

CANADA / JUDGMENT

Briggs v. Kasdorf

2020 BCSC 1702

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Supreme Court of British Columbia

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2020 BCSC 1702 Briggs v. Kasdorf

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Briggs v. Kasdorf,

2020 BCSC 1702

Date: 20201112

Docket: E54483

Registry: New Westminster

Between:

Cheryl Ann Briggs

Claimant

And

Vernon Arthur Kasdorf

Respondent

Before: The Honourable Mr. Justice Verhoeven

Reasons for Judgment

The Claimant Appearing in Person:

C.A. Briggs

The Respondent Appearing in Person:

V.A. Kasdorf

Place and Dates of Hearing:

New Westminster, B.C.

July 21, 22, 2020

August 21, 2020

Additional Affidavits and Submissions:

September 29 - October 7, 2020

Place and Date of Judgment:

New Westminster, B.C.

November 12, 2020

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I. Introduction

- [1] In this family law case, the parties have filed cross applications seeking various orders, mostly having to do with both past and prospective child support issues, relating both to table amounts payable under the Federal Child Support Guidelines, SOR/97-175 [Guidelines], and s. 7 Guidelines (special and extraordinary expense) issues.
- [2] In addition, the claimant, Ms. Briggs, seeks repayment to her of \$28,161 that she paid to the respondent, Mr. Kasdorf, when she received an income tax refund in that amount.
- [3] The parties also raise various issues having to do with s. 7 expenses, and the Registered Education Savings Plans (RESPs) for their two children.

II. Background

- [4] The parties were married June 22, 1991. They separated December 15, 2005, and were divorced in June 2008. Ms. Briggs is 51 years of age. Mr. Kasdorf is 53 years of age.
- [5] They have two children together, a son, Kale, born in July 2001, and a daughter, Kennedy, born in January 2003. Therefore, Kale turned 19 years of age in July 2020, and Kennedy will be 19 years of age in January 2022.
- [6] Mr. Kasdorf remarried, to Catherine Brown. He and Ms. Brown have a daughter together, born in 2006. He and Ms. Brown separated on October 1, 2018. He has re-partnered again since then.
- [7] Ms. Briggs remarried in September 2015, to Bruce Briggs, and became stepmother to his daughter.
- [8] The parties entered into a comprehensive settlement agreement April 13, 2006, with the assistance of separate, independent legal counsel.
- [9] The separation agreement records that, at the time, Mr. Kasdorf was employed by Barrick Gold, earning approximately \$125,000 per annum, but had been given notice of termination effective June 30, 2006. Ms. Briggs was a schoolteacher who was on an extended leave of absence in order to remain at home and care for the children. The separation agreement indicates that she planned to return to work as a teacher, capable of earning approximately \$52,500, on a full-time basis. However, she planned to return to work on a part-time basis, increasing her work hours gradually, to 80% of full-time capacity, in 2009. The children were

to reside primarily with Ms. Briggs.

[10] The separation agreement provides that Mr. Kasdorf will pay child support to Ms. Briggs pursuant to the Guidelines in the amount of \$1,757 per month commencing May 1, 2006 and continuing each month until the children reach 18 years of age. The agreement does not explain why 18 years was referenced, when the age of majority in British Columbia was and is 19.

[11] The agreement provides for reviews of child support, as follows:

3.6 The child support arrangements in this Agreement shall be reviewable on any material change in circumstances and in any event, once a year, if either party asks in writing, Vern and Cheryl will review the child support arrangements in this Agreement and, if they do not agree about any change, they will use the section of this Agreement entitled "Dispute Resolution" to resolve the issue(s).

3.8 Until the support is adjusted by an amending agreement, court order or arbitration award, Vern will continue to pay the child support and his contribution to the children's special and extraordinary expenses under the parties' most recent written agreement, court order or arbitration award.

[12] The separation agreement also provides for spousal support, pursuant to the Spousal Support Advisory Guidelines, based upon their then current levels of income, in the amount of \$2,686 per month, terminating on the earliest of December 31, 2013, or on the remarriage or marriage-like cohabitation of Ms. Briggs.

[13] The parties entered into two addendums to the separation agreement. There is no indication that either party had legal advice or representation about the addendums. The first addendum is dated November 24, 2010 (the "first addendum"). Among other things, the first addendum provides for:

1. payment of \$13,134 for retroactive child support payments relating to the period from May 1, 2006 to November 1, 2010, in recognition of the increased income of Mr. Kasdorf during that time;
2. amendments to the provisions of the separation agreement relating to s. 7 expenses;
3. payment of lump sum spousal support to Ms. Briggs in the sum of \$98,000, in satisfaction of all claims for spousal support; and
4. retention by Ms. Briggs of the entirety of her teachers' pension plan benefits.

[14] The parties entered into the second addendum on August 3, 2015 (the "second addendum"). In the second addendum, among other things, the parties agreed that Kale and Kennedy would reside equally with each parent on an alternating one-week schedule.

[15] The second addendum provided that Ms. Briggs would pay Mr. Kasdorf approximately \$40,000 that she was expecting to receive as a refund for income tax she mistakenly paid on the lump sum spousal support. The relevant clause is as follows:

8. The parties hereby agree that paragraph 5.19 will be included in the Separation Agreement and will read as follows:

5.19 Cheryl will pay to Vernon the total amount of the CRA refund she will receive related to the tax she paid on the lump sum Spousal support payout of \$98,000 in November 2010. This tax refund amount is approximately \$40,000, but the actual amount of the refund will be calculated by CRA. Both Vernon and Cheryl paid tax on that Spousal support payout. The decision to pay out the Spousal support was based on a tax refund for Vernon. CRA does not allow a tax refund to the payor if it is given in one lump sum. Cheryl agrees that the tax refund she will receive belongs to Vernon.

[16] Despite the passage of time, and changes in incomes of the parties that had occurred, the second addendum did not provide for a change in the amount of child support to be paid. However, the second addendum contemplated that Mr. Kasdorf would continue to pay child support to Ms. Briggs, in that it referenced the provision to Ms. Briggs of post-dated child-support cheques by December 1 of each year.

[17] In fact, the children began residing equally with both parents as of September 2013. The second addendum simply confirmed that fact. As of September 2013, Mr. Kasdorf was paying child support of \$2,824.72 per month. In October 2013, he reduced the payment to \$1,800 per month. Mr. Kasdorf continued to pay \$1,800 per month until July 2015, with the exception of September 2014, when he paid \$1645.00. He made a reduced payment for August 2015 of \$1,688.02, and further reduced the payment to \$1,000 in September 2015. He then made no further payments of child support for the next 24 months.

[18] Mr. Kasdorf asserts that in or about August or September 2015, he and Ms. Briggs verbally agreed that his child support payments should be suspended. He asserts that his income had suffered a dramatic decline, and that Ms. Briggs owed him \$30,610.20, as a combination of past overpayments by him, and failure by Ms. Briggs to pay child support to him when she had earned more money than he did, in 2015.

[19] Ms. Briggs denies that there was any such agreement.

[20] In September 2017, each party retained legal counsel to deal with, among other things, a review of child support. The parties were unable to come to any negotiated agreements about this, and were unable to agree to mediate the disputes.

[21] Mr. Kasdorf resumed paying child support in October 2017. He paid \$1,088 per month. He continued these payments up to and including May 2019. In June 2019 he began paying \$1,757 per month, which is the amount set out in the separation agreement. He reduced the child support to \$1,154 per month commencing November 2019.

- [22] Ms. Briggs filed a notice of family claim on December 29, 2017, seeking, among other things, retroactive and prospective child support for the two children, as well as payment of special and extraordinary expenses, both retroactive and prospective. The claims were made under the Divorce Act, R.S.C., 1985, c. 3 (2nd Supp.) [Divorce Act] and Family Law Act, S.B.C. 2011, c. 25 [FLA].
- [23] The claimant also made claims for spousal support and with respect to property. Those claims have not been pursued.
- [24] Mr. Kasdorf filed a response to family claim and a counterclaim in February 2018. He filed an amended counterclaim October 10, 2019.
- [25] The parties attended a judicial case conference ("JCC") with Master Caldwell (as he then was) June 14, 2018. At the time both had lawyers. Master Caldwell ordered that the matter be scheduled for a 10-day trial. As far as I am aware, no trial date was ever set. No trial has occurred. No substantive orders have previously been made in these proceedings.
- [26] The eldest child, Kale, began attending the University of Victoria in September 2019, living in residence there.
- [27] Both parties have been guilty of steadily expanding the matters in dispute, seemingly in retaliation for the claims and accusations made by the other.
- [28] As I explained to the parties at the hearing, I am dealing with the matters raised in their notices of application, not necessarily every issue raised in their pleadings.
- [29] Ms. Briggs filed a notice of application October 31, 2019. Mr. Kasdorf filed a notice of application November 15, 2019. Ms. Briggs filed another notice of application May 13, 2020. The matters came on for hearing before me July 21-22, 2020. By then, both parties were self-representing. I made certain orders and directions, and the hearing continued before me on August 21, 2020, at which time judgment was reserved.
- [30] After the hearing, I discovered that an affidavit relied upon by Ms. Briggs at the hearing was incomplete, compared to the filed version. I allowed Mr. Kasdorf to prepare a reply affidavit, which he did, filed September 1. On September 22, Mr. Kasdorf requested an opportunity to provide fresh information about Kale's change of plans for this fall. I granted leave for the parties to provide fresh evidence about that. They provided affidavits, which included submissions. In response to another memorandum from me dated October 20, they declined the option of another hearing.

III. Analysis

A. Past Child Support Claim

- [31] The second notice of application filed by Ms. Briggs seeks arrears of child support from August 2015 to the present. She also asks for a recalculation of child support from August 2015, based upon a higher than table amount, asserting that Mr. Kasdorf has historically had an income over the amount of \$150,000. Ms. Briggs contends that on a nine-year average basis, spanning 2011-2018, Mr. Kasdorf averaged an income of \$175,000 per annum.
- [32] Mr. Kasdorf denies that there are any arrears of child support owing. As noted, he contends that in August 2015 the parties mutually agreed to reduce child support payments, to zero, in recognition of "overpayments" that he had made previously.
- [33] Also as noted, the separation agreement provided that the child support arrangements set out in the agreement were reviewable, either on a material change in circumstances or, in any event, annually, on the written request of either party.
- [34] The separation agreement makes clear that child support is to be paid in accordance with the Guidelines, which are expressly referenced several times. However, the child support was to end at age 18, and the agreement did not reference the possibility that the children could remain dependant children of the marriage after that.
- [35] On the basis of email exchanges, it is clear that Ms. Briggs sought a review of child support obligations as of no later than July 7, 2017. Ms. Briggs asserts that she had been regularly seeking payment of child support well before that. Mr. Kasdorf disputes this. At the time, Mr. Kasdorf had not been paying child support since September 2015. I need not resolve this issue, as I will explain.
- [36] Beyond the request or demand that Ms. Briggs undoubtedly made in July 2017, it is clear that by then several material changes in circumstances had occurred. The parties had formally recognized the change in parenting arrangements in the second addendum of August 3, 2015. Material changes had occurred in the income of, at least, Mr. Kasdorf. For the purposes of s. 17(4) of the Divorce Act, not in itself applicable here, where the amount of child support includes a determination made in accordance with the applicable table, a change in circumstances that would result in a different child support order constitutes a change in circumstances that may give rise to the making of a variation order: Guidelines: s. 14(a); D.B.S. v. S.R.G., 2006 SCC 37 [D.B.S.], at para. 66. In brief, a significant change in income of the payor that would result in a different child support order is a material change in circumstances. Therefore, the separation agreement terms provided for a review of child support.
- [37] In fact, but for the reference in the separation agreement to material change in circumstances, no finding of a material change circumstances would be required.
- [38] As noted in *Harras v. Lhotka*, 2016 BCCA 246, at paras. 17-18:

- [17] Where one spouse seeks a review of child support obligations in a separation agreement, the agreement explicitly provides for a review of such obligations, and there is no pre-existing court order respecting child support obligations, it is not necessary for the applicant to prove a material change of circumstances as a basis for the review: *Kopp v. Kopp*, 2012 BCCA 140 at paras. 39-44. When the court has made no prior determination as to child support, the hearing is a hearing de novo, conducted pursuant to s. 15.1 of the Divorce Act. Subject to limited exceptions, originating orders must be made in accordance with the requirements of the Guidelines.
- [18] The application before the chambers judge was a hearing de novo, conducted as an initial application for support.
- [39] Child support provisions in separation agreements are not subject to the same level of deference that spousal support provisions enjoy: *Reid v. Reid*, 2017 BCCA 73, at paras. 87-88, citing *Kopp v. Kopp*, 2012 BCCA 140, and *Kaler v. Kaler*, 2013 BCCA 57.
- [40] As noted, the claimant's notice of family claim references both the Divorce Act and the FLA in relation to child support. The notice of family claim seeks orders under the relevant provisions of both statutes, including s. 15.1 of the Divorce Act.
- [41] Understandably, since both parties are now self-represented, neither party made any submissions as to which statute ought to be applicable in this respect. While both statutes are applicable, I will decide this issue with respect to the provisions of the Divorce Act, as the paramount legislation: *Hejzlar v. Mitchell-Hejzlar*, 2011 BCCA 230, at para. 20; *Nestor v. Nestor*, 2018 BCCA 453, at para. 8, and there is no reason to apply the FLA.
- [42] Although not expressly stated under s. 15.1 of the Divorce Act, support may be awarded retroactively: *D.B.S.*, at paras. 81-84.
- [43] In *D.B.S.*, the court recognized that retroactive awards may be made where the amount payable under a separation agreement has not measured up to the Guidelines: *Reid*, at para. 105; *D.B.S.* at paras. 77-78. However, it is not always appropriate for a retroactive award to be ordered. A myriad of factors can affect that issue. The Court in *D.B.S.* enumerated four specific factors: (1) whether there was a reasonable excuse for not having sought support earlier; (2) the conduct of the payor parent; (3) the circumstances of the child; and (4) any hardship that would be caused by a retroactive award: *Reid*, at para. 108. The Court in *D.B.S.* at para. 99 noted that none of these factors is decisive, and emphasized that courts should strive to look at the matter holistically and decide each case on the basis of its particular facts.
- [44] A retroactive reduction in child support obligations also engages the *D.B.S.* analysis: *G.M.W. v. D.P.W.*, 2014 BCCA 282.
- [45] However, arrears of child support owing pursuant to a separation agreement or court order engage a different analysis. In this scenario, the court considers whether the arrears payable under the agreement or order should be cancelled. This involves determination of: (1)

whether there is a material change in circumstances; and (2); whether it would be "grossly unfair" not to cancel or reduce the arrears. In general, arrears will only be cancelled if the applicant shows he is unable to pay "now and in the future". The test for cancelling arrears of child support is more stringent than that for refusing to make a retroactive child support order. It is a "higher threshold": *MacCarthy v. MacCarthy*, 2015 BCCA 496, at para. 54.

- [46] Ms. Briggs provided no particular calculations as to the amount of arrears of child support that she seeks, or the basis thereof. Clearly, she seeks child support in relation to the 24 months from October 2015 to October 2017 during which no child support was paid. Beyond that, she appears to seek a general review.
- [47] In effect, Mr. Kasdorf joins in the request for a review. He seeks the Court's endorsement as to his asserted 2015 agreement to suspend child support payments, and he also seeks retroactive recalculation of the amount of child support payable under the separation agreement, to reflect, as I infer it, his asserted agreement as well as changes in income of the parties over time and shared parenting, as recognized in the second addendum.
- [48] The Family Maintenance Enforcement Program ("FMEP") has calculated his arrears payable under the separation agreement at \$62,828.11, as of April 2, 2020. That is its calculation, not mine. The manner in which FMEP has made this calculation is not in evidence. I was told that FMEP is aware that this issue is before the Court for determination.
- [49] In summary, in effect both parties seek a retroactive determination of the amount owing pursuant to the separation agreement. Both parties are seeking determination of the amount of arrears, if any, pursuant the separation agreement, including its review clause.
1. Did the parties agree to suspend payment of child support due to "overpayment" by Mr. Kasdorf?
- [50] A key issue is whether, as Mr. Kasdorf asserts, the parties agreed to suspend his child support payments in 2015, in recognition of his asserted "overpayment" of child support in the past.
- [51] Mr. Kasdorf has provided a schedule of payments that he made over the years. Ms. Briggs does not disagree with his schedule. In general, it shows that Mr. Kasdorf paid greater amounts of child support than the \$1,757 amount set out in the separation agreement over the years. Pursuant to the first addendum, he paid a top up child support payment of \$13,134 in November 2010. He made a further top up payment of \$19,970 in April 2011. There was a significant decline in child support beginning October 2013, when the amount paid dropped from \$2,824.72 to \$1,800. I infer this coincided with the change in parenting. He continued to pay that amount until July 2015, with the exception of September 2014, when he paid \$1,645. He paid lower amounts of child support in August and September 2015, and then discontinued payments altogether until October 2017.

[52] As I interpret his position, Mr. Kasdorf contends that the court should recognize the agreement he asserts the parties made in 2015, in order to relieve him of liability for child support from August 2015 to October 2017.

[53] Ms. Briggs claims for past child support from August 2015. Therefore, she takes no issue with the payments made prior to then.

[54] As noted, the separation agreement provides:

3.8 Until the support is adjusted by an amending agreement, court order or arbitration award, Vern will continue to pay the child support and his contribution to the children's special and extraordinary expenses under the parties' most recent written agreement, court order or arbitration award.

[55] The burden is on Mr. Kasdorf to establish the amending agreement he asserts.

[56] Section 3.8 of the separation agreement contemplates variation by way of written amending agreements, or orders. There is no written evidence of such an amending agreement. In view of the terms of the separation agreement, that is sufficient to dispose of the issue.

[57] In any event, beyond that, I accept the evidence of Ms. Briggs that she did not make such an agreement. It does not make sense to me that she would have agreed to this. Her affidavit evidence makes clear that she was in need of child support, and I accept this. At the same time, she perceived that Mr. Kasdorf was enjoying a lavish lifestyle, despite his reduced income in 2015. There is some evidentiary basis to support this, in the evidence of Ms. Briggs. At the time, Mr. Kasdorf was married to Ms. Brown, who enjoyed a very large income. Ms. Briggs certainly did not agree that Mr. Kasdorf could not afford to pay child support, therefore, it does not make sense that she would agree to suspend child support payments. In the circumstances, it would be highly surprising if she agreed that, in fact, she owed Mr. Kasdorf for past overpayments, as he asserts.

[58] It is of course notable that the parties entered into the second addendum at approximately the same time as Mr. Kasdorf's asserted child support variation amendment agreement, yet the second addendum does not record any such agreement. This is despite the fact that the second addendum provides that the children will reside equally with each party.

[59] Mr. Kasdorf asserts that Ms. Briggs agreed to suspend child support payments at approximately the same time she agreed, in the second addendum, to repay to him up to \$40,000 out of the \$98,000 that she received as lump sum spousal support in November 2010. It would also be highly surprising that Ms. Briggs would agree to suspend child support, at approximately the same time as she agreed to pay Mr. Kasdorf up to \$40,000.

[60] Therefore, Mr. Kasdorf has failed to establish the amending agreement regarding payment of child support that he asserts.

- [61] If a finding of blameworthy conduct were required to allow for a retroactive award of child support before the date of effective notice, then Mr. Kasdorf's failure to pay child support in breach of the agreement obviously qualifies. Since there was no agreement or court order, in effect, Mr. Kasdorf unilaterally decided to discontinue making child support payments, notwithstanding the need of the children. This was very serious blameworthy conduct.
- [62] In any event, agreement or not, I reject Mr. Kasdorf's claim for return of alleged overpayments prior to August 2015.
- [63] The evidence does not indicate that Mr. Kasdorf could not have afforded to make the payments at the material time, notwithstanding his reduced income. Currently, he has ample assets. On the basis of all of the evidence, I infer that he could have drawn on available assets in order to make the child support payments at the relevant time.
- [64] I observe that an order for payment of arrears owing imposes no significant hardship on Mr. Kasdorf, having regard to the amount of the award, his available assets, and his overall means and circumstances.
- [65] In summary, I accept the position of Ms. Briggs that child support should be recalculated back to August 2015, without regard to the agreement Mr. Kasdorf alleges and without regard to his claim of overpayment of child support prior to that time.

2. Incomes of the Parties

- [66] The incomes of the parties relevant to these applications are as follows:

Year

Kasdorf

Briggs

2006

125,000

2007

135,434

2008

200,580

2009

219,385

2010

328,000

2011

338,463

2012

256,550

2013

143,836

2014

104,756

62,581

2015

24,723

71,844

2016

152,544

66,094

2017

192,696

58,325

2018

194,718

52,409

2019

208,836

56,800

2020

150,000

71,000

[67] I have no specific information as to the income of Ms. Briggs prior to 2014.

- [68] Mr. Kasdorf was employed by Teck Resources as Director of Global Information Technology Infrastructure from 2006 through 2012. Clearly, he enjoyed some very good incomes during those years. His employment with Teck Resources was terminated in October 2012. He then started a new business with a partner that was initially very lucrative; however, the business sector they relied on (oil and gas, and mining) "imploded" as he puts it, and the business fell off. By 2015 his business was earning very little. He says he continued to make child support payments at the then applicable amounts notwithstanding the drop in his income, on the expectation that he would continue to earn similar amounts to those he had earned in the past, but this did not occur. He contends that he approached Ms. Briggs, and they agreed to the suspension of payments. I have rejected that contention.
- [69] Ms. Briggs alleges that Mr. Kasdorf could have obtained employment with Telus in 2012 when his employment with Teck Resources was terminated. She alleges that his then-spouse, Ms. Brown, a senior executive with Telus, could have obtained employment for him with Telus at that time, and that she was instrumental in him obtaining employment with Telus in 2016. She also alleges that he quit his job at Telus voluntarily in 2018 when his relationship with his then-spouse Ms. Brown ended. In effect, she makes allegations of deliberate underemployment, which, if established, could lead to imputation of income pursuant to s. 19(1)(a) of the Guidelines.
- [70] This contention would be relevant to his income in 2015, and perhaps, to a lesser extent, his income in 2020.
- [71] Mr. Kasdorf denies leaving any job voluntarily, or ever being deliberately underemployed. I accept his evidence in this respect, which is consistent with the overall history of his career and the earnings pattern he has demonstrated.
- [72] The onus lies upon the party asserting intentional underemployment or unemployment to establish it. On the evidence, I am not able to determine that Mr. Kasdorf was underemployed or unemployed as contended by Ms. Briggs. The basis of her assertions is not apparent. Therefore, I do not impute incomes to Mr. Kasdorf higher than those he declared for the years 2015-2019.
- [73] For his part, Mr. Kasdorf asserts that Ms. Briggs has understated her income, in failing to include income from hosting international students "and other income". He also notes that Ms. Briggs' elderly widowed father resides with her, and pays no rent. There is no detail in the evidence about revenue, or much less, net income from international students. Ms. Briggs has not hosted such students for several years now, since 2016. Ms. Briggs' father is disabled and in need of assistance. I am not satisfied that his presence amounts to foregone income. None of these contentions affect my determination as to the income earned by Ms. Briggs.

[74] The evidence does not establish that the children would not now benefit from payment of child support that ought to have been paid at the relevant time. There is no evidence that would support an assertion of hardship on the part of Mr. Kasdorf in making the missed payments.

3. Income over \$150,000

[75] As noted, Ms. Briggs argues that on average, over a nine-year span, 2011-2018, Mr. Kasdorf averaged an income of \$175,000 per annum, and therefore child support should be assessed, according to her notice of application, "based on a higher than regular table amount". Again as noted, she provided no particular submissions as to what the amount should be, or considerations for how the amounts should be calculated.

[76] In fact, the average income of Mr. Kasdorf is only somewhat higher than the \$150,000 threshold. The five-year average for the years Ms. Briggs seeks to review (2015 to 2019) is \$154,703. This is due to low income in 2015. However, in other recent years his income has exceeded \$150,000, and I expect that his income in the future will continue to exceed \$150,000.

[77] Pursuant to s. 2 of the Guidelines, "table" child support is support pursuant to the table set out in Schedule I. The current Guidelines provide that for two children, where income is \$150,000 or greater, child support is \$2,159, +1.18% of income over \$150,000. Therefore, incomes over \$150,000 are subject to payment of child support, on the applicable table.

[78] Under s. 3(1) of the Guidelines, the amount of child support for children under the age of majority is the amount set out in the applicable table, and the amount, if any, determined under s. 7 of the Guidelines.

[79] In making her request for special treatment of child support based on Mr. Kasdorf's income, it may be that Ms. Briggs does not realize that such income is subject to payment of child support, pursuant to the applicable table. The issue was not addressed in any detail in the submissions made at the hearing of the applications.

[80] Section 4 of the Guidelines provides as follows:

Incomes over \$150,000

4 Where the income of the spouse against whom a child support order is sought is over \$150,000, the amount of a child support order is

- (a) the amount determined under section 3; or
- (b) if the court considers that amount to be inappropriate,
- (i) in respect of the first \$150,000 of the spouse's income, the amount set out in the applicable table for the number of children under the age of majority to whom the order relates;

(ii) in respect of the balance of the spouse's income, the amount that the court considers appropriate, having regard to the condition, means, needs and other circumstances of the children who are entitled to support and the financial ability of each spouse to contribute to the support of the children; and

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

[81] Thus, a precondition to the application of s. 4(b) is that the court must determine that the amount of child support calculated under s. 3 is "inappropriate".

[82] A party seeking to depart from the table amount of support must rebut the presumption that the table amount of support is appropriate. In *Francis v. Baker*, [1999] 3 S.C.R. 250, [1999] S.C.J. No. 52 [Francis], the Court held at para. 43 that there must be: "clear and compelling evidence" before departing from the table amount of support. This must now be read in light of more recent case law. The burden of proof is on a balance of probabilities: *F.H. v. McDougall*, 2008 SCC 53 at para. 40; *Nagy v. BCAA Insurance Corporation*, 2020 BCCA 270 at paras. 41-42. If the evidence shows the applicable table amount is inappropriate, the court can increase or decrease the table amount. A convenient summary of the applicable principles having regard to Francis is set out in the Court of Appeal decision in *Metzner v. Metzner*, 2000 BCCA 474, at para. 30:

[30] The court then considered whether the trial judge erred in exercising her discretion in the way she did. It concluded that she had not and dismissed the appeal, affirming the trial judge's award of the Guidelines Table amount. As I understand the reasons for judgment of the court in reaching that conclusion, these principles were applied:

- 1) It was Parliament's intention that there be a presumption in favour of the Table amounts in all cases (para.42);
- 2) The Guidelines figures can only be increased or reduced under s.4 if the party seeking such a deviation has rebutted the presumption that the applicable Table amount is appropriate (para.42);
- 3) There must be clear and compelling evidence for departing from the Guidelines figures (para.43);
- 4) Parliament expressly listed in s.4(b)(ii) the factors relevant to determining both appropriateness and inappropriateness of the Table amounts or any deviation therefrom (para. 44);
- 5) Courts should determine Table amounts to be inappropriate and so create more suitable awards only after examining all circumstances including the factors expressly set out in s.4(b)(ii) (para.44);

- 6) Section 4(b)(ii) emphasizes the "centrality" of the actual situation of the children. The actual circumstances of the children are at least as important as any single element of the legislative purpose underlying the section (para.39). A proper construction of s.4 requires that the objectives of predictability, consistency and efficiency on the one hand, be balanced with those of fairness, flexibility and recognition of the actual "condition, means, needs and other circumstances of the children" on the other. (para.40)
- 7) While child support payments unquestionably result in some kind of wealth transfer to the children which results in an indirect benefit to the non-paying parent, the objectives of child support payments must be kept in mind. The Guidelines have not displaced the Divorce Act which has as its objective the maintenance of children rather than household equalization or spousal support (para.41).
- 8) The court must have all necessary information before it in order to determine inappropriateness under s.4. If the evidence provided is a child expense budget, then "the unique economic situation of high income earners" must be considered.
- 9) The test for reasonableness of expenses will be a demonstration by the paying parent that the budgeted expense is so high "as to exceed the generous ambit within which reasonable disagreement is possible": *Bellenden v. Satterthwaite*, [1948] 1 All E.R. 343 at 345.
- [83] The presumption in favour of the table amount of support is not rebutted in this case. Ms. Briggs has not presented any particular evidence as to why the table amount of support should be considered inappropriate. Moreover, the evidence adduced on the application does not allow for the kind of analysis required pursuant to s. 4(b) of the Guidelines.

4. Parenting Time

- [84] In her most recent affidavits Ms. Briggs asserts that the children have resided primarily with her. This position is inconsistent with the second addendum and her pleadings. Her affidavit evidence is also inconsistent on this issue.
- [85] The second addendum confirms that the parenting schedule is for week on-week off residency, in general. There is no evidence of a written agreement of the parties to the contrary.
- [86] Ms. Briggs' pleadings state that the children reside with each party equally on a week on-week off basis. Mr. Kasdorf's counterclaim makes the same assertion, and the response to counterclaim of Ms. Briggs agrees with it. In formal terms, therefore, Ms. Briggs agreed that the children were residing equally with both parents. In her affidavit evidence she concedes that the children commenced residing equally with both parents in September 2013.
- [87] However, the recent affidavit of Ms. Briggs filed with the court July 15, 2020 asserts that the children reside "60-70% of their time with [her]". She points out that the children have gone to school in Langley, where she has continued to reside since the separation, while Mr. Kasdorf has resided in Vancouver, and then North Vancouver. She says that most of their

extracurricular activities, such as sports, have centred on Langley, although Kale played hockey in North Vancouver for two years. She says their medical and dental providers are in Langley. Her fresh evidence affidavit reiterates this position as it relates to Kale, specifically, as Kale has taken a break from his university education, and has begun playing for a Junior B hockey team, the Ridge Meadows Flames, whose home rink is close to her residence, and distant from the residence of Mr. Kasdorf in North Vancouver.

- [88] Ms. Briggs attaches numerous emails to the July 15, 2020 affidavit in an effort to establish the parenting time over the past several years.
- [89] The emails are, of course, merely point in time references. They do not establish the overall pattern. Ms. Briggs acknowledges that the children hold the view that their parenting time is 50-50. She minimizes this by adding that they believe that "because it makes them feel like they are being loyal to each parent". The fact remains that the children believe parenting time is equal. I infer that they attempt to govern themselves accordingly. I accept that there would be substantial variation in this, particularly in view of the fact that the children are now older and their schedules and activities are more variable. So, for example, if Kale's current hockey commitment means that recently he is spending more time with Ms. Briggs, this can be expected to change again in the future. It does not mean that the overall parenting arrangements have substantially varied.
- [90] Ms. Briggs' earlier affidavit, in support of her first application, sworn November 25, 2019, is inconsistent with her more recent evidence. There, she stated that during the months of April through August 2020, when Kale would be home from university, he would spend his time equally between the homes of both parents. She adds "the children are free to choose where they go and they are brilliant at making sure it is equal time because they enjoy spending time at both homes".
- [91] I note that this recent assertion of Ms. Briggs seems to have an element of retribution about it. Her July 15, 2020 affidavit makes clear that she decided to make this assertion in response to the evidence of Mr. Kasdorf concerning where Kale resides. This leads me to give less weight to her evidence on the parenting time point.
- [92] I also observe that, from a policy point of view, it is undesirable that parents seek to re-characterize parenting arrangements well after the fact, in the face of express agreements, in order to make claims for child support arrears.
- [93] On the evidence overall, and on the basis of the second addendum and the pleadings, I am satisfied that in reality the parties have had shared custody of the children, within the meaning of s. 9 of the Guidelines, which sets out the 40% threshold, since September 2013, and that this continues to be the arrangement.

5. Determination of Child Support Arrears

- [94] Both parties recognize that the reference in the separation agreement to child support being payable until each child reaches the age of 18 is not consistent with British Columbia law.
- [95] Pursuant to s. 9, the Court must determine the amount of support payable in accordance with all three factors set out in the section; however, the set-off of table amounts is the starting point: *Contino v. Leonelli-Contino*, 2005 SCC 63, at para. 49. The evidence of the parties and their submissions do not specifically address the other s. 9 factors set out in ss. (b) and (c):
- (b) the increased costs of shared custody arrangements; and
 - (c) the conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought.
- [96] It is particularly difficult to address these considerations in context of past claims for child support, and without the benefit of the kind of detailed, focused evidence that could be available on a trial. I bear in mind that the parties seek determinations on application processes, and have declined proceeding to a trial. There has been much delay to date, and further adjournments for gathering more evidence and obtaining further submission is not in the interests of justice. I therefore apply the set-off approach, without further adjustment pursuant to ss. 9(b) and (c) of the Guidelines.
- [97] On the basis of the incomes previously noted, and repeated here for convenience, the child support arrears are as follows:

Year

Kasdorf

Briggs

Child Support Payable

Extension

2015

24,723

71,844

Briggs pays \$703 mo. x 5 months

(\$3,515)

2016

152,544

66,094

Kasdorf pays \$1,134 mo. x 12

\$13,608

2017

192,696

58,325

Kasdorf pays \$1,757 x 11 + \$1758 x 1

\$21,085

2018

194,718

52,409

Kasdorf pays \$1,871 x 12

\$22,452

2019

208,836

56,800

Kasdorf pays \$1,972 x 12

\$23,664

2020

150,000

71,000

Kasdorf pays \$1,057 x 7 months (to July)

\$7,399

2021

200,000

71,000

TOTAL

\$84,693

Child support payments made [August, 2015 to March, 2020]:

\$39,003

Net amount payable as of July 31, 2020 (less further payments made April to July, 2020)

\$45,690

- [98] The assessment of Mr. Kasdorf's income of \$150,000 for 2020 is a combination of his estimated income for the year, and to some extent, imputation of income. He has earned \$72,000 so far this year. His July 15, 2020 F8 indicates that he anticipates signing a contract or agreement with LiteLink Technologies Inc. through his company KubeData Systems Inc. within the next 60 days. In submissions he advises that he will be Chief Technical Officer. He does not provide evidence as to the income to be received through that contract. He acknowledges that his income earning capacity can reasonably be assessed at \$200,000, annually. He has an established a record of achieving substantial incomes. I have therefore elected to choose \$150,000 as a reasonable assessment of his actual and imputed earnings for 2020. I impute his income at \$200,000 for 2021.
- [99] Ms. Briggs does not disagree with the assertion of Mr. Kasdorf that if she were working full-time as a teacher with the Langley School District, she would earn \$71,000 per annum. She quit her job as a teacher in September 2019, electing to establish a small business, called "Small Wonders EFW". She describes this as an "Equine Facilitated Wellness" business and states that she became certified as an EFW facilitator in combination with her teaching certification. She is qualified to work with equines and children, as well as with individuals with special needs or in need of support. The business uses miniature donkeys. The business has earned little if any significant income to date. Ms. Briggs does not suggest that she is likely to earn as much or more than she would have as a teacher. She is content to have income imputed to her based upon her teacher's income earning ability. I impute her income at \$71,000 for 2020 and 2021.
- [100] Mr. Kasdorf contends that her income should be imputed at \$71,674. However, union dues are deductible from employment income for child support purposes, pursuant to Schedule III, s. 1(g) of the Guidelines. I have reduced her imputed income somewhat to allow for this.
- [101] In his fresh evidence affidavit, Mr. Kasdorf asserts that Ms. Briggs has taken employment as a full-time teacher as of September 2020. Ms. Briggs does not deny this. Since I have already imputed income commensurate with this, it does not affect my decision.
- [102] Prior to leaving her teaching job in September 2019, Ms. Briggs worked four days out of a possible five, or 80% of full-time. The separation agreement contemplated that her work would increase to 80% of full-time capacity. The second addendum did not address this point. Bearing in mind her childcare and parental care obligations and all of the other evidence set out in her affidavits, I do not impute income to Ms. Briggs for full-time employment prior to 2020.

[103] The table of payments provided by Mr. Kasdorf extends to March 2020. On the basis of Mr. Kasdorf's table of payments, he paid \$39,003 from August 2015 (including \$1,688 in that month) to and including \$1,154 paid March 2020.

[104] Thus, the net amount payable by Mr. Kasdorf as of July 31, 2020 is \$45,690, less any other payments he may have made for the months of April through July 2020. This is the amount of arrears that Mr. Kasdorf owes as of that date, pursuant to the separation agreement, and after review.

B. Child Support - Future

1. Child Support - Kennedy

[105] Kennedy is under the age of 19 and therefore remains a child of the marriage, currently. Whether she remains a child of the marriage after her 19th birthday in January 2022 is an issue that will have to be addressed at that time. It is not before me now.

2. Kale - Child of the Marriage Issue

[106] Ms. Briggs contends that Kale remains a child of the marriage, for whom child support should be payable. Mr. Kasdorf disputes this.

[107] I discussed the general legal principles applicable to this issue in my decision in *Lamont v. Johnson*, 2016 BCSC 366 [Lamont], at paras. 44 to 50, which I adopt. Those paragraphs are as follows:

[44] Under the DA, the court may make an order for child support for a "child of the marriage", which is defined as follows:

2. (1) "child of the marriage" means a child of two spouses or former spouses who, at the material time,
 - (a) is under the age of majority and who has not withdrawn from their charge, or
 - (b) is the age of majority or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessities of life .

[45] In British Columbia, the age of majority is nineteen.

[46] The term "necessaries of life" is not simply defining food, home, and clothing. It will vary with the specific applicant considering their reasonable expectations: *Lougheed v. Lougheed*, 2007 BCCA 396 at paras. 23 and 25.

[47] The pursuit of education necessary to equip a child with a career qualifies as "other cause" for continuing dependence of a child of or over the age of majority; in determining whether a child pursuing an education is unable to withdraw from her parents' charge or obtain the necessities of life a court must consider the surrounding circumstances; mere attendance at an educational institution is not sufficient; the determination is fact specific: *W.P.M. v. B.J.M.*, 2005 BCCA 7 at paras. 18, 22. The court added:

30 The jurisprudence supports the view that there is a wide range of factors to be considered in the determination of whether a child is a "child of the marriage" and that individual factors will be of varying importance in different cases. All of the relevant factors must be considered. There is no arbitrary cut-off point based on the number of degrees or the eligibility of the student for financial assistance.

[48] In *Sijercic v. Kazic*, 2016 BCSC 186, Pearlman J. wrote:

[29] Whether a child over the age of majority remains a child of the marriage is not determined by simply asking whether the child can support herself while attending university. The court must determine whether the adult child should be entitled to continued support from her parents, taking into account her particular academic, financial and family circumstances: *Beninger v. Beninger*, 2010 BCSC 1509 at para. 15; *Goundrey-Breskau* at para. 24.

[49] In *Lerner v Lerner*, 2013 BCSC 239 at para. 32, Goepel J. summarized the applicable legal principles with respect to determining whether a person who is the age of majority or older is a child of the marriage:

[30] In *Darlington v. Darlington* (1997), 32 R.F.L. (4th) 406 at para. 14, 99 B.C.A.C. 134, the Court of Appeal adopted the factors set out in *Farden v. Farden* (1993), 48 R.F.L. (3d) 60 at 64-65 by Master Joyce (as he then was) for determining whether a person over the age of 18 is a "child of the marriage". The Court of Appeal held that a parent seeking support for a child over the age of majority does not have to present evidence in regard to all of the factors mentioned in *Farden*, and further that in each case different factors may be given more or less weight depending on the circumstances.

[31] The factors described in *Farden* at p. 64-65 are as follows:

- (1) whether the child is in fact enrolled in a course of studies on a full time or part time basis;
- (2) whether the child has applied for, or is eligible for, student loans or other types of financial assistance;
- (3) whether the child has a plan of pursuing educational goals that is related to a career or other reasonable objectives;
- (4) whether the child can contribute to his own support through part time work;
- (5) the age of the child;

- (6) the child's past and current success in the education program;
 - (7) the parents' plans for the children's education, particularly if the plans were made during the marriage; and
 - (8) whether the child has unilaterally terminated his or her relationship with the parent from whom support is sought.
- [32] Once a child reaches the age of majority, the onus of proving that such a child remains a child of the marriage lies with the party so asserting: *Classen v. Anima*, 2011 BCSC 868.
- [50] Similarly, in *Neufeld v. Neufeld* 2005 BCCA 7, Levine J.A. for the Court stated that the factors listed in *Farden* "are not a set of minimum criteria all of which must be satisfied." They are factors to be considered, along with others (at para. 22).
- [108] As noted, Kale is currently 19 years of age, having turned 19 in July 2020.
- [109] In September 2019, he enrolled in a four-year computer science degree program at the University of Victoria. He remained in residence when school was in session. Mr. Kasdorf notes that the program is actually five years in total, including four years of course-work and one year of co-op practicum.
- [110] There are no issues about whether Kale's career plans or program of educational instruction are reasonable. He is a good student. The parties expected and planned for their children to enrol in postsecondary education, as reflected in the terms of their separation agreement, which stipulated that they would each keep paying into the children's RESP plans.
- [111] Covid-19 has disrupted Kale's education to some extent. In-class instruction was suspended after February 2020, and Kale returned to the Lower Mainland. However, he is continuing on the same educational plan.
- [112] As of the August 21, 2020 hearing of this matter, the evidence was that Kale intended to return to Victoria for his second year of university in September 2020, but as the University of Victoria is only providing online or distance learning in the first semester, he might choose not return to Victoria until January 2021.
- [113] The fresh evidence is that Kale has decided to take a year away from his post-secondary education, essentially for two reasons: the disruption caused by Covid-19, and at the same time, an opportunity to play junior hockey. However, he is expected to resume his studies next year; that is, September 2021.
- [114] As of September 23, 2019, the balance in Kale's RESP account was \$57,538.70.
- [115] To date, Kale's RESP fund has covered his tuition, residence expenses, and the cost of books. \$15,000 was paid out of the RESP to Kale January 9, 2020. Mr. Kasdorf had fronted these expenses.

- [116] Kale's hockey involves significant expenses. According to Mr. Kasdorf the cost is \$5,500 for the season. Ms. Briggs says that the total cost over the season will be approximately \$9,000. Kale has some savings from summer work, which together with employment earnings during the season, may enable him to cover most or all of this expense.
- [117] As a result of his ability to work when not in school, and work part-time while in school, Kale has been somewhat self-sufficient financially. During summer months he works. Ms. Briggs says he earns \$20 per hour for a 40-hour week during the summer. This would be \$1,600 in two weeks. Mr. Kasdorf states that when Kale is working full-time in the summer, he earns \$1,302 every two weeks. I infer that the difference may be gross versus net pay.
- [118] When at school, Kale may be able to work part-time. The parties differ as to the work that he is expected to take on, and the evidence concerning the amount of possible earnings is mixed and uncertain. In any case, the amount of part-time earnings Kale may be capable of earning will not be large, and may depend on available work opportunities and the demands of his studies, which will take precedence.
- [119] The fresh evidence of the parties is that Kale is looking for work, currently. Mr. Kasdorf states that Kale can work full-time, and has several promising leads. Ms. Briggs says that Kale is busy with hockey games or practices 4-5 times per week, and that if he gets part-time work, it would likely be sporadic in nature. For example, he could be a take-out meal delivery driver. She states that Kale will not earn enough to support himself.
- [120] I accept that Kale is not working currently, and that if he finds work, it is likely to be less than full-time, and the pay will be modest. He is far from able to support himself financially.
- [121] The parties differ as to whether Kale has an actual bedroom in the residence of Ms. Briggs. This seems to be a matter of interpretation. I do not need to review the details of each party's assertions, which are spread among their numerous affidavits. I am satisfied that Kale spends a substantial portion of his time in the household of Ms. Briggs, and that she is required to maintain reasonable residential accommodation for him for that purpose. That is sufficient to dispose of that issue.
- [122] While Kale is somewhat self-sufficient with respect to many of the ordinary expenses one would expect for a post-secondary student, (or, for the time being, a young adult still living with his parents) such as cell phone, transportation, meals and other incidental expenses, it is clear that he remains substantially dependent on both parties, even leaving aside the matter of his direct educational expenses which the parties hope will be covered by his RESP account. Mr. Kasdorf's evidence focuses upon these incidental expenses and contends that Kale can cover much of these himself. However, he remains dependant on his parents for general accommodation and other living expenses, even during this year away from his studies.

[123] The Farden factors all militate in favour of finding that Kale remains a child of the marriage. I do not consider it necessary to review each one individually in the circumstances of this case.

[124] I have no difficulty concluding, on all the evidence, that Kale remains a child of the marriage within the meaning of the Divorce Act.

3. Amount of Child Support - Kale

[125] Section 3(2) of the Guidelines is as follows:

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

[126] The choice between the two sections is discretionary and is to be determined by the particular circumstances of each case: *McClement v. McClement*, 2017 BCCA 416, at para. 12. The court added at para. 12:

The view taken by this Court is that the burden of proof rests with each party in the ordinary manner to persuade the court which of the two sections is the appropriate one to apply in the particular circumstances before the court. There are of course factors that tend to support the appropriateness of relying on one section rather than another and which guide the exercise of a judge's discretion. For example, the more closely the circumstances of the adult child resemble those of a minor child living at home, the less likely it is that the approach found in s. 3(2)(a) will be determined to be inappropriate. Each case will depend on its facts .

[127] Given that Kale has a degree of financial independence, has RESP funds, and, at least in normal times, resides away from both parents' homes when in residence at university, in my view the table amount under the Guidelines would not be appropriate.

[128] On a set-off basis, at the income levels I referred to for 2020, the extra table child support for two children as compared to one is \$377 per month. Utilizing an income of \$200,000 for Mr. Kasdorf, the extra table child support for two children as compared to one would be \$577 per month.

[129] Ms. Briggs asserts that when Kale was away at university from September 2019 to February 2020, she paid \$2,720 in various direct incidental expenses for him, for such things as a computer, ferry charges, and food and entertainment. She asserts that she also spends money on his behalf when he resides with her for a variety of incidental expenses. In addition, she calculates that a one-fifth share of household expenses (based upon five

persons in the household) is \$2,734 per annum. The parties challenge each other's expense contentions to some degree, however, without descending into excessive detail, her assertions as to her expenses appear broadly reasonable. It is fair to conclude that Ms. Briggs continues to incur ongoing, regular, direct and indirect expenses for Kale, as does Mr. Kasdorf, of course.

[130] Bearing in mind all of the evidence available, I determine that the amount of child support to be paid by Mr. Kasdorf in respect of Kale is \$300 per month. That amount will be paid commencing August 1, 2020, and will continue for so long as Kale continues to be a child of the marriage, within the meaning of the Divorce Act.

[131] The payment of child support for Kale is of course subject to variation, rescission or suspension pursuant to s. 17 of the Divorce Act. No order is necessary in this respect.

4. Basic Child Support

[132] Kennedy remains a child of the marriage for whom table child support remains payable.

[133] I order that Mr. Kasdorf pay table child support for Kennedy at the one child level (as I have made a separate determination for Kale): McCabe v. McCabe, 2008 BCCA 187 at para. 34; Clarke v. Taylor, 2014 BCSC 353, at para. 17.

[134] Based upon Guidelines incomes of \$150,000 for Mr. Kasdorf and \$71,000 for Ms. Briggs, the amount of table child support Mr. Kasdorf will pay for Kennedy is \$680 per month, commencing August 1, 2020. I have imputed income to Mr. Kasdorf of \$200,000 for 2021. Commencing January 1, 2021, monthly child support for Kennedy is \$1,070 per month, based upon Guidelines income of \$200,000 for Mr. Kasdorf, and \$71,000 for Ms. Briggs.

[135] Therefore, the total amount of monthly child support payable by Mr. Kasdorf commencing August 1, 2020 is \$980 per month. (For comparison, the table set-off child support at the indicated 2020 incomes for two children is \$1,057.) The total amount of monthly child support payable by Mr. Kasdorf commencing January 1, 2021 is \$1,370 per month. (The table set-off child support for two children is \$1,647).

5. Special and Extraordinary Expenses

[136] The parties raise various issues concerning special and extraordinary expenses, (or "s. 7 expenses") both past and future.

[137] The separation agreement provides as follows:

3.5 In addition to paying the base amount of child support according to his annual guideline income, Vern shall pay Cheryl a proportionate share of any special and/or extraordinary expenses as agreed to from time to time by the parties as child support for children until they reach the age of 18 years.

[138] The first addendum provides as follows:

4. The parties hereby agree that paragraph 3.5 of the Separation Agreement is deleted and replaced with the following:

3.5 Until each child attains the age of 19 years, Vern will contribute to the Children's section 7 extraordinary expenses as follows:

- a. 100 percent of the expenses related to one activity per child each year (sporting or musical) up to a maximum of \$1,000 per child each year;
- b. 50 percent of the cost of any registered counselling sessions and extraordinary medical or dental expenses for the Children; and

all other section 7 special and extraordinary expenses agreed upon in advance in writing between the parties will be shared equally by the parties.

[139] Mr. Kasdorf alleges that Ms. Briggs failed to pay various special and extraordinary expenses in the past, such as elite hockey expenses for Kale, and travel expenses for Kennedy. The hockey expense was approximately \$19,000, for Delta Hockey Academy. The travel expense was \$1,650 for a trip to France. He seeks a retroactive order for payment of s. 7 expenses. This claim is broadly set out in his amended counterclaim, but is not set out in his notice of application, and is therefore not properly before me. A claim of this nature should be specifically and clearly set out in the notice of application, with details as to each expense in issue, and the relevant circumstances, pursuant to s. 7 of the Guidelines, and applicable legal principles.

[140] In any event, I would not give effect to this claim.

[141] The separation agreement provides that Mr. Kasdorf would pay for s. 7 expenses, as agreed. The first addendum provides that expenses outside those specifically set out in the addendum will be shared equally as "agreed upon in advance in writing between the parties".

[142] Mr. Kasdorf argues that Ms. Briggs should be responsible for payment of a share of s. 7 expenses in cases where she agreed to the activity in question. Agreeing to allow the child to participate in an activity is a separate matter from agreeing to share the expense of it.

[143] Given the disparate incomes and means of the parties, the provision for equal sharing was unfair. Ms. Briggs did not agree in advance in writing to the expenses she contests and denies being responsible for. Considering the unfairness of this aspect of the first addendum, it is in my view especially appropriate that the term requiring mutual agreement of the parties in writing be applied. Accordingly, Ms. Briggs is not responsible for past s. 7 expenses to which she did not agree in advance, in writing.

[144] Both special expenses and extraordinary expenses must be reasonable and necessary: *Bodine-Shah v. Shah*, 2014 BCCA 191, at para. 66. The court provides this helpful commentary:

66 Special expenses listed in ss. 7(1)(a)-(c) and (e) are distinct from extraordinary expenses referred to in ss. 7(1)(d) and (f). Special expenses are defined as relating to child care, medical or dental insurance premiums, health-related costs, and post-secondary education. They must be found to be reasonable and necessary. Extraordinary expenses are not defined. Their extraordinariness is determined in the context of the combined income of the spouses, as well as other considerations, including the nature and amount of the individual expense, the nature and number of the activities, any special needs or talents of the child, and the overall cost of the activities. They also must be found to be reasonable and necessary. Relevant considerations for the tests of necessity and reasonableness include whether the expenses are necessary in relation to the child's best interests, and reasonable having regard to the means of the spouses, the child, and to the family's spending pattern prior to separation. See *McLaughlin v. McLaughlin* (1998), 57 B.C.L.R. (3d) 186 at paras. 81-82 (C.A.). In assessing "means", the court may consider the parties' capital assets, income distribution, debts, third-party resources, access costs, support obligations, receipt of support, and any other relevant factor: *Delichte v. Rogers*, 2013 MBCA 106, 37 R.F.L. (7th) 81 at para. 38. Courts may consider whether the non-custodial parent was consulted regarding the expense, though a lack of consultation does not automatically preclude a finding that the expense is reasonable and necessary: *Delichte* at paras. 39, 44.

[145] The hockey expense is clearly unreasonable having regard to the means of Ms. Briggs. More broadly, Mr. Kasdorf has not established that the past expenses fall within s. 7.

[146] Ms. Briggs's second notice of application also refers to a claim for past s. 7 expenses, but does not delineate the claim in detail, nor does her affidavit in support. This claim is dismissed.

C. CRA Refund Issue

[147] Ms. Briggs applies for an order requiring Mr. Kasdorf to repay her the sum of \$28,161 that she paid to him in or about April 2017, pursuant to the terms of the second addendum.

[148] The separation agreement provided for spousal support, in part, as follows:

4.2 At Vern's current level of income (\$125,000.00) and Cheryl's current level of income (nil), Vern will pay spousal support to Cheryl in the amount of \$2,686.00 per month commencing on May 1, 2006 and continuing on the first day of each month thereafter until the earliest of the following:

- (a) December 31, 2013;
- (b) Cheryl's remarriage; or
- (c) Cheryl's cohabitation with another person in a relationship resembling marriage for more than 6 months;

at which time spousal support shall cease absolutely.

[149] The agreement noted that the spousal support payments would be taxable to Ms. Briggs and deductible to Mr. Kasdorf.

[150] The first addendum provided for, among other things, payment of lump sum spousal support to Ms. Briggs in the amount of \$98,000, and termination of periodic spousal support. Mr. Kasdorf claimed this as a deduction against his taxes for 2010. CRA advised him July 12, 2011 that he could not deduct lump sum spousal support. Ms. Briggs included the payment in her income for 2010, and was taxed accordingly. When Mr. Kasdorf's deduction was refused, I infer that she filed an amended return, seeking a tax refund.

[151] The second addendum provided as follows:

8. The parties hereby agree that paragraph 5.19 will be included in the Separation Agreement and will read as follows:

5.19 Cheryl will pay to Vernon the total amount of the CRA refund she will receive related to the tax she paid on the lump sum Spousal support payout of \$98,000 in November 2010. This tax refund amount is approximately \$40,000, but the actual amount of the refund will be calculated by CRA. Both Vernon and Cheryl paid tax on that Spousal support payout. The decision to pay out the Spousal support was based on a tax refund for Vernon. CRA does not allow a tax refund to the payor if it is given in one lump sum. Cheryl agrees that the tax refund she will receive belongs to Vernon

[152] Thereafter, Ms. Briggs paid Mr. Kasdorf the amount of the CRA refund she received, \$28,161.

[153] The affidavit evidence she provides in support of this application is very scant. She states in her first very brief affidavit sworn in support of the application that she felt tricked and manipulated into paying the CRA refund to Mr. Kasdorf. She provides no detailed supporting evidence for this assertion.

[154] In response, Mr. Kasdorf emphasizes what is already stated in the second addendum; that is, that when the first addendum was made the parties believed that the payment would be deductible to him and taxable to her. That must be so, based upon their subsequent actions. Ms. Briggs included the payment in her income for tax purposes. He denies any trickery or pressure.

[155] In effect, Ms. Briggs seeks to set aside this portion of the second addendum.

[156] I am not satisfied that her application for this relief comes within her pleadings as set out in the notice of family claim. It appears that her application is founded on common law grounds such as misrepresentation or duress. The notice of family claim makes no such claims.

- [157] The notice of family claim seeks to set aside all of the spousal support provisions in the separation agreements and addendums, and seeks an order for past and future spousal support under s. 15.2(1) of the Divorce Act. However, Ms. Briggs has not proceeded with these claims, which would very likely have required a lengthy trial, as the JCC order of Master Caldwell contemplated. Instead, both parties discharged their legal counsel and have avoided going to trial.
- [158] The leading decision with respect to the weight or deference given to a separation agreement in relation to an application for spousal support under the Divorce Act is *Miglin v. Miglin*, 2003 SCC 24 [Miglin]. That case dealt with, as here, an initial application for spousal support under s. 15.2(1) of the Divorce Act. A comprehensive analysis is required. I described the nature of the analysis required under Miglin in *J.A.F. v. J.J.F.*, 2016 BCSC 300, at paras. 176 to 180.
- [159] The notice of family claim does not seek to set aside the CRA payment provision of the second addendum, in isolation.
- [160] Therefore, I dismiss this claim on the ground that it has not been pleaded.
- [161] I also dismiss it on the merits.
- [162] The law relating to misrepresentation and unconscionable bargains in the context of a separation agreement was summarized by Justice Wedge in *Akkor v. Roulston*, 2009 BCSC 258, at paras. 110-130 [Akkor], which I adopt here.
- [163] In brief, Ms. Briggs has not established grounds for setting aside the relevant term of the second addendum on the basis of contractual misrepresentation, or unconscionableness. She has not established a material misrepresentation of untrue fact that she relied upon in entering into the agreement, nor grounds for unconscionability, as set out in *Akkor*.
- [164] The evidence establishes that, as Mr. Kasdorf asserts, when the parties entered into the first addendum, they expected that the spousal support payment would be deductible to Mr. Kasdorf and taxable to Ms. Briggs. The second addendum expressly confirms that, and the conduct of Ms. Briggs in declaring the income supports this. It seems to me that Ms. Briggs simply regrets making this particular agreement, and has chosen to add it in with her other claims.
- [165] Ms. Briggs has not adduced evidence that would allow me to vary the second addendum pursuant to the principles discussed in *Miglin*.
- [166] *Miglin* sets out a two stage analysis, recently summarized in *Nicholl v. Nicholl*, 2020 BCCA 173, as follows:
- [40] In summary, a court undertaking a Miglin analysis should:

Stage One

1. Inspect the circumstances at the time the agreement was entered into to determine if there is evidence of "oppression, pressure, or other vulnerabilities". If such negative circumstances existed, the "agreement will merit little weight".
2. If there are no such negative circumstances, determine whether the agreement considered the Divorce Act factors and complied with its objectives. If the agreement does not comply with those objectives, the intervention of a court is only warranted where the agreement operates in a way that reflects a "significant departure from the general objectives" of the Divorce Act.

Stage Two

If the court has not intervened at stage one, the court must still analyze the agreement at the time of the application for spousal support to consider whether it represents the parties' original intentions and whether it continues to comply with the Divorce Act. The claimant needs to demonstrate that new circumstances, not reasonably anticipated at the time of the agreement, warrant the court's intervention. The change in circumstances needs to be significant but need not be "radically unforeseen". However, the focus is not on whether a change occurred, but whether the agreement continues to represent the parties' intentions and continues to be in substantial compliance with the objectives.

[167] Ms. Briggs has not adduced evidence that would enable me to conclude that there are reasons to discount the second addendum, or to vary it or set it aside.

[168] I dismiss this claim.

D. RESP Issues

[169] The parties also have various disputes regarding the RESP funds for the children.

[170] The separation agreement provides:

3.4 Both Vern and Cheryl will continue contributing (until the children are 18 years old), the maximum amount that allows for the full benefit of the government subsidy for the children's RESPs (Vern for Kennedy, Cheryl for Kale) on the understanding that the RESPs will provide any post-secondary support required to assist the children with further education.

[171] The mutual intention of the parties as expressed in the separation agreement was that the RESP accounts would be utilized to pay for the expenses of post-secondary education. Each child has a substantial RESP account. As noted, in Kale's case as of September 2019, thus before withdrawals for the recent academic year, Kale's RESP account stood at \$57,538. Kennedy's account was valued at \$58,859 as of August 21, 2020. Mr. Kasdorf continues to make monthly contributions to her account. These will end shortly.

[172] To the extent possible, the children's post-secondary education expenses should be paid from the RESP accounts. This is in keeping with s. 7(2) of the Guidelines, which states:

Sharing of expense

(2) The guiding principle in determining the amount of an expense referred to in subsection (1) is that the expense is shared by the spouses in proportion to their respective incomes after deducting from the expense, the contribution, if any, from the child.

[173] In my view the RESP funds are effectively and perhaps legally trust funds belonging to the children. They must remain available to them to contribute to the cost of their post-secondary education, in keeping with the original intention of the parties as set out in their separation agreement. This aligns with s. 7(2) of the Guidelines.

[174] Therefore, I order that post-secondary education expenses that can be paid out of the RESP accounts will not be shared between the parties as child support pursuant to s. 7 of the Guidelines. If the RESP accounts are exhausted, then post-secondary education expenses will be shared as s. 7 special or extraordinary expenses in proportion to their respective incomes, in accordance with s. 7(2) of the Guidelines.

[175] The parties raise various other issues having to do with the RESP accounts.

1. Control of Kale's RESP Account

[176] Mr. Kasdorf and Ms. Briggs are joint subscribers on Kale's RESP account, although pursuant to terms of the separation agreement, only Ms. Briggs paid the monthly contributions, which have now ended.

[177] Mr. Kasdorf complains that Ms. Briggs has refused to allow the funds to be used for Kale's university education. He seeks an order that control of the account be given exclusively to him. As I understand it, because they are joint subscribers on the account, Mr. Kasdorf cannot withdraw funds without the concurrence of Ms. Briggs. Mr. Kasdorf is the sole subscriber for Kennedy's RESP account, and therefore he has control over the account.

[178] Ms. Briggs complains that she does not have access to information about Kennedy's RESP account. During the hearing, Mr. Kasdorf provided a printout showing the current status of the account. Clearly Ms. Briggs should receive regular information about the account.

[179] I therefore order that Mr. Kasdorf provide Ms. Briggs with a complete account statement for Kennedy's RESP account, quarterly; that is, effective at the end of March, June, September, and December of each year, immediately after the end of these periods.

[180] Ms. Briggs initially refused to allow access to Kale's RESP account for his educational expenses. On April 28, 2019, she wrote to Mr. Kasdorf stating that she would not be accessing the funds, because among other things, she was owed years of child support, and return of the CRA refund she had paid pursuant to the second addendum. This was wrongful conduct, potentially harmful to Kale's interests. Her other claims ought to have

been kept separate from the matter of payment of the educational expense from the RESP fund, which as I have said is effectively (and perhaps legally) a trust fund. The affidavits indicate that Kale was involved in this dispute, for which Ms. Briggs is responsible. Although Kale is now an adult, this is inappropriate.

[181] In view of the orders I make, there is no need to transfer exclusive control of Kale's RESP fund to Mr. Kasdorf, as he seeks. If Ms. Briggs again wrongfully withholds withdrawals, then Mr. Kasdorf should apply to court for a remedy. A court could well penalize Ms. Briggs in costs in that scenario.

2. Claim of Ms. Briggs to Kale's RESP Funds

[182] Mr. Kasdorf was compelled to pay Kale's university expenses, which are substantial. He paid expenses of \$7,665 for the first term, in 2019. Second term expenses were projected at \$7,494. Ms. Briggs states that she paid \$15,000 out of the account in January 2020, to Kale, and that Mr. Kasdorf was repaid. She states that she is willing to fund year two from the account. However, in her view the remaining amount of about \$30,000 should be paid to her. She contends that future educational expenses for Kale (after his second year) should be funded as s. 7 expenses, shared between the parties (as Kale's RESP account will be gone). She asserts that the separation agreement was unfair, in that she had to solely make the monthly contributions of \$167 for Kale's account.

[183] She frames the issue as one of retroactive s. 7 expenses for Kale's education. She seeks substitution of an aspect of the separation agreement with an order for shared payment of the s. 7 expense that would otherwise be paid from the RESP funds, and payment of the RESP funds to her, instead.

[184] Here again, as with the CRA issue, Ms. Briggs is attempting to re-write or vary a specific, isolated term that she previously agreed to, without challenging the whole agreement, or seeking a trial of the issues.

[185] I have serious doubts about whether I have the authority to order that the RESP monies be paid to the personal benefit of Ms. Briggs. However, I do not have to decide the matter on that basis, as I am dismissing the claim on other grounds.

[186] There is no pleading specifically relating to Kale's RESP fund. Once again, that is sufficient to decide the matter.

[187] Once again, I also dismiss the claim on the merits.

[188] I note that in respect of the separation agreement, unlike the addendums, Ms. Briggs had independent legal advice. The agreement is clearly comprehensive, and sophisticated. Although the effect of this particular provision imposed an unequal burden on Ms. Briggs, in view of the incomes of the parties, that would have been obvious at the time. I infer that this formed part of the give and take that one would expect in the circumstances.

- [189] There is no evidence from which I could conclude that the separation agreement as a whole should not be afforded "great weight" as indicated in Miglin, upon the stage one analysis. On the second stage, in the context of all the facts, I do not find that the agreement is not now in substantial compliance with the objectives of the Divorce Act, or that it does not still reflect the original intentions of the parties. There is no evidence that would support common law grounds for interfering with the agreement.
- [190] Therefore, the claim of Ms. Briggs for payment to her of Kale's RESP funds is dismissed. I have already set out the order that I make in relation to future s. 7 expenses, and the RESP funds of both children.

3. Claim of Mr. Kasdorf re Underpayment of RESP

- [191] In his final submissions Mr. Kasdorf alleges that Ms. Briggs failed to make the full RESP contribution payments for Kale that were required by the separation agreement.
- [192] He contends that she under-contributed by \$3,268 over the years, and that as a result Kale's RESP account was reduced in value by \$4,033.32. He seeks an order for a compensating payment by her of future s. 7 expenses in this amount.
- [193] While there is a reference to such a claim in his amended counterclaim, his notice of application does not advance this claim, and it is not, therefore, before me. His affidavit evidence makes only passing reference to the alleged under-contribution, which is only set out in detail in his final submission. Ms. Briggs has not had a proper opportunity to respond to this contention.
- [194] Were this claim properly before me, I would not give effect to it. The underpayment is not established on the evidence. The evidence is that Ms. Briggs faithfully made the monthly payments she was obliged to make. Mr. Kasdorf is a joint subscriber on the account, and could have raised this allegation long ago, but there is no evidence that he did so. The provision for equal contributions to the RESPs was unfair, and at a minimum, Ms. Briggs substantially complied with it.

E. Claim for Penalty

- [195] In one of his most recent affidavits, sworn August 14, 2020, Mr. Kasdorf states that he seeks payment of a penalty by Ms. Briggs in the amount of \$5,000 pursuant to the terms of the separation agreement, which stipulated that if a party refused to attempt to resolve disputes concerning the separation agreement through Collaborative Family Law or mediation and court proceedings resulted, that party must pay the other \$5,000 as a contribution towards the other's legal fees.

[196] When the parties had legal counsel in 2017, there was discussion of mediating their disputes. Names of potential mediators were discussed, but no agreement to mediate resulted. I am unable to determine why efforts to mediate faltered, and which party, if any, could be at fault. Ms. Briggs commenced these proceedings December 29, 2017.

[197] This is another recent, add-on claim, not set out in the notice of application filed by Mr. Kasdorf. Ms. Briggs has had no opportunity to respond to it, nor is she required to do so. In an effort to keep these matters within some bounds, on July 22, 2020, I prohibited the filing of further affidavits by either party except as directed. The claim is dismissed, for these reasons.

IV. Conclusion, Summary, and Costs

[198] In summary, I order as follows:

1. This order is made pursuant to the Divorce Act;
2. The respondent will pay the claimant as arrears of child support the sum of \$45,690, less any child support payments he made for the months of April through July 2020;
3. The respondent will pay monthly child support for Kale in the amount of \$300 per month commencing August 1, 2020, and continuing for as long as Kale remains a child of the marriage, within the meaning of the Divorce Act;
4. The respondent will pay child support for Kennedy at the amount payable pursuant to the Guidelines, for one child, on a set-off basis for shared parenting, for as long as Kennedy remains a child of the marriage, within the meaning of the Divorce Act.
5. Commencing August 1, 2020, based upon Guidelines incomes of \$150,000 for the respondent and \$71,000 for the claimant, the respondent will pay table child support for Kennedy of \$680 per month;
6. Commencing January 1, 2021, the respondent will pay table support for Kennedy of \$1,070 per month, based upon Guidelines income of \$200,000 for the respondent, and \$71,000 for the claimant;
7. The parties will share s. 7 special and/or extraordinary expenses in proportion to their Guidelines incomes;
8. Section 7 expenses will be those that are agreed upon by the parties, either before or after the expense is incurred, or, failing agreement, as determined by the court;
9. Subject to the agreement of the parties or court order otherwise, to the extent possible, expenses for post-secondary education shall be paid from the RESP accounts of the children, and shall not form part of s. 7 expenses to be shared by the parties;

10. The respondent will provide the claimant with complete account statements for Kennedy's RESP account, quarterly (at the end of March, June, September, and December of each year) immediately after the end of these periods;
11. The parties will exchange income information annually, not later than July 1 of each calendar year;
12. Child support payable may be varied by mutual written agreement of the parties, or by the court; and
13. All other claims set out in the notices of application before the court are dismissed. The notices of application before the court are: (1) the claimant's notice of application filed October 21, 2019; (2) the respondent's notice of application filed November 15, 2019; and (3) the claimant's notice of application filed May 13, 2020.

[199] Success is broadly divided. There will be no order for costs to either party.

"Verhoeven J."

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