

CANADA / JUDGMENT

D.E.A. v. A.L.B.

2024 BCSC 161

COURT

Supreme Court of British Columbia

DECIDED

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2024 BCSC 161 D.E.A. v. A.L.B.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

D.E.A. v. A.L.B.,

2024 BCSC 161

Date: 20240206

Docket: E65575

Registry: New Westminster

Between:

D.E.A.

Claimant

And

A.L.B.

Respondent

Before: The Honourable Justice Norell

Reasons for Judgment

Counsel for the Claimant:

I. Hill

Counsel for the Respondent:

D. Halkett

Place and Date of Hearing:

New Westminster, B.C.

January 9, 2024

Place and Date of Judgment:

New Westminster, B.C.

February 6, 2024

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Introduction

- [1] Each party brings a summary trial application for several orders that relate to the support of their child M.
- [2] The parties married in 1995, separated in 2009, entered into a separation agreement ("SA") on October 26, 2012, and were divorced in 2013.
- [3] The SA stated that the claimant's income was \$85,000 and that the respondent's income was "\$65,000 plus commission". It further stated that as the parties have "similar incomes" and shared parenting, that "neither shall pay child support to the other", except for sharing s. 7 expenses. Implicitly, each party agreed to pay equal child support, so there was no need to exchange monthly payments. There was no provision in the SA for yearly exchange of income information. Until this action was commenced, the parties did not exchange such information. The parties continued with equal shared parenting, typically on a week on/off

basis, for eight years until March 3, 2020, when M, then age 14, decided to live only with the claimant, contrary to the wishes of the respondent. This situation remained as of the date of this hearing.

- [4] On June 26, 2021, the claimant asked the respondent to pay child support, but the respondent has not paid any, nor any portion of s. 7 expenses. On August 25, 2022, the claimant filed his notice of family claim seeking child support retroactive to March 2020. On October 5, 2022, the respondent filed her response and counterclaim seeking child support retroactive to 2009. Amended pleadings were filed by both parties in March and April 2023.
- [5] On September 9, 2023, the claimant filed his summary trial application, seeking: (i) determination of the parties' incomes since 2020; (ii) retroactive child support from March 2020; (iii) prospective child support; (iv) orders regarding s. 7 expenses; (v) an order concerning a RESP; and (vi) a fine. The claimant seeks to impute income to the respondent since March 2020 on the basis of under-employment and failure to disclose financial information. The parties agree that there was a material change in circumstances in March 2020 when the shared parenting ceased, and that the term in the SA regarding no child support being exchanged should be set aside and an order for child support made. However, the parties disagree on the date from when that order should commence: from March 2020, or as late as June 2021, when effective notice was given that a claim for child support would be made.
- [6] On December 19, 2023, the respondent filed her summary trial application, seeking: (i) determination of the claimant's income; (ii) retroactive child support from 2009 (changed in argument to October 2012, the date of the SA) to February 2020; and (iii) an order for s. 7 expenses. The respondent argues that from 2012 to February 2020 the claimant's income was greater than hers, and that the term of the SA regarding no child support being exchanged should be set aside and an order for child support made. The parties disagree whether their incomes during that time period were significantly different to amount to a material change in circumstances, and if so, when any retroactive order should commence. The first time the respondent gave effective notice of this claim was when she filed and served her counterclaim on about October 5, 2022.
- [7] M is currently 18 years old and will be turning 19 toward the end of this year. He has spinal muscular atrophy. He cannot lift his limbs and is wheelchair bound. He requires physical assistance and equipment such as a hospital bed and a lift. He has complete cognitive ability, and began attending university in September 2023, and is living with the claimant. Plans are underway for him to move onto campus very soon, and to return to the claimant's home during university breaks. The respondent does not argue that any child support should be reduced for the time that M is living on campus.
- [8] The parties agree these issues are suitable for determination by summary trial. I have considered the principles in *Inspiration Mgmt. Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 at 214, 1989 CanLII 229 (C.A.); and *Gichuru v. Pallai*, 2013 BCCA 60 at

paras. 30--31. There are no conflicts in the evidence. The respondent has failed to disclose income information despite a legal obligation and a court order to do so, and both parties have had an opportunity to put their cases forward. The issues are not complex and credibility is not a significant factor. The quantum in dispute militates in favour of a summary trial. This is a proportional way to resolve their disputes, without further procedural steps and resultant delay. I find that I am able to find the facts necessary to decide the issues of fact and law, and it would not be unjust to decide those issues.

- [9] The issues above are addressed under the following headings: Parties' Guidelines Incomes; Child Support; Section 7 Expenses; RESP; and Fine.

Parties' Guidelines Incomes

- [10] The Federal Child Support Guidelines, SOR/97-175 [Guidelines], provide the framework for determining income for the purpose of child support. The relevant provisions are set out in ss. 16 to 20. Pursuant to s. 16, the calculation commences with total income from line 15000 of a spouse's personal tax return and is adjusted in accordance with Schedule III: *Brown v. Brown*, 2014 BCCA 152 at para. 16; *Vincent v. Vincent*, 2012 BCCA 186 at para. 35. The court then considers if the circumstances in ss. 17 to 20 are present and whether there should be an adjustment to arrive at the fairest determination of income available for support, keeping in mind the objectives in s. 1 of the Guidelines: *Brown* at paras. 23 and 29.

- [11] I summarize the evidence from tax assessments, tax returns, or pay stubs, in the table below:

Claimant's line 15000

Respondent's line 15000

2012

\$30,679

No evidence

2013

\$126,509

No evidence

2014

\$101,765

No evidence

2015

\$57,352

No evidence

2016

\$64,978

No evidence

2017

\$67,795

\$60,433

2018

\$55,092

\$64,184

2019

\$86,962

\$67,834

2020

\$59,418

\$53,126

2021

\$99,803

\$34,413

2022

\$99,000

\$41,745

2023

\$102,956

No documentary evidence

Claimant's Guidelines income

- [12] I find the claimant's Guidelines income from 2012 to date is as summarized in the table above. No argument was advanced by either party that there should be an adjustment to the claimant's income pursuant to ss. 17 to 20 of the Guidelines.
- [13] The 2012 income is significantly below the \$85,000 stated to be his income in the SA, and the 2013 income is significantly above. Similar but less significant variations in income are evident in 2014 and 2015. The claimant also produced his 2009 to 2011 tax assessments, which show he had line 15000 income of \$83,323, \$70,712, and \$72,717, respectively for those years. No explanation was given for the decreases and increases in income. The average annual income from 2012 to 2016 was \$76,257, consistent with his average income from 2009 to 2011. All of these averages are less than the \$85,000 anticipated in the SA. Although no mention was made of this in affidavits or argument, the 2019 income includes \$15,755 in net RRSP withdrawals, and documents the claimant included in his financial statement show that he made a consumer proposal that year. While RRSP withdrawals are presumptively included in income for child support, a court may not include them if it determines that doing so would not be the fairest determination of income available for support: s. 17(1) of the Guidelines; *McKenzie v. Perestrelo*, 2014 BCCA 161, at paras. 82-83; and *Kinsella v. Mills*, 2020 ONSC 4785 at paras. 188-192. The 2020 and 2021 incomes also include RRSP withdrawals which I will return to when discussing the circumstances of M. I have included the RRSP withdrawals in Guidelines income, as I received no argument otherwise from the claimant. The 2022 and 2023 incomes are extrapolated from December 15, 2022 pay stubs produced for each year.

Respondent's Guidelines income

- [14] The respondent has not produced any information regarding her income from 2012 to 2016. She produced tax assessments for 2017 to 2022 but no tax returns. She received employment insurance ("EI") from November 2022 to at least April 2023.
- [15] The parties attended a Judicial Case Conference on May 8, 2023 before Associate Judge Krentz. Amongst the orders made were the following:
3. The Respondent will provide to the claimant in respect [to] job searches from March 2020 to date. Including a list of employment sought and any responses from potential employers. This will be provided by June 15, 2023.
 4. The Respondent will provide to the Claimant copies of income tax returns, from 2009 to date, upon receipt from the CRA.

- [16] The respondent has not complied with this order. No list of employment sought, or responses from potential employers, was produced. Only tax assessments from 2017 were produced. The only explanation was her counsel's submission that the respondent tried to get information from the CRA and could not. No evidence was filed by the respondent to that effect, or documenting her efforts to do so.
- [17] Even if it were impossible to obtain information from the CRA, that is not necessarily the only source of evidence. For example, her employer may have records, or she may have paycheque statements, or bank records that show regular deposits. However, there is nothing in evidence.
- [18] It is impossible to determine the respondent's Guidelines income from 2012 to 2016 because she has not produced any evidence of her income in that period, nor explained why she has not done so, despite that she seeks a determination that there is a material change due to disparity in incomes between the parties since 2012. However, given my conclusion on a retroactive date for her counterclaim for child support (discussed below), this impossibility is not material.
- [19] I find the respondent's Guidelines income from 2017 to 2019 is as summarized in the chart above.
- [20] As for 2020 to date, the claimant seeks to impute income to the respondent of \$67,000 per year. He argues that this is what the respondent is capable of earning, based on her income in 2019. The claimant states that the respondent had been working for a large marine company. The respondent always had a full-time job. He learned that she recently completed a Master of Public Policy and Administration. While this is unattributed hearsay, the respondent's counsel acknowledged this was true, although counsel had no details of when and how the respondent completed this, other than that it was completed in about early 2023. The respondent's 2020 to 2022 tax assessments show a "Canada training credit", consistent with this. The claimant also argues that the respondent has not complied with the order of Associate Judge Krentz and as a result, the court can impute income and make an adverse finding against the respondent regarding her income. The claimant points out that, unlike him, the respondent's capacity to work for the past nearly four years has not been hampered by child care responsibilities.
- [21] The respondent's financial statement sworn May 1, 2023 states that she is unemployed and her income (EI) is \$8,595. In her affidavit sworn December 15, 2023, she states that she is "only now" employed with a different identified organization, earning approximately \$37,000 per year. She provides no other evidence regarding her employment.
- [22] A court may impute income to a spouse if the spouse is "intentionally under-employed or unemployed" other than when this is "required by the needs of a child" or by the "reasonable educational or health needs of the spouse": s. 19(1)(a) of the Guidelines.

- [23] The test is whether the spouse has taken reasonable steps to obtain employment commensurate with his or her age, health, education, skills, work history, and availability of work: *Marquez v. Zapiola*, 2013 BCCA 433 at para. 37; *Drygala v. Pauli* (2002), 61 O.R. (3d) 711 at 718, 2002 CanLII 41868 (C.A.) at para. 45. The onus is on the person seeking to impute income to show an evidentiary basis on a balance of probabilities: *Marquez* at para. 36.
- [24] In *Drygala* at para. 23, the court set out the three questions that a court must answer when deciding whether to impute income to a spouse:
1. Is the spouse intentionally under-employed or unemployed?
 2. If so, is the intentional under-employment or unemployment required by virtue of the spouse's reasonable educational or health needs or the needs of a child of the marriage?
 3. If the answer to question #2 is negative, what income is appropriately imputed in the circumstances?
- [25] There is a duty to seek employment where a parent is capable of doing so. "Intentionally" means a voluntary act, such as when a parent chooses to earn less than he or she is capable of earning. A parent is not intentionally unemployed where, through no fault of their own, he or she is unable to work, for example due to being laid off. It is not necessary to show that there was an intent to evade or minimize child support; what matters is whether the parent is earning what the parent is capable of earning: *Drygala* at para. 28; *Barker v. Barker*, 2005 BCCA 177 at paras. 18-19.
- [26] Once the spouse seeking to impute income establishes that the other spouse is intentionally under-employed or unemployed, the burden shifts to the other spouse to establish what is required by the needs of the child or his or her reasonable educational or health needs. The rationale for why the burden shifts is that the other spouse has access to the relevant information: *Drygala* at para. 41.
- [27] A court may also impute income to a spouse if "the spouse has failed to provide income information when under a legal obligation to do so": s. 19(1)(f) of the Guidelines. A spouse has an obligation to provide this information if the spouse's income is necessary for a determination of child support: s. 21 of the Guidelines. Further, when an order has been made for production of income documents and a spouse has failed to comply, a court may draw an adverse inference against that spouse and impute income: Rule 5-1(28) of the Supreme Court Family Rules; and s. 23-24 of the Guidelines.
- [28] I find that the claimant has established that the respondent was intentionally under-employed between 2021 and 2023. I have considered that: (i) the respondent's earning history from 2017 to 2020 shows that she was capable of earning in the range of \$60,000 to 65,000; (ii) her income from 2021 to 2023 is significantly below that range; (iii) the respondent failed to fulfill her financial disclosure obligations; and (iv) the respondent failed to comply with the order of Associate Judge Krentz to provide information regarding her attempts to find work. As a result, I draw an adverse inference regarding her attempts to find

work and impute income. I do not find that the claimant has established that the respondent was intentionally under-employed in 2020. Her income did not decrease as significantly in that year. Further, although she reported \$53,126 in income, working backwards from the 2020 RRSP allowable contribution as shown on her tax return, her employment income was in the range of \$39,000. I take judicial notice that the COVID-19 pandemic commenced in March 2020. In all those circumstances, I am not prepared to conclude that she was intentionally unemployed during that year.

- [29] There were only two possibilities suggested in argument or evidence as to why the respondent's income decreased so significantly: educational needs, or she was laid off.
- [30] The respondent has not established that her decline in income was reasonably required by her educational needs. She has not provided evidence of why she completed the master's degree, the demands of the course, or whether the amount she worked was reasonable considering those demands. She has not provided evidence of why she is now working at a different organization at about half of her former income, whether it is full-time or part-time work, what her position is, or what her employment plans are. She may have had a good reason for completing a master's degree, such as eventual increased income prospects, but she did not give evidence of that.
- [31] The respondent's response to application and notice of application state that she was "laid off", but the respondent does not state that in her affidavit nor does she provide any details of this, despite being the person who would have possession of such information. This is not a case like *Streeper v. Streeper*, 2017 BCSC 1093, in which Justice Church found the applicant was not intentionally under-employed because his "layoff was not something that he voluntarily undertook": at para. 12. To support that finding, however, the applicant provided his termination letter to the court, which suggested the layoff was related to difficulties in the party's business sector.
- [32] There was a period of unemployment of at least six months where the respondent was eligible for and received EI. The respondent had in the past always worked full time, and there had not been a pattern of intentional unemployment. However, the respondent failed to comply with the order of Associate Judge Krentz to provide information regarding her attempts to find work. Even were the respondent to have established by evidence that she was laid off, she did not provide evidence of her attempts to find work following that.
- [33] Considering all of the above, I impute income of \$60,000 per year to the respondent for 2021 to 2023, which is in the range for her average previous years' incomes.

Child Support

- [34] There is no pre-existing order for child support. The parties are seeking to set aside the child support terms of the SA, and obtain an original retroactive order for child support. Although the claimant pled only the Family Law Act, S.B.C. 2011, c. 25 [FLA] in his notice of civil claim, he pled both s. 15.1 of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) [DA], and ss.

147-150 of the FLA in his notice of application. The respondent pled both of these statutes in her counterclaim and notice of application. At the hearing, the parties stated they were seeking the child support orders under the DA.

- [35] The principles which apply for making a retroactive variation to a pre-existing child support order, and for making a retroactive child support order when there is a pre-existing agreement for child support, are similar but not identical. The leading cases are *D.B.S. v. S.R.G.*, 2006 SCC 37; *Colucci v. Colucci*, 2021 SCC 24; and *Michel v. Graydon*, 2020 SCC 24.
- [36] As summarized in *Colucci* at para. 114, where a recipient seeks to increase a pre-existing order under s. 17 of the DA:
- a) The recipient has the onus of establishing the threshold of a past material change in circumstances;
 - b) If a material change is established, the presumptive date of retroactivity is the date the recipient gave effective notice of the request for an increase, up to three years before formal notice. For effective notice, the recipient need only broach the subject because of "informational asymmetry" between the parties regarding income;
 - c) If there is no effective notice, the retroactive date should generally be the date of formal notice;
 - d) A court may exercise its discretion to depart from the presumptive date of retroactivity where the result would otherwise be unfair upon consideration of the "D.B.S. factors"; and
 - e) Once the date of retroactivity is determined, the proper amount of support is that calculated according to the Guidelines.
- [37] The D.B.S. factors, as further discussed in *Michel* are: (i) the reason(s) for the delay in seeking child support; (ii) the conduct of the payor spouse, including any blameworthy behaviour; (iii) the circumstances of the child; and (iv) any hardship occasioned by a retroactive award: *D.B.S.* at paras. 100-117; *Michel* at paras. 109--126.
- [38] When there is no pre-existing order but only a pre-existing agreement, and the recipient seeks an original order for child support pursuant to s. 15.1 of the DA, there is a modified approach. As with a pre-existing order, a court must still balance the parties' interests in certainty (reliance on the agreement), with the need for fairness (the child's right to support in accordance with the payor's income) and flexibility. The DA and the FLA encourage parents to resolve family law issues without resort to litigation, and it is correspondingly important for courts to be deferential to those resolutions. However, in the situation of a pre-existing agreement for child support, the payor parent cannot have the same expectation of certainty as he or she may have had with a pre-existing order: *D.B.S.* at paras. 74-76. As discussed in *D.B.S.*, the welfare of the child must remain the primary focus:

- [77] The fact that we are dealing with children must remain of primary significance in a court's analysis. Thus in the Divorce Act, Parliament has provided that a court may depart from the Guidelines if both parents consent, but only "if it is satisfied that reasonable arrangements have been made for the support of the child to whom the order relates": s. 15.1(7). What is "reasonable" will be determined with reference to the Guidelines: s. 15.1(8). Because of this, a payor parent who adheres to a separation agreement that has not been endorsed by a court should not have the same expectation that (s)he is fulfilling his/her legal obligations as does a payor parent acting pursuant to a court order.
- [78] In most circumstances, however, agreements reached by the parents should be given considerable weight. In so doing, courts should recognize that these agreements were likely considered holistically by the parents, such that a smaller amount of child support may be explained by a larger amount of spousal support for the custodial parent. Therefore, it is often unwise for courts to disrupt the equilibrium achieved by parents. However, as is the case with court orders, where circumstances have changed (or were never as they first appeared) and the actual support obligations of the payor parent have not been met, courts may order a retroactive award so long as the applicable statutory regime permits it: compare *C. (S.E.) v. G. (D.C.)* (2003), 43 R.F.L. (5th) 41, 2003 BCSC 896.
- [39] As the parties also pled the FLA, I note that if they had proceeded under that statute, I would have come to the same result. Section 148(3) of the FLA provides the court with authority to set aside and retroactively replace with an order, or all or part of an agreement respecting child support, if the court would make a different order on consideration of the matters in s. 150: *Hinz v. Davey*, 2022 BCCA 232 at para. 52. Section 150 of the FLA is similar to the provisions in s. 15.1 of the DA.
- [40] I turn now to the parties' different claims for retroactive child support.

Claimant's claim for child support from March 2020

- [41] The respondent has not paid child support, and initially relied on the terms of the SA for not doing so, as she wished that M return to the shared parenting regime. However, at this hearing, she did not contest that once M began permanently living with the claimant full time, there was a material change in circumstances such that the child support terms of the SA should no longer be enforced. Child support was no longer payable by the claimant, and was only payable by the respondent and in an amount in accordance with the Guidelines.
- [42] The only issue is the date on which the retroactive order should commence. The claimant seeks retroactive child support commencing March 3, 2020, the date M commenced living with him full time. The respondent argues that any retroactive order should commence sometime between March 3, 2020 and the date of effective notice on June 26, 2021, after it became clear that this change in parenting time was a permanent situation.
- [43] On June 26, 2021, the claimant emailed the respondent requesting child support:

After much consideration and review of this past 15 months of having [M] full-time, I'd like to ask you to help contribute to his needs. If I'm assuming your income is somewhere in the \$80k range, that would look to be in the area of \$500/mth or so.

Given the living arrangements stipulated in our separation/divorce agreement are no longer applicable, I believe this to be a fair request.

[44] On June 28, 2021, the respondent replied:

The divorce/separation agreement is not changeable to fit your narrative. I have not relinquished custody, nor will I ever. I want [M] home. I have always said that if [M] needed something, I would buy it for him.

[45] As the date of effective notice is within three years of formal notice, a presumption arises that any order made will be retroactive to the date of effective notice, being June 26, 2021. The court has discretion to depart from the presumptive date where the result would otherwise be unfair on consideration of the D.B.S. factors. I turn to those now.

(i) The reason(s) for the delay in seeking child support

[46] I find that it was reasonable for the claimant not to make an immediate demand for child support, but that he has not provided a reasonable explanation for why it took one year and three months to give effective notice.

[47] The claimant states that at first, he did not think that M's decision to live with him would be a permanent situation, and that eventually M and the respondent would resolve their differences. As a result, at first, he did not actively pursue child support. However, it later became apparent that M was not going back. He does not state when this was. He also said he was busy caring for M. The respondent states that she did not agree with M's choice to live solely with the claimant, and wanted a return to shared parenting. Both parties gave evidence of the high level of assistance required by M and the challenges in providing that care alone. The claimant states that equal parenting time was agreed to by the parties in the SA to ensure that both parents got as much time with M as possible, and as fairly as possible, but also to allow the parties a break from caring for M to avoid burnout.

[48] I conclude that the claimant supported M's decision to live only with him, but expected a return to shared parenting; and the respondent wanted a return to shared parenting. In the context of this, it is understandable that there was not an immediate demand for child support. However, and without in any way diminishing the care demands that were on the claimant, in my view being busy is not a reasonable explanation for any delay following that. It takes very little time to write a short email. In my view, effective notice could have been given earlier.

(ii) The conduct of the payor parent, including any blameworthy behaviour

- [49] On the other hand, I find the respondent's failure to pay child support once a change in the parenting regime took place was blameworthy conduct. This is conduct which has "the effect of privileging [the payor's] interests over the child's right to support": Colucci at para. 101 (emphasis in original); Michel at para. 118.
- [50] The respondent states that she has not refused to pay child support. She points out that in her response to the claimant's June 26, 2021 email, she said she would purchase whatever M needed, but she was not asked. She also states that she would have assisted the claimant, such as by taking M to appointments, if the claimant had asked for her help.
- [51] In my view, the respondent has refused to pay child support. First, the change in circumstances was obvious. There was no "informational asymmetry" between the parties, unlike situations where there is an increase or decrease in income which is known to only one parent. This is not a situation where the respondent could have reasonably believed that she was fulfilling her child support obligations, prior to the claimant making the request for child support. The respondent knew that the entire basis of the equal set-off of child support payments in the SA was gone. Similar to the claimant not immediately making a demand for support, the respondent not immediately paying child support may be understandable given the parties' expectations of a return to shared parenting. However, the respondent's failure to pay child support after it should have become apparent that M was not returning to shared parenting was blameworthy conduct. Second, offering to pay for "whatever M needed" is not the same as paying regular monthly child support.

(iii) The circumstances of the child

- [52] There is no evidence that M did without from March 2020 to the present. However, there is evidence of the financial circumstances of the claimant with whom M was residing.
- [53] The claimant states that during the COVID-19 pandemic he had been laid off work and it was difficult finding work. He was struggling to pay for all of M's support and had to withdraw from his RRSP to keep paying their bills and often borrowed from friends and family. The withdrawals from his RRSP are corroborated by his 2020 and 2021 tax returns, which show total net withdrawals for those years of \$38,037. The claimant's financial statement shows he has modest assets, and that his debts exceed his assets. While child support may not have remedied all of the claimant's financial circumstances, it would have partially alleviated them.

(iv) Any hardship occasioned by a retroactive award

- [54] While the focus is on hardship to the payor, this must be assessed after considering the totality of the circumstances. This includes factors such as the recipient not being able to repay debts that were incurred if the sum owing is not ordered to be paid, and the benefit the payor parent received by not paying support: Michel at para. 125.

- [55] While I accept that, given the respondent's current income, a retroactive award will cause her some difficulty, I do not find that it will cause her hardship. In contrast to the financial circumstances of the claimant, despite that the respondent was earning less income than she had prior to 2020, her tax returns show that she was able to contribute a total of \$25,500 to her RRSP in 2021 and 2022. Further, a review of the respondent's financial statement shows that unlike the claimant who has no significant net assets, the respondent owns a home, and she has a net worth of about \$385,000.
- [56] The respondent argues that it is not "fair" that she be ordered to pay retroactive child support when the claimant had greater income than her from 2012 to 2020. That argument is best addressed under her claim for retroactive child support.

Conclusion

- [57] Balancing all of the above, and considering the parties' interests in certainty, flexibility and fairness, and M's right to child support, I exercise my discretion to depart from the presumptive date of retroactivity. I order that retroactive support is payable from May 1, 2020. By that time, two months had passed since M decided to live solely with the claimant, and in my view that was long enough to indicate that this would not be a brief interruption in shared parenting time, where the parties might absorb any interruption in support.
- [58] Based on the respondent's Guidelines incomes found in the preceding section, I calculate the arrears to December 31, 2023 to be \$24,404, calculated as (2020: 8 months at \$499/month) plus (2021-2023: 36 months at \$567/month).
- [59] I decline to order any minimum payment plan for the respondent, as this was barely touched on by the parties in argument, and there was no evidence on which to base the proposed order of the claimant. This is better addressed through agreement or enforcement proceedings.
- [60] Commencing January 1, 2024, child support payable by the respondent to the claimant is \$567 monthly.
- [61] Although there was no evidence filed of this, it is common ground between the parties that M may be entitled to different government benefits when he turns 19, and this may affect child support obligations. Further, the respondent argues that there may be other factors that will affect her obligation to pay child support at that time. Given these potential changes, there will be an order to permit a review of child support when M turns 19.

Respondent's claim for child support before March 2020

- [62] The respondent seeks an order for retroactive child support from October 26, 2012, the date of the SA, to February 29, 2020, arguing that the claimant had greater income during those years. She argues that based on the SA, there was a yearly difference in income of \$20,000 (\$85,000 less \$65,000) from 2012 to 2016, and in total the claimant had greater income from 2017 to 2020. She calculates the difference in child support alleged to be owing to her from 2012 to be about \$16,000.
- [63] The claimant argues that the SA should be given weight, and there was no evidence of a material change in the parties' incomes. The claimant states that at the time they entered into the SA, the parties earned about the same income, although he acknowledges that he earned "slightly more". Since then, the parties have appeared to have the same quality of life and provided for M in the same way. He states that he relied on the SA. Until the respondent provided financial information this year, he had no idea she was in university or had left her previous job, or what she was earning. He assumed their incomes over the years had increased at the same rate. Further, the first notice of this claim was in October 2022.
- [64] For the following reasons, I dismiss the respondent's application for retroactive child support.
- [65] For the years from 2012 to 2016, apart from any consideration of whether it would be appropriate to go back more than 10 years to increase the claimant's child support obligation, the respondent has not provided any evidence of her income in that period. The respondent's income was not stated in the SA to be "\$65,000"; it was stated to be "\$65,000 plus commission", which the parties agreed was "similar" to the claimant's then income of \$85,000. Further, without doing a year to year calculation of the amounts owing, the claimant's tax returns show that his income was not \$85,000, but that the average from 2012 to 2016 was \$76,257. The respondent bears the burden of proof of her income and that inadequate child support was effectively not "paid" by the claimant, and she has not met that burden for those years.
- [66] For the years from 2017 to March 2020, I have determined the parties' Guidelines incomes. Again, without any consideration of whether it would be appropriate to go back more than six years to increase the claimant's child support obligation, I consider the following. The SA was intended to settle all issues between the parties, something the DA and the FLA encourage. The parties agreed that their incomes were "similar". There is an indirect benefit to M in the parties not spending resources on yearly reviews of income, and potentially avoiding conflict, so long as their incomes do remain similar. The SA did not provide for the yearly exchange of income information. I conclude that the parties anticipated that their incomes would stay about the same, and that while there may be year to year variations, their incomes would remain, on average, similar. The parties did not provide any evidence or argument that there were other special provisions, such as unequal property division, that would justify no child support being paid if their incomes were not similar. In my view,

allowing for some small year to year variability, so long as their incomes remained about equal, reasonable support would be provided for M, and deference should be given to the SA.

- [67] Again, putting aside for the moment the issue of the date of retroactivity, for 2017 and 2018, the parties' incomes were equally variable, and in total very similar, resulting in a small amount owing by the respondent to the claimant. For 2019, the claimant had \$19,128 more in income. For 2020, the claimant had \$6,292 more in income, but the shared parenting regime was only in effect until March 3, 2020. I conclude that if the date of retroactivity reaches back to January 2019, the differences in the parties' incomes are sufficiently material to not give deference to the SA, and to order child support be payable by the claimant.
- [68] However, I now turn to the date of retroactivity. The presumptive date for any retroactive order would be from the date of effective notice. This was the date of formal notice, being the service of the counterclaim, on or about October 5, 2022, which was two and a half years after shared parenting had ended.
- [69] Considering the four factors in D.B.S., I would not exercise my discretion to order child support payable for any period prior to the date of effective and formal notice. First, while the respondent has not provided any evidence of why she did not seek an increase in child support earlier, the parties did not exchange any financial information, and I have assumed that she did not know of the claimant's income, just as the claimant did not know of hers. Second, I cannot find blameworthy conduct on the part of the claimant. He acknowledged his income in 2012 was "slightly more" than the respondent's, however in the SA, he agreed his income was \$85,000 and his actual average income from 2012 to 2019 was \$73,892, below that anticipated in the SA. There is no evidence to suggest that the claimant knew or would have reason to think that his income was significantly different than that of the respondent. Third, the claimant stated that M did not do without prior to March 2020, and appeared to have an equal standard of living in both homes. Fourth, considering the claimant's financial circumstances in comparison to those of the respondent, and his lack of any net assets from which to pay a retroactive award, the award sought by the respondent (\$16,000 going back to 2012) would cause hardship to him.
- [70] There is no compelling reason to depart from the presumptive date of retroactivity. However, even if I am in error, and an order were to reach back three years prior to formal notice, that would be to October 5, 2019. As shared parenting ceased on March 3, 2020, the claim would be for only five months. The total amount owing on a straight set-off of table amounts would be \$685, calculated as follows: (2019: 3 months at \$187/month) plus (2020: 2 months at \$62/month). An award of \$685 would not cause the claimant hardship, but I also consider that he has solely shouldered all of M's high care needs, which he states has affected his capacity for work.

Section 7 Expenses

- [71] Clauses 9.1 to 9.7 of the SA address s. 7 expenses and tax benefits. Clause 9.2 states that the parties will equally share M's special and extraordinary expenses. Clause 9.3 states that all other expenses for M shall be agreed to in writing in advance and the parties will equally share those expenses.
- [72] The claimant sought orders with respect to s. 7 expenses because since March 2020, the respondent has not contributed anything toward them. The claimant and respondent both sought an order for proportionate sharing of s. 7 expenses. The claimant also sought an order for reimbursement by the respondent of her proportional share of the \$480.63 in net cost paid by the claimant toward a swing lift. The cost of the lift was over \$7,000 but the claimant was able to obtain funding through Cure SMA Canada. The parties agree there should be an order that they consult each other prior to incurring large s. 7 expenses.

RESP

- [73] Clause 11 of the SA addresses a RESP for M. Currently there is about \$18,000 in the RESP, and it is held by the respondent.
- [74] When the claimant wished to use some of those funds for M's enrollment in university in September 2023, a dispute arose between the parties, resulting in some delay in accessing the funds. The claimant initially sought an order that the RESP be transferred to him to avoid future disputes, however, there is an issue whether this Court has jurisdiction to make such an order 10 years after the SA, as it concerns property division. This can be resolved by an order with respect to a time for payment of funds upon request.

Fine

- [75] The claimant seeks an order that the respondent pay a fine of \$2,000 for her non-disclosure of financial documents following the order of Associate Judge Krentz.
- [76] Section 213 of the FLA provides the court with authority to order a fine for failure to comply with financial disclosure. The primary goal of s. 213 is to secure compliance with disclosure: J.D.G. v. J.J.V., 2013 BCSC 1274 at para. 25. As discussed by Justice Punnett in J.D.G. at para. 21, "[s.] 213 recognizes that non-disclosure is a barrier to the speedy and inexpensive determination of cases".
- [77] I find that the lack of disclosure by the respondent contributed to the inability of the parties to come to a resolution of the matters. Had she provided the information she was obligated to produce, this application may not have been required. On the other hand, her failure to produce the information ordered by Associate Judge Krentz has contributed to the decision to impute income to her. In the circumstances, I order a fine of \$500.

Orders

1. Clause 9.0 of the SA, which states that no child support will be paid, is set aside effective May 1, 2020;

2. The parties' Guidelines incomes for the purpose of child support are:

Claimant

Respondent

2020

\$59,418

\$53,126

2021

\$99,803

\$60,000

2022

\$99,000

\$60,000

2023

\$102,956

\$60,000

3. The respondent shall pay Guidelines table amount child support to the claimant retroactive to May 1, 2020. Based on the above incomes, the arrears of child support owing by the respondent to the claimant for the period from May 1, 2020 to December 31, 2023 is \$24,404;

4. Commencing January 1, 2024, the respondent shall pay to the claimant monthly child support of \$567 for the support of M, payable on the first of each month, for as long as M is eligible for support under the DA;

5. The claimant's application that the respondent pay a minimum of \$200 per month toward the arrears of child support is dismissed;

6. The respondent's application for retroactive child support for the period from October 2012 to February 2022 is dismissed;

7. By consent, clause 9.1 of the SA, which concerns equal sharing of s. 7 expenses, is set aside effective May 1, 2020. The parties shall proportionately share the net s. 7 expenses for M for as long as M is eligible for support under the DA;

8. The party incurring a s. 7 expense shall promptly provide the other party with a receipt for reimbursement;
9. The following expenses will be special or extraordinary expenses:
 - a) the net costs of any medical treatments, therapies, or surgeries as recommended by M's physicians;
 - b) the net costs of any medical prescriptions, medications and equipment; and
 - c) the net costs of any post-secondary expenses after subsidies and RESPs are applied;
10. The parties will consult with each other prior to incurring any significant special or extraordinary expense, being an expense over \$500, or such other amount as may be agreed to by the parties in writing;
11. By February 29, 2024, the respondent will pay to the claimant \$178 for her share of the net cost of the swing lift for M;
12. By May 31 of each year, for as long as M remains a child of the marriage, each party will provide the other party with a copy of their previous year's tax return, and upon receipt provide the other party with a copy of the notice of assessment and any notice of reassessment. On July 1 of each year, the parties will adjust child support and the proportionate share of s. 7 expenses payable pursuant to the Guidelines;
13. Upon M turning 19 years of age, either party may seek review of this order with respect to child support and s. 7 expenses;
14. If the claimant provides to the respondent an invoice for M's post-secondary expenses, and seeks payment of funds from the RESP for the purpose of paying that invoice, the claimant will, within two weeks, disburse those funds to the respondent from the RESP for that purpose; and
15. The respondent will pay a fine to the claimant of \$500 for failure to disclose financial information.

Costs

- [78] The parties requested that the Court defer the issue of costs. If the parties cannot agree to costs, the parties may arrange through Supreme Court Scheduling to speak to the matter at 9:00 a.m. in the next 60 days.

"Norell J."

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