
CANADA / JUDGMENT

Dorey v. Havens

2017 BCSC 2206

COURT

Supreme Court of British Columbia

DECIDED

1 December 2017

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2017 BCSC 2206 Dorey v. Havens

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Dorey v. Havens,

2017 BCSC 2206

Date: 20171201

Docket: E084211

Registry: Vancouver

Between:

Simon Peter John Dorey

Claimant

And:

Pamela Anne Havens

Respondent

Before: The Honourable Madam Justice Morellato

Reasons for Judgment

In Chambers

Acting on his own behalf:

S. Dorey

Acting on her own behalf:

P. Havens

Place and Date of Trial/Hearing:

Vancouver, B.C.

October 7, 2016

December 2, 2016

February 17, 2017

May 11-12, 2017

Written Submissions:

June 2, 2017

June 23, 2017

July 4, 2017

August 1, 2017

Place and Date of Judgment:

Vancouver, B.C.

December 1, 2017

I. Introduction

- [1] This family matter concerns protracted proceedings between the parties arising from prior orders of this court involving child support. Ms. Haven ("Mother") and Mr. Dorey ("Father") were married in December 2000, separated in September 2008, and were divorced in February 2015. Parenting responsibilities, maintenance, and property division issues were determined, by an order of Madam Justice Russell in 2011 after an 11-day trial ("Trial"). Since then, the parties have shared equal parenting time with their twin children born June 7, 2004 ("Children"). As part of her judgment, Russell J. made a lump sum child support award in favour of the Mother which was deducted from the Father's portion of the equity in the matrimonial home, as well as an order that the Father pay two-thirds of future s. 7 expenses. Russell J. did not include future s. 7 expenses or extraordinary expenses in her lump sum award. The Mother did not claim spousal support.
- [2] The Mother has brought this application in her continued efforts to enforce payment of s. 7 expenses by the Father, as well as prior court orders relating to child support. The Father denies any outstanding obligations to pay child support, court costs or s. 7 expenses arising from prior court orders. He has brought his own application seeking, among other relief, child support and s. 7 expenses. The parties are self-represented.

[3] The Mother seeks the following orders:

1. the characterization of prior orders of the court as "maintenance" under the Family Maintenance Enforcement Act, R.S.B.C. 1996, c. 127 [FMEA];
2. the Father pay \$16,875.90, or a court ordered reconciled amount, in regard to s. 7 expenses incurred by the Mother from January 1, 2012 to May 31, 2017;
3. initially, the Mother requested that the order of Russell J. dated December 23, 2011, which divides section 7 expenses with the Father paying 66.6% and the Mother paying 33.3%, be continued into the future with the Father being required to reconcile expenses by June 30th and December 31st of each year. The Mother subsequently amended her application by submitting that s. 7 expenses be apportioned on a 50/50 basis moving forward, in an effort to avoid further applications;
4. 3% be applied to the outstanding monies owed by the Father;
5. court costs awarded to the Mother by Madam Justice Holmes in the amount of \$2,547.15, and later assessed by the Registrar, be characterized as "maintenance" under the FMEA; and
6. the costs of this application also be characterized as "maintenance" under the FMEA.

[4] The Father takes issues with each of the orders sought by the Mother. He argues the previous awards of this Court cannot or should not be enforced. He relies, in part, on his bankruptcy and also on submissions regarding his reduced earnings over the years and his current income, which he asserts is lower than the Mother's income. Specifically, with regard to his own application, the Father seeks the following orders against the Mother:

1. "the balance of the outstanding lump sum child support award that was originally ordered to be paid by the decision of Russell J. in December 2011 be repaid" to him;
2. the Mother pay child support for 2015-2016;
3. the Mother pay a lump sum child support award from January 1, 2016 until the Children are 19 or, in the alternative, that ongoing child support be paid by the Mother;
4. in the further alternative, should the court not order that child support be paid by the Mother to the Father, that the Mother be responsible for all s. 7 expenses until the Children are 19;
5. either parent is entitled to take the Children abroad at any time until they are without permission of the other parent, subject to the details of the travel being provided to the other parent;
6. costs for this hearing and a ruling that they be characterized as child support pursuant to the FMEA; and
7. the Mother's signature on the order of this court be dispensed with.

II. Background Information and Orders

- [5] The Father is an Oxford educated Chartered Accountant with an international accounting designation. He is also a certified data management specialist and a certified management consultant. He is 60 years old. The Mother is also an accomplished professional with a diploma in Adult Education; she holds the equivalent of a Master's degree in gerontology. She is 52 years old.
- [6] Prior to the current application, several decisions were made in this case. In April 2010, Mr. Justice Rice issued an order requiring the Father to pay interim child support of \$907 per month. The court found that the Father's Guideline income at that time ought to be imputed at \$60,000 per year. No child support was paid by the Father under this order. In July of 2010, the Father brought an application to vary the child support ordered by Rice J. Mr. Justice Savage dismissed the Father's application. Despite the fact that the order of Rice J. continued in place, the Father did not make any child support payments.
- [7] As referenced above, after Trial, Russell J. made a number of orders in 2011, including a lump sum award for maintenance in favour of the Mother. She found the Mother had a Guideline annual income of \$60,000 and imputed the Father's annual income at \$120,000. During the course of her reasons for judgment, Russell J. refers to a previous decision of the court, *Prittie v. Dorey*, 2010 BCSC 1923, relating to the Father's first marriage and a claim for child support for the Father's daughter from his first marriage. In her Reasons for Judgment (*Dorey v. Havens*, 2011 BCSC 1777), Russell J. states:
- [23] In 2004, Ehrcke J. found Mr. Dorey to be deliberately underemployed and imputed income to him accordingly: *Prittie v. Dorey*, 2004 BCSC 1709 (QL).
- [24] More recently, in *Prittie v. Dorey*, 2010 BCSC 1923, Gropper J. imputed income of \$120,000 per annum to Mr. Dorey and assessed child support accordingly for the daughter of his first marriage. In [that] application, Mr. Dorey had attempted to have the income imputed to him by Ehrcke J. reduced to his actual income. He also applied to cancel payment of child support to his daughter. He was unsuccessful.
- [25] Mr. Dorey states that he enjoys his bookkeeping job because it accommodates his week-on/week-off access to his children. When asked by the court if he would accept a senior executive position at a much higher salary if it were offered to him, he answered that he would refuse it because it would interfere with his ability to look after his children.
- [26] I take from this that he is no longer seeking employment at an executive level, although he is quick to assure the court that he has diligently sought such employment and has not even been granted an interview. Now he is interested in maintaining this minimal employment
- [8] Later in her judgment, Russell J. reasons:

- [42] I have heard Mr. Dorey's arguments on why he ought not to have income imputed to him and why he should be permitted to remain underemployed so that he can maximize his time with his children.
- [43] He has made it clear before me that the ordinary rules concerning child support ought not to apply to him. But I must point out that child support is not a privilege to a child, it is a right and the parent has an obligation to earn as much as he or she is reasonably capable of earning. Child support is based on the ability to pay, not on what the parent feels he or she is able to pay based on that parent's priorities.
- [44] There will be child support payable by Mr. Dorey for his children, notwithstanding the fact that there is shared parenting in place. A set-off amount would be appropriate considering the level of income which he is capable of earning.
- [45] Following an appearance in May 2010, Rice J. ordered interim support of \$907 per month, based on Mr. Dorey's declared income of \$60,000.
- [46] Mr. Dorey agrees that he did not pay anything towards this child support order, but argues that the children were unfairly in Ms. Havens' custody due to the unfounded charges of assault laid against him. He rationalizes that had untruths not been used against him, he would have had the children 50% of the time and would not have incurred child support arrears.
- [47] I do not accept this argument and find that as of April 2011, when the access arrangements between the parties changed, the figure stated by Ms. Havens of \$9,032.26 in arrears had accumulated for which Mr. Dorey is liable to Ms. Havens.
- [48] Mr. Dorey also argued that by assisting with other expenses such as the two lease payments he made on the Honda Odyssey, which Ms. Havens has now bought out with the help of her parents, he was in effect paying child support.
- [49] He also argued that the money he spent to furnish the house in which he is living to accommodate his children should be credited to his child support obligation.
- [50] It is not acceptable for him, at his whim, to select the way in which he will meet his child support obligations. He is not entitled to flout the rules and to dictate to Ms. Havens what will constitute child support. It is, as Mr. Justice Ehrcke expressed it, not a valid excuse for failing to pay child support for the payor to say that he benefited his children in other ways: *Prittie v. Dorey*, 2004 BCSC 1709 at para. 59 (QL).
- [9] In reaching her conclusion that the Father's income should be imputed at \$120,000, Russell J. reasons:
- [52] To decide the issue of child support, I must decide what Mr. Dorey's income is and what ought to be imputed to him. I must also assess Ms. Havens' income to determine the set-off amount.

- [53] His last job was paid at \$175,000 with options and benefits in addition. However, he was not able to retain this job and I infer that it was to some degree beyond his capabilities.
- [54] But he is intelligent and well-educated. He is, clearly, able to earn more than \$60,000 per year.
- [55] With respect to that figure, I am not certain that it is accurate. I have only Mr. Dorey's word that that is the amount he has earned over the last year. It does seem somewhat odd that his main client would trust him sufficiently to send him abroad for a month to perform business services when he describes himself as a fee-for-service bookkeeper who charges \$40 per hour.
- [56] Mr. Dorey admitted in cross-examination that he altered the document from Romero, which set out his salary at \$175,000, so that it would show a salary of \$125,000 and, thus, reduce his exposure for child support to his oldest child. I have little confidence that he has been forthright in this proceeding concerning his actual income. His willingness to swear a false affidavit in the past does not give me confidence in his reassurance that before me, he is telling the truth.
- [57] I also reject his attempt to blame this forgery on Ms. Havens. He is a Chartered Accountant and fully understands the effect of making false statements before the courts.
- [58] At the same time, I realize that unemployment has risen in Canada and in the recent past, Mr. Dorey did make efforts to find jobs which paid more than \$70,000 without success. But he has ceased to seek more lucrative employment and points to his child care requirements as relieving him from the obligation to continue to look for the most rewarding employment he is capable of performing. I cannot ignore the fact that he has admitted he is deliberately underemployed and, thus, he is in breach of his obligation to his children to support them to the best of his ability.
- [59] While I am not bound by the decision of Gropper J., at the same time, I have nothing before me to distinguish the facts she sets out concerning the claimant's capability to earn income. It would also embarrass the court to have another judge of the same court on the same facts express a different opinion on virtually the same issue, but concerning different children. Therefore, I adopt her finding and impute income of \$120,000 per annum to the claimant for purposes of child support to his children of this marriage.
- [10] Russell J. also addresses the circumstances justifying her order for a lump sum maintenance award arising from a distribution of the proceeds of the sale of the matrimonial home:
- [125] Prima facie, each party's share in the house would amount to \$190,504.00.
- [126] Ms. Havens paid all of the mortgage payments on the house post-separation, undertook a loan for the outstanding property taxes and paid the property taxes up to the s. 57 declaration and to present.

- [127] On the other hand, she has also had the benefit of living in the house while the claimant rented nearby.
- [128] In addition to her claim for reapportionment under section 65 of the FRA, Ms. Havens has asked that any child support payable by Mr. Dorey be paid in a lump sum given his history of non-compliance with court ordered child support and his demonstration before me of his unwillingness to pay any support or to work to the level expected so that his income and his child support would increase. She also points to his acknowledged efforts to minimize income for purposes of child support by disavowing any interest in the house, attributing debts owed to her on his PFS and his unabashed admission that he has sought to "preserve his assets" from FMEP by swearing false affidavits.
- [129] I am satisfied that I can have little confidence in the claimant's evidence concerning his income in general. In light of my order that he pay child support for the twins, I must assume the court can expect him to resist payment in the future just as he has in the past.
- [130] I will order that child support be paid in a lump sum but before I determine the amount to be deducted against the claimant's portion of the value of the house, I will complete my assessment of the assets and liabilities to be apportioned to each party.
- [11] After assessing the assets and liabilities to be apportioned between the parties, Russell J. determined the amount of lump sum maintenance owed by the Father as follows:
- [168] I have decided that Mr. Dorey's failure to pay child support to his daughter by his first marriage and his failure to pay any amount to Ms. Havens while she had sole custody provide a record on which I can and will accede to Ms. Havens' request that Mr. Dorey pay future child support in a lump sum from his share of the value of the house. I consider that to calculate child support this way will also remove one more subject of contention between the parties.
- [169] I will also assess to Mr. Dorey for payment from the value of the house not only child support for the future, but arrears owed to December 2011 and the amount owed to Ms. Havens from the Romarco settlement.
- [170] From his portion of \$171,454 will be deducted \$23,246 to the credit of Ms. Havens for the Romarco settlement and the \$10,000 debt which Mr. Dorey carried with him into the marriage from support owed for a subtotal of \$148,208.
- [171] From this amount retroactive child support Mr. Dorey owes to Ms. Havens of \$9,032 will be deducted for a subtotal of \$139,176.
- [172] Child support payable to December 31, 2011 from the date of trial at \$907 per month X 9 months = \$8,163 for a new subtotal of \$131,013.

- [173] I have calculated that the children will receive ordinary child support for another 12 years. At \$907 per month (with no provision for any increase), this would equal \$130,608. At a discount rate of 2.5% (the rate used to discount payments for future loss in personal injury cases) this amount is \$111,645.52 (rounded to \$111,645.50). Schedule A attached contains a table setting out the calculations.
- [174] The balance remaining of Mr. Dorey's portion of the house is \$131,013 - \$111,645.50 = \$19,367.50, plus \$400 credit for the piano for a total of \$19,767.50.
- [175] I have chosen not to deduct the further \$60,000, which Mr. Dorey swore he owed to Ms. Havens during his marriage to her in his attempt to minimize his income for purposes of deceiving FMEP as to the true state of his finances in the Prittie v. Dorey matter. Ms. Havens was aware this was a falsehood at the time and I have some concern that she should not benefit thereby: See Daemore v. Von Windheim, 2011 BCSC 1523, Voith J.
- [176] I have not accounted for extraordinary expenses in the calculation of future child support and the result is that the parties will have the obligation to exchange income tax returns each year by July 1 and notices of assessment by July 30, for the purpose of calculating and reconciling extraordinary expenses for the children.
- [206] Special expenses will be payable 33.33% by Ms. Havens and 66.66% by Mr. Dorey with accounting to occur annually as indicated and with Mr. Dorey to be given credit for 50% of the child tax credit and BC tax credit which Ms. Havens receives for the two children by way of deduction from Mr. Dorey's share of special expenses.
- [207] There is an obligation on the parties to consult each other with respect to activities which will attract special expenses. If they parties cannot agree, the parent who desires the activity may choose to absorb the cost himself/herself or may make an application to the court.
- [208] The parties must exchange income tax returns by July 1 and notices of assessment by July 30 of every year for the purposes of calculating and reconciling extraordinary expenses for the children.
- [241] I consider that Ms. Havens largely succeeded on the issues before the court.
- [242] For that reason, and because costs follow the event, she will have her costs at Scale B.
- [12] The decision of Russell J. was not appealed. However, in the instant case the Father continues to take issue with her findings.
- [13] After Russell J. rendered her decision in 2011, the parties could not reach agreement on the terms of the order or in regard to s. 7 expenses. There were also outstanding issues relating to various assets and liabilities arising from the marriage. On April 3, 2012, court costs from Russell J.'s decision were assessed by Master MacNaughton at \$41,500. Master MacNaughton also undertook a final reconciliation of various assets and liabilities, including an assessment of s. 7 expenses, child support owing to December 31, 2011, and retroactive child

support. Master MacNaughton determined that offer deducting what the Father owed the Mother from his portion of the equity in the matrimonial home, the Father still owed the Mother a balance of \$28,346.70. The decision of Master MacNaughton was not appealed. The Father has not paid the amount he was ordered to pay by Master MacNaughton.

- [14] On January 28, 2014, Madam Justice Koenigsberg heard the Mother's application to enforce payment of the outstanding balance owed by the Father to the Mother arising from the previous orders of Russell J. and Master MacNaughton, and to address the continuing dispute relating to s. 7 expenses. The Mother also sought, at that time, to characterize her court costs as maintenance. Koenigsberg J. adjourned most of the orders sought by the Mother in the application as there were insufficient materials before her; however, she made an order varying the amount owed by the Father to the Mother from \$28,346.70 to \$24,264.52, plus post-judgment interest. The reduction in the amount owed by the Father reflected the fact that the \$28,346.70 sum did not reflect the Father's entitlement to a one-half share in the Child Tax Credit. The Father has not paid the amount ordered to be paid by Koenigsberg J.
- [15] Approximately a year later, in January of 2015, the Father brought an application seeking, in part, to vary the lump sum maintenance award made by Russell J. in favour of the Mother. He submitted that his imputed income should be re-assessed. He also sought an order for a re-apportionment of s. 7 expenses and a retroactive order regarding s. 7 expenses "for the period 2011 to the present date and thereafter." Holmes J. heard the Father's application in these respects. In an order made January 26, 2015, she dismissed each of the orders sought in the Father's application: see *Dorey v. Havens*, 2015 BCSC 344 [in Chambers].
- [16] The relief sought by the Father in the application before me, as well as his legal arguments, are similar, and in some instances identical, to the relief he sought before Holmes J. Specifically, in the application before me, the Father argues that the lump sum award granted by Russell J. should be varied and repaid to him. He also submits that he was entitled to a retroactive determination and apportionment of s. 7 expenses for the Children. In 2015, Holmes J. dismissed the Father's application in these respects, reasoning in part as follows:
- [2] Mr. Dorey submits that there has been a material change in circumstances since Russell J. made her order, namely a significant reduction in the income properly attributable to him under the Child Support Guidelines. He therefore seeks a retroactive adjustment of the lump-sum award to reflect a reduction of his income as of the year the Court finds the change to have taken place.
- [3] Mr. Dorey submits that such an adjustment is permissible in law as a result of the combined effect of subsections 17(6.1) and (6.2) of the Divorce Act.

- [4] He submits that the adjustment is possible in practice because, in arriving at the amount of the lump-sum award, Russell J. calculated the child support payable year-by-year for the 12 years she concluded child support would be payable: see *Dorey v. Havens*, 2011 BCSC 1777 at para. 173 and Schedule A. In that calculation, Russell J. imputed to Mr. Dorey an income of \$120,000 per year. She accepted that (for set-off purposes) Ms. Havens' income was as stated in her tax returns (*Dorey v. Havens*, para. 35).
- [5] The material change of circumstances on which Mr. Dorey relies is the conclusion of Mr. Justice Groves on February 29, 2012 (as expressed in his reasons in *Prittie v. Dorey*, Vancouver D107188 [B.C.S.C. Chambers], and the corresponding order) that Mr. Dorey earns \$65,000 per year. Groves J. found that an income of \$65,000 was a reasonable income for Mr. Dorey to earn in the circumstances, and that Mr. Dorey should no longer have income imputed to him in the amount of \$120,000.
- [6] Mr. Dorey relies also on evidence that, despite approximately 150 applications for employment, Mr. Dorey has had little success in finding the more highly-paid work he once had, and that overall he has achieved nowhere near the \$120,000 annual income Russell J. imputed to him.
- [7] One difficulty for Mr. Dorey is that Russell J. based her decision to impute an income of \$120,000 on more than Mr. Dorey's simple lack of success in his search for employment. She based it also on her assessment of his credibility generally, and, more specifically, on her assessments of his willingness to accept employment, his history concerning his financial affairs, and his efforts to minimize his income for child support purposes. All of those assessments were negative assessments.
- [8] Another difficulty for Mr. Dorey is that Groves J. reached his conclusion about Mr. Dorey's income in a different action, to which Ms. Havens was not a party. *Prittie v. Dorey* related to a previous marriage of Mr. Dorey's. The application before Groves J., which was brought in chambers, related to a child who is not one of the children to whom the present application relates. Ms. Havens had no opportunity to provide evidence in that proceeding.
- [9] Groves J. was aware that Russell J. had issued reasons in *Dorey v. Havens* relating to issues concerning the children of that marriage (see *Prittie v. Dorey*, para. 18). However, it is unclear whether Russell J.'s reasons were presented to Groves J. in any detail, and therefore whether, in referring to Russell J.'s reasons, Groves J. was referring to their full content or, rather, to their effect in having produced the orders concerning the Dorey-Havens children's custody and support.
- [10] Also, Groves J.'s reasons concerning Mr. Dorey's income may – and I emphasize "may" – be obiter dicta on that point. After discussing Mr. Dorey's income and his efforts to find work, as well as the means and needs of the child, who was 19½ years of age, Groves J. concluded that the appropriate amount of child support was less than the amount payable even on a Guidelines income of \$65,000 (*Prittie v. Dorey*, para. 33). I do appreciate that, as Mr. Mansfield submitted, an assessment of Mr. Dorey's income may nonetheless have played

some part in assessment of the child's needs, because those are to an extent measured in relation to the parents' financial circumstances and their ability to pay.

- [11] In the application before Groves J., Mr. Dorey relied in part on Russell J.'s order for shared (alternating weeks) custody of the Dorey-Havens children as a material change in circumstances concerning his obligation to support the Prittie-Dorey child. This change in circumstances was described as having taken place in January 2011, when Mr. Dorey took up week on/week off care of the Dorey-Havens children, and thereby, by Mr. Dorey's position, limited his capacity to earn. Mr. Dorey relied also on the Prittie-Dorey child reaching the age of adulthood as an additional change in circumstances. Groves J. described Mr. Dorey's position thus:
- [7] Essentially, as in all applications or reviews of child support, there is an onus on the party to convince the court, first and foremost, that there has been a change in circumstances. Essentially here, Mr. Dorey argues before the court that it is appropriate to review the level of support based on two significant changes in circumstances. The first of these is that as of January of 2011, Mr. Dorey has had half-custody of his infant twin children from his second marriage. They are about seven years of age. It was in January 2011 that Madam Justice Russell, grant Mr. Dorey with his other children essentially on a week-on/week-off basis.
- [10] Mr. Dorey, of course, challenges these historical observations of the court, but argues now that due to a change in circumstances in January 2011, he has care of his children one-half the time. The children are in school and sometimes not in school. The children have activities for which he is responsible to take them to outside of school hours, and having children in his care makes it impossible for him to have a traditional type of accounting job.
- [12] In reaching his conclusion concerning Mr. Dorey's income, Groves J. took into account Mr. Dorey's custodial obligations to the Dorey-Havens children, and the effect of those obligations on his ability to find work:
- [35] That being said, I do believe that Mr. Dorey has produced ample evidence of efforts to find work, which I had the opportunity to review prior to this hearing by virtue of having the binders for a few weeks in between the first attempt at the hearing and today, and Mr. Dorey has convinced me that his childcare responsibilities, which another judge of this court has determined are in the best interests of his two infant twin children, make it appropriate for the court to no longer impute income to Mr. Dorey, and I am satisfied that he in fact earns \$65,000 per year and that is reasonable.
- [13] The change in circumstances (concerning Mr. Dorey's childcare obligations) that gave support to his application before Groves J. took place in January 2011, which was during the course of the trial before Russell J. The trial before Russell J. began in November 2010, and the evidence concluded in May 2011. As I have noted, Russell J. issued her reasons on December 23, 2011. Although, therefore, in the Prittie v. Dorey proceeding before Groves J., the week-on/week-off arrangement concerning the Dorey-Havens children amounted to a change in circumstances as between Ms. Prittie and Mr. Dorey, it is difficult to view that

arrangement as a change in circumstances as between Mr. Dorey and Ms. Havens in this proceeding, where the arrangement existed during the trial and was the basis on which Russell J. made her order concerning child support.

- [14] I appreciate that in this application Mr. Dorey is not relying directly on the shared parenting arrangement. However, to an extent it plays a part nonetheless in Mr. Dorey's position, because Mr. Dorey submits here too that his income-earning capacity is limited by the arrangement and his commitment to the children. But that position was, with numerous other submissions Mr. Dorey now makes, before Russell J. when she determined that his income should be imputed at \$120,000 per year.
- [15] For the reasons I have given, I am not persuaded that Groves J.'s order is or reflects a material change of circumstances in relation to the parties to these proceedings. Nor does the evidence submitted independently of Groves J.'s conclusion disclose a change in Mr. Dorey's income, or the circumstances relating to his income, outside the contemplation of Russell J. Together, the changes Mr. Dorey asserts do not amount to a material change of circumstances sufficient to permit a variation of Russell J.'s order.
- [16] Mr. Dorey's application for variation of Russell J.'s order for lump-sum child support is therefore denied.
- [17] Specifically, Holmes J., *inter alia*, dismissed the Father's application to vary Russell J.'s lump sum maintenance award and also dismissed the Father's application that the Mother be ordered to pay retroactive s. 7 expenses "from 2011 to the present date and thereafter." She also ordered that the Father pay the costs of the application. These orders were not appealed.
- [18] The costs of the application before Holmes J. were later assessed by the Registrar at \$2,547.15 and confirmed in a Certificate of Costs issued on May 5, 2015. The Father has not paid these costs either.
- [19] In February 2015, the Father filed for bankruptcy. He was declared bankrupt in November 2015.
- [20] The Father has to date also declined to pay expenses relating to the Children's prescriptions, dental and orthodontic work, and certain sports activities which the Children have enjoyed for a number of years. He continues to assert that he earns significantly less than the Mother.

III. Discussion

Issue 1: Do previous court awards, including costs awards, constitute "maintenance" within the meaning of subsection 1(1) of the FMEA? If so, what are the amounts owing as maintenance under the FMEA? Are any of the amounts owing eliminated by the Father's bankruptcy?

[21] This aspect of the Mother's application relates to her attempt to enforce previous court orders through the FMEA. Specifically, the Family Maintenance Enforcement Program (FMEP) will enforce orders where a court finds that a particular award constitutes "maintenance" under the FMEA. The Mother says that the Father has "not made a single payment in 4 and ½ years" in regard to the various orders of the court in this case, and has contributed to few s. 7 expenses. For this reason, she has had to rely on the FMEP enforcement program. Specifically, the Mother seeks an order that the following previous orders of this Court issued against the Father constitute "maintenance", as defined under ss. 1(1) of the FMEA:

- (1) the order, as varied by Koenigsberg J. on January 28, 2014, requiring the Father to pay \$24,264.52 plus post-judgment interest;
- (2) the order for costs awarded to the Mother by Holmes J. on January 26, 2015, and later assessed by the Registrar on May 5, 2015, in the amount of \$2,547.15 plus post-judgment interest; and
- (3) the costs of this application.

[22] The Father asserts that a very small proportion of the Trial actually concerned issues relating to the maintenance of the Children. Moreover, he argues that Russell J., Holmes J., and Koenigsberg J. did not characterize their monetary awards as ones relating to maintenance or child support under the FMEA and that this Court does not have the jurisdiction to make such an order. He also submits that by bringing this application, the Mother is attempting to inappropriately vary or appeal the quantum of child support ordered by Russell J.

[23] I am satisfied that remedial relief sought by the Mother under the FMEA is available in this case to her. While Russell J., Holmes J., and Koenigsberg J. did not determine the issue of whether their monetary awards related to maintenance or child support under the FMEA, that fact does not preclude me from applying the FMEA and exercising my discretion at this time. Moreover, the Children's best interests include having the Father support the cost of their upbringing as ordered by this Court. I see no legitimate procedural or substantive bar in this regard.

[24] I am mindful that there is limited jurisprudence that specifically addresses the application and interpretation of ss. 1(1) of the FMEA. In addition, the cases have been inconsistent on the question of whether an award of costs, made in lump sum form by a judge, falls within the definition of "taxed costs" in ss. 1(1) of the FMEA. The cases appear to have gone both ways in this regard: see *C.L.M. v. M.J.S.*, 2017 BCSC 1517; *Olsen v. Chinniah*, 2012 BCSC 624; *Sandhu v. Sandhu*, 2012 BCSC 1183; *Caterini v. Zaccaria*, 2011 ONSC 946; *British Columbia (Attorney General) v. Houle* (1994), 1 B.C.L.R. (3d) 215 (S.C.) [in Chambers]; *MacKenzie v. MacKenzie*, 2011 BCSC 1652.

[25] In this context, it is prudent to address the proper interpretation and application of ss. 1(1) of the FMEA, beginning with a consideration of the plain language of the provision, followed by a purposive interpretation. Sub-section 1(1) of the FMEA provides:

"maintenance" means maintenance, support or alimony, whether payable

- (a) periodically, annually or otherwise,
- (b) for an indefinite or limited period or until the happening of a specified event, or
- (c) as a lump sum,

and includes

- (d) expenses arising from and incidental to
 - (i) the prenatal care of the mother or child, or
 - (ii) the birth of a child,
- (d.1) the cost of tests for paternity,
- (e) an amount payable under section 14 (1) (b) or 22 (2) (a),
- (f) fixed costs awarded under the regulations in favour of the director or a creditor,
- (g) taxed costs awarded in relation to anything that comes within this definition,
- (h) prescribed fees or expenses.

[Emphasis added.]

[26] The FMEA further defines a "maintenance order" as a provision for the payment of maintenance in an order that may be enforced through various mechanisms (e.g. through garnishment).

[27] It is significant that the definition of "maintenance" is inclusive and expressly includes "lump sum" awards and "taxed costs awarded in relation to anything that comes within this definition". The word "includes" expands the definition such that the words described as being included in the definition are not exhaustive or prescriptive but, rather, are in addition to, and not in limitation of, any words that have not been listed in the definition: see Ruth Sullivan, *Statutory Interpretation*, 3d ed. (Toronto: Irwin Law, 2016) at 79-81; *R. v. McLeod*, [1950] 2 W.W.R. 456 (B.C.C.A.); and *Pacific Abrasives & Supply, Inc. v. British Columbia (Revenue)*, 2010 BCCA 369 at para. 18. As such, I am of the view that the definition of "maintenance" under ss. 1(1) is broad in scope and includes not only "taxed costs" relating to child support, but also those costs awarded by way of a lump sum to a spouse seeking to obtain or enforce a maintenance order.

[28] My conclusion in this regard is consistent with and supported by the legislative intent to "facilitate the enforcement of maintenance orders": see *Director of Maintenance and Enforcement v. Timmermans*, 2010 BCSC 347 [Timmermans] at para. 56. Subsection 1(1) expressly provides that "taxed costs" include costs awards from a family proceeding where child support is ordered and the costs are taxed. It logically follows, in my view, that costs awards would also be enforceable pursuant to the FMEA if the court assesses the costs as a lump sum. A purposive interpretation of the FMEA supports this conclusion.

[29] In *Timmermans* at para. 56, Madam Justice Dardi cited the decision in *British Columbia (Maintenance Enforcement) v. I.W.A. Forest Industry Pension Plan (Trustee of)* (1992), 86 D.L.R. (4th) 461 (B.C.C.A.) [I.W.A. Forest] at 466 where our Court of Appeal applied a purposive construction of the FMEA as follows:

The Family Maintenance Enforcement Act is an example of what is sometimes referred to as "social legislation". It is designed to address the evil of widespread default in payments required to be made by family maintenance payment orders. In essence it makes available to persons entitled to maintenance payments the power and resources of the state to enforce payment and thereby alleviate the distress which is the frequent consequence of non-payment. It is of the class of enactment to which the court has traditionally given a "purposive" construction.

[Emphasis added.]

[30] The FMEA's main legislative purpose is two-fold: to ensure that payor spouses who owe maintenance payments make regular payments to payee spouses; and to ensure there are enforcement mechanisms in place in the event that payor spouses do not make those payments: see *British Columbia, Legislative Assembly, Hansard 34th Parl., 1st Sess.* (1 March 1988) at 3195 (Hon. Brian Smith). In other words, the legislation is meant to reduce the burden on the payee spouse to enforce the payments themselves. In this sense, under the FMEA, enforcement becomes a responsibility of the state.

[31] A purposive approach would treat awards relating to maintenance proceedings uniformly, whether they are awarded as taxed costs after assessment by a Registrar or Master, or costs assessed as a fixed, lump sum award by a judge. A legislative interpretation that treats a lump sum maintenance award or a related lump sum award of costs, differently than taxed costs related to a maintenance proceedings would be at odds with the purpose of the legislation. Such a result would be inconsistent with the legislative intent to simplify the enforcement of maintenance payments. If a lump sum costs award could not be characterized as maintenance under ss. 1(1) of the FMEA, a payee spouse would have to pursue his or her costs related to such a maintenance order without the benefit of the FMEA's enforcement mechanisms; yet, a payee spouse who was awarded taxed costs in relation to a maintenance order would receive that benefit. Such disparate treatment of the two types of costs awards makes little sense and would defeat the purpose of the legislation. Given this particular legislative context, and the issues and circumstances before me, there is no meaningful difference between a spouse whose costs are taxed by the Registrar after a

court has ordered costs in regard to a maintenance proceeding, as compared to a spouse whose costs are assessed as a lump sum award of costs by the court at such a proceeding.

- [32] In summary, the conclusion that court costs, related to the establishment and enforcement of a maintenance order fall within the definition of maintenance for the purposes of the FMEA is not only consistent with the language of ss. 1(1) but is also aligned with the purpose and objectives of the legislation which include averting circumstances where the benefit of child support awards are undermined by the costs of litigation; further, it ought not matter whether those costs are assessed or taxed by the Registrar or, alternatively, are awarded in the form of a lump sum amount by the court hearing the maintenance application. Both types of costs constitute maintenance within the meaning of the FMEA. In such circumstances, it is ultimately the children of the marriage who suffer if the costs of enforcing such orders remain unpaid; such a scenario is clearly not in their best interests. Notably, in the instant case, although the Father argues that the costs of prior proceedings do not constitute maintenance under the FMEA, the Father has asked that I award him the costs of this application and, moreover, has submitted that these costs be characterized as "maintenance" under the FMEA.
- [33] On the question of if, and to what extent, the three orders of the court identified by the Mother may be properly characterized as "maintenance" within the meaning of the FMEA, I have carefully reviewed the submissions of both parties, as well as the record before me and the reasons of Russell J., Holmes J. and Koenigsberg J. I am satisfied that all three decisions address the issue of maintenance as contemplated within the definition of maintenance in ss. 1(1).
- [34] The Father argues that only a small proportion of the issues dealt with by Russell J. at Trial related to the maintenance of the Children, and that Koenigsberg J.'s order ought not be characterized as maintenance. I find however, that a significant proportion of the issues before both Russell J. and Koenigsberg J. were intertwined with the issue of child support.
- [35] I accept the Mother's submissions that much of the evidence and issues before Russell J. related to the issues of child support including, for example, the assessment of the parties' respective Guideline incomes, the Father's earning capacity, and the justification for a lump sum maintenance award based on the Father's equity in the matrimonial home. In addition, the evidence at Trial concerned whether various assets and liabilities of the parties were to be characterized as family assets and deducted or added to the Father's portion of the matrimonial home. These assessments were an integral part of Russell J.'s determination of the appropriate lump sum child maintenance award ordered in favour of the Mother. That assessment included a consideration of a financial settlement the Father received during the marriage from a former employer (the Romarco settlement); the significant sums of money advanced by the Father's family and received by the parties during the marriage; and the debt the Father carried into the marriage. The issue of child maintenance clearly permeated many issues before the court at Trial. Having reviewed and considered the matter carefully, I am satisfied that at least 65% of Koenigsberg J.'s judgment of \$24,264.52, that is, \$15,771.94,

falls within the meaning of maintenance in ss. 1(1) of the FMEA.

- [36] My conclusion in this regard is buttressed by Master MacNaughton's reconciliation order (later revised by Koenigsberg J.). A review of Master MacNaughton's calculations also confirms that child maintenance issues were inextricably related to other issues and determinations at Trial. In settling the terms of the order after the Trial, Master MacNaughton was not only required to assess the costs of the Trial (which the Father was ordered by Russell J. to pay) but she was also required to assess, determine, and reconcile the Father's 66.66% apportionment of s. 7 expenses, as well as the Father's other child support debts, including the retroactive child support debt. Master MacNaughton's reconciliation included deducting these amounts from the Father's equity in the matrimonial home. In my view, a 65% allocation of the Koenigsberg J. order is easily justified and proper.
- [37] With regard to the costs awarded by Holmes J., I am of the view that these may be entirely characterized as maintenance. The primary focus of this application related to the Father's attempt to vary the lump sum maintenance award of Russell J., entailing a review of evidence and arguments relating, for example, to the Father's imputed income and his efforts to find work. Accordingly, I order that the sum of \$2,547.15 constitutes maintenance under the FMEA.
- [38] The Father also argues that he is not required to pay these outstanding court orders due to his bankruptcy. He asserts that the unpaid order of Koenigsberg J. (requiring him to pay \$24,264.52) ought to be attributed entirely to court costs rather than maintenance. That is, he submits that I should assume that the amounts deducted by Master MacNaughton from his equity in the family home, as part of her reconciliation calculations, related entirely to outstanding child support and retroactive child support payments; that is, the amounts that remain unpaid from her reconciliation relate only to court costs and not maintenance. He argues that child support was notionally paid out first and deducted from his equity in the family home. As such, what remains unpaid are court costs, not child support, and are therefore debts that were extinguished as a result of his bankruptcy. This argument does not hold for a number of reasons.
- [39] First, I have already found that a significant portion of the orders requiring the Father to pay the Mother specified moneys relate to child support. Further, as discussed above, to the extent the awards relate to court costs, such costs fall within the meaning of maintenance in ss. 1(1) of the FMEA in any event. In addition, a parent cannot avoid child support obligations by declaring bankruptcy. Section 178 of the Bankruptcy Insolvency Act, R.S.C. 1985, c. B-3 [BIA] states that bankruptcy does not release the bankrupt from any debt or liability related to a support or maintenance order. Also, liability for costs related to such orders will also not be released through bankruptcy, as they are covered by s. 178.
- [40] Section 178 provides:

178(1) An order of discharge does not release the bankrupt from

- (c) any debt or liability arising under a judicial decision establishing affiliation or respecting support or maintenance, or under an agreement for maintenance and support of a spouse, former spouse, former common law partner or child living apart from the bankrupt.

[41] In *Mandreck v. Mandreck*, 2009 BCSC 1511 at paras. 28 to 31, Madam Justice Hyslop found that pursuant to s. 178 of the BIA, debts for child support payments are not released as a result of bankruptcy. The child support debts are still owed together with all interest and penalties, as calculated by the FMEP; see also *B.(K.J.) v. B.(W.S.)*, 2004 BCSC 837. It is clear that bankruptcy does not remove one's liability to pay child support.

[42] Nor will bankruptcy eliminate the obligation to pay costs as they relate to a family law proceeding regarding child support. In *Cain v. Hodgson*, 2013 BCSC 310 [in Chambers], Mr. Justice Blair relied on s. 178(1) of the BIA and made an order that the costs relating to child support in that proceeding would survive bankruptcy on the part of the other party. Specifically, he reasoned:

[31] [h]aving heard the trial of this action, I find that although there were a number of issues dealt with at the trial, some 50 percent of Ms. Hodgson's costs are attributable to the claims for child support which she advanced at the trial. I conclude that given the circumstances, the costs relating to child support which I awarded to Ms. Hodgson shall survive a bankruptcy on the part of Mr. Cain. In reaching that conclusion, I have referred to the decisions of *Lees, Re*, 2002 BCSC 570 and *Sandhu v. Sandhu*, 2012 BCSC 1183.

[43] In addition, the Court directly noted that costs incurred in obtaining an order for child support fall within the meaning of s. 178(1) of the BIA in *Lees (Bankruptcy of)*, 2002 BCSC 570, where Mr. Justice Wilson stated:

[17] It is beyond dispute that costs incurred in obtaining an order for child support are included in the notion of "any debt or liability under a support order". The Grealys' claim goes beyond the simple obtaining of the order, to costs incurred in securing payment of the maintenance.

[18] A framework of analysis for giving content to the words in s. 178 is set out in *Jerrard v. Peacock* (1985), 57 C.B.R. (N.S.) 54 (Alta. Master). The analysis is provided by Master Funduk, described as "an experienced official in matters of this nature" in *Simone v. Daley*, applying that framework. On the matter of s. 178(1)(c), Master Funduk said, at page 62:

[40] Considering the new start object ingrained in the Act, the logical interpretation of the two subsections in question is that subs. (2) creates the general principle (being a release of all debts) with subs. (1) being an exception to the general principle. Subsection (2) establishes exceptions, not the principle, and must be viewed in that light.

[41] It is as if the section literally reads that the order of discharge releases the bankrupt from all claims provable in bankruptcy "except the following" and then lists the . . . categories in subs. (1).

- [44] All of the exceptions in the section are based on what might be classed as an overriding social policy. In other words, they are the kinds of claims which society (through the legislators) considers to be of a quality which outweighs any possible benefit to society in the bankrupt being released of these obligations.
- [46] Paragraphs (b) and (c), regardless of the language used, are nothing other than society's vested interest in ensuring that a person "supports" a dependent spouse and children. Obligations incurred for that cannot be shucked by the bankruptcy.
- [19] I adopt the notions expressed by Master Funduk and conclude that the costs incurred by the Grealys in creating and enhancing a fund for the security for payment of the child maintenance are included in the notion of "any liability under a maintenance order".
- [44] In Sandhu, Madam Justice Fisher considered whether the Court possessed jurisdiction to amend a costs order, after the order was entered, in circumstances where a party who is liable to pay costs subsequently makes an assignment into bankruptcy. Fisher J. previously made an order regarding costs following a family law proceeding and a related action under the Fraudulent Conveyance Act, R.S.B.C. 1996, c. 163. The previous costs order covered costs for a variety of issues. One of the parties entered into bankruptcy and another party sought further orders as to costs due to the effect of that bankruptcy. Specifically, the non-bankrupt party sought a declaration stating what percentage of the costs awarded to her related to child and spousal maintenance and what percentage related to equitable set off.
- [45] Fisher J. stated that the court possesses jurisdiction to change a court order so that those costs awarded in a previous proceeding related to support would survive bankruptcy. Notably, she stated the following at para. 17 of Sandhu:
- [17] [s]ection 178(1)(c) of the BIA Act provides that an order of discharge does not release a bankrupt from any liability under a support or maintenance order. Numerous authorities have established that costs incurred in obtaining an order for child or spousal support is part of the award for the purposes of the BIA Act: see *Lees, Re*, 2002 BCSC 570, and *S.L.M. v. D.R.M.*, 2003 BCSC 1094 [*Manolescu v. Manolescu*, [2003] B.C.J. No. 1687]. Therefore, only those portions of costs that relate to the claims for support will come within the exception in s. 178(1)(c).
- [46] In light of the above, it is clear that costs related to obtaining a support or maintenance order will survive bankruptcy.

Issue 2: Is the Father required to pay outstanding section 7 expenses and to reimburse the Mother for these expenses?

- [47] It is apparent from both the oral and written submissions of the Father that he has not accepted the findings and orders of Russell J. While he did not appeal her decision, he continues to argue the decision is without merit and asserts that he has paid much more than is required or can be justified. His views in this regard were repeated in his submissions that he should not be required to pay any outstanding s. 7 expenses. The Father

also asserts there is no court order stating that the Children ought to be enrolled in certain activities and that because the Mother has chosen to enroll the Children in various activities, she should therefore pay for them. Further, he argues that the Mother is claiming expenses, such as clothing and school costs, that are not proper s. 7 expenses. Notably, the Father has not contributed to the significant cost of the Children's dental or orthodontic expenses, nor to the cost of prescription medications.

- [48] The Father also argues that he cannot afford to pay for these expenses in any event, given his very low income and debt load. He raises the same arguments before this court as those advanced before Holmes J. and Russell J. regarding his income level, earning capacity, and efforts to find work; each of these arguments were previously considered and dismissed. The Father re-argues and disputes the findings of Russell J. that the significant moneys advanced to the parties by his family in England during the marriage were not loans or family debt; he asserts that they were and ought to be considered in assessing outstanding s. 7 expenses. The Father also reargues the submission he made before Holmes J., in 2015, regarding the decision of Groves J. in Prittie; specifically, he submits that his income should have been imputed at \$65,000 in 2011 rather than the \$120,000 imputed by Russell J. (see also Holmes J.'s judgment on this point reproduced above at paras. 16 and 17 above).
- [49] The Father also argues that there has been a material change in circumstance since the Holmes J. order in 2015, stating his income has decreased substantially, while the Mother's has increased. He submits there ought to be a large reduction in the income that may be properly attributable to him under the Federal Child Support Guidelines, SOR/97-175 [Guidelines], and that a significant increase ought to be attributed to the Mother. He therefore seeks, among other relief, a retroactive adjustment to Russell J.'s order which provides he must pay 66.66% of s. 7 expenses.
- [50] The Mother underscores her frustration in having to repeatedly contend with the Father's refusal to follow prior court orders, asserting that he "just thinks I should be responsible for paying everything for the children always." She submits:

All of this was anticipated by Madame Justice Russell except that the money from his family was characterized as an advance on his inheritance. I am unclear what the \$568 monthly payment on principal is [referring to the Father's submission that this is the debt he must pay monthly that has arising from the marriage] as all debt (apart from child related debts which he has not been paying) was discharged by bankruptcy. Additionally I don't see his family asking for repayment of the "advance on inheritance" or "loans" since as Mr. Dorey says they keep giving him more money. Mr. Dorey has not purchased a new vehicle since the trial so not sure what the vehicle loan [again referred to in the Father's submissions] is. I think it is part of what Mr. Dorey's family has given him.

Mr. Dorey is the one with the arrears in his payment. I believe Mr. Dorey is bankrupt because he refuses to find a job if he thinks it is below him or if he is employed so his wages can be garnisheed to enforce payment of debts relating to children.

All of Mr. Dorey's debt has been discharged by bankruptcy (apart from that relating to the children). This is in fact a better financial position than he was in when Madame Justice Russell submitted her order.

Mr. Dorey's financial and emotional stress would be relieved if he were to stop trying to be self-employed to evade collection of child related expenses and instead just get steady income.

- [51] The Mother deposes that she has been trying to reconcile s. 7 expenses with the Father, as ordered by Russell J., but that he has continuously refused to pay. She deposes that she repeatedly attempted, on many prior occasions, to consult with the Father about these expenses before they were incurred but that, in most instances, he has refused to pay.
- [52] At the time of the bankruptcy proceedings, the Mother was of the view that the Father ought to be allowed to resolve his other financial issues so that he could meet his court ordered obligations to support his Children. However, now that the Father has been declared bankrupt, the Mother asserts that he has not "stepped up to make his children a priority" and instead "sets his holiday travel to Barcelona, Amsterdam and Paris as more of a priority than responsibilities to his children (including but not limited to the dental care of his son)". She submits that even though she was eligible for spousal support, she gave this up in order to reduce conflict between the parties.
- [53] The Father says that he is able to afford various vacations because his current common law partner pays for his trips. He explains he has also received financial assistance from his family in England when he has taken the Children to see his family there (once for a family funeral).
- [54] In response to the Father's allegations that the Mother has claimed inappropriate expenses as s. 7 expenses, the Mother says that she has limited her claim to medical and dental expenses and sports-related expenses for the Children, such as basketball and soccer activities, which they have been involved in consistently over the years. She has also taken steps to have the costs of extracurricular sports activities waived or discounted so as to reduce the pressure on both her and the Father. The Father has not objected to such extracurricular activities in principle, recognizing their benefit to the Children, but he has declined to pay for most of the associated expenses.
- [55] The Mother is not requesting the Father to pay for any clothing expenses, haircuts or gas associated with the Children's activities. She has not claimed "everyday" expenses as s. 7 expenses.
- [56] At the hearing, the parties agreed to try to reconcile outstanding s. 7 expenses. The Mother provided the Father with itemized lists of expenses and receipts; her calculations included monies the Father had paid since Master MacNaughton's reconciliation in 2012, including additional expenses from 2011 which were not previously included. At my request, the Mother agreed to provide her updated reconciliation of s. 7 expenses to the Father for his review and comment. She did so and the Father was given an opportunity to respond and to

also provide receipts for her expenditures.

- [57] I have reviewed the receipts, emails, submissions and materials both parties have provided to me. I accept the Mother's evidence that she has not claimed expenses such as clothing, haircuts and gas as part of her s. 7 claim. The s. 7 expenses the Mother has incurred, which the Father has refused to pay, are proper s. 7 expenses. They relate to medical and dental care, education, and extra-curricular activities.
- [58] I also accept the Mother's evidence that she has made repeated efforts to consult with the Father, before incurring the s. 7 expenses. The materials before me establish that, since this Court's last reconciliation of outstanding s. 7 expenses, the Mother has continued to pay most of the s. 7 expenses, and has done so by a large margin. Taking into account the Father's contributions towards these expenses, and after reviewing the Mother's calculations, I find that as of May 1, 2017, the Father owed her \$15,504.99, based on the two-thirds proportional share of s. 7 expenses, as ordered by Russell J.
- [59] In assessing the appropriate amount of s. 7 expenses to be paid by the Father, I have considered his submissions that his income has been dramatically reduced in recent years, and that, as such he should no longer be required to pay s. 7 expenses. As discussed in greater detail below, I find there has been no material change in circumstances that warrant a reapportionment of s. 7 expenses. I continue to be satisfied, as were previous courts before me, that the Father has the capacity to earn much more than he claims. Accordingly, I order that the Father pay \$15,504.99, forthwith, representing his portion of s. 7 expenses due and owing from January 1, 2012 to May 1, 2017. (I note that I have not included s. 7 expenses incurred in 2011 prior to Master MacNaughton's order.)
- [60] Before concluding that there has been no material change warranting a variation in the order of Russell J. regarding the Father's obligation to pay 66.66% of such s. 7 expenses, I reviewed all the evidence submitted in this application, including the parties' 2016 income statements. The Father swore a Form F8 Financial Statement on May 26, 2016 wherein he provides he is a self-employed Chartered Accountant and deposed he receives no annual employment income and a net self-employment income of \$12,000 annually (i.e., a gross income of \$14,000). He deposes to a Guidelines income, before adjustments, of \$0.00. The Mother swore a Form F8 Financial Statement on June 23, 2016 and deposed to an employment income of \$53,456 and interest and investment income of \$20,290.34. Specifically, she deposed to a Guidelines income, before adjustments, of \$73,746.34.
- [61] The Father acknowledges that, as the Children are older now, his employment opportunities are no longer constrained by his prior decision to work less than full time in order to spend more time with them. However, he deposes that despite numerous, concerted, and arduous efforts to find work, he has had great difficulty doing so. He has found sporadic contract work and says he has a number of opportunities on the horizon but none have materialized. As such, he states that he continues to struggle financially.

- [62] The Mother questions the veracity of the Father's stated earnings, noting that his assertions of financial hardship are inconsistent with his standard of living. She asserts that, in any event, his earning capacity is at least at the amount imputed by previous courts at \$120,000 annually, and is very likely higher. The Mother underscores the reasons of Russell J., at paras. 56 and 57, where the Court finds the Father to be less than truthful.
- [63] At the hearing of this matter, the Father responded by affirming that he had in fact previously altered a letter from a former employer (which set out a salary of \$175,000 so that it showed a salary of \$125,000) and he acknowledges he did so in order to reduce his exposure for child support in relation to his child from a previous marriage. He did not express a sense of regret about his misrepresentation to a prior court in relation to his salary level. Rather, the Father continues to argue that the Mother was urging him to alter the letter in question and that his first wife also lied to the Court. In his oral submissions to this Court, he stated: "I must admit I didn't feel too bad about it at the time."
- [64] Having considered the representations of the parties in this matter and the evidence before me, I am of the view that the Father, as an experienced, intelligent, and well-educated accountant, has the capacity to currently earn at least \$120,000 per annum. I am, therefore, not persuaded that any material change has arisen from the time of Russell J.'s order to the present that warrants a reapportionment of the Father's obligation to pay 66.66% of outstanding s. 7 expenses. More specifically, the evidence before me supports the conclusion that the Father's earning capacity continues to be significantly higher than that of the Mother, and that it is not less than what it was at the time of the Trial or since. Child support payments are based on earning capacity, not only on what a parent actually earns. Parents have a legal obligation to earn as much as they are reasonably capable of earning: see *M.A.G. v. P.L.M.*, 2014 BCSC 126, at para. 52. The Father has not done so.
- [65] The Father also argues that the Mother's increase in income from \$60,000 at the time of the Russell J.'s order in 2012 to \$73,746.34 in 2016 constitutes a material change such that his proportional obligation to pay s. 7 expenses should be reduced on this basis as well. I do not agree. In light of the history of this case, a contextual analysis on the question of whether a material change has occurred is particularly important.
- [66] In *Clarke v. Babensee*, 2008 BCSC 468, aff'd 2009 BCCA 122, the Court applied a contextual analysis and concluded there was no material change in circumstances even though the mother's income had increased by approximately \$80,000 and the father's income had decreased. The court reasoned as follows:
- [9] I accept, as well, that the analysis should be contextual, and here I refer to para. 55 of Contino where this is said:

The analysis should be contextual and remain focussed on the particular facts of each case. For example, an application that represents a variation of a prior support arrangement, will usually raise different considerations from a s. 9 application where no prior order or agreement exists. In the former case, the recipient parent, when he or she first got custody, may have validly incurred

expenses based on legitimate expectations about how much child support would be provided. These expenses should be taken into [account] and a court should have proper regard to the fixed costs of the recipient parent.

[67] The Court in *Clarke* then considers s. 14 (b) of the Guidelines and sets out that the threshold question has been construed to mean material, substantive, unforeseen and of a continuing nature. The Court cites both our Court of Appeal and the Supreme Court of Canada, reasoning as follows (at para. 13):

[13] Here, I refer to the decision of the Court of Appeal in *T.L.A.T v. W.W.T*, [1996] B.C.J. No. 1577, where Justice Newbury, writing for the court, quoted the Reasons of Justice Sopinka, writing for the majority, in *Willick v. Willick*, [1994] 3 S.C.R. 670, where this is said at para. 33:

In deciding whether the conditions for variation exists, it is common ground that the change must be a material change of circumstances. This means a change, such that, if known at the time, would likely have resulted in different terms. The corollary to this is that if the matter which is relied on as constituting a change was known at the relevant time it cannot be relied on as the basis for variation.

[68] Similar to the situation in *Clarke*, in the case before me, the child support ordered by Russell J. was a lump sum award based on a shared custody arrangement and not strictly a table amount order. Accordingly, a contextual approach to any potential variation in child support is proper. Furthermore, a material change requires a finding that if the change in question had been known at the time of original order, a different order would have been made. In my view, in the circumstances of this case, where a lump sum child support order is made covering a period of years until the children reach the age of majority, it is foreseeable that the parties' incomes may change to some degree over time.

[69] In *C.A.O. v. S.J.O.*, 2012 BCSC 378, after a lengthy review of various cases, the Court reasoned as follows on the question of what change in income is sufficient to constitute a material change:

[34] From all of these authorities, I conclude that what is required to warrant consideration of variation of child support under s. 17(4) of the Divorce Act and s. 14 of the Guidelines is a sufficient change in the payor's Guidelines income.

[35] What will be sufficient will depend on the circumstances: an apparently small change can assume great importance if the income is itself modest, whereas a high-income payor may be able to sustain larger fluctuations in annual earnings.

[36] This makes overall sense, as during a marriage or other relationship, the amount available to raise children would be susceptible to the ordinary vicissitudes of life: unemployment, illness interrupting income, increases in income following promotion, overtime work, etc.

- [37] There seems little reason to isolate the children from those normal vicissitudes after separation of the parents, so long as the vicissitudes occur naturally, and are not the product of manipulation by the payor parent.
- [70] In the context of this case, I am satisfied that the increase in the Mother's income does not constitute a material change in circumstances to warrant a reapportioning of the s. 7 expenses incurred by the Mother to May 1, 2017. Indeed, she had a legitimate expectation that the order of Russell J. would be honoured unless or until it was varied: see *Contino v. Leonelli-Contino*, 2005 SCC 63 at para. 55.
- [71] My conclusion that there ought to be no change in the order of Russell J. relating to s. 7 expenses to May 1, 2017 is galvanized by the reasons of the Supreme Court of Canada in *D.B.S. v. S.R.G.*, 2006 SCC 37. That case involved four appeals in which the issue of retroactive child support was raised. The Father in the instant case is essentially asking for a retroactive order varying Russell J.'s order. The Court in *D.B.S.* provided some useful guidance regarding the appropriateness of retroactive child support orders in the context of the underlying principles of certainty and flexibility:
- [95] It will not always be appropriate for a retroactive award to be ordered. Retroactive awards will not always resonate with the purposes behind the child support regime; this will be so where the child would get no discernible benefit from the award. ...
- [96] Unlike prospective awards, retroactive awards can impair the delicate balance between certainty and flexibility in this area of the law. As situations evolve, fairness demands that obligations change to meet them. Yet, when obligations appear to be settled, fairness also demands that they not be gratuitously disrupted. Prospective and retroactive awards are thus very different in this regard. Prospective awards serve to define a new and predictable status quo; retroactive awards serve to supplant it.

[Emphasis added.]

In the instant case, the Mother has consistently paid over the years for most of the Children's s. 7 expenses. The Father is seeking a variation in the Russell J. order to benefit himself. I see no discernible benefit accruing to the Children arising from the order the Father seeks.

- [72] *D.B.S.* also identified four factors to be considered in determining the appropriateness of such a retroactive order: (1) the circumstances surrounding the delay in bringing the application; (2) the payor parent's conduct; (3) the children's circumstances; and (4) any hardship caused by a retroactive child support order. These factors each favor dismissing the Father's request of a retroactive order. The Mother's conduct in caring for her Children has been exemplary. It is clear to me that the situations that retroactive orders were intended to remedy do not apply to the circumstances before me. In the context of the Father's refusal to honour previous court orders, it would be unseemly to require the Mother to pay any retroactive child support, including s. 7 expenses. Furthermore, any possible inequity the Father may claim arising from the Mother's increased income will in any event

be remedied by the Mother's concession, in the interest of diffusing further conflict and litigation, to pay for 50% rather than 33.33% of s. 7 expenses into the future.

Issue 3: Should the order of Madam Justice Russell dated December 23, 2011 which divides section 7 expenses, with the Father paying 66.6% and the Mother paying 33.3%, continue into the future with the Father being required to reconcile expenses by June 30th and December 31st of each year?

- [73] As noted above, the Mother has amended her application in this regard by submitting that she would be content to proceed with splitting s. 7 expenses on a 50/50 basis with the Father, moving forward. I will respect her submissions in this regard.
- [74] The parties have both asked for clarity on what constitutes proper s. 7 expenses. I have already found that proper s. 7 expenses include the medical, dental, health-related, and educational expenses, as well as extra-curricular activities the Mother has previously claimed. The categories of expenses incurred by the Mother up to May 1, 2017, are reasonable s. 7 expenses that ought to guide the parties into the future.
- [75] The Court trusts that both parents shall make best efforts to consult with each other with regard to s. 7 expenses and attempt to reach agreement. Each parent shall provide receipts to the other and attempt to reconcile outstanding amounts at the end of every quarter (March 31st, June 30th, September 31st and December 31st). The parties are free to alter this schedule by agreement should they choose to do so.

Issue 4: Should the balance of the lump sum child support award that was ordered to be paid by Madam Justice Russell in December 2011 be repaid to the Father?

- [76] Before addressing the merits of this and subsequent issues raised by the Father in his application, I wish to underscore the well-established principle that courts may decline to hear such applications in those instances where the applicant has not paid support orders: see *Hokhold v. Gerbrandt*, 2015 BCCA 268 at paras. 12-13; *J.R. v. N.R.*, 2015 BCSC 1384; and *A.-F. v. M.-A.*, 2015 BCSC 1572. In *J.R.*, the Court reasoned as follows in this regard:
- [81] I would not have heard the respondent's application except for the need to hear the claimant's application so as to make sure the orders I have made are complied with. The respondent seems to think that only money owed to him by the claimant should be enforced by the court and money owed to the claimant should not be enforced.
- [82] In *Hokhold v. Gerbrandt*, 2015 BCCA 268, the appeal court said this:
- [12] Mr. Kahn provided other authorities which affirm that a person who has not paid a support order must provide a "convincing reason" to this court as to why his appeal should be heard: see *Bullock v. Bullock*, 2008 BCCA 162; *Berry v. Berry*, 2002 BCCA 129. *Bullock* involved a failure to pay spousal support.

- [13] Having heard from both Dr. Hokhold and Mr. Kahn, we formed the view that Dr. Hokhold had not provided any "convincing explanation" as to why he remains in arrears with respect to the Supreme Court orders relating to support. In the circumstances of this case, the administration of justice would be called into disrepute by our hearing an appeal at the request of a person who has exhibited disdain for the judicial process and continues to use this process to overwhelm his former partner.
- [83] The respondent has a history since separation from the claimant in failing to obey court orders. That behaviour continues with no thought to the interest of his former wife and children, and the burden the judicial process places on them.
- [77] The Father in this case has had a history of not complying with child support orders. On this basis, I could decline to hear his applications until such time as he has complied with these orders. However, in the interests of addressing these long-outstanding matters and in an effort to provide meaningful relief now, I am of the view that it is in the best interests of all concerned to address the Father's application at this juncture.
- [78] This particular issue, regarding the variance of Russell J.'s lump sum order, was previously argued by the Father before Holmes J. She concluded it was without merit and her decision was not appealed. The issue cannot, therefore, be successfully re-litigated due to the doctrine of *res judicata* or issue estoppel. The three pre-conditions for issue estoppel, a branch of *res judicata*, are satisfied on the facts before me: (1) the issue being decided is the same as that in the previous proceeding before Holmes J.; (2) the Holmes J. decision was final; and (3) the parties to both proceedings are the same: see *Toronto (City) v. C.U.P.E.*, Local 79, 2003 SCC 63 at para. 23, cited in *Stallan v. Palleson*, 2015 BCSC 1463 at para. 29.
- [79] Quite apart from the prior decision of Holmes J. and the doctrine of *res judicata*, I have also considered the new evidence placed before me in these applications and, specifically, the evidence that seeks to establish a material change in circumstances that could warrant the relief sought by the Father in this regard. As I have discussed above, I have found no such material change. Again, I have concluded that the Father's earning capacity far exceeds what he claims it is. In my view, he is capable of earning much more than he claims he has: see *Fuzi v. Fuzi* (1999), 92 A.C.W.S. (3d) 102 (B.C.S.C.); *Beissner v. Matheusik*, 2015 BCCA 308 at para. 44; and *K.P.B. v. A.S.R.*, 2016 BCCA 382 at para. 20. I am not able to find on the facts or the law that there is a basis upon which I can conclude that the Father should be paid any of the lump sum award which Russell J. ordered be paid to the Mother.

Issue 5: Should a lump sum child support award be paid to the Father from January 1, 2016 until the Children are 19 or, in the alternative, should ongoing child support be paid to the Father?

- [80] I see no basis on the evidence or at law that would entitle the Father to child support on a lump sum basis or otherwise. He remains capable of earning significantly more than the Mother.

Issue 6: In the further alternative, if the Court does order that child support be paid by the Mother to the Father, should the Mother be responsible for all special expenses until the Children are 19?

[81] As discussed above, there is no principled basis for requiring the Mother to be entirely responsible for all s. 7 expenses relating to the Children.

Issue 7: Should the Mother and Father be required to seek the other's permission before traveling with the Children abroad?

[82] As noted above, the Father seeks an order that either parent is entitled to take the Children abroad at any time without permission of the other parent, provided the details of the travel in question are provided to the other parent. I am not persuaded that such an order is in the Children's best interest. Should either parent wish to leave the country with the Children at any time, they are to consult each other, seek the permission of the other parent, and provide the other parent with appropriate details, including contact information and travel itineraries.

Issue 8: Should the Mother pay the Father child support for 2015-2016?

[83] In light of my findings and reasons above, I see no basis to support the Father's claim for child support during this period or otherwise. Throughout the period following Russell J.'s order, and to the present time, I have found that his earning capacity has significantly exceeded that of the Mother.

Issue 9: Who is entitled to the costs of matter? Should these costs also be characterized as maintenance under the FMEA?

[84] As the Mother was largely successful in this proceeding, she is entitled to costs. Given the unique circumstances of this case, I am prepared to make an award of costs of \$2,500, payable forthwith to the Mother. In light of my reasons above, I am satisfied that the entirety of this costs award may be properly characterized as maintenance under ss. 1(1) of FMEA.

Issue 10: Is interest owed on the prior court orders?

[85] The FMEA and its regulations address the interest payable on maintenance awards: see s. 6.5 of the Family Maintenance Enforcement Regulation, B.C. Reg. 346/88. Once court orders are registered with the FMEP, "interest and penalties accrue automatically under s. 11.[1] of the [FMEA]": see *Beavis v. Beavis*, 2014 BCSC 422 at para. 52. Accordingly, the application and calculation of interest on these orders will be left for the Director to determine and address under the Act and Regulation.

IV. Disposition

[86] In summary, I have concluded as follows: (1) the sums of \$15,771.94, \$2,547.15, and \$2,500 constitute maintenance under the FMEA; (2) interest will be paid on each of these sums according to the FMEA and its regulations; (3) the Father is required to pay, forthwith,

\$15,504.99 for outstanding s. 7 expenses; (4) commencing May 1, 2017, the Father and the Mother shall each pay 50% of all s. 7 expenses; (5) the Father's application that "the balance of the lump sum child support award made by Russell J. be repaid to him" is dismissed; (6) the Father's application for an order that the Mother pay child support either by way of lump sum, on a monthly basis, or as otherwise requested for various periods is also dismissed; and (7) each party shall seek the consent of the other before travelling out of the country with the Children.

[87] The Mother need not obtain the Father's signature as to the form of this Court's order relating to these applications.

[88] I shall remain seized of this matter.

"MORELLATO J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/17/22/2017BCSC2206.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/dorey-v-havens-2017>

Prepared on 27 October 2026 · Esheria