorce Act are clear that payor parents must pay more support as income rises and that this obligation can be enforced after the fact: *Colucci v. Colucci*, 2021 SCC 24 at para. 44. Positions of the Parties Position of the Claimant
- [47] The claimant submits that she was not aware of the significant increases in the respondent's employment income, rental income and severance income until she was provided with some disclosure in 2022. She did not pursue the disclosure on an annual basis because the process of settling the family law issues was financially and emotional draining on her and she could not go through court applications on an annual basis. Position of the Respondent
- [48] The respondent argues that retroactive child support should not be payable on the basis that the required factors have not been met. The claimant has not adduced any evidence to support she was financially or emotionally unable to take steps. He points out that under the terms of the Separation Agreement the claimant received a sizeable amount of money. The respondent further says that under the Separation Agreement, if neither party institutes a review, then the previous amount remains.

- [49] The respondent submits that he has been making payments of \$200 to D.P.B. to assist her with her educational expenses. His position is that any payment of child support should be made to D.P.B. and not to the claimant. He does not suggest that child support should be cancelled.

Analysis

- [50] I find retroactive child support appropriate in this case. First, I find that the claimant did not unreasonably delay her pursuit of child support. She first learnt of the employment, rental, and severance income the respondent had received in prior years in 2022. She gave notice of her intention to seek income disclosure on October 8, 2021 but ultimately had to obtain a court order to compel the financial disclosure.
- [51] Second, I found that the respondent's conduct fits the "expansive view" of blameworthy conduct that courts are encouraged to take: D.B.S. at para. 106. It is not solely egregious conduct, but any conduct that "privileges the payor parent's own interests over his/her children's right to an appropriate amount of support": D.B.S. at para. 106. The respondent was obliged to provide his financial information in accordance with the Separation Agreement and he has a moral duty to support his children.
- [52] The only evidence of hardship on the children is that D.P.G. has had to take on employment in April 2020 to contribute to her expenses. The claimant's evidence is that as a result of having to work many hours to contribute to her expenses, her daughter has been in a state of high stress. If the respondent had paid the correct amount of support, that could have reduced the amount of work so that she could focus on her studies.
- [53] There is no evidence to support that the payment of retroactive child support will be a hardship for the respondent and the respondent concedes no hardship. The respondent's financial statement discloses significant assets of approximately \$1.4 million and minimal debt. He currently is earning over \$100,000 annually.
- [54] In all of the circumstances, I find the appropriate date to commence the retroactive child support is January 2017 since I have found the presumptive three-year limit does not apply due to the respondent's blameworthy conduct. I find that this is a reasonable period. I further note that the respondent may also have been under paying child support prior to January 2017, but there has been no financial disclosure to establish his income prior to that date. Issue 3: What amount of retroactive child support should be paid?
- [55] I will first consider the income of the respondent as disclosed in the financial information provided and the appropriate Guideline income: · 2017 Ø Line 150 income: \$133,960.53 Ø Gross rental income: \$8,750.00 Ø Net rental income: \$136.78 Ø Guideline income: \$133,960.53 · 2018 Ø Line 150 income: \$132,743.05 Ø Gross rental income: \$15,000.00 Ø Net rental income: \$2,399.17 Ø Guideline income: \$132,743.05 · 2019 Ø Line 150 income: \$123,848.85 Ø Gross rental income: \$15,000.00 Ø Net rental income: \$1,376.69 Ø Guideline income: \$123,848.85 · 2020 Ø Employment income: \$71,097.00 Ø Gross rental income:

\$16,200.00 Ø Net rental income: \$5,046.00 Ø Other income (being severance pay):
\$105,000.00 Ø Guideline income: \$186,143.81 · 2021 Ø 15000 income and Guideline income:
\$79,096.41 · 2022 Ø 15000 income and Guideline income: \$125,447.38

- [56] I have imputed an income of \$125,000 for the respondent for 2023 since there is no indication that there was any change in his income this last year.
- [57] The claimant seeks to impute rental income in 2021, 2022, and 2023 of \$5,046.51. The respondent's evidence is that in May 2022, the rental condo he owns with his current spouse was sold. He believes that his spouse claimed the rental income in 2021. I note that from 2017 to 2020, the respondent declared rental income in his tax returns. There was no explanation given as to why there was a change to having his spouse declare the rental income. I see no reason to ignore the respondent's evidence regarding the sale of the rental condo. I accept that rental income should be imputed for 2021. Since the respondent has chosen not to provide the precise numbers, I will impute a net rental income based on the 2020 figures. I am not prepared to impute any rental income in 2022 and 2023.
- [58] The amount of retroactive child support owed is: Period Months Guideline income Monthly Support Total Support for Period 2017 12 \$133,960.00 \$1,167.00 \$14,004.00 2018 12 \$132,743.00 \$1,173.00 \$14,976.00 2019 12 \$123,848.00 \$1,097.00 \$13,164.00 2020 12 \$186,143.00 \$1,622.00 \$19,464.00 2021 12 \$84,143.00 \$738.00 \$8,856.00 2022 12 \$125,447.00 \$1,111.00 \$13,332.00 2023 12 \$125,000.00 \$1,107.00 \$13,284.00 TOTAL \$97,080.00
- [59] The respondent has paid child support in the sum of \$809 per month from January 2017 to January 2022 and then \$947 per month from February 2022 to October 2023. I have assumed he has also paid \$947 for November and December 2023. If he has not, then an adjustment to the numbers can be made. The total payments he has made is \$71,130. The claimant suggests that an amount of retroactive child support should be ordered, but the parties can fix the arrears. If an adjustment in the amount paid the parties is needed, the parties have leave to adjust the numbers by agreement.
- [60] The claimant points out that the voluntary increase in payments from February 2022 to present is being held by FMEP and has not been paid to the claimant. As a result of these reasons, the amounts held by FMEP should be immediately paid to the claimant.
- [61] The difference between the amount owed by the respondent, being \$97,080, and the amount paid, being \$71,130, is \$25,950. As I have indicated above, if there is an adjustment needed for the amount of child support already paid, then that adjustment can be made.
- [62] The claimant submits that the respondent should have no difficulty paying this amount since he discloses in his financial statement that he has funds in a tax-free savings account in the sum of \$33,776.40, which would be more than sufficient to pay the difference.

- [63] In my view, it is reasonable to give the respondent some time to arrange his financial affairs. He will have three months from the date of this order to pay the claimant the retroactive award of \$25,950. Issue 4: What amount of ongoing child support should be paid?
- [64] The respondent concedes that D.P.B. remains a child of the marriage as she is enrolled in full-time post-secondary education. The respondent has not made an application to cancel or reduce the child support for D.P.B. The respondent does not dispute his obligation to pay child support for D.P.B. but argues that it should be paid to his daughter and not to the claimant.
- [65] Section 146 of the FLA sets out: In this Part and section 247 [regulations respecting child support] "child" includes a person who is 19 years of age or older and unable, because of illness disability or other reasons, to obtain the necessities of life or withdraw from the charge of his or her parents or guardians.
- [66] In *Nordeen v. Nordeen*, 2013 BCCA 178 the Court of Appeal set out the eight factors that may assist a court in determining whether the pursuit of education is a valid reason for continued dependence. I will quote from some of the claimant's submissions at para. 37 since they accurately set out the eight factors and the evidence in support:
- (1) Whether the child is in fact enrolled in a course of studies and whether it is a full-time or part-time course of studies [D.P.B.] is enrolled in full time studies.
 - (2) Whether or not the child has applied for or is eligible for student loans or other financial assistance [D.P. B.] applied for and received two scholarships in 2021 in the sum of \$2,250.00
 - (3) The career plans of the child, i.e. whether the child has some reasonable and appropriate plan or is simply going to college because there is nothing better to do. [D.P.B.'s] plan is to become a high school English teacher.
 - (4) The ability of the child to contribute to her own support through part-time employment. [D.P.B.] is employed part time during the school year and full time during the summer months. She earned an income of \$30,900.43 in 2022. She contributes to some of her expenses, but is not able to pay for all of her expenses without the support of her parents.
 - (5) The age of the child. [D.P.B.] is 21.
 - (6) The child's past academic performance, whether the child is demonstrating success in the chosen course of studies. [D.P.B.] has a 3.52 cumulative GPA. The Respondent acknowledges that [D.P.B.] has maintained good grades.
 - (7) What plans the parents made for the education of their children, particularly where those plans were made during cohabitation. There is no indication of plans made by the parents for education of the children during their marriage. The respondent did have an RESP set up for [D.P.B.] and provided her with \$3,000 from this RESP in 2021.

- (8) At least in the case of a mature child who has reached the age of majority, whether or not the child has unilaterally terminated a relationship with the parent from whom support is sought. Neither party has alleged [D.P.B.] has terminated a relationship [with] the Respondent. The Respondent acknowledges that he and [D.P.B.] speak regularly.
- [67] In *Lewis v. Lewis*, 2021 BCSC 2099, the court found it appropriate to reduce the amount of child support payable on the basis that the child's tuition and related child school expenses would be paid by the parties rather than being included in the monthly child support.
- [68] The claimant submits that the respondent should pay \$200 monthly, in addition to the table amount of child support as section 7 expenses. I am not persuaded that this is a fair approach and adopt the approach followed in *Lewis*. D.P.D. has the potential to earn a good income to assist in supporting herself. In 2022, she earned more than \$30,000. In light of that income, it seems reasonable to reduce the amount of child support paid.
- [69] The table amount of child support is \$1,107. The respondent should be paying to D.B.P. the amount of \$200 a month while she completes her teaching certificate. I will reduce an equivalent amount from the child support the respondent has to pay the claimant. This results in a monthly child support paid by the respondent to the claimant of \$907.
- [70] The respondent suggests that any child support should be paid to D.B.P. and not to the claimant. This ignores the reality that D.B.P. is living with the claimant and paying for the majority of her living expenses and cost of accommodation. I see no basis to direct that the child support amount should be paid directly to the child. This type of order may be appropriate if the child was living outside of the parent's home while attending university, for example, in another city or province, but not when the child remains living with the custodial parent.
- [71] The respondent is entitled to receive copies of all expenses related to the tuition and cost of school supplies incurred by D.P.B.

Conclusion

- [72] The following orders are made:
1. The respondent will pay to the claimant a fine of \$1,000 pursuant to s. 213 of the Family Law Act for his failure to comply with the requirements of the Separation Agreement and the order of Master Keighley made March 14, 2022.
 2. The respondent is found to be a resident of Alberta and is found to have a gross imputed income for 2023 of \$125,000.
 3. The retroactive child support owing from the respondent to the claimant as of December 2023 is \$25,950. The parties have leave to adjust the figure based on the amount of child support paid in the past.

4. The respondent is required to pay the retroactive child support to the claimant within three months of these reasons being pronounced.
 5. The respondent will pay to the claimant the sum of \$907 per month for the support of D.P.B. commencing on January 1, 2024 and continuing for so long as D.P.B. is eligible for support under the Family Law Act or until further agreement of the parties or Court order.
 6. The respondent will pay the sum of \$200 to D.P.B. to assist in her post-secondary expenses while she attends a full-time undergraduate university program.
 7. The respondent is entitled to receive copies of all invoices relating to the tuition and costs of school supplies for D.P.B.
- [73] As the claimant has been substantially successful there is no reason to deviate from the typical order respecting costs of applications. The costs of the applications shall be paid by the respondent to the claimant. "The Honourable Justice C. Forth"

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