

CANADA / JUDGMENT

Dirks v. Dirks

2025 BCSC 900

COURT

Supreme Court of British Columbia

DECIDED

14 May 2025

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2025 BCSC 900 Dirks v. Dirks

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Dirks v. Dirks,

2025 BCSC 900

Date: 20250514

Docket: E17476

Registry: Chilliwack

Between:

Evie Denise Dirks aka Evie Denise Karding

Claimant

And

Jayson Tyler Dirks

Respondent

Before: The Honourable Justice Walkem

Reasons for Judgment

In Chambers

Counsel for the Claimant:

W.L. Scott, K.C.

The Respondent, appearing in person:

J. Dirks

Place and Date of Hearing:

Chilliwack, B.C.

February 7, 2025

Place and Date of Judgment:

Chilliwack, B.C.

May 14, 2025

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Background

- [1] The parties began their relationship in August 2010 and married a few months later. Their only child, R.D., was born in 2012. The Claimant has another child from a previous relationship, who is not a child of the marriage. The parties separated in May 2014. On August 30, 2017, they entered into a separation agreement (the "Separation Agreement") which addressed how they would parent R.D. and provided for the Respondent to pay \$537 to the Claimant in monthly child support, intended to be in accordance with the Federal Child Support Guidelines, SOR/97-175 [Guidelines].
- [2] The Separation Agreement was drafted by the Respondent's then counsel. The Claimant did not seek independent legal advice prior to signing the Separation Agreement.
- [3] Under the terms of the Separation Agreement, the Claimant filed an application for a desk order divorce in October 2020. The application was delayed for a year because the marriage licence had to be translated from Italian. The COVID-19 Pandemic further delayed consideration of the divorce application. On November 3, 2021, this Court declined to grant the divorce. In that same correspondence, it noted that, based on incomes listed in the Separation Agreement, child support payable from the Respondent to the Claimant had been wrongly calculated by approximately \$200 per month, based on the Guidelines. The Claimant shared this information with the Respondent in November of 2021.
- [4] In January 2022 -- approximately two months after he was notified by the Claimant that the child support he was paying was not up to Guidelines amounts -- the Respondent stopped paying child support altogether.
- [5] The Respondent became unemployed during the COVID-19 Pandemic and has largely remained so. Parenting arrangements for R.D. also changed during this period. These COVID-19 Pandemic-related changes are discussed below.
- [6] In July 2024, the Claimant filed a Notice of Application for a divorce and to amend the Separation Agreement to increase the amount of child support payable from the Respondent to the Claimant to reflect the Guidelines amounts, retroactive from July 1, 2017 to the present.
- [7] The Respondent argues that parenting time has been shared since the beginning of the Covid-19 Pandemic and so child support should be calculated on the basis of a shared parenting regime. Further, the Respondent argues he would suffer undue hardship given his health and unemployment if ordered to pay retroactive child support based on his past income.

Issues

- [8] Issues that must be decided are as follows:

1. Whether the Separation Agreement should be amended and child support retroactively increased from July 1, 2017 to the present;
 2. A determination of whether R.D. lived more than 60 percent with either parent (for purposes of determining Guidelines child support amounts) from the beginning of the Covid-19 Pandemic to the present;
 3. The income of both parties for the purposes of determining child support pursuant to the Guidelines from July 1, 2017 to the present; and
 4. Whether the Respondent has established undue hardship, thus reducing or eliminating child support he owes to the Claimant for R.D. from January 2022 onward.
- [9] The parties agree upon three orders: (1) a divorce; (2) a name change for the Claimant from Dirks to Karding; and (3) dismissal of the Claimant's claim for spousal support.
- [10] The Claimant made a retroactive claim for expenses under s. 7 of the Guidelines. However, this issue was not argued before me.

Separation Agreement

[11] Relevant terms of the Separation Agreement provided that:

Parenting

6. [R.D.] will spend parenting time primarily with [the Claimant].

Child Support

14. Pursuant to the Federal Child Support Guidelines, [the Respondent] shall pay child maintenance in the amount of \$537 per month to [the Claimant] based on his guideline income of approximately \$76,000 per annum and [the Claimant's] guideline income of approximately \$20,000 per annum.
15. Expenses arising in the future which qualify as special or extraordinary expenses within the meaning of the Federal and British Columbia Child Support Guidelines shall be shared in proportion to the parties' respective incomes (65% to be paid by [the Respondent] and 35% to be paid by [the Claimant]) or as agreed between the parties.
17. The parties agree that [the Claimant] shall be entitled to collect any child tax benefit or like benefit.
18. The parties further agree that [the Respondent] shall be entitled to claim [R.D.] as a dependent on his Income Tax Return.

Variation or Review of Child Support and Special or Extraordinary Expenses

21. To determine whether or not child support needs to be revised pursuant to the Federal Child Support Guidelines, the parties shall provide each other with a photocopy of their most recent Income Tax Return and Notice of Assessment on or before June 1st of each year.
22. The parties agree that on July 1st of each year, the child support payable by [the Respondent] to [the Claimant] will be adjusted in accordance with the Federal Child Support Guidelines and the parties' proportionate share of special and extraordinary expenses will be determined in accordance with their respective incomes.

General Provisions

57. (a) If a dispute arises concerning any of the terms of this Agreement following its execution, neither party shall commence Court proceedings or apply to a Court of Law until they both have first sought to resolve the matter with the assistance of a Mediator, Family Justice Counsellor, Parenting Coordinator or other family dispute resolution professional.
- [12] The parties did not undertake an alternative dispute resolution process as required by the Separation Agreement. While the parties explored mediation, they ultimately did not pursue it due to the Respondent's actions. The Claimant introduced evidence that one mediator refused to accept the engagement due to what he described as the "venom" of the Respondent's correspondence with him in the initial planning stages. I find that the fact the parties did not engage in an alternative dispute resolution process does not impact the Claimant's ability to bring this application as she has.

Following the Separation Agreement

- [13] The parties intended child support under the Settlement Agreement to reflect Guidelines amounts. The Settlement Agreement committed the parties to regularly providing an update of their incomes, and adjusting child support accordingly. In practice, child support was never adjusted between the parties.
- [14] Furthermore, the Child support payable from the Respondent to the Claimant for R.D. under the Separation Agreement was miscalculated at approximately \$200 per month less than the Guidelines amount payable, based on the Respondent's income of \$76,000 and the Claimant's income of \$20,000.

COVID-19 Pandemic Impacts

- [15] The COVID-19 Pandemic influenced the events that unfolded between the parties. The Claimant's divorce application was not processed until approximately a year after it was filed. Consequently, the parties did not learn that the Respondent had been underpaying child support until approximately four years had passed.

- [16] The Respondent could not work in his regular workplace due to the COVID-19 Pandemic, and instead offered his RMT services from his own home. Three complaints were made against the Respondent relating to clients' disagreement with COVID-19 precautions. These claims were referred to his insurer. In November 2021, the Respondent was notified by the Registered Massage Therapists' Association that "due to [his] existing claims history and related circumstances", he was no longer eligible for the insurance coverage needed to operate as an RMT. The expiry date of coverage was December 31, 2021.
- [17] I accept the Respondent's evidence that he sought insurance coverage from other providers but was unable to secure insurance and so could no longer practice as an RMT due to this development. The Respondent may be able to apply for insurance again in the future after the claims are resolved, and some time has passed.
- [18] The Respondent says that he was forced to sell his house as he could no longer afford the upkeep payments on it. The Respondent purchased a condo outright. The Respondent says he has largely lived off of the proceeds from the sale of his home since then. Financial disclosure filed by the Respondent in September 2022 shows that he had assets of \$1,069,630.13 at that time. This includes a condo with value listed at \$600,000 as well as cash, bank accounts, investments and vehicles (truck and boat). The Respondent has not filed any further financial disclosure.
- [19] Financial disclosure filed by the Claimant in January 2025 shows she had an income of \$33,280 in 2024, a 2006 vehicle with a nominal value, some credit card debt, and no real estate or other investments. The Claimant has a different partner now and makes no spousal support claim against the Respondent. Overall, the financial statements filed by the Claimant in this family law proceeding show that she is of very modest means, and has been so since the parties entered into the Separation Agreement.

Analysis

1. Should Child Support be Retroactively Increased from July 2017 to the Present?
- [20] I first turn to the question of whether child support that the Respondent pays to the Claimant should be retroactively increased, and the Separation Agreement varied from July 2017 to the present.
- [21] The Respondent's claim of hardship is addressed separately, as is his argument that the parties transitioned to a shared parenting arrangement, and that Child support should be calculated on an offset basis from when a shared parenting arrangement was put in place.

Varying a Separation Agreement

- [22] Pursuant to s. 148(3) of the Family Law Act, S.B.C. 2011, c. 25, the court may "set aside or replace all or part of an agreement respecting child support if the court would make a different order on consideration of the matters set out in section 150".

- [23] The court's authority to vary a separation agreement concerning child support, and the approach to take, was described in *M.L.G. v K.G.G.*, 2021 BCSC 682 at para. 61, *aff'd Gauthier v. Gauthier*, 2022 BCCA 193. There, the court emphasized that: "The court has authority to set aside or replace the terms of the Separation Agreement respecting child support only if the court would have made a different order on consideration of the matters set out in s. 150." Per s. 150, if the Court makes an order respecting child support, it must determine the support in accordance with the Guidelines. There are exceptions to this. The court may order an amount other than the Guidelines amount if the parties have an agreement respecting child support and reasonable arrangements have been made for the child: Family Law Act, ss. 150(1)-(2) .
- [24] Similar language is found in s. 15.1 in the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.). Under s. 15.1(1) of the Divorce Act, a court may make an order regarding child support on application by either spouse. Generally, this type of order should be made in accordance with the Guidelines: Divorce Act, s. 15.1(3). However, the court may award an amount that diverges from the Guidelines amount if it is satisfied that special provisions in a written agreement directly or indirectly benefit the child and that, given those special provisions, the Guidelines amount would be inequitable: Divorce Act, s. 15.1(5).
- [25] Given the needs and circumstances of the child and parties, and consideration of the law regarding varying a separation agreement, I find it appropriate to vary the Separation Agreement regarding child support. I would have made a different order on consideration of matters set out in s. 150 of the Family Law Act. Though the parties have an agreement, I do not consider that reasonable arrangements have been made to support the child. Therefore, any order I make should be determined in accordance with the Guidelines. I now turn to the question of amount and duration of retroactive child support.

Child Support Guidelines Regime

- [26] The Guidelines set out a comprehensive and predictable regime for determining child support based on parents' incomes.
- [27] A parent's annual income is generally determined by their total income on their tax return: Guidelines, s. 16. Provision is also made for parties who have a business, trust, or other sources of income that must be calculated differently. Section 17 of the Guidelines provides for consideration of the last three years of income to determine a fair and reasonable amount of income, in light of patterns of income, fluctuation in income, or receipt of a non-recurring amount during those years.
- [28] Each parent must provide timely and sufficient financial information to determine their income, to ensure a child's right to be supported according to the means of each of their parents is met: Guidelines, ss. 21(1)-21(2). The Supreme Court Family Rules, B.C. Reg. 169/2009 also require parties to keep their financial information current. Rule 5-1 (15) states:

Information must be kept current

- (15) If information contained in a document filed and served under this rule is rendered inaccurate or incomplete by a material change in circumstances, the party who filed and served that document must, promptly after that material change, serve on all parties
- (a) a written statement setting out the accurate and complete information, or
 - (b) a revised Form F8 financial statement containing the accurate and complete information.
- [29] Disclosure gives effect to the right of a child to be supported according to the means and ability of their parents, and protects the interests of both payor and recipient parents. A payor-parent's failure to disclose increases of income does not reduce child support due, but it may delay receipt until such time as the underreporting is discovered, requiring the court to make an order that applies retroactively.

Retroactive Child Support

- [30] In *D.B.S. v. S.R.G.*, 2006 SCC 37, the Supreme Court of Canada emphasized that child support is the right of the child, and gave directions on how retroactive child support should be calculated:
- [54] [P]arents have an obligation to support their children in a way that is commensurate with their income. This parental obligation, like the children's concomitant right to support, exists independently of any statute or court order. [T]he total amount of child support owed will generally fluctuate based on the payor parent's income. Thus, under the federal scheme, a payor parent who does not increase his/her child support payments to correspond with his/her income will not have fulfilled his/her obligation to his/her children.
- [31] Retroactive child support awards are not unusual: *D.B.S.* at paras. 5 and 97. Writing for the majority in *D.B.S.*, Justice Bastarache emphasized the need to consider the rights of the child and to disincentivize payor parents from shielding income to reduce child support payments:
- [4] the ultimate goal must be to ensure that children benefit from the support they are owed at the time when they are owed it. Any incentives for payor parents to be deficient in meeting their obligations should be eliminated.
- [32] Retroactive child support awards are generally made retroactive to the date of effective notice, up to three years before the date of formal notice. However, where the payor parent has engaged in blameworthy conduct, the court may make an award retroactive to the date where increased support should have been paid: *D.B.S.* at para. 124 - 125; *Colucci v. Colucci*, 2021 SCC 24 at para. 6 (concerning a retroactive decrease in payments). The three-year timeline is intended to reflect a balance between the need for both certainty and flexibility, and is not set in stone: *D.B.S.* at para. 124, *Colucci* at paras. 4 and 46. When considering whether and for what period to order a retroactive increase in child support, courts must

balance differing interests to achieve a fair result in the overall circumstances including:

- 1) The child's interest in receiving the appropriate amount of support to which they are entitled: "[C]ourts are not to be discouraged from defending the rights of children when they have the opportunity to do so": D.B.S. at para. 60;
 - 2) The interest of the parties and the child in certainty and predictability; and,
 - 3) The need for flexibility to ensure a just result given fluctuations in payor income: Colucci at para. 46.
- [33] While a court should attempt to craft any retroactive award made in a way that minimizes hardship to a payor parent, "hardship for the payor parent is much less of a concern where it is the product of his/her own blameworthy conduct, it remains a strong [concern] where this is not the case": D.B.S. at para. 116. The court may consider different ways of paying (for example, periodic, or lump sum payments) to reduce hardship to a payor parent.
- [34] Failure to disclose an increase in income, which would have resulted in increased child support payments, is an example of blameworthy conduct and may cause a court to reach further back in time in making an award for the retroactive increase in child support: see D.B.S. at paras. 106, 124-125; Michel v. Graydon, 2020 SCC 24 at paras. 31-34.
- [35] Failure to provide accurate financial information puts the recipient parent at a disadvantage, as they may not even be aware child support is being underpaid absent disclosure. As the Supreme Court of Canada outlined in Colucci at para. 49:
- [49] The pivotal role of disclosure comes as no surprise since the premise underlying the Guidelines "is that the support obligation itself should fluctuate with the payor parent's income" (D.B.S., at para. 45). The structure of the Guidelines thus creates an informational asymmetry between the parties. In a system that ties support to payor income, it is the payor who knows and controls the information needed to calculate the appropriate amount of support. The recipient does not have access to this information, except to the extent that the payor chooses or is made to share it. It would thus be illogical, unfair and contrary to the child's best interests to make the recipient solely responsible for policing the payor's ongoing compliance with their support obligation.]
- [36] In Michel, the Supreme Court of Canada emphasized the importance of financial disclosure in determining child support payable:
- [10] In D.B.S., this Court endorsed certain important principles governing orders for child support (including retroactive child support) that merit restating here:
- Child support is the right of the child, which right cannot be bargained away by the parents, and survives the breakdown of the relationship of the child's parents (para. 38);
 - Child support should, as much as possible, provide children with the same standard of living they enjoyed when their parents were together (para. 38);

- The child support owed will vary based upon the income of the payor parent, and is not confined to furnishing the "necessities of life" (paras. 38-45).
 - Retroactive awards are not truly "retroactive", since they merely hold payors to the legal obligation they always had to pay support commensurate with their income (para. 2);
 - Retroactive awards are not confined to "exceptional circumstances" or "rare cases" (para. 5); and
 - In determining whether to make a retroactive award, the payor parent's interest in certainty in his/her obligations must be balanced with the need for "fairness and ... flexibility". A court should consider whether the recipient parent's delay in seeking retroactive support was reasonable in the circumstances, the conduct of the payor parent, the circumstances of the child, and the hardship the retroactive award might entail (para. 133).
- [37] The Court further noted that it is the recipient parent and child who suffer from insufficient financial disclosure:
- [31] When a payor parent fails to pay the appropriate amount of child support, the recipient parent is left to shoulder the burden. If the recipient parent does not have the means to provide their child reasonable support, the child suffers. Both the recipient parent and the child may experience hardship because of a payor parent's neglect. Seen in this light, it bears repeating that retroactive child support is not exceptional relief (D.B.S., at para. 5): there is nothing exceptional about judicial relief from the miserable consequences that can flow from payor parents' indifference to their child support obligations ...
- [38] As a bottom line: a child and recipient parent should not suffer hardship, while a non- or under-disclosing payor parent reaps the reward of their own failure to provide adequate and timely financial disclosure.
- [39] At paras. 99-116 of D.B.S., Bastarache J. listed several factors that a court should consider in deciding whether to exercise the discretion to award retroactive child support: (1) Reasonableness for why support was not sought earlier; (2) Whether the payor engaged in blameworthy conduct; (3) Circumstances of the child; and (4) Any hardship created by a retroactive award for the payor parent. None of these factors is determinative, and the assessment should be made on holistic assessment of the overall circumstances of the child and parents.
- [40] I now turn to a consideration of these four factors.
- [41] On the first D.B.S. factor, I find there was a reasonable excuse for the Claimant not seeking the increase earlier. The Claimant relied on a calculation in the Separation Agreement drafted by the Respondent's own counsel and did not discover that the payments were inconsistent with the Guidelines until notified by this Court in November 2021. Following that, she notified the Respondent about the underpayment.

- [42] On the second D.B.S. factor, as the payor parent, the Respondent was under an obligation to provide updated and meaningful financial disclosure.
- [43] For several years following the signing of the Separation Agreement (2018, 2019, 2021), and prior to 2022, the Respondent's income increased from the amount listed in the Separation Agreement. In 2020 his income was lower. From 2022 onward, the Respondent unilaterally stopped all child support payments.
- [44] I find the Respondent's failure to provide updated ongoing financial disclosure to be blameworthy conduct within the meaning of the second D.B.S. factor. The Respondent's failure to provide financial disclosure in this application supports a negative inference against him.
- [45] On the third D.B.S. factor, there was a significant difference between the financial means and resources of the Respondent and Claimant in 2018, 2019, 2020 and 2021. The Respondent's income was at least double that of the Claimant during this time. I find that the Claimant and R.D. experienced financial hardship because they were not supported to the level of the Respondent's ability to provide that support. This is especially so given the significant discrepancy of incomes between the Respondent and Claimant.
- [46] On the fourth D.B.S factor, I accept that retroactively increasing child support to reflect the Respondent's actual income will occasion hardship to the Respondent. This factor is not determinative and must be considered in light of the needs of the child as well as the hardship the child and recipient parent experienced due to the under payment. I observe that the Respondent sold his home and had funds with which the rectify the underpayment shortly after it was brought to his attention and chose not to do so.
- [47] I find that child support owing, according to the Guidelines and framework set out in D.B.S., should be retroactively varied from November 2021 onward. Retroactive amounts should reflect any changes to parenting time and income of the parties, as well as consideration of the undue hardship arguments raised by the Respondent, as discussed below.
2. Parenting Time of the Child from July 1, 2017 to Present.
- [48] Section 9 of the Guidelines provides that, in the case of a shared parenting arrangement where either party has at least 40 percent of the parenting time, child support is generally determined as an offset between the parties.
- [49] The Claimant says that the retroactive increase in child support she seeks should be based upon the assumption that she had primary (more than 60 percent) parenting time of R.D. from the time of the Separation Agreement to present. The Separation Agreement acknowledged that the Claimant had primary parenting of R.D.

- [50] During the COVID-19 Pandemic shut down, the parties agreed to adjust the time that R.D. spent with each of them. I take judicial notice of the fact that around mid-March 2020, the Province of British Columbia declared a state of emergency in response to the COVID-19 Pandemic. For the purposes of this application, I find that from the beginning of April 2020 onward, R.D. spent approximately three days per week with the Respondent, and four days per week with the Claimant.
- [51] The Respondent argued that the parties' parenting of R.D. switched to a shared parenting arrangement beginning in or around April 2020, near the advent of the COVID-19 Pandemic, and continuing onward.
- [52] The Claimant introduced evidence in which she calculated parenting time on an hourly basis and argues that she had R.D. for slightly more than 60 percent of the time overall. The Claimant argues that she had R.D. for more than 60 percent of the time most months, if parenting time is calculated on an hourly basis and hours at school assigned from January 2020 to May 2024. The Respondent argues that he had approximately 43 percent of parenting time and the Claimant had 57 percent of the parenting time. The Respondent challenges the Claimant's calculations as being made after the fact and inaccurate. The Respondent argues that the parties agreed to shared parenting of R.D.
- [53] There is no universally-accepted method for calculating the 40 percent threshold to determine whether a parenting regime can be considered to be shared. The specific circumstances of each case are determinative. The court has, at times, adopted both hourly and daily measurements in determining the threshold parenting time under s. 9 of the Guidelines. These calculations variously assign hours of time (such as when a child is at school) to different parents, based on factors such as which parent has responsibility for the child while at school or other activities.
- [54] The way that division of parenting time impacts child support payment obligations may influence parenting decisions and lead parents to conduct a detailed measuring of time better suited to calculating units or measurements on paper, rather than the life and care of a living breathing child: *Berry v. Hart*, 2003 BCCA 659. In *Berry*, the Court of Appeal observed that parents can effectively become "time accountants" with their evidence or assessments of time spent with the child frequently in conflict: at para. 4.
- [55] A granular minute-by-minute calculation of time spent with each parent may distract the court from assessing the essence of how parenting time is actually shared and experienced by the child and parties. The court in *Berry* noted that "rather than assessing the essence of the situation to determine whether there is truly shared custody or not, this approach turns a court into a calculator and the hearing into an accounting exercise": at para. 4. Such an approach may also aggravate parenting disputes through the "financial incentive and financial disincentive inherent in an increase of a child's time with the minority-time parent": *Berry* at para. 6; see also, Rollie Thompson, "The TLC of Shared Parenting: Time, Language and Cash" (Paper delivered at the 27th Annual Institute of Family Law, 13 April

2018 - 14 April 2018) 2018 CanLIIDocs 10853 at 324-325.

[56] Ultimately, an assessment of parenting time should be made in the overall context of a child's life to determine whether there is truly shared parenting time:

[10] In my view the issue is a matter of judgment not amenable to simply a time accounting exercise. I consider that in determining whether the threshold level for application of s. 9 is met the question is whether the paying parent spends such a sizeable percentage of time with a child or children that, on any reasonable view of the evidence and considering the advantage that may accrue to a child in spending the occasional additional day, part day or hour with a parent, one can say reasonably that the 40 percent or more level is achieved. It follows, in my view, that a court may assess child-parent time as meeting the s. 9 criteria without a tight accounting. That assessment should be made by considering the broader context of the parenting arrangement. It perhaps bears mentioning, further, that simply finding that a parental regime comes within s. 9 does not compel an automatic reduction in child support. That determination must be made considering all of the criteria in ss. (a) to (c) of s. 9.

[Berry]

[57] I find, following the approach outlined in Berry, that from April 2020 onward, the parties' arrangement that R.D. spends 3 days with the Respondent and 4 days with the Claimant amounted to a shared parenting arrangement. On the evidence before me, the decision to share parenting time of R.D. was based on the parties' greater available time and ability to care for R.D. during the Covid-19 Pandemic shut-down, and that situation has continued moving forward. I make this finding on a consideration of the parties' shared care of, and responsibilities for, R.D. and shared responsibility to meet his needs.

3. Incomes of the Parties for Purposes of Determining Child Support

[58] The Claimant provided financial disclosure for all relevant times. The Claimant's income is as follows:

2018

\$20,972

2019

\$16,681

2020

\$25,361

2021

\$31,021

2022

\$30,078

2023

\$41,649

2024

\$40,000*

* amount she suggests should be imputed despite being temporarily underemployed at the time of the application

- [59] The Claimant's circumstances are that she is working part-time as a care aid for approximately 20 hours each week, earning \$27.00 hourly, though she intends to resume full-time employment. She currently receives employment insurance.
- [60] In consideration of this, I accept the Claimant's income for 2018-2023, as stated in the table above and supported by her financial disclosure. I accept the imputation of \$40,000 that she has proposed for 2024 and adopt it for 2025 as well.
- [61] The Respondent has not provided updated financial disclosure and calculating his income for Guidelines purposes presents a challenge. It is worth repeating here that lack of disclosure has been described as the "cancer" of family law litigation: Michel, para. 33.
- [33] Failure to disclose material information is the cancer of family law litigation (Cunha v. Cunha (1994), 99 B.C.L.R. (2d) 93 (S.C.), at para. 9, quoted in Leskun v. Leskun, 2006 SCC 25, [2006] 1 S.C.R. 920, at para. 34). And yet, payor parents are typically well aware of their obligation as a parent to support their children, and are subject to a duty of full and honest disclosure -- a duty comparable to that arising in matrimonial negotiations (Brandsema, at paras. 47-49). The payor parent's obligation to disclose changes in income protects the integrity and certainty afforded by an existing order or agreement respecting child support. Absent full and honest disclosure, the recipient parent -- and the child -- are vulnerable to the payor parent's non-disclosure.
- [62] The Respondent has not provided any income tax documents, as required by the Separation Agreement, for 2018 to the present. Likewise, financial disclosure for this application was incomplete.
- [63] I appreciate that the Respondent is self-represented. The court process and procedures are not doubt difficult and challenging to negotiate. Self-represented litigants should be given some leeway, within bounds. Pursuant to the Statement of Principles on Self-represented Litigants and Accused Persons, adopted by the Canadian Judicial Council in September 2006, self-represented litigants should not be denied relief on the basis of a minor or easily-corrected deficiency of their case. The overall goal is to ensure fairness within the court process, and that matters are heard and decided on their merits, and not on a self

represented party's lack of knowledge about court procedure or rules.

- [64] Self-represented litigants have an obligation to familiarize themselves with court process and procedures and do their best to forward their case, including by providing supporting materials in a reasonably expeditious matter and according to the timelines set out in the Supreme Court Family Rules.
- [65] There is an obligation on parties who are self-represented to do their best and to make reasonable efforts to comply with court rules and processes and to provide the necessary information to allow a matter to be heard and decided on its merits. This could include, for example, availing themselves of available online resources or in court duty-counsel, or seeking legal advice on a limited retainer basis. If the Respondent had filed a financial statement, even an incomplete one, it may have allowed the Claimant to identify or seek to rectify any deficiencies in the information provided. Instead, no information was filed in advance of the hearing, and additional financial information (albeit very limited) was only received in response to my further request for information.
- [66] The fact a party is self-represented, in itself, cannot be used as a delay tactic. To allow this would provide a means to circumvent the rights of a child, put recipient parents (who are often women, reflecting the feminization of poverty that the Supreme Court of Canada commented on in *Michel* at paras. 41, 43 and 97) at a disadvantage, risk an unfair and unjust result, and deny - rather than promote - access to justice.
- [67] The lack of sufficient and ongoing financial disclosure started when the Respondent first failed to update his income after the Separation Agreement was signed. The failure to provide updated financial disclosure has been to the benefit of the Respondent, and to the detriment of the child, R.D., and to the Claimant as the recipient spouse.
- [68] Section 19 of the Guidelines allows a court to impute income in certain circumstances as the court considers it appropriate. Such circumstances include where:
- 19 (1)
- (a) the spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the spouse;
- (f) the spouse has failed to provide income information when under a legal obligation to do so;
- [69] Where a person is intentionally under or unemployed, a court may impute income per s. 19(1)(a) of the Guidelines even absent evidence of bad faith: *Mayall v. Kebarle*, 2013 BCSC 2605 at para. 12, citing *McCaffrey v. Paleolog*, 2011 BCCA 378 at paras. 50-53.
- [70] The Claimant argues that the Respondent is underemployed and not earning to his capacity, and that it is appropriate in such circumstances to impute income to him. The Claimant relies on *Van Gool v. Van Gool*, 166 DLR (4th) 528, 1998 CanLII 5650 (B.C.C.A.), where the

court imputed income to a payor parent, finding her to have shown a "preference not to work at all" and to have made only the "the least effort possible to obtain part-time work": at para. 37. The Claimant also cites *Hanson v. Hanson*, [1999] CarswellBC 2545, 1999 CanLII 6307 (B.C.S.C.), in which the court discusses when it is appropriate to impute income to determine child support at paras. 8 and 9.

[71] In *Hanson* at para. 14, the court listed principles for determining a parent's capacity to earn income, including on consideration of the following principles:

1. There is a duty to seek employment in a case where a parent is healthy and there is no reason why the parent cannot work. It is "no answer for a person liable to support a child to say he is unemployed and does not intend to seek work or that his potential to earn income is an irrelevant factor." (*Van Gool* at para 30.)
2. When imputing income on the basis of intentional under-employment, a court must consider what is reasonable under the circumstances. The age, education, experience, skills and health of the parent are factors to be considered in addition to such matters as availability of work, freedom to relocate and other obligations.
3. A parent's limited work experience and job skills do not justify a failure to pursue employment that does not require significant skills, or employment in which the necessary skills can be learned on the job. While this may mean that job availability will be at the lower end of the wage scale, courts have never sanctioned the refusal of a parent to take reasonable steps to support his or her children simply because the parent cannot obtain interesting or highly paid employment.
4. Persistence in unremunerative employment may entitle the court to impute income.
5. A parent cannot be excused from his or her child support obligations in furtherance of unrealistic or unproductive career aspirations.
6. As a general rule, a parent cannot avoid child support obligations by a self-induced reduction of income.

[72] Overall, the court should consider the parent's capacity and responsibility to earn income, on an assessment of factors such as health, education, skill and experience: For a helpful discussion, see *S.A.H. v. J.J.G.V.*, 2019 BCSC 2438 at para. 40. A parent may have to seek employment in places other than their preferred or accustomed areas in order to meet their obligations to their child.

[73] The Claimant argues that the Respondent's income should be imputed as follows:

2018

\$77,952

2019

\$80,997

2020

\$62,665

2021

\$92,855

2022

\$78,839**

2023

\$78,839**

** suggested imputed income based on averaging the Respondent's income from 2019, 2020 and 2021

[74] The Claimant bases the 2018-2021 calculations on a set of "without prejudice" correspondence from the Respondent's former legal counsel setting out income amounts. The Claimant argues that these amounts are relatively in line with the income the Respondent was listed as having in the Separation Agreement.

[75] Ordinarily, this would be an inappropriate use of "without prejudice" correspondence. However, the settlement privilege that usually adheres to "without prejudice" communications will not apply when "a competing public interest outweighs the public interest in encouraging settlement": *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37 at para. 19. I turn again to the earlier comments about lack of disclosure. In this case, there is an informational deficit which the Respondent has refused to rectify. Neither R.D., nor the Claimant should bear the burden of his non-disclosure. A child and recipient parent should not suffer - nor should a non-disclosing payor parent benefit - from lack of financial disclosure.

[76] I impute income to the Respondent as follows: 2021 - \$92,855. The Respondent has argued that his circumstances changed from 2022 onwards. I address the undue hardship claim, how much (if any) income should be imputed to the Respondent, and how his income should be determined from 2022 onward, below.

4. Has the Respondent Established a Claim for Undue Hardship?

[77] The Guidelines set out conditions in which a payor parent may make a claim for undue hardship and seek to be relieved of all or part of their child support obligations: s. 10. Even if a parent claims hardship, parties to an application for child support must provide disclosure related to their financial situation: Guidelines, s. 21. If that disclosure does not occur, s. 23 of the Guidelines permits a court to "draw an adverse inference against the spouse who failed to comply and impute income to that spouse in such amount as it considers appropriate." As

a starting point, I observe the Respondent's ongoing refusal to provide appropriate financial disclosure.

- [78] The Respondent claims that he has suffered a number of challenges which impacted his ability to earn income from around January 2022 onward. He says he lost his ability to practice as a RMT and has suffered from various illnesses. He has been living off the proceeds from the sale of his home and has been largely unemployed since December 2021.
- [79] In his submissions, the Respondent claimed he began to suffer from health issues during this period and could no longer work. He says he was employed for three months in 2023 at the Harrison Hot Springs Resort and Spa, earning approximately \$13,000 during that time. He did not pass his probation period and his employment was terminated.
- [80] The Respondent says he has applied, unsuccessfully, for a job as a dispatcher with the RCMP. He also says he did a day of training at a casino.
- [81] Appended to an affidavit filed by the Respondent was a one-line "Certificate of Health Status" from Dr. Dodds, dated July 18, 2022, which states: "It is hereby confirmed that this patient was seen by the doctor at this clinic today, regarding a medical problem. Unable [] to work starting Jan, 2022 and has been under my medical care and continues to be followed in the office for care" (the "Doctor's Note").
- [82] In his submissions, the Respondent passed up another document signed by Dr. Dodds, which contained similarly sparse information, with the additional notation that the Respondent suffers from "depression" and a "sleep disorder" (the "Second Doctor's Note"). The Second Doctor's Note was not in evidence.
- [83] When questioned by the court about his claim of undue hardship and the nature of the health issue that he claimed prevented him from working and paying child support, the Respondent became upset. He suggested that being required to share such information violates his Charter rights, and said he was unaware of what type of information he had to provide to support his claim for undue hardship.
- [84] Following the hearing, on February 24, 2025, I issued a Memorandum to Counsel/Parties which invited further submissions, as follows:
- "One of the issues in this application was the Respondent's assertion that health issues prevent him from working, or working full-time. I am inviting further submissions on this issue which could include information on the Respondent's diagnosis; Respondent's ability to work, part or full-time; whether this diagnosis impacts all or particular types of employment; and the prognosis for return to work, full or part-time."
- [85] The Memorandum provided a timeline for any additional material and responsive material. Each party provided an additional affidavit. I have concerns about each of these additional affidavits.

[86] Rather than responsive submissions, the Claimant filed an affidavit. It was largely opinion. It would have been more properly submitted as a written argument rather than the affidavit format used. I have not read the affidavit as evidence, per se, but rather as setting out the Claimant's response position.

[87] The Respondent's affidavit attached medical records from Southgate Medical Clinic of Dr. Dodds. Overall, the notes are difficult to decipher. The notes cover a period from 2017 onward. The affidavit attaches a note from Dr. Dodds, (the "Third Doctor's Note") written on March 16, 2023:

It is hereby confirmed that this patient was seen by the doctor at this clinic today, regarding a medical problem. Unable [] to work since Jan, 2022 been under my medical care and continues to be followed in the office for care.

[88] The Respondent redacted certain portions without explanation. Based on these notes and letters, the Respondent argues that he does not have the capacity to earn income due to his health.

[89] Taken with these concerns in mind, I conclude the following from the record: The Respondent suffered from lateral epicondylitis on his right elbow (also known more commonly as tennis elbow), and received treatment for anxiety, sleep disturbance, and other mental health challenges. There was a note made in April 2019, relating to a WCB claim by the Respondent, which noted a recommendation that the Respondent seek alternate employment that would not require physical use of his arms, as a result of the tennis elbow issue.

[90] The evidence from Dr. Dodds provides sparse information on the Respondent's actual diagnosis and no information on how long the Respondent has been treated for any particular illness(es); the impact of the illness(es) on the Respondent's ability to work, the type of work he can do, or any other such relevant information that would assist the court in determining the Respondent's ability to meet his child support obligations.

[91] In *Taylor v. Taylor*, 2010 BCSC 1539, Justice Greyell discussed short and generic medical notes, similar to the type of notes the Respondent attached to his affidavit. Justice Greyell observed that "unreliable and self-serving" medical notes are often written at the insistence of the patient by a doctor without any specific details or seemingly any purpose: see paras. 32-34.

[92] Based on the evidence provided, it is clear that the Respondent suffers from some health issues, including mood instability, stress, and pain. However, according to the medical records provided, these conditions appear to be treatable with medication, counselling, and/or physical activity. Given the limited evidence and lack of detailed or specific information, I give little weight to the Respondent's position that he cannot return to work in any capacity.

- [93] The Respondent obtained a managerial position at Harrison Hot Springs in 2023 but was released prior to the end of his probationary period. While he told his doctor that there was "bullying" and "undermining of his position" by coworkers, he does not mention whatsoever that his health figured into this job loss.
- [94] The Respondent provided evidence of a rather limited job search. In his most recent affidavit dated February 26, 2025, the Respondent deposed that he has applied to four massage therapy colleges for work over the last year, in either an instructive or administrative capacity.
- [95] The Respondent has said that he's applied to the RCMP dispatch, trained at a casino, and has attempted to become a Personal Trainer. As noted in Hanson at para. 14, regarding capacity to earn income, "limited work experience and job skills do not justify a failure to pursue employment that does not require significant skills, or employment in which the necessary skills can be learned on the job".
- [96] The Respondent has failed to provide updated financial disclosure despite being required to do so. The court in such circumstances may draw negative inferences contrary to the non-disclosing party's interest. In the circumstances, the evidence supports a finding that the Respondent experienced challenges, but these challenges did not rise to the level of undue hardship, such that no retroactive child support payments should be ordered. I also find it appropriate to impute an income, albeit lower than his earlier earnings, to the Respondent.
- [97] I find, for 2022 onward, the Respondent ought at least to have been able to earn \$4,500 per month (this is roughly the amount he earned at Harrison Hot Springs Spa) and impute an income to him of \$54,000 for 2022. This reduced income reflects the fact that the Respondent was coping with the immediate aftermath of loss of insurance coverage. For 2023, 2024 and 2025, I impute the Respondent's income, as suggested by the Claimant, at \$78,839.

DISPOSITION

[98] Based on these reasons, I order that:

- a) the parties are divorced from each other, and the divorce will take effect on the 31st day after the date of this order;
- b) the Claimant's name change is granted; and
- c) the Claimant's claim for spousal support is dismissed.

[99] The Respondent owes retroactive child support for R.D., as follows:

- November-December 2021: parties shared parenting time, the Respondent's income is imputed at \$92,855, Claimant's income is \$31,021, and child support is determined as an offset between the parties. The Respondent owes \$885.18/month, and the Claimant owes \$289.21/month. The offset amount the Respondent owes the Claimant is: \$595.97/month (Adjustments should be made to reflect any amounts the Respondent paid in child support, which I believe to be $\$537 \times 2 = \$1074$).
- 2022: parties shared parenting time, the Respondent's income is imputed at \$54,000, Claimant's income is \$30,078, and child support is determined as an offset between the parties. The Respondent owes \$507/month, and the Claimant owes \$279.78/month. The offset amount the Respondent owes the Claimant is: \$227.22/month.
- 2023: parties shared parenting time, Respondent's income is imputed at \$78,839, Claimant's income is \$41,649, and child support is determined as an offset between the parties. The Respondent owes \$753.89/month, and the Claimant owes \$392.10/month. The offset amount the Respondent owes the Claimant is: \$361.79/month.
- 2024: parties shared parenting time, Respondent's income is imputed at \$78,839, Claimant's income is \$40,000 and child support is to be determined as an offset between the parties. The Respondent owes \$753.89/month, and the Claimant owes \$376/month. The offset amount the Respondent owes the Claimant is: \$377.89/month.
- 2025: parties shared parenting time, Respondent's income is imputed at \$78,839, Claimant's income \$40,000, and child support is to be determined as an offset between the parties. The Respondent owes \$753.89/month, and the Claimant owes \$376/month. The offset amount the Respondent owes the Claimant is: \$377.89/month.

[100] Based on these findings of income/parenting time, I provide this calculation of amounts of child support outstanding for ease of reference. If the calculations are not found to correctly reflect amounts due, parties can reflect a corrected amount in the final order:

Incomes

Calculations

Owing

2021 (November and December)

Respondent Income: \$92,855

Respondent Paid: \$6,444

Claimant Income: \$31,021

Respondent (\$885.18 a month)

= \$1,770.36 for the year

Claimant (\$289.21 a month)

= \$578.42 for the year

Difference (\$ 595.97a month)

= \$1,191.94 for the year

= \$1,191.94 (Respondent owing)

2022

Respondent Income: \$54,000

Claimant Income: \$30,078

Respondent (\$507.00 a month)

= \$6,084 a year

Claimant (\$279.78 a month)

= \$3,357.36 a year

Difference (\$227.22 a month): \$2,726.64 a year

= \$2,726.64 (Respondent owing)

2023

Respondent: \$78,839

Claimant Income: \$41,649

Respondent (\$753.89 a month)

= \$9,046.68 a year

Claimant (\$392.10 a month)

= \$4,705.20 a year

Difference (\$361.79 a month)

= \$4,341.48 a year

= \$4,341.48 (Respondent owing)

2024

Respondent Income: \$78,839

Claimant Income: \$40,000

Respondent (\$753.89 a month)

= \$9,046.68 a year

Claimant (\$376 a month)

= \$4,512 a year

Difference (\$377.89 a month):

= \$4,534.68 a year

= \$4,534.68 (Respondent owing)

2025 (January to April)

Respondent Income: \$78,839

Claimant Income: \$40,000

Respondent (\$753.89 a month)

= \$3,015.56 January to April

Claimant (\$376 a month)

= \$1,504 January to April

Difference (\$377.89 a month):

= \$1,511.56 January to April

= \$1,511.56

(Respondent owing)

\$1,191.94

\$2,726.64

\$4,341.48

\$4,534.68

\$1,511.56

= \$14,306.30 (Total Respondent Owing).

The Respondent continues to owe \$377.89/month going forward

[101] Per the Separation Agreement, parties are to share updated financial information each year, resuming in 2026. The amount of retroactive child support that the Respondent owes the Claimant will be due as follows: 50 percent at the end of July 2025 and the remaining 50 percent at the end of October 2025. This gives the Respondent time to make any necessary arrangements and to reduce hardship he may experience.

[102] Monthly Child support payable for May 2025 is due immediately and monthly child support is due per the terms of the Settlement Agreement.

[103] The parties did not argue the retroactive claim for expenses under s. 7 of the Guidelines before me, and I do not address it here.

[104] The Claimant was successful on most points and is entitled to her costs at Schedule B.

"A. Walkem J."

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Prepared on 28 October 2026 · Esheria