
CANADA / JUDGMENT

Evans v. Evans

2019 BCSC 294

COURT

Supreme Court of British Columbia

DECIDED

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2019 BCSC 294 Evans v. Evans

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Evans v. Evans,

2019 BCSC 294

Date: 20190307

Docket: E032402

Registry: Vancouver

Between:

Peter Dale Evans

Claimant

And

Allison Jane Evans

Respondent

Before: The Honourable Madam Justice Dardi

Reasons for Judgment

The Claimant, appearing in person:

A. Evans

The Respondent, appearing in person:

P. Evans

Place and Date of Hearing:

Vancouver, B.C.

August 2, 2018

October 4, 2018

Written Submissions:

October 10 and 26, 2018

Place and Date of Judgment:

Vancouver, B.C.

March 7, 2019

INTRODUCTION

- [1] The parties have engaged in extensive litigation arising from the breakdown of their marriage in 2002. This litigation has spanned some 14 years.
- [2] There are three daughters of the marriage. The Oldest Child (the "OC") was born in April 1991, the Middle Child (the "MC") born in April 1993, and the Youngest Child (the "YC") born in March 1995. I have used pseudonyms for the names of the children to protect their privacy.
- [3] The parties' two oldest daughters have completed their university educations. It is common ground that they are now both self-sufficient adults. It was anticipated that the YC, who is 23 years old, would graduate from university in December 2018.
- [4] The respondent mother (the "Mother") seeks an order for retroactive table amount child support from the claimant father (the "Father") for the YC for the period from May 1, 2014 to May 30, 2018 (the "Application Period"). She also seeks an order requiring the Father to reimburse her for what she alleges was an overpayment of her proportional share of the YC's post-secondary educational expenses.
- [5] The Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) [Divorce Act], governs this application.
- [6] There were 13 affidavits filed on this application, one of which was 61 pages in length and attached 334 pages of exhibits.
- [7] While I have reviewed and considered all the materials submitted by the parties, for purposes of this ruling, it is not necessary to recite the evidence in full.
- [8] Each of the parties presented tables and summaries purporting to show, for the Application Period: their respective incomes for the purposes of the Federal Child Support Guidelines, S.O.R./97-175 (the "Guidelines"); the yearly amounts of the post-secondary expenses of the YC; and the amounts paid by each party on account of those expenses.

- [9] The Mother also prepared a chart purporting to show the table amount of child support she alleges is owing to her by the Father for the Application Period.

BACKGROUND

- [10] The parties were married on October 17, 1987.
- [11] They separated on March 5, 2002.
- [12] In written reasons issued after a 10-day trial and indexed at 2004 BCSC 485, Mr. Justice Scarth granted a divorce, addressed issues of custody and access, division of property, and child and spousal support. Mr. Justice Scarth made further orders through 2004 and 2005.
- [13] The Father has remarried.
- [14] From 2006 through 2009, Mr. Justice Pitfield made orders relating to custody, child and spousal support.
- [15] Pursuant to Mr. Justice Pitfield's order pronounced on December 14, 2009, the Father's obligation to pay spousal support terminated on June 30, 2010.
- [16] From 2011 through to September 2013, Mr. Justice Leask made various orders regarding child support.

Child Support Orders

- [17] On October 13, 2011, Mr. Justice Leask ordered, among other things, the amount that the OC, who had reached the age of majority, would be required to contribute to her post-secondary expenses. His order provided that the Father would pay two-thirds of the parental share of the post-secondary expenses and the mother one-third. Additionally, Mr. Justice Leask ordered that the Father would assume responsibility for the children's future medical and dental expenses through his employer benefit plan.
- [18] On August 22, 2012, Mr. Justice Leask ordered:
1. Mr. Evans will procure an outline of the medical benefits and coverage of his Pacific Blue Cross policy by October 31, 2012.
 2. Mr. Evans will provide copies of the medical and dental receipts. He will further provide an explanation of extended health and dental claims as they relate to the children. Mr. Evans will have until October 31st, 2012, to provide this information to Ms. Evans.
 3. Ms. Evans owes Mr. Evans \$500 for her share of the uncovered medical and dental expenses.
 4. Mr. Evans will pay \$1950 in child support for the three children to Ms. Evans for July and August 2012. As Mr. Evans has already paid \$1,839 for July, he will pay \$111 to make up the difference for July.

5. Mr. Evans will pay \$1950 for August, less \$500 that Ms. Evans owes, in medical and dental reimbursements. Ms. Evans has agreed by consent to have the \$500 deducted from the August 2012 child support payment. Mr. Evans' August child support payment will therefore be \$1450.
 6. Starting September, 2012, Mr. Evans share of the costs for [OC] to attend university (tuition, student fees, books, room and board, miscellaneous) is \$9,000. Ms. Evans share is \$4,500.
 7. Starting September, 2012, Mr. Evans share of the costs for [MC] to attend university (tuition, student fees, books, room and board, miscellaneous) is \$8,000. Ms. Evans share is \$4,000.
 8. Mr. Evans will pay \$7,000 in child support for [YC] until May, 2013. Child Support will be reviewed on June 24, 2013, at 4:00 pm.
 9. Mr. Evans child support payments total \$24,000 until May, 2013. Paid over 8 months, Mr. Evans will pay \$3,000/month in s.7 and child support payments to Ms. Evans.
 10. Mr. Evans will receive the benefit of the tuition tax credits for this school year for all the children.
 11. Mr. Evans will file a requisition with the court to confirm the next date to review child support as June 24, 2013 at 4:00 pm before Mr. Justice Leask.
 12. In preparation of the hearing to review child support on June 24, 2013, the parties will provide to the other party by June 10, 2013, at 4:00pm, all materials they intend to rely on.
 13. Mr. Evans will draft the order and upon obtaining a signature from Ms. Evans, he will write a cover letter to the Registry indicating that Mr. Justice Leask has requested that the Order be sent directly to his attention for review and entry.
- [19] On December 12, 2012, Mr. Justice Leask made a further order regarding the payment of the OC's post-secondary expenses.
- [20] On September 19, 2013, Mr. Justice Leask ordered:
1. Mr. Evans will pay his portion of Child Support for post-secondary expenses directly to the children.
 2. Ms. Evans support payments may be made by cash, cheque or VISA to keep track of her "flow" of support paid towards the children.
 3. For the school year 2013-2014 [the YC's] cost for post-secondary expenses is estimated to be \$19,000. [The YC] will contribute \$3,000 towards the cost. The parent portion will be \$16,000. Mr. Evans share will be \$10,666. Ms. Evans share will be \$5,333.

4. For the school year 2013-2014 [the MC's] cost for post-secondary expenses (tuition, rent, food, books, supplies and miscellaneous) will be \$16,000. [The MC] will contribute \$5,000 towards the cost. The parent portion will be \$11,000. Mr. Evans share will be \$7,333. Ms. Evans share will be \$3,666.
 5. For the school year 2013-2014 [the OC's] cost for post-secondary expenses (tuition, rent, food, books, supplies and miscellaneous) will be \$15,000. [The OC] will use her \$550 Credit from UVic towards her costs. She will also apply any further, yet to be received, credits from UVic towards her costs.
 6. For the school year 2013-2014 Mr. Evans will, by consent, contribute \$500 monthly towards [the OC's] post-secondary costs. Ms. Evans does not have to contribute from September to December. This may be reviewed in December.
 7. The children will keep a budget and accounting of monies paid and received and provide an accounting of their Term 1, September-December costs in December, 2013, and their Term 2, January-April costs in April, 2014.
 8. Mr. Evans will draft the Order and upon obtaining a signature from Ms. Evans he will write a cover letter to the Registry indicating that Mr. Justice Leask has requested that the Order be sent directly to his attention for review, signature and entry.
- [21] Mr. Justice Leask did not make any orders for child support that would govern the parties after the end of the university term in April 2014. The September 19, 2013 order did not contain a review provision or provide for the subsequent exchange of financial information.
- [22] No further steps were taken in the litigation until the Mother filed a notice of application on June 21, 2018 (the "June Application").

Current Applications

- [23] In the June Application, the Mother sought an order, among other things, that the Father provide his Form 8 financial statement ("Form 8"), pay his share of the YC's post-secondary educational expenses (the "s. 7 expenses") in proportion to his and the Mother's current incomes for 2014-2018 and reimburse the YC for medical and dental expenses.
- [24] The Father produced his Form 8. He also sent the YC \$1,410 for what was alleged to be arrears of his proportionate share of her s. 7 expenses. The YC confirmed that as of August 2018, the Father had paid his proportionate share of those expenses. The Father also reimbursed the YC for her medical and dental expenses.
- [25] On July 30, 2018, the Mother brought a second notice of application seeking, among other things, retroactive table amount of child support from the Father in the amount of \$54,050, retroactive to May 2014 (the "July Application"). She subsequently revised the amount she was seeking to \$51,724.

- [26] In her applications, the Mother also sought an order that the YC remained a child of the marriage and that the YC be required to pay one-third of her post-secondary expenses. The Father does not dispute these aspects of the applications. The hearing proceeded on the basis that the YC would remain a child of the marriage until December 31, 2018 and that the YC assumed responsibility for paying one-third of her own post-secondary expenses throughout the Application Period.
- [27] In any case, I am satisfied on the totality of the evidence that at the material time, and in particular as of the date of the Mother's June application, the YC was a child of the marriage within the meaning of s. 2 of the Divorce Act. Her pursuit of post-secondary education was the cause of her continued dependence on her parents and her inability to withdraw from their charge. She remained a child of the marriage so long as she continued to attend university.

Further affidavits filed in October

- [28] At the hearing on October 4, 2018, the Mother disclosed to the Court that the YC had a student loan.
- [29] I directed that the Mother file affidavit material regarding the student loan by October 10, 2018, and that the Father would have an opportunity to file any response materials by October 26, 2018.
- [30] In his affidavit in response, the Father produced a revised table of calculations in an attempt to demonstrate that from 2013-2018, he had overpaid child support for the YC by \$18,000.
- [31] I have examined the table and am unable to reconcile the figures. Quite apart from the fact that this revised table is not responsive to the Mother's affidavit on the student loan, the table addresses child support in the period that predates the Application Period. Moreover, the YC was a minor in 2013. She reached the age of majority in March 2014.
- [32] Moreover, and in any event, the Father has not brought an application seeking any relief with regards to the alleged overpayment. Had it been properly before the Court, the Mother may have had an explanation or response to the alleged overpayment.
- [33] In all the circumstances, I find that it would not be appropriate to grant the Father any relief with respect to the alleged overpayment.

The YC

- [34] As I stated earlier, the YC is 23 years old.
- [35] The YC attended Simon Fraser University (SFU) as a full-time student, commencing in January 2016. As of the hearing, it was anticipated that she would graduate from SFU in December 2018 with a degree in criminology. The YC intends to pursue a career in policing. She performs community police volunteer activities and participates in various other volunteer endeavours. By all accounts, she is a good student and is thriving.

- [36] The YC first attended university at the University of Victoria for the school year 2013-2014. Mr. Justice Leask set her post-secondary costs for that year at \$19,000. There is no dispute that each of the parties paid the YC's post-secondary expenses for the school term at the University of Victoria pursuant to the terms of Mr. Justice Leask's order.
- [37] In May 2014, the YC returned home to reside in West Vancouver with her mother at her grandmother's apartment (the "West Vancouver Apartment"). She attended Capilano University from the fall of 2014 through 2015.
- [38] In August 2015, the YC moved into a 2-bedroom basement/garden suite with the MC at the Father's home on the westside of Vancouver. The suite had a living room, kitchen and laundry facilities. The Father and his wife live on the main floor. The Father's wife owns the home. The MC, who was attending Emily Carr University, had moved into the Father's suite in August 2013, and lived there rent-free until September 2015. From September 2015 until she moved out in March 2018, the MC paid \$400 in rent.
- [39] The YC lived rent-free in the suite in the Father's home from August 2015 to March 2018 (the "Residence Period"). She did not pay any utilities or internet charges. The Father maintained that while the YC stayed at the West Vancouver Apartment from time to time because she worked in West Vancouver, his home was her primary residence.
- [40] The Mother asserts that the YC was residing in West Vancouver at least 40% of the time during the Residence Period. The MC and the YC shared a bedroom in the West Vancouver Apartment.
- [41] At the hearing, the Father commendably informed the Court that in order to avoid any potential strain on his daughter, for purposes of these applications, he would not take issue with the Mother's assertion that the YC resided at least 40% of the time, the threshold referenced in the Guidelines, with her mother at the West Vancouver Apartment during the Residence Period.
- [42] Balancing the evidence as a whole, I find that the YC resided no more than 40% of her time at the West Vancouver Apartment during the Residence Period. Her primary residence was in the two-bedroom suite she shared with her sister at her father's home. This finding accords with the preponderance of the probabilities a reasonable person would recognize in the circumstances of this case.
- [43] In March 2018, the MC and the YC moved back to the West Vancouver Apartment because there was a flood in the Father's suite. They resided there for three months.
- [44] Commencing June 1, 2018, the MC and the YC rented an apartment in downtown Vancouver. The Father acted as a guarantor on their lease. The parties agreed to contribute to the YC's living and post-secondary expenses for the period from June to December 2018. The Father agreed to pay 85% of the parental contribution with the Mother paying 15%. This included a contribution to the YC's tuition and books as well as living expenses. At the Father's request, I ordered that his payment of \$7,470 would be spread over ten months in order to ease his

financial burden. Accordingly, I ordered that the Father pay the YC \$747 per month from June 2018 to March 2019.

- [45] During the period she attended university, the YC worked part-time through the school year and during each summer. The YC earned employment income of \$8,302 in 2015, and \$8,262 in 2016. Her 2017 T4 indicates she earned \$8,900.98.
- [46] The evidence shows that the YC has received \$2,000 in government grants and \$8,228 in student loans.

Guideline Incomes

- [47] The key objective of the Guidelines is to establish a fair standard of support for children after separation. The presumptive rule requires payment of the "table" amount of child support based on the payor's annual income, and an additional amount, if any, for extraordinary or special expenses, under s. 7, based on both parents' annual incomes: *B.G.M.S. v. J.E.B.*, 2018 BCSC 1628 at para. 179.
- [48] The essential task of the Court is to determine a fair figure for the parties' annual income for the purpose of determining their respective child support obligations.

The Father's Financial Circumstances and Guideline Income

- [49] The Father, who has been a school administrator for the past twenty years, has been a school principal with the Vancouver School Board since 2006. He is 56 years old.
- [50] The Father has produced various documents regarding his income in the Application Period. While I found some of his evidence on this point difficult to reconcile, the disparities are relatively minor.
- [51] The Mother alleges that based on his 2016 T4 that showed his income as \$160,329.56, the Father's Guideline income in 2016 was \$157,929. I am satisfied on the totality of the evidence that the Father's 2016 T4 was issued in error. The totality of the evidence supports a finding that his actual income for 2016 was \$121,963.33.
- [52] Additionally, there are some relatively minor discrepancies in what each party asserts is the appropriate figure for the Father's Guideline income. The Father has claimed certain deductions in arriving at his Guideline income. Although the Mother, in her materials, has questioned whether those deductions should be allowed, the appropriateness of the deductions claimed by the Father was not canvassed at the hearing. The Father has deposed that he is entitled to approximately \$5,000 per year in allowable deductions for association fees, form T2200 deductions and work-related expenses. In the absence of any reliable evidence or cogent submissions that the deductions that he has claimed are unfounded, I have taken the deductions into account.

[53] For purposes of her tables and calculations, the Mother shows the Father's Guideline income for 2018 to be \$119,184. For consistency, I have used this figure for both 2017 and 2018.

[54] All things considered, and doing the best I am able on the imperfect evidence, I find that the Father's Guideline income to be as follows:

Year

Guideline income

2014

\$102,000

2015

\$107,000

2016

\$117,000

2017

\$119,184

2018

\$119,184

[55] In his Form 8, the Father has deposed that he owns a vehicle and a RRSP of \$51,000. He has entitlement to the B.C. Teacher's Federation pension plan. The Father also deposed that he has a debt of \$50,500, which includes \$50,000 debt to his parents. He lives in a home owned by his current spouse.

The Mother's Financial Circumstances and Guideline Income

[56] As of 2006, the Mother, who has a university degree, was employed as a special education assistant with the West Vancouver School Board.

[57] In 2009, Mr. Justice Pitfield set the Mother's Guideline income at \$43,200.

[58] In 2011, the Mother quit her job with the West Vancouver School Board. She decided that she would embark on a sailing trip with her common law spouse. She was away from Vancouver, sailing in Mexico and Central America for several months at a time, during the period from 2011 to June 2014.

- [59] When her common law relationship ended in June 2014, the Mother returned to live with her mother in the West Vancouver Apartment. She was admitted to the psychiatric ward at Lions Gate Hospital in September 2014. She remained in the hospital until December 2014. In January 2015, she continued as a psychiatric outpatient at Lions Gate Hospital.
- [60] In 2015, the Mother qualified for Persons with Disability income and Canada Pension Plan Disability income.
- [61] It is undisputed that the Mother has not worked since 2014. She is 54 years old and continues to reside with her mother at the West Vancouver Apartment.
- [62] The Father contends that, given her historical and chronic underemployment, the Court should impute a higher income to the Mother.
- [63] The court has a broad discretion to impute income to either or both spouses for the purposes of determining child support.
- [64] It bears emphasis that the imputation of income must not be the product of speculation or guess work. The party seeking to have income imputed must establish an evidentiary basis for such a finding: *Marquez v. Zapiola*, 2013 BCCA 433 at para. 36 [*Marquez*].
- [65] Imputation of income must align with a realistic reflection of the party's education, work history, skills, age and any health conditions that may adversely impact the party from a vocational standpoint: *Cotter v. Cotter*, 2015 BCSC 1730 at para. 49, *aff'd* 2016 BCCA 254; *Marquez* at para. 37.
- [66] The Mother relies on her receipt of disability benefits as proof of her professed inability to work due to her mental health considerations. She also relies on a letter dated June 16, 2017, from her treating psychiatrist, Dr. Paragas, in which he states that the Mother "is not capable of going back to work for an undetermined period of time". Strictly speaking, the letter is hearsay evidence and is not properly admissible as opinion evidence. In any event, the authorities establish that the absence of a properly admissible independent medical opinion in relation to the Mother's capacity to work is not fatal: see generally *Turpin v. Clark*, 2009 BCCA 530 at paras. 19-20 and *Leskun v. Leskun*, 2006 SCC 25 at para. 28; *Luney v. Luney*, 2007 BCCA 567 at para. 37 (*leave to appeal ref'd* [2008] S.C.C.A. No. 90).
- [67] Mr. Justice Kent's observations in *Walker v. Maxwell*, 2014 BCSC 2357 are apt in this case:

64 Of course, one of the stark realities of family law litigation is that the parties are often unrepresented by counsel and/or are unable to afford the substantial cost of experts and the procuring of expert evidence.

65 Evidence in family law cases is subject to the same rules applicable to any other area of civil law. In reality, however, the technical yields to the practical and the strict rules of evidence are often ignored or accorded only slight deference. Nonetheless, the issues of admissibility and weight of evidence come into sharp focus insofar as determining the best interests of the child may be concerned.

[68] All things considered, and in the context that the Mother is currently receiving disability benefits, I am not persuaded that there is a sufficient evidentiary basis for imputing any income to the Mother.

[69] Accordingly, I find the Mother's Guideline income to be as follows:

Year

Guideline Income

2014

\$2,475

2015

\$17,720

2016

\$11,306

2017

\$14,309

2018

\$13,407

[70] In 2017, the Mother, appearing on her own behalf, successfully sued her former common law spouse. In reasons indexed at 2017 BCSC 1657, she was awarded \$153,342.34 as her share of family property and \$19,000 as a lump sum for spousal support.

[71] In her Form 8, the Mother has deposed that, in addition to her vehicle, she holds real estate valued at \$189,000, bank accounts of approximately \$24,000 and a LIRA valued at \$349,800. She has no debt. The Mother is also a beneficiary of a discretionary trust. The evidence does not disclose the identity of the trustee, the terms of the trust or whether the trustee holds any assets other than the GIC's of \$21,989 disclosed in the Mother's Form 8.

LEGAL FRAMEWORK

[72] Before turning to the analysis of the issues, I will refer to the legal principles that I must apply for determining child support for an adult child who is a child of the marriage.

[73] Where an adult child is found to be a child of the marriage, the court must consider whether the usual Guidelines approach is inappropriate. Section 3 of the Guidelines provides:

Presumptive rule

3 (1) Unless otherwise provided under these Guidelines, the amount of a child support order for children under the age of majority is

- (a) the amount set out in the applicable table, according to the number of children under the age of majority to whom the order relates and the income of the spouse against whom the order is sought; and
- (b) the amount, if any, determined under section 7.

Child the age of majority or over

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

[74] The focus of s. 3(2) is whether, having regard to its underlying assumptions, the usual Guidelines approach is inappropriate. Section 3(2)(b) of the Guidelines expressly stipulates that it is the approach to support, and not the amount of support, that the court must consider "inappropriate" to deviate from the applicable table. The underlying assumptions that typically apply to a child under the age of majority include: the child resides with one or both parents, the child is not earning income, and the child is dependent on his or her parents: *Schreiber v. Schreiber*, 2009 BCSC 366 at paras. 11-13; *Hausmann v. Klukas*, 2016 BCSC 853 [Hausmann] at para. 63. The more closely the circumstances of an adult child resemble those of a minor child living at home, the less likely it is that the approach found in s. 3(2) will be found to be inappropriate: *McClement v. McClement*, 2017 BCCA 416 at para.12.

[75] The four-step test for the determination of support under s. 3 of the Guidelines was formulated by Martinson J. in *Wesemann v. Wesemann*, [1999] B.C.J. No. 1287 (S.C.), and endorsed, with a slight modification, by the Court of Appeal in *W.P.N. v. B.J.N.*, 2005 BCCA 7 [W.P.N.], as follows :

[38] In *Wesemann*, Martinson J. formulated (at para. 6) a four-step test for determining the "appropriate" amount of child support under s. 3(2) of the Guidelines. Those four steps are:

Step One

Decide whether the child is a "child of the marriage" as defined in the Divorce Act? If s/he is not, that ends the matter.

Step Two

Determine whether the approach of applying the Guidelines as if the child were under the age of majority ("the usual Guidelines approach") is challenged. If that approach is not challenged, determine the amount payable based on the usual Guideline approach.

Step Three

If the usual Guidelines approach is challenged, decide whether the challenger has proven that the usual Guidelines approach is inappropriate. If not, the usual Guidelines amount applies.

Step Four

If the usual Guidelines amount is inappropriate, decide what amount is appropriate, having regard to the condition, means, needs and other circumstances of the child and the financial ability of each spouse to contribute to the support of the child?

[39] The second and third steps of the test as articulated by Martinson J. require that one of the parties challenge the application of the "usual Guidelines approach" to determining child support. There may be cases, however, where a party has not challenged the appropriateness of the application of s. 3(2)(a), but the court considers on the facts of the particular case, that it is inappropriate. In my opinion, the absence of a challenge does not preclude consideration of s. 3(2)(b) and in such a case, the court should determine child support under that provision.

[42] In my opinion, in principle, support for an adult child who is entitled to child support because of his or her attendance at a post-secondary institution generally should be determined under s. 3(2)(b). The "table amount", as noted by Martinson J. in Wesemann, contemplates a contribution by the non-custodial parent to the expenses borne by the custodial parent in providing a home for the child. The fact that the "table amount" increases incrementally and not absolutely for additional children supports that interpretation of the intention of the Guidelines. The "table amount" does not contemplate a child's contribution, which is an important factor in considering the amount of support a student requires.

[Emphasis added.]

[76] In sum, the decision on whether to apply s. 3(2)(a) or s. 3(2)(b) is a discretionary determination that must be governed by the circumstances of the case: *De Beck v. De Beck*, 2012 BCCA 465 at para. 56. While each case must be assessed on its own circumstances, support for an adult child attending a post-secondary educational institution generally should be determined according to s. 3(2)(b): *W.P.N.* at para. 42.

- [77] An important consideration in the analysis is that adult children have an obligation to make a reasonable contribution to their education: The court has a very broad discretion to determine the amount an adult child should contribute: *Semancik v. Saunders*, 2011 BCCA 264 [Semancik] at paras. 73 and 74.
- [78] Pursuant to s. 7(1)(e) of the Guidelines, expenses associated with post-secondary education may qualify as special or extraordinary expenses. As with all s. 7 expenses, they must be reasonable and necessary in light of the parents' ability to pay: *Cole v. Cole*, 2016 BCSC 716 at para. 143 [Cole].
- [79] There is no single judicial approach to structuring a child support order for an adult child attending post-secondary education. In assessing what is reasonable for any given familial circumstances, the Court must take into account the needs and contributions of the student and the ability of the parents to contribute. A child's expenses incurred during the pursuit of post-secondary education may form the basis for an order for child support, s. 7 expenses, or both: *Cole* at paras. 145 and 146. Under s. 3(2)(b), the Court has a broad discretion to determine what order is fair and just in all the circumstances: *Hamilton v. Popp*, 2014 BCSC 506 at para. 35; *Hausmann* at para. 99.

Retroactive Orders

- [80] The leading authority with respect to the issue of retroactive child support is the decision of the Supreme Court of Canada in *D.B.S. v. S.R.G.*, 2006 SCC 37 [D.B.S.]. In *D.B.S.*, the Court reviewed the key principles to be applied in considering claims for retroactive child support. While the decision to order retroactive support is discretionary, the Court endorsed the notion that retroactive awards should not be regarded as exceptional. The core principle is that parents have a joint financial obligation to support their children commensurate with their income and those support obligations should fluctuate with a payor parent's income.
- [81] The Court held that there are three situations where retroactive awards may be made:
- (i) where there has already been a court order for child support to be paid;
 - (ii) where there has been a previous agreement between the parties; and
 - (iii) where there has not already been a court order for child support to be paid.
- [82] The Court in *D.B.S.* identified four factors that a court should consider before making any retroactive award:
- (i) whether there was a reasonable excuse for the recipient parent failing to make an earlier request for support;
 - (ii) the conduct of the payor parent;
 - (iii) the circumstances of the children; and

(iv) any hardship occasioned by a retroactive award.

[83] The Court directed trial judges to adopt a broad and holistic approach and underscored that none of the four relevant factors are determinative. At para. 105, Mr. Justice Bastarache stated that in determining the appropriate balance between certainty and flexibility in any given case, the Court should consider each parent's behaviour. Each case must be decided on the basis of its particular factual matrix.

[84] Fairness to the parties is an animating consideration. As the Court in D.B.S. explained:

[96] 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.

ISSUES

[85] The issues that I must decide in this matter are as follows:

1. Is the Father entitled to a credit for the \$1,478 payment that he paid to the Mother in August 2018?
2. Should the Mother be reimbursed for her alleged over-contribution to the YC's post-secondary expenses in the Application Period?
3. Is the Mother entitled to table amount of child support for the YC for the Application Period?

[86] I note that, because there is no court order that governs the amount of child support payable during the Application Period, the material change in circumstances test is not relevant.

ANALYSIS

1. Is the Father entitled to a credit for the \$1,478 payment that he paid to the Mother in August 2018?

[87] On the first day of the hearing, the Mother alleged that the Father owed her \$1,950 for arrears of the August 2013 child support payment. She pointed to Mr. Justice Leask's order of August 22, 2012, which provided the Father would pay the Mother \$1,950 in child support for three children for each of July and August 2012. She submitted that the Father therefore owed her \$1,950 in child support for August 2013.

[88] The parties resolved the issue of the outstanding August 2013 payment out of court. They agreed that the Father would pay the Mother \$1,478 because there were, in fact, only two children living with her in August 2013. The Father paid the Mother \$1,478 on August 10, 2018.

[89] Given that the material events transpired more than five years ago, it appears that the parties did not recall that in 2012, Mr. Justice Leask had set the child support payment for two children at \$1,500. At a hearing on August 27, 2013, Mr. Justice Leask found that, in light of

the fact that the OC did not live with the Mother during the summer of 2013, the Father had overpaid child support to the Mother for May, June, and July 2013. Accordingly, he concluded that the Father only owed the Mother \$150 for August 2013. The Father has deposed that he paid \$150 to the Mother.

[90] Accordingly, I conclude that the Father is entitled to reimbursement of \$1,478 which he paid to the Mother in error in August 2018.

2. Should the Mother be reimbursed for her alleged over-contribution to the YC's post-secondary expenses in the Application Period?

[91] During the Application Period, the parties, apparently with the YC's concurrence, conducted themselves on the basis that the YC would pay one-third of her s. 7 post-secondary expenses. The remaining two-thirds of the s. 7 expenses were shared one-third by the Mother and two-thirds by the Father. This arrangement maintained the same apportionment of the parents' share ordered by Mr. Justice Leask on September 19, 2013, for the 2013-2014 school year. The Father confirmed this apportionment in an email to the Mother dated August 11, 2014.

[92] The Mother contends that from September 2014, there should be a retroactive reapportionment of the parties' respective share of the s. 7 expenses based on their actual incomes. She seeks payment of \$3,593 from the Father.

[93] The Father opposes such an order and submits that there should be an imputation of income to the Mother. He also contends that the Mother did not provide effective notice of her intention to claim a readjustment.

[94] Earlier in these Reasons I declined to impute any income to the Mother.

[95] The totality of the evidence supports a finding that the first time the Mother raised any issue regarding the parties' proportionate contribution to the parents' portion was in an email to the Father dated April 19, 2017. The relevant portion of her email stated:

I have been on PWD-Persons With Disability and CPPD for over two years and receive PWD\$143 and CPPD \$890 monthly income \$1,033 a month.

We need to adjust the percent that we share in [the YC's] university to reflect our current incomes.

The 2/3 of the parents portion with your income over \$100,000 to mine of \$12,400 starting May 1 2017. If we need to go to court for this adjustment I will have it adjusted back two years.

[96] The Father responded with a suggestion that the Mother focus her efforts on her then extant legal dispute with her former partner. I note the Father in fact provided her some assistance regarding this legal proceeding. This assistance was acknowledged by the Mother to the Father, in an email dated July 17, 2017.

[97] The Mother then formally served the Father with the June Application on June 21, 2018.

[98] Given that the Mother is seeking a retroactive adjustment and payment, I must consider the D.B.S. factors. The authorities establish that the principles formulated by the Supreme Court of Canada in D.B.S. are applicable to s. 7 expenses: Semancik at para. 57.

(i) Reasonable excuse for delay

[99] As I noted above, the evidence establishes that the Mother first notified the Father that she was seeking an adjustment in the apportionment of the parties' respective shares of the YC's s. 7 expenses in April 2017. This constituted effective notice as that term is understood in the authorities.

[100] The Mother maintains that her mental health issues prohibited her from pursuing a reapportionment earlier. The Father counters with the submission that the Mother, appearing in person, was capable of launching and pursuing an action against her former common law partner. She conducted a 10-day trial in the summer of 2017, and as I stated earlier, she succeeded in recovering a monetary award.

[101] That said, the fact that the Father was aware that the Mother did not resume any form of employment after her hospitalization in 2014 is a significant factor in the analysis.

(ii) Conduct of the payor

[102] The Court in D.B.S. characterizes this factor as "anything that privileges the payor parent's own interests over his/her children's right to an appropriate amount of support": at para. 100.

[103] This aspect of the Mother's claim against the Father relates to her alleged over-contribution to the YC's s. 7 expenses. This is plainly a claim that relates solely to the proportionate sharing as between the parties. It is not a claim that raises the question of whether the Father avoided his parental support obligations.

[104] For completeness I note that as a public sector employee, the Father's salary increased on a pre-established grid from 2014 to 2018. These were neither unanticipated nor major increases in his salary. I am not persuaded that in the absence of an order requiring further disclosure, the Father's failure to update his financial disclosure constituted, without further inquiry, blameworthy conduct, as that term has been interpreted in the authorities. Notably, the Guidelines do not burden a payor parent with automatic disclosure every time his or her income increases: Cook v. Schlase, 2013 BCSC 393 at para. 12; see also C.L.L. v. S.W.J., 2013 BCSC 917 at para. 54.

(iii) Circumstances of the child

[105] In light of the fact that two-thirds of her s. 7 expenses have been paid by her parents pursuant to the family arrangement, the circumstances of the YC are not a relevant factor in the analysis.

(iv) Hardship occasioned by a retroactive award

[106] As I stated earlier, the Mother is seeking \$3,593 from the Father as the amount of the retroactive adjustment. Earlier in these reasons, I have determined that the Mother owes the Father \$1,478. This amount should be set-off from any amount the Father is found to owe to the Mother.

[107] The amount sought - in the range of \$2,000 - is relatively modest and militates against any assertion of hardship.

(v) Disposition

[108] Balancing the relevant factors, I conclude that a retroactive adjustment to the amount each of the parties paid for the s. 7 expenses of the YC is warranted. Given the Mother's Guideline income during the Application Period, I find that it was inequitable for her to have contributed one-third of the parental share of the s. 7 expenses.

[109] I must now decide the date to which the award should be retroactive and secondly, the amount of the award.

[110] The date of the retroactive award is ultimately one of discretion informed by the principles set out in D.B.S. At para. 123, the Court in D.B.S. held that it is usually inappropriate to make a support award retroactive to a date more than three years before formal notice was given. In this case, formal notice was given in June 2018.

[111] All things considered, I conclude that fairness requires that there be a retroactive adjustment to 2015. To be clear, the readjustment is to be based on the parties' proportionate incomes for the period from 2015 through to May 2018. The methodology for the calculation of the quantum of the adjustment is based on the parties' proportionate incomes, the amount of the s. 7 expenses, and the amount each party in fact contributed to the s. 7 expenses.

[112] Each of the parties provided tables of calculations, which they subsequently revised during the course of the application.

[113] Based on their respective Guideline incomes, the parties' proportionate contribution to the s. 7 expenses should have been:

Year

Father

Mother

2015

86%

14%

2016

91%

9%

2017

89%

11%

2018

90%

10%

- [114] Given how the case was presented, I cannot reconcile the evidence regarding the actual amount of the s. 7 expenses for the years 2015-2018 and the actual amounts each party paid for those expenses.
- [115] The parties have each used a different amount for the s. 7 expenses in their respective tables and calculations. The pertinent CRA documentation produced is not complete. It is not clear on the record whether the s. 7 expenses include books and supplies.
- [116] Nor does the evidence establish with any precision the amounts each party actually contributed to the s. 7 expenses. In his reply affidavit filed in October 2018, the Father revised the amount he says he paid for s. 7 expenses. In his materials, the Father provided banking records to show the funds he transferred to the YC over the Application Period. The Father also paid the YC's medical and dental expenses. There may have been other moneys forwarded to her for her birthday, Christmas, or other matters unrelated to the s. 7 expenses.
- [117] Although I am unable to determine the amount owing with any precision, I note that with this set-off of \$1,478 the amount owing by the Father to the Mother is likely in the range of \$2,000. It may be that the parties will be able to resolve this matter.
- [118] However, if the parties are unable to agree on the amount of the retroactive adjustment, the issue is referred to the Registrar for resolution pursuant to Rule 18-1(1) of the Supreme Court Family Rules, B.C. Reg. 104/2015. The result of the Registrar's assessment shall be certified and will be binding on the parties pursuant to Rule 18-1(2).
3. Is the Mother entitled to table amount of child support for the YC for the Application Period?
- [119] The Mother also seeks \$51,724 in retroactive table child support for the YC. Her calculations are based on a set-off of the table amounts of child support that would have been payable by each party in accordance with their respective Guideline incomes.

- [120] The Father opposes any order for retroactive child support. He emphasizes that once the children had reached the age of majority and were attending post-secondary institutions, Mr. Justice Leask had historically applied a budget-driven approach rather than the usual table amount approach for determining child support.
- [121] Accordingly, the first step in the analysis is to determine whether to apply the approach under s. 3(2)(a) or s. 3(2)(b) of the Guidelines.
- [122] The authorities clearly establish that when determining child support payable for a child who has reached the age of majority, the court has a broad discretion whether to apply s. 3(2)(a) or s.3(2)(b) of the Guidelines. In *W.P.N.*, the Court of Appeal observed that support for an adult child who is entitled to child support because of her attendance at a post-secondary institution should generally be determined under s. 3(2)(b): at para. 41.
- [123] The table amount approach contemplates a contribution via a non-custodial parent to the expenses borne by the custodial parent in providing a home for the child. However, the table amount approach does not contemplate the financial contribution of a child who has reached the age of majority. This is a relevant factor in determining whether it is appropriate to apply s. 3(2)(b): *L.M.W. v. R.L.W.*, 2016 BCSC 758 at paras. 32-33.
- [124] During the Application Period, the YC worked part-time and during the summers. Given the financial circumstances of the parties, it was reasonable that she should have contributed to her own expenses.
- [125] It is also an important consideration that both parents provided the YC with rent-free accommodation during the Application Period. From May 2014 to July 2015, and from March 2018 to May 2018, the YC's s primary residence was with her mother at the West Vancouver Apartment. The YC paid no rent. There is no evidence suggesting that the Mother incurred any debt by consequence of having the YC living with her in the West Vancouver Apartment. From August 2015 through to March 2018, the YC's primary residence was in a two-bedroom suite in her father's home. She paid no rent and did not contribute to any expenses for utilities.
- [126] The parties also paid two-thirds of the YC's s. 7 expenses for the Application Period.
- [127] In all the circumstances of this case, I conclude that s. 3(2)(b) of the Guidelines applies in this case. To conclude otherwise would be to ignore the YC's ability to contribute to her own expenses.
- [128] This is a family with limited financial resources. In my view, the arrangement during the Application Period achieved a reasonable and fair balance of the YC's duty to contribute and her parents' obligation to contribute to her support. I am not persuaded that there needs to be any adjustment for living expenses by ordering the payment of any table amount of child support.

[129] For completeness, I will next apply the D.B.S. framework in determining whether a retroactive order for table amount of child support is appropriate. I will consider each of the factors in turn.

(i) Reasonable excuse for delay

[130] Balancing the evidence as a whole I find that the first time the Mother raised the issue of table amount of child support being payable for the YC during the Application Period was when she served the Father with formal notice of the July Application.

[131] I am not persuaded that the Mother's emails to the Father in August 2014 constitutes effective notice of a claim that she would be seeking the table amount of child support from the Father. On August 11, 2014, the Mother emailed the Father requesting his "suggestions for expenses for the girls' upcoming school expenses" (emphasis added). On August 16, 2014, in response to the Father's email dated August 11, 2014, in which he sets out a "formula" for the payment of the YC's tuition and books, the Mother stated:

Explain [the MC's] money for September 2014 on [sic]

for [the YC] it needs to be the same as [the MC's] living expenses.

[132] There is no reference in the email exchange to the Mother seeking the table amount of child support from the Father.

[133] The parties followed the arrangement proposed by the Father in his August 2014 email until the Mother's April 2017 email to the Father. Importantly, in her 2017 email to the Father, wherein she advised him that she would be seeking an adjustment of her contribution to s. 7 expenses, she did not make any mention of seeking the table amount of child support.

[134] For completeness, even if the Mother's 2014 email constitutes effective notice, I find there was unreasonable delay in bringing any formal application after that notice was given: see D.B.S. at para. 130. The delay by the Mother has not been adequately explained.

[135] In my view, the evidence does not establish a reasonable excuse, as that term is understood in the authorities, for the Mother failing to notify the Father that she would be seeking the table amount of child support. I recognize that the Mother was hospitalized for her mental health issues in 2014. However, as I noted earlier, thereafter she was able to launch and pursue a claim against her former common law spouse, including representing herself in a two-week trial in the summer of 2017 wherein she succeeded in recovering a monetary award.

[136] The Father, by providing the YC with rent-free accommodation during the Application Period, lost market rental income for the suite, which he estimates at \$2,000 per month. This exceeded any table amount of child support he would have had to pay for one child. He ordered his affairs based on this arrangement. Neither party saw fit to seek a change in the arrangements. If the Father had been apprised that the Mother would seek the table amount of child support, he may well have conducted himself differently. The Father's

interest in certainty here is compelling. In my view, to allow the Mother to now claim the table amount of child support would result in a significant unfairness.

(ii) Conduct of the payor.

[137] As the Court of Appeal noted in *Evanow v. Lannon*, 2018 BCCA 208 at para. 44, D.B.S. mandates a context specific analysis for assessing blameworthy conduct.

[138] The Court in D.B.S. aptly observed that "the existence of a reasonably held belief that (s)he is meeting his/her support obligations may be a good indicator of whether the payor parent is engaging in blameworthy conduct": para. 108.

[139] Since September 2014, the Father has contributed to the YC's s. 7 expenses pursuant to the parties' arrangement. While there may have been delay in making some of the s. 7 payments, I do not find this delay to be particularly significant in the context of the evidence as a whole. I note parenthetically that the record also shows that on occasion the Mother had delayed in making payments for her daughters' post-secondary expenses. The Father also provided rent-free accommodation to the YC during the Residence Period. In 2018, the Father agreed to pay the YC \$7,470 as a contribution to her expenses for the period of June to December 2018, in order that the YC could live more independently in an apartment while she completed her final year of university.

[140] The considerations I outlined at paragraph 103 regarding disclosure of his income also inform the analysis here.

[141] Overall, the Father has acted reasonably and responsibly in supporting the YC's pursuit of her post-secondary education. The preponderance of the evidence does not support a finding that the Father made a conscious choice to ignore his parental support obligations: *Rosenberg v. Gold*, 2016 ONCA 565 at para. 68. I cannot conclude that he engaged in any blameworthy conduct.

(iii) Circumstances of the child

[142] As I stated earlier, the YC appears to be doing well with her educational pursuits during the Application Period. The evidence suggests that both parents have supported the YC in her decisions regarding post-secondary education, work, and volunteer activities. There is no properly admissible evidence that the YC suffered any undue hardship or that her standard of living was compromised based on a lack of financial resources.

[143] The Father only became aware at the hearing in October that the YC had incurred a student loan of some \$8,000.

[144] I note that the OC also had taken out a student loan. While there is some suggestion that, in 2013, it was greater than \$5,000, the amount of her loan was not established on the evidence before me.

[145] Given the limited financial means of the parties, and in the context of having attended slightly more than four years of university (September 2014-December 2018), the YC's amount of student loan is not unreasonable. Children of the marriage who have reached the age of majority are obliged to contribute to their education in a way that reasonably reflects their efforts in developing self-reliance. In my view, the quantum of the YC's student loan reflects a fair balance between her capacity to contribute to her own post-secondary education and the contribution of her parents.

(iv) Hardship occasioned by a retroactive award

[146] The fourth and final D.B.S. factor is whether the Father would suffer hardship as a result of having to pay a retroactive child support award.

[147] While he earns in the range of \$125,000 per year, taking into account his current expenses and obligations, I infer that the imposition of a retroactive award, in the amount sought by the Mother, would disrupt the management of his financial affairs and impose a significant burden on the Father's financial situation. He is approaching retirement age. Although he has pension benefits, he has no significant savings other than \$51,000 in his RRSP account. In all likelihood, he would be required to take out a loan in order to pay a retroactive award.

[148] While not determinative, the hardship that would be imposed by a significant retroactive award is an important factor that informs the analysis in this case.

(v) Disposition

[149] Applying the holistic approach endorsed by the appellate authorities and given the particular factual matrix of this case, I conclude that a retroactive award for the table amount of child support is not warranted.

CONCLUSION

[150] The Mother's application for a retroactive award for table child support is dismissed.

[151] I order a reference to the Registrar to assess the amount of the reimbursement the Father owes the Mother for her contribution to the YC's post-secondary expenses in the Application Period.

[152] Despite their considerable difficulties, the parties are to be commended for raising three daughters who, having completed their respective post-secondary educations, have developed into self-sufficient adults.

COSTS

[153] In my view, neither party was substantially successful on this application; success was divided. Each party shall bear his or her own costs.

"Dardi J."

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