

CANADA / JUDGMENT

C.A.M. v. T.C.H.

2023 BCSC 1283

COURT

Supreme Court of British Columbia

DECIDED

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2023 BCSC 1283 C.A.M. v. T.C.H.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

C.A.M. v. T.C.H.,

2023 BCSC 1283

Date: 20230727

Docket: E44580

Registry: New Westminster

Between:

C.A.M.

Claimant

And

T.C.H.

Respondent

Before: The Honourable Justice Schultes

Reasons for Judgment

Counsel for the Plaintiff:

G.K. Dosanjh

The Respondent, appearing in person

T.C.H.

Place and Date of Hearing:

New Westminster, B.C.

November 21, 2022

January 24, 2023

Place and Date of Judgment:

New Westminster, B.C.

July 27, 2023

Introduction

[1] In this family law matter, the respondent[1] T.C.H. seeks to:

- retroactively vary the amounts of his child and spousal support to conform to a reduction in his income;
- terminate his obligation to pay spousal support as of January 2018;
- have the claimant pay a proportionate share of their children's daycare costs;
- have her provide disclosure[2] of the amount of Canada child benefit[3] payments she has received; and
- make her subject to conduct orders governing her statements about him on social media, and shielding the children from inappropriate material that he says she posts on it.

[2] In her application, the claimant C.A.M. seeks conduct orders governing the parties' communications with their children and with each other. Distilled to their essence, the orders she seeks would require them to:

- Put the children's interests ahead of their own;
- Encourage the children to have a positive relationship with the other parent and that parent's partner, and to attend for their parenting time with the other parent;
- Maintain polite and respectful communications with each other, both in general and in the presence of the children;
- Refrain from questioning the children about their time spent with the other parent, discussing adult or court matters with them, or disparaging the other parent to them.

[3] After the initial submissions were made, the application was adjourned to allow the respondent to provide a supplementary affidavit that addressed the criteria for retroactive support variations more fully, and for the claimant to respond to it. Both of them have taken advantage of that opportunity.

Background

- [4] The parties began a marriage-like relationship in 2008 and separated in 2013. Their children X. and Y. are now 14 and 12 years old respectively.
- [5] A trial dealing with parenting and support issues was held in 2016. In his reasons for judgment (2016 BCSC 1756), the trial judge reached several conclusions that are relevant to the present applications.
- [6] The interim parenting arrangements, which had involved the children being with the respondent from 8:00 am Mondays to 8:00 am Thursdays, and with the claimant the balance of the time, were affirmed, with one exception - the parties were to alternate Sundays with the children. This change was made to allow the claimant time to see clients on Sundays at her laser and electrolysis business.
- [7] The respondent's income for support purposes was found to be \$107,040 for 2015. At the time he was employed as an installer with a telecommunications company.
- [8] The judge concluded that the claimant was capable of earning income but had "chosen a path that does not garner her any income at all, although it may at some point". As a result, he imputed income to her for 2015 of \$22,500.
- [9] There was evidence in the trial that she had trained as a licenced practical nurse, but had not succeeded in gaining long-term employment in that field, because of sub-par skills. The judge did not consider it reasonable to expect her to gain such employment.
- [10] The monthly child support amount to be paid by the respondent was \$1,211, based on a set-off of the amounts of table support payable at the parties' respective incomes[4].
- [11] Special and extraordinary expenses for the children were to be shared proportionately on the basis of the parties' incomes as the judge had found or imputed them - 32% to be contributed by the claimant and 68% by the respondent.
- [12] The parties were ordered to exchange their income tax returns and notices of assessment by June 1 of each year, "in order to assess whether any change to child support ought to be made".
- [13] Spousal support was awarded to the claimant on a compensatory basis, due to the economic disadvantages to being out of the workforce to care for the children when they were very young, and on the basis of her current need for support to maintain an adequate standard of living. The judge determined that the low end of the range provided under the Spousal Support Advisory Guidelines was appropriate, because:

- [136] (1) C.A.M.'s compensatory claim to spousal support, though clearly established, is not particularly strong as she was disadvantaged for a few years only; (2) T.C.H. works substantially more than full-time and his income is higher as a result; and (3) I conclude C.A.M. should have continuing incentives to secure remunerative employment given that she has earned virtually nothing in the three years after separation.
- [14] This resulted in ongoing support from the respondent of \$1,270 per month.
- [15] The judge ordered that there could be a review of spousal support at any point after January 1, 2018. He explained:
- [139] Although that review will address all of the circumstances of the parties, my purpose in ordering a review is to assess C.A.M.'s income and her efforts to become self-sufficient. In short, she should know by that point whether or not her business is going to succeed, and if it has, to what extent, and if it has not, what other efforts she has made to become self-sufficient.
- [16] The judge also awarded retroactive spousal support, effective July 2013, in varying amounts that reflected the parties' incomes over the intervening time to trial.
- [17] The parties were directed to calculate the resulting arrears, with the assistance of the Family Maintenance Enforcement Program, and the respondent was permitted to pay off that amount in monthly installments.
- [18] Finally, because the evidence indicated that "each party has denigrated the other in the presence of the children" the trial judge ordered that they refrain from such behaviour. He noted that neither party was opposed to such an order being made.
- [19] Since those support orders were made, very significant arrears have accumulated, and the FMEP has taken enforcement measures against the respondent.

The Current Applications

The Respondent

Support

- [20] On the issue of retroactive support variations, he has provided his tax returns and notices of assessment from 2015 to 2021.
- [21] The figures he provided include several adjustments.
- [22] He declared bankruptcy in 2016, so there are both the pre- and post-bankruptcy notices of assessment for that year.

[23] In relation to his employment with the telecommunications company, the trial judge had permitted him to deduct his union dues and work-related vehicle expenses from his total income, pursuant to Schedule III of the Federal Child Support Guidelines, and he has continued to make those deductions for the applicable years in his calculations.

[24] For 2019-21 he has included income from other cash employment that was not reported on his tax returns.

[25] Finally, he deducts any requirement to pay child support for January - October 2019 when the children were placed in his care after the claimant suffered a drug-induced psychosis.

[26] His resulting calculations are:

Year

Respondent's Income

Claimant's Income

Monthly Child Support Actually Payable

Monthly Spousal Support Actually Payable

2016

\$95,854

\$22,500

\$1,111

\$668

2017

\$89,522

\$22,500

\$1,026

\$519

2018

\$37,975

\$22,500

\$252

None payable at the parties' incomes under the SSAGs

2019

\$30,019

\$22,500

\$129

None payable at the parties' incomes under the SSAGs

2020

\$41,374

\$22,500

\$300 (for November and December only)

None payable at the parties' incomes under the SSAGs

2021

\$47,518

\$22,500

\$390

None payable at the parties' incomes under the SSAGs

[27] According to his Notice of Application, his arrears of support as of September 2022 were \$130,373.20, plus interest and fines. He expects that the retroactive variation to accord with the actual amount of support payable at his income from time to time will reduce them to the \$20,000-\$25,000 range.

[28] The claimant's unpaid 32% contributions to daycare costs as a special expense, as ordered following the trial, would reduce these arrears further. He is able to support his payment of \$6050 in 2017 with a receipt from the daycare provider. This amount would require the claimant to repay him \$1936 of it.

[29] In addition, he alleges that the claimant has used the Canada child benefits for her own personal needs, and that this misappropriation should also result in a deduction from his support arrears.

[30] He deposes that the decline in his income after 2017 was due to his decision to refuse an alternative position with the telecommunications company, after it reorganized its structure. He explains that it made better sense to switch to a position as a contractor for a company that performed the same type of installation work, because he received almost the same pay and all of the same benefits, and also received a \$20,000 buyout from his former employer in return for leaving. In addition, his former employer was switching to a seven-day rotating shift model that would have had a negative impact on his parenting time.

- [31] He adds that unfortunately the overall installation industry "fell apart", with both his former employer and its major competitor increasingly resorting to lower paid non-union contractors (he is a union member), so in 2020 he made the decision to give up that type of work in favour of an apprenticeship as an electrician, which he was still engaged in when he made this application. While the apprenticeship required a significant reduction in his income, he maintains that in the long run it will be more financially beneficial for him to qualify as an electrician.
- [32] Extrapolated to a yearly rate, the apprenticeship earnings set out in his September 2022 financial statement are \$40,033.
- [33] To rebut the suggestion that he was intentionally underemployed when he refused the alternative position, he has provided a letter from his union representative asserting that the employer "aggressively reduced their employee headcount" in favour of contractors, and has continued to lay off additional staff since the respondent left their employment. A letter from another union representative confirms that the wage he received when he left that position for one as a contractor with a new company was very close to the one he had been previously receiving, and that he worked for two cable or communications companies after leaving his original employer - the first one from February 2017 to June 2019, and the second one from November 2019 to February 2020.
- [34] With respect to the delay in making a retroactive variation application, the respondent deposes that he made six attempts to vary the amounts payable in 2018. The first judge he appeared before referred the matter to the trial judge, who ruled that he could not provide a decision on the material that had been submitted, and that he was not seized any further of the matter. A further attempt to make the application failed because the respondent submitted his notices of assessment for the years in question, but not his filed returns.
- [35] The court file contains a notice of application filed by him dated December 18, 2018, requesting the retroactive variation of his support obligations, and the recorded outcome of a hearing before the trial judge was that it was adjourned and the judge was not seized of the matter, so there is some independent support for this version of events. The notice contained a detailed recalculation of his support based on the decreases in income that it described, and it was accompanied by an affidavit.
- [36] He said that the motivation behind these repeated attempts to reduce his arrears was to recover his passport, which had been seized by the FMEP, in order to attend a friend's wedding outside of the country. He became discouraged after this sustained lack of success. He also believed that the granting of a retroactive variation was "commonplace", by which I took him to mean that he thought he would eventually be successful. When the pandemic hit, he began to receive CERB payments, which temporarily reduced the financial pressure that he was under and therefore the urgency of the application.

- [37] His final reason for delaying a further application was that the claimant makes life extremely difficult for him whenever he applies to court, and he finds it beneficial to avoid conflict with her as much as possible.
- [38] The most recent development affecting child support was that two months before he filed the present application their youngest child Y. began to live with him full time. He says that Y. told him that she did not want to live with the claimant any further because the claimant was always out working as a bartender during her parenting time.
- [39] In the same vein, he alleges that she has been requiring X., their oldest child, to take the SkyTrain and bus to her home, which requires X. to pass through a high-crime area of Surrey, even though she would not be home when their son arrived. Compounding these concerns, he says that she then colluded with X. to create a false story that she was going to pick him up at the New Westminster SkyTrain station, so that he could leave the respondent's home to meet his friends. He deposes that X. subsequently admitted the lie to him, and attaches a text message from X. to that effect, as well as an email exchange with the claimant that includes her admission that "I absolutely helped [X.] lie so that he could leave your house. He sounded so very scared so of course I will do that!!!"
- [40] At the end of November, X. was involved in an incident during the claimant's parenting time that resulted in him being brought home by the police. When the respondent asked her to let him know when X. is left alone while she is working so that he can check on him, she was not receptive to the request.
- [41] More generally, he accuses her of maintaining her parenting time with X. only to ensure that she continues to receive child support payments.

Conduct

- [42] The online behaviour by the claimant that the respondent seeks to restrict has two aspects.
- [43] The first involves her making baseless allegations against him on Facebook - that he says negative things about her to their children and, more seriously, that he once attempted to kill her by strangling her. This had the effect of inflaming her supporters to make further negative comments about him online. He has attached copies of posts by her from September 2022 that contain such allegations, including one that contains his telephone number.
- [44] He adds that Y. was sufficiently concerned about the strangulation allegation that she contacted the claimant and asked her to remove the post. The claimant said that she had done so, but a subsequent check by Y. revealed that it was still there, which upset Y. further.
- [45] He adds that in 2018 the parties attended a Provincial Court hearing in Surrey, the exact nature of which was not specified, and that during it the presiding judge warned the claimant "very sternly" not to post about the respondent on Facebook again, and that the respondent agreed not to do so.

- [46] The second aspect is that the claimant posts sexualized images of herself online, which can be accessed by their children and the children's friends. He attaches a still image of what appears to be a video bearing the claimant's name, in which she is scantily clad and assuming what could be regarded as a suggestive pose, and a second image that is more overtly sexual in nature.
- [47] When he asked her to stop posting such material in a location that the children could access, she posted a video of herself waving a large kitchen knife, with a caption asking whether she was wearing enough clothes for his liking.

The Claimant

Support

- [48] She disputes the income claimed by the respondent, on the basis that it is implausibly low in relation to his lifestyle expenses, which have included multiple changes to his apartments and vehicles, extensive travel and recreational activities, regular dining out and food delivery, and the acquisition of new furniture, an expensive dog, and a diamond engagement ring for his fiancée. For example, the rent for the apartment he occupied in 2019 would have consumed his entire claimed income for that year.
- [49] She also believes that he has investments in two properties that he has not disclosed.
- [50] She further alleges that he is intentionally underemployed and that his choice to join another company as a contractor instead of accepting alternative employment with the telecommunications company was motivated by the fact that the person who "may possibly" own the company that he moved to was a childhood friend. Notably, he has not indicated what his salary would have been if he had accepted the alternative position with his former employer.
- [51] Her counsel submits therefore that no material change in his income has been demonstrated, and that the income of \$107,000 that the trial judge identified for 2015 should continue to be imputed to him.
- [52] Counsel also submits that a relevant consideration when I am being asked to reduce his support obligations retroactively are the extended periods during which he has not made any payments, which according to the FMEP documents that have been provided were October 2018 to January 2019, July to October 2019, February 2020 to January 2021, and March 2022 to July 2022.

- [53] The claimant maintains that she has not received any previous applications by the respondent to vary his support obligations. The only related application that she is aware of was the one he made in 2018 to have his passport returned so that he could travel to Mexico (I took this travel to be in relation to the friend's wedding that he described). It is also relevant, she points out, that she did not receive proper financial disclosure from him until he made the present application.
- [54] The only daycare-related expense that she agrees has not been equally shared between them was in relation to a financial penalty that was imposed on their daycare operator, for altering the form that she had submitted to the operator in order to receive a subsidy. She says that the respondent paid this penalty on behalf of the operator, after she refused to do so.
- [55] As to her efforts to earn income since the trial, she explains that since 2018 she has operated her own mobile foot care company (although her 2017 business tax documents also make reference to income from such a business). In 2021 she began acting as a distributor for a company that sells water purifying machines and related products, and in 2022 she added a third position, as a bartender with a party services business.
- [56] As of the end of October of last year she was working in all three positions, and according to her financial statement her income for child support purposes was \$29,241, and \$31,046 for spousal support purposes. Her counsel notes that her average income over the last three years has been approximately what the trial judge imputed to her.
- [57] She has also provided her tax returns and notices of assessment for 2017-2021 and, to lend support to her current claimed income, bank statements from May - October 2022, and several invoices from her foot care business.
- [58] Like the respondent, she has also declared bankruptcy previously, although hers was in 2017. The amount of her post-bankruptcy income for that year is not clear, because there was a significant reassessment of the entire amount owing for the year.

Year

Total Income

2017

\$40,265 - pre-bankruptcy (in totality re-assessed as \$2,449)

2018

\$12,265

2019

\$11,568

2020

\$23,300

2021

\$29,749

- [59] Without further explanation, the claimant's bank statements and treatment invoices do not lend themselves to any particular conclusion, other than that the amounts that were being received by her as payments and deposited to her account do not seem wildly out of step with the current annual income that she deposes to.
- [60] She denies ever having used the Canada child benefits for her personal needs.
- [61] To the extent that they are relevant to the present issues, the claimant offers a different version of the ongoing parenting disputes than the one offered by the respondent.
- [62] The time that she spent apart from the children resulted from someone informing her that the respondent had a gun and was going to kill her. His attempt to strangle her, which she maintains occurred in 2013, lent credence to this comment in her mind. She had just smoked marihuana when she reported the threat to the police, and after they attended in relation to her complainant they had her admitted to hospital (for psychiatric examination, I infer). She subsequently complied with all of the requirements that were imposed on her by the Ministry of Children and Families as a result of the incident (undergoing counselling and mental health assessments, and taking medication), and no further issues of this nature have arisen since.
- [63] She also denies ever having left the children home alone during her parenting time in order to go to work.
- [64] She alleges that the respondent has been attempting to entice Y. to stay with him full time by promising her various benefits. On October 28, 2022, following a dispute about Y. staying with a friend, the respondent simply announced by email that Y. would be staying with him on her parenting time that night.
- [65] Of particular concern, the claimant says that he has also involved Y. in the court process by requesting her to bring a notice of application in this matter with her to her parenting time with him, and has attached a text message between him and Y. containing that request.
- [66] With respect to the supposed danger that she exposes X. to when he is travelling to her home, she explains that he has been taking the SkyTrain and bus since he was ten years old, which she did not approve of at that time (I infer that her position is that the respondent did approve of it). Regardless, she is generally on the phone with X. while he rides the mere three stops on the SkyTrain that are necessary in order for her to pick him up.

- [67] She also provides a more benign interpretation of the incident in which X. was picked up by the police, one which did not involve any misbehaviour on X.'s part. The key point from her perspective is that once X. was brought to his home, the respondent would not allow him to leave, which required her to come and pick him up.

Conduct

- [68] Her position is that the respondent has misrepresented the nature of her online activity. She made the Facebook post criticizing his conduct in an effort to stop him from repeatedly emailing her, and removed his phone number from the post within a few days.
- [69] She does not recall ever having been reprimanded by a judge for posting messages about the respondent. She says that in general she posts only "positive messages, mental health help, and work-related marketing."
- [70] She says that in any event, the children have been blocked from her posts.
- [71] With respect to the type of communications with the children that she says need to be curbed by a conduct order, she explains that the respondent continues to seek to persuade both children to live with him full-time and to discourage them from being with her for her parenting time. As an indication of his inappropriate sharing of information about the family proceedings with them, she says that the children get angry with her for not buying them things even though the respondent is paying her support, and also tell her that it is unfair that he is having to pay support.

Discussion

Suitability for Resolution by a Chambers Application

- [72] The respondent's applications to retroactively vary child and spousal support and terminate spousal support require variations of a final order (the one made following the trial), pursuant to Rule 10-5(2)(b) of the Supreme Court Family Rules. While the SCFRs permit such a variation to be dealt with as a chambers application, if a triable issue arises and the party who raises it is not "bound to lose", the chambers judge must consider whether there are any hybrid procedures, such as cross-examination on affidavits or examinations for discovery, that would place the court in a position to decide the matter fairly. If such procedures are not capable of resolving the matter appropriately, then it must be referred to the trial list: *Robertson v. Dhillon*, 2015 BCCA 469 at para. 56; *Cepuran v. Carlton*, 2022 BCCA 76 at paras. 160, 165-166; *C.M.R. v. L.F.R.*, 2019 BCCA 371 at paras.11-13.
- [73] When deciding whether a dispute between the parties amounts to a triable issue, it is important to keep in mind that the disputed issue being relied on by a party, quite aside from the likelihood of its success, must have a factual basis. As explained in *Bank of Montreal v. Yow* (1986), 16 B.C.L.R. (2d) 249 (C.A.) at para. 22, where the proposed triable issue arose in the context of a foreclosure proceeding:

The applicable test is whether there is a bona fide triable issue or issues upon which [the respondent] could defend against the claims of the Bank ... The issue must be bona fide in the sense that the proposition of law has a bona fide foundation in fact. One cannot raise an issue of law hypothetically or in the abstract. In my view each of the issues of law proposed by the appellant depends for its viability and bona fides on a body of evidence which will support [the defence] ...

- [74] I do not think that the points raised by the claimant in opposition to the retroactive variations and termination meet this requirement. They are all based on assertions by her of matters of which she does not describe any first-hand knowledge (the respondent's expenses, employment and lifestyle), and which are not grounded in any objective contradictory evidence in the record. For example, the expenses listed in the respondent's financial statement are roughly equivalent to his current claimed income.
- [75] This does not mean that the respondent's application will automatically succeed, because he still has to satisfy the relevant factual requirements himself, and there is a common body of evidence on which the claimant can base her opposition to it. The point is simply that there is no procedural bar to deciding it as a chambers application.
- [76] This conclusion is restricted to the suitability of the support variation issues. As I will discuss, there are several aspects of the parenting situation that cannot be resolved on the existing material, and my ability to make conduct orders must be based on findings that do not require me to prefer one party's version of events over the other's.
- [77] I should add, on the subject of the chambers application process, that both parties relied on various hearsay documents to advance their positions. Such evidence is of course inadmissible in an application for a final order, in the absence of a further order under s.10-3(4) of the SCFRs, but their roughly equal degree of reliance on it satisfies me that in this particular case there has been no prejudice to either of them from their approach, and that in the interests of overall fairness I should receive the evidence.

Retroactive Variation

- [78] The decisions of *D.B.S. v. S.R.G.*; *L.J.W. v. T.A.R.*; *Henry v. Henry*; *Hiemstra v. Hiemstra*, [2006] 2 S.C.R. 231 [D.B.S.] dealt with applications by recipient parents for retroactive increases in child support, based on past increases in the payors' income. The applicability of the D.B.S. analysis to applications to reduce support was confirmed and clarified in *Colucci v Colucci*, 2021 SCC 24.
- [79] For present purposes, the essential points made in *Colucci* were:
- For a payor to obtain a retroactive reduction in their support obligation based on a decrease in income, the decrease "must be significant and have some degree of continuity, and it must be real and not one of choice" (para.61).

- "The payor must have disclosed sufficient reliable evidence for the court to determine when and how far their income fell, and to ascertain whether the change was significant, long lasting, and not one of choice. A decision to retroactively decrease support can only be made based on 'reliable, accurate and complete information'" (para. 62).
- If a material change in income is shown, there is a presumption that support will be varied as of the date of effective notice by the payor to the recipient parent, up to three years before formal notice was provided (para.80).
- Other than in exceptional situations, "effective notice must be accompanied by 'reasonable proof' that is sufficient to allow the recipient to 'independently assess the situation in a meaningful way and respond appropriately'" (para.88).
- In the absence of effective notice, the usual date of retroactivity will be the date of formal notice (para.95).
- There is discretion to depart from that presumptive date if the result would be unfair. The factors that were relevant to a retroactive increase in support in D.B.S. - the reason for the delay in seeking the variation, blameworthy conduct by the payor, the circumstances of the children (including the effect on them of any order for repayment of support already received), and hardship to the payor - will guide the exercise of that discretion (paras.97-108).

[80] I conclude that in requiring the payor to demonstrate that their past reduction in income was not "one of choice", the Court did not intend to displace the existing case authorities dealing with intentional underemployment of a payor for support purposes. As is well known, the test for imputing income for intentional under-employment is reasonableness, "having regard to the parties' capacity to earn income in light of their age, education, health, work history and work availability": *Marquez v. Zapiola*, 2013 BCCA 433 at para. 37. Income should not be imputed due to a career change by a payor parent, as long as the change is reasonable in the circumstances, "in light of the joint obligation of parents to maintain their children and the requirement that a parent must earn to his or her ability": *Hanson v. Hanson*, [1999] B.C.J. No. 2532 (S.C.) at para 17.

[81] I am satisfied that the respondent has provided the sort of detailed financial disclosure, in the form of his tax documents dating back to the start of the proposed period of retroactivity, and a financial statement that is current to the date of the application, that was envisioned in *Colucci*.

[82] In the absence of any evidence to contradict their completeness, his voluntary inclusion of his off-the-books income, and his explanation of its sources, lends a further degree of reliability to the overall figures he has provided.

[83] This evidence establishes that since the trial he has not earned the income that was identified for 2015, and that since 2017 he has earned considerably less than that income.

- [84] The evidence is also sufficient to show that the change in his employment was a rational career choice, rather than a deliberate effort to pay less support. The letter from his union representative supports his account of the reorganization by his employer that led him to refuse an alternative position there, and instead to work for several years for other telecommunications companies.
- [85] While it would have been preferable if he had addressed more directly why his switch to a different telecommunications company did not allow him to maintain his previous income, despite the similarity in their hourly rates, his explanation that the industry then "fell apart", leading him to switch to training as an electrician, implicitly explains what occurred, and provides adequate evidence on that point, in the absence of anything contradicting it.
- [86] Further, I am satisfied that the reduction in income that has accompanied his switch to an apprenticeship reflects a legitimate career change that was reasonable in all of the circumstances, and that upon completion of his apprenticeship his financial prospects as a qualified electrician will improve meaningfully, to the longer-term benefit of the children.
- [87] Having found a material downwards change in his income that is not due to intentional underemployment, I conclude that the date of effective notice of his need to adjust support in light of that change was his previous application to reduce the arrears and terminate spousal support, filed in December 2018, which certainly met the requirements for effective notice as described in Colucci.
- [88] It is not tenable for the claimant to maintain that she was not aware until the present application of his wish to obtain those orders - the court file reveals that she filed an application response to his December 2018 application on January 9, 2019, it appears as a self-represented litigant, in which she advanced arguments similar to her present ones.
- [89] Thus, the presumptive date of retroactivity is December 18, 2018, the date that he filed his original uncompleted request for a variation.
- [90] None of the D.B.S. factors weigh against extending retroactivity that far back, or suggest that it should be extended further. The application filed on that date is the first reference in the evidence to the need to reduce the respondent's support being broached by him; no blameworthy conduct on his part in the course of seeking a reduction has been identified; the amounts owed appear to consist mostly of arrears, so the children will not be deprived while in the claimant's care by any requirement to repay them; and there has been no indication that hardship to the respondent would result from failing to extend retroactivity even farther back.
- [91] I appreciate that the arrears that have accumulated are substantial, and that there have been periods in which he paid no support at all, but the point underlying a retroactive reduction in support is that the payor is liable only for the support that corresponded to his income at the time. It must be distinguished from a request to cancel arrears due only to a current inability to afford to pay them, in which past failure to pay when the payor could have

afforded to would be a highly relevant inquiry (see Colucci at paras.137-138). In any event, the gap in this case between the respondent's actual incomes in the years since the trial and the one under the trial order is so large that I do not think anything blameworthy can be inferred from the amount of the arrears or the sporadic payments.

[92] Because notice came more than halfway through December of 2018, I will make the variation effective January 1, 2019. It results in the respondent's income for support purposes from then on being:

- 2019: \$30,019
- 2020: \$41,374
- 2021: \$47,518
- 2022 to date of application, and ongoing: \$40,333

[93] The monthly table amount of child support payable by the respondent for each of those years will be set off against support at the income imputed to the claimant at trial of \$22,500, which she has not applied to vary and which still approximates her recent average income, and the net amount will be his child support owing. Those monthly amounts are:

- 2019: \$484 - \$355: \$29.00
- 2020: \$655 - \$355: \$300
- 2021: \$745 - \$355: \$390
- 2022 to date of application, and ongoing: \$640 - \$355: \$285

[94] However, I would not adjust the number of children in relation to whom support was payable by the respondent, either for the period in 2019 during which both of them were in his care, or for Y.'s apparent recent preference to stay with him.

[95] The 2019 situation was not the subject of an application to vary the parenting arrangements, with a corresponding change in the support payable, and was not of an enduring nature. There is also a dispute about the extent of the incapacity to care for the children on the claimant's part and whether the catalyst for that incapacity was past family violence, which cannot be resolved on the existing evidence.

[96] Y.'s situation has also not resulted in an application to vary those arrangements, and once again the underlying reason for the change, in particular whether it results from any inducements on the respondent's part, is hotly disputed and cannot be resolved on the present material.

[97] The respondent's spousal support obligations from January 1, 2019 onwards must also be recalculated using the respective incomes that I have provided above. As the respondent correctly predicted in his submissions, based on an application of the SSAGs to those incomes, no spousal support is payable by him during the retroactivity period that I have identified.

[98] I will rely on the FMEP to recalculate the arrears accordingly, as well as the effect of the variations on the interest that has accrued and penalties that have been imposed.

Ongoing Disclosure

[99] The parties are already under an obligation to exchange their filed tax returns and notices of assessment every year by June 1, and so I will simply emphasize that situations like the present one can easily be avoided in the future if they comply with that requirement and adjust the setoff amount accordingly as of that date.

[100] The claimant denies having misappropriated any Canada child benefits and there is no independent evidence that is capable of resolving the dispute, so I would not impose any specific disclosure requirement with respect to them on her, beyond the information with respect to it that will already be contained in her tax returns.

Review of Spousal Support

[101] The relevant part of s. 168 of the Family Law Act provides that:

(2) On review, a court, on application, may do one or more of the following:

- (a) confirm an agreement or order respecting spousal support;
- (b) set aside all or part of an agreement, or terminate an order, respecting spousal support;
- (c) make an order under section 165 [orders respecting spousal support].

(3) In making an order under this section, the court is not required to consider any of the matters referred to in sections 164 [setting aside agreements respecting spousal support] and 167 (2) [changing, suspending or terminating orders respecting spousal support].

[102] Given the length of time for which spousal support has been in place relative to the duration of the relationship (although it has not actually been payable since 2019 due to the decline in the respondent's income relative to the claimant's), and the corresponding opportunity that the claimant has had to establish herself in the business that she was engaged in at the time of trial, or its successor, I think that both of the bases on which it was originally ordered have been exhausted, and it should now be terminated, effective on the date of the present application.

[103] I would not terminate it retroactively to the first date of eligibility for a review. While I am sympathetic to the obstacles that the respondent faced in making his application for the retroactive support variation and to terminate this order, there is an issue of fairness to the

claimant, who would not have been aware before the date of effective notice in December 2018 that he was seeking to take advantage of the review that had been ordered. Practically speaking, this means that his spousal support obligations under the trial order, and any arrears accumulated under it, remained in place until January 1, 2019, when the retroactive variation in the amount of support took effect.

Special or Extraordinary Expenses

- [104] The respondent has documented his payment for the children's daycare expenses of \$6050 in 2017, of which the claimant is responsible for \$1936, pursuant to her 32% share of special and extraordinary expenses that was ordered at trial. Her explanation of the sole situation in which she claims not to have contributed to a daycare expense does not correspond to the 2017 payment, which she has not addressed in her material.
- [105] I therefore order that she pay the respondent \$1936 for 2017, which may be set off against his support arrears.
- [106] The parties' proportionate shares of such expenses going forward have not been the subject of an application for variation by the respondent, although the change in his income would support it. Pending such an application, they will remain at the proportions that were set by the trial order.

Conduct

- [107] When dealing with this issue, it is important to keep in mind that there is currently no application being made to change the parenting arrangements that were imposed at trial, so the competing allegations of inappropriate parenting behaviour contained in the affidavits are only relevant to the need for conduct orders.
- [108] Section 222 of the FLA provides that such orders may be made for the following purposes:
- (a) to facilitate the settlement of a family law dispute or of an issue that may become the subject of a family law dispute;
 - (b) to manage behaviours that might frustrate the resolution of a family law dispute by an agreement or order;
 - (c) to prevent misuse of the court process;
 - (d) to facilitate arrangements pending final determination of a family law dispute.
- [109] Because the age of these children mean that many years remain in which parenting disputes may require resolution in court, I think that (a)(b) and (c) are potentially engaged by the conduct that is being alleged here.

- [110] Section 227(c) permits a court to make an order requiring a party to "do or not do anything, as the court considers appropriate, in relation to a purpose referred to in section 222". (More generally, s. 225 permits a court to make an order "setting restrictions or conditions respecting communications between parties".)
- [111] As an overview, it is clear, not just from the posts in question but the other electronic communications that are contained in the material, that the parties have a very hostile relationship, and that trust between them on parenting issues is nonexistent.
- [112] It is also clear that the children have been drawn into the parties' disputes to an unacceptable degree. For example, I am particularly concerned with the manner in which they each enlisted X. in support of their respective positions in their dispute over the safety of his travel arrangements. He should also not be encouraged by the claimant to lie to the respondent, or be prevented by the respondent from being in the claimant's care during the claimant's parenting time. And, as is almost too obvious to need saying, Y. should not be having anything to do with court documents, for any reason.
- [113] That said, I am not convinced that the claimant posting negative comments about the respondent on Facebook, or posting pictures of herself that he considers inappropriate, are the proper subject of conduct orders.
- [114] The degree of caution that attaches to such proposed restrictions was well explained in *A.B. v. C.D.*, 2020 BCCA 11:
- [189] Sections 222 and 227 have been interpreted as giving the court "broad discretion to craft appropriate conduct orders": see *R.A. v. W.A.*, 2018 BCSC 1910 at para. 219. However, in crafting appropriate conduct orders, particularly orders that restrict a party's ability to communicate with others, courts should take into account a party's right to freedom of expression. In *Chellappa v. Kumar*, 2016 BCCA 2, a conduct order was described as "a complete gag on either party discussing the case with anyone" (at para. 30). This court (in obiter) expressed considerable doubt as to whether a trial judge has jurisdiction to make a conduct order that so broadly restricts a party's freedom of expression, but if such jurisdiction does exist, "it should only be invoked in the clearest of cases on a full evidentiary record" (at para. 30).
- [115] It is worth noting that the form of restriction on the father's public communications that was imposed in *A.B.* was found to be necessary to prevent the harm to the child that was being caused by the father publicizing his dispute with that child. The Court also emphasized that when applying these sections, the governing consideration is the best interests of the child. In other words, in cases involving parenting conduct orders are not primarily a means of protecting the parents' interests.

- [116] I think that in this case the law of defamation, and the respondent's ability to request social media platforms remove any material that violates it, sufficiently protect him against false and injurious statements being made by her on social media, without restricting the claimant's general right to communicate about matters of interest to her, including this case, as she sees fit.
- [117] Similarly, while her sexual self-expression online could be potentially relevant to her ability to parent in the children's best interests, if it exposes them prematurely to adult activities or ridicule among their peers, those concerns are best considered in the context of an application to vary the current parenting arrangements, if one is made.
- [118] Therefore, I decline to make the conduct orders sought by the respondent. To be clear, I am by no means endorsing the claimant's online activities. I have simply concluded that there are more appropriate responses to them than conduct orders.
- [119] However, I agree with the claimant that orders governing the parties' communications with each other, and about each other to the children, are necessary to address the applicable concerns in s.222. I will seek to achieve those purposes by slightly more focused terms than she has proposed.
- [120] Therefore, the parties will be subject to the following conduct orders:
- Except in an emergency affecting the health or well-being of a child, they will communicate with each other only by email, and only on the subject of the children;
 - Such emails will contain only factual descriptions of the circumstances of the children that make it necessary for them to communicate at that time;
 - These emails will contain no criticism of the other parent, express or implied;
 - A party is not obligated to respond to an email that does not comply with the preceding requirements;
 - They will not discuss this family law matter with the children at any time, in any manner. For greater certainty, this includes issues of child support, parenting time, and any potential changes to the parenting arrangements; and
 - They will also not share any disagreements that they may have with each other with the children, or involve the children in any manner in those disagreements.
- [121] Because the respondent is self-represented I will add, not as an order but as information for his benefit, that unless they are varied, whether by further application or agreement, the current parenting arrangements must be adhered to, and that a parent is justified in withholding a child from parenting time under an existing order only under the very narrow circumstances set out in s. 62 of the FLA. If he believes that the best interests of one or both of the children require a change in parenting arrangements, then he should make an application to have them changed, rather than allowing situations that are contrary to

the terms of the existing order to continue.

Costs

[122] In the absence of further submissions, my tentative view is that success has been evenly divided on the matters of importance, and that the parties should each bear their own costs. If either party disagrees, the parties may make written submissions according to a schedule for exchanging and filing them that is convenient to them, and in that case I will keep an open mind on the issue until I have read the submissions.

"Schultes J."

- [1] He listed himself as the claimant in his application materials, but I have referred to the parties by the roles set out in the pleadings.
- [2] He also sought disclosure of her income tax information for the period in question, but in response to his application she has filed a financial statement that attaches it.
- [3] The parties' referred to these payments as "child tax payments".
- [4] The judge also identified the amounts of support that should have been paid by the respondent on a set-off basis back to the date of separation, but it appears from the reasons that those amounts did not result in any ongoing arrears.

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