
CANADA / JUDGMENT

G.J.L. v. M.J.L.

2017 BCSC 688

COURT

Supreme Court of British Columbia

DECIDED

28 April 2017

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

G.J.L. v. M.J.L.,

2017 BCSC 688

Date: 20170428

Docket: E130396

Registry: Vancouver

Between:

G.J.L.

Claimant

And

M.J.L.

Respondent

Before: The Honourable Mr. Justice Schultes

Reasons for Judgment

Appearing on her own behalf:

G.J.L.

Counsel for the Respondent:

A. Huang

Place and Date of Trial:

Vancouver, B.C.

May 4-6, 2015

July 15-17, 2015

November 12-13, 2015

Written Submissions of the Claimant:

November 30, 2015

Written Submissions of the Respondent:

January 15, 2016

Reply Submissions of the Claimant:

March 29, 2016

Place and Date of Judgment:

Vancouver, B.C.

April 28, 2017

1. INTRODUCTION

- [1] In this family law trial, the claimant G.J.L. ("J.") seeks an order varying the child support provisions of her separation agreement with the respondent M.J.L. ("M.") to increase the amount of support that she receives. The amount she seeks is the difference between the table amounts of support that is payable at each of their respective incomes pursuant to the Federal Child Support Guidelines, [Guidelines], based on the shared parenting of their three children. This is usually described as the "set-off" amount.
- [2] J. also seeks: (1) retroactive support at the set-off amount going back to the point in 2013 when she advised M. of her intention to file an amended notice of family claim, (2) clarification of the basis on which their incomes for support purposes and their respective shares of the special and extraordinary expenses for their children will be determined in the future, and (3) a divorce.
- [3] M. opposes all of these orders except for the divorce. In essence, he submits that a proper application of the factors relevant to an order for child support in a situation of shared parenting, pursuant to s. 9 of the Guidelines, will lead to the current arrangements for payment of support and special and extraordinary expenses being upheld.
- [4] J. represented herself in this trial and did a good job of putting forward her case. M.'s counsel treated her fairly, while still advocating effectively for M.'s position.

2. EVIDENCE

a. Overview

- [5] Both parents work in the technology field. J. is a software engineer and M. is a product manager.
 - [6] They began living together in 1998. They were married in 2002 and separated in June 2011. They have three children--the oldest child born in 2000 and twins born in 2003.
 - [7] They signed the separation agreement on May 24, 2011. They negotiated it together and then a lawyer retained by J. drafted it. Although J. is not seeking to set aside the agreement on the basis of the circumstances surrounding its creation, it is common ground that there was some urgency to concluding it, because she had made an unconditional offer to purchase her new home and her bank required a separation agreement before it would approve the financing.
 - [8] The separation agreement has not been filed with the court.
 - [9] Their former family home in Richmond was sold as part of the separation process. J. then bought a detached house in Ladner and M. bought a townhouse in Richmond. J.'s house has three bedrooms and a den and is 2,200 square feet. M.'s townhouse has three bedrooms and is 1,600 square feet.
 - [10] The children live with each parent on a week on/week off basis. Their school breaks and vacation time are also shared equally between the parents. They continue to attend school in Richmond and are able to use M.'s home as a base before and after school, even if it is J.'s week to care for them.
 - [11] While there are tensions between them arising from the child support and child expense issues, hence the need for this trial, overall J. and M. have maintained a good level of cooperation in relation to their parenting responsibilities and a civilized tone in their communications.
 - [12] J. is now in a relationship with B.V. ("B."), who lives with her and contributes to the mortgage on her home, as well as to some household expenses.
 - [13] Due to a freak injury that she received during a chiropractic treatment in July of 2013, J. suffers from chronic severe back pain. She has been off work and receiving disability payments at certain times since the separation, including at the point that the trial concluded.
- ### b. The Separation Agreement, Implementation and Modifications
- [14] In the separation agreement the parties' incomes were agreed to be \$87,000 per year for J. and \$116,000 per year for M.
 - [15] They agreed that they would share custody of the children.

- [16] The difference between the table amount of support that would be payable by J. under the Guidelines (\$1,666) and the amount that would be payable by M. (\$2,137) was \$471. The parties agreed to "share the difference" between these amounts--that is, to split the set-off, resulting in a monthly support payment by M. to J. of \$238.50[1].
- [17] J. testified that despite her initial proposal that the straight set-off be used, M. was adamant that this splitting of it be used as the formula in the agreement, because it would result in them each having the same amount to spend on the children. In her evidence she used the example of M. owing \$1,000 for support and her owing \$500. If he paid her the set-off of \$500 she would have \$1,000 to spend on the children and he would have \$500, whereas if they split the set-off they would each have \$750 to spend on them. She found this a logical formula initially and one that was difficult to argue with. The problem that she encountered with it was that "the numbers in the tables don't support or are not equivalent to the actual expenses for the children in the end."
- [18] M. agreed in his cross-examination that during the course of the discussions with J. about child support, the straight set-off of their respective table amounts was one of the models considered.
- [19] While, as I have said previously, J. is not seeking to set the agreement aside on the basis of unfairness in its creation, this sharing of the set-off was one of several aspects that she considered less than fair, but was willing to accept in order to allow her house purchase to complete. A consideration in her decision to accept it was that the agreement provided for future changes if required.
- [20] In addition to the child support formula, the agreement provided that the parents would "each be responsible for the cost of the Children while in [their] care, including appropriate housing, transportation and the duplication of toys, equipment and clothes."
- [21] Special and extraordinary expenses were defined as childcare expenses, medical and dental expenses that exceeded their insurance coverage, extracurricular activities that they agreed on, and any other expenses that met the definitions in the Guidelines. Neither party was to incur an extraordinary expense (for which they intended to seek a contribution from the other party, I infer) without first seeking the other party's permission. These expenses were to be shared in proportion to their respective incomes, after deducting any tax benefit or subsidy that was available for them.
- [22] M.'s contribution to J. for childcare expenses was to be proportionate to their incomes, but would take "into account any tax benefit" to her, thus reducing the amount that actually changed hands.

- [23] Child support, special or extraordinary expenses, M.'s contribution to childcare expenses and the allocation of any federal or provincial child benefit were to be reviewed on May 31 of each year. "If necessary", the parties were to revise the support and their contributions to the special or extraordinary expenses "to ensure that it accords with the requirements" of the Guidelines. To facilitate this process of review and revision they were to provide comprehensive financial disclosure to each other by May 31.
- [24] Despite the provision of the agreement that the parties would each be responsible for the cost of the children while in their care, including responsibility for the duplication of various items in each home, they have in fact shared a much wider range of expenses than would otherwise fall within the definition of special and extraordinary expenses under s. 7 of the Guidelines. In addition to the costs of the children's activities and any significant school fees, the parties also share the cost of clothing, equipment and personal items that the children use when they are in both homes. They have dealt with the allocation of these costs by the use of detailed spreadsheets to itemize the child-related expenses that each of them has incurred. The costs incurred by each parent are then to be reconciled periodically.
- [25] During the summer the children's activities while in one parent's care, such as summer camps, are the entire responsibility of that parent.
- [26] Since the agreement J. and M. have been in a more or less constant process of discussion and negotiation about financial issues relating to the children.
- [27] In cross-examination J. expressed her view that the language of the agreement, which provides for ongoing reviews to ensure that it conforms to the Guidelines, does not restrict the parties to one specific child support formula. In particular, she did not see the split set-off formula as being final and expected (when she entered into it) that both parties would be reasonable if an issue arose that needed adjusting.
- [28] Fortunately they were able to address by consent some of the problems that arose in the implementation of the agreement.
- [29] Fairly early on they changed the formula for sharing childcare expenses, which had originally been calculated after subtracting the tax effect of the childcare benefit. That formula had resulted in J. spending more on childcare than she was receiving in child support and the childcare contribution from M. combined[2].
- [30] In 2012 they agreed that M.'s income for support purposes would include his bonuses (or "commissions"--the parties use these terms interchangeably), which are a regular feature of his compensation.

- [31] In 2013 they agreed that for support-calculation purposes capital gains and dividends would be subtracted from their incomes as shown on Line 150 of their tax returns. This was done to address the fact that the simple action of transferring the shares in her employer company that J. received as part of her compensation into her RRSP triggered a deemed disposition for tax purposes, and a capital gain that she had to pay tax on.
- [32] Employer matching of RRSP contributions was never included in the parents' income for child support purposes under the agreement, so no modification was required.
- [33] J.'s evidence was that since the earliest days of the agreement she had expressed to M. her persistent concern about her cash flow as a result of the amounts she was receiving from him.
- [34] She described this problem as initially resulting from the childcare expense formula in the separation agreement, exacerbated by the delay in settling the distribution of the proceeds from the sale of the family home. After those matters were resolved, her injury and the resulting reduction of her income created an equally significant issue. A further problem in this regard was the lack of timeliness in M.'s reconciliation payments of special and extraordinary expenses and the additional common ones.
- [35] In 2012 J. made an alternative proposal for a child support calculation formula to M., which she described as "fair" in her introduction to the spreadsheets illustrating it. Under this formula, responsibility for the total Guidelines support amounts based on their incomes would be allocated between them based on the proportion that their incomes bore to each other. This resulted in a minor increase in the amount of support that she received, to about 57% of the set-off amount for their incomes at that point. It was implemented for the 2012 and 2013 readjustments of support based on changes in income. J. emphasized that this alternative formula was not something that she was content with in a more general sense-- she was just looking for something fairer than the existing arrangements, and was trying to put something forward that could be agreed to quickly by M.
- [36] After unsatisfactory attempts to resolve her ongoing concerns through negotiation, J. filed a notice of family claim in February of 2013. She testified that although she sought only a divorce in the original notice, she advised M. that she would also raise the issue of child support in her claim if he was unwilling to agree to a new formula for those payments.
- [37] She intended to seek a desk order divorce (that is, an undefended application for a divorce, granted without a court hearing) after filing this notice. Her understanding was that in the course of reviewing her divorce application, a judge would be required to consider the arrangements that had been made for the children, and was not likely to be satisfied that the support for them provided in the existing separation agreement was adequate. When M. would not agree to the changes to the agreement that she requested, she put the divorce application through, hoping that a judge would reject it on that basis.

- [38] When she found out that the divorce application "had not proceeded" (by which I infer she meant that it had not been processed by the court yet) she instead amended her notice of family claim in September 2013, to formally seek the set-off amount. She had notified M. by email in June of that year that she was planning on doing so[3].
- [39] In September of 2014, J. made an interim application to have the child support paid on the basis of the full set-off Justice N. Smith adjourned that application generally, but did adjust the amount of support payable by M. based on the parties' current incomes, under the half set-off formula[4], retroactive to January of that year.
- [40] J. has calculated the difference between the full set-off table amounts of support for the parties at their income levels since June 2013, and the amounts that were actually paid to her by M.:

Dates

Full Monthly Set-off Amount

Monthly Amount Actually Paid by M.

Total Shortfall for that Period

June 2013 - December 2013

\$721

\$416

\$2,137

January 2014 - May 2015

\$1,170

\$585

\$9,950

- [41] If J.'s request for the full set-off amount were made retroactive to June 2013, she calculated that the amount owing to her by M. as of the date of her direct evidence would be \$12,087 as of the start of the trial.
- [42] J. also testified about problems with the timeliness of M.'s repayment of the common expenses that she has incurred. As an illustration of the current state of affairs, she established in cross-examination of M. that as of the date of his testimony in November 2015 he owed her \$908 for certain child-related expenses since the previous July. He initially said he did not know if he had received a receipt for that expense but then agreed that he and J. have not required each other to produce receipts unless specifically requested. He also agreed that the intention of their arrangement, agreed to by him as far back as April of 2012, was to settle expense claims on a monthly basis.

- [43] While he conceded that he was late in dealing with their common expenses, he emphasized that his track record in the preceding four or five years demonstrated that the expense would ultimately be paid without difficulty. As he put it, "there may be in some [cases] a certain amount of delay, I will acknowledge that, but nothing has ever been withheld or not paid " He bristled at "the insinuation that in the big picture expenses are not being paid." It is simply the case that "life gets in the way." He also expressed the view that he does not "need to be nagged" by a person with whom he no longer has any relationship except through their children.
- [44] One cause of delay that he referred to is that J. has closed a bank account that he was previously able to access to pay her electronically, requiring him now to use cheques. Another problem is that the final totals for some of her claims have not yet been resolved. He has some difficulty understanding all of the complicated information on different issues that she provides in the spreadsheet. This was despite his agreement that she had then created a second version of the spreadsheet, which I infer she intended to be more understandable. He considers that some of her expense claims are just "thrown over the wall" for him to pay, without any prior input from him. In those circumstances he needs to understand the claim first, before addressing the issue of repayment. Further, since May of 2015 she has not actually requested that he resolve these particular expenses.
- [45] When pressed further, M. said that there were also some child-related expenses that he was owed by J., but had not submitted yet. Once again he agreed that their plan was to settle expenses monthly, but he explained that in "the real world" it has taken one to three months. He added that he only asks questions of J. about expenses when they exceed his expectations, such as their discussions about their oldest son's cell phone plan.
- [46] When J. then suggested that the full amount owed to her at that point for all common expenses, according to their spreadsheet, was \$1,283.86, he stressed again that even if that looks like the balance, there are also these outstanding items owed to him that are not reflected in the total. J. will certainly receive the net of those amounts from him, he said, which will be much less than her current total once his expenses are subtracted.
- [47] In re-examination he elaborated that delays in payment are sometimes the result of his requests to J. for clarification of an expense, which can ultimately work to her benefit as well as his. In answer to a follow-up question from me, M. said that he is open to developing ways of responding to J.'s requests for repayment in as timely a way as possible.
- [48] M. said that the reason for a delay in paying his child support that previous June was that it followed the date (May 31) that, pursuant to their agreement, the amount of support for which they were each responsible was to be recalculated according to changes in their income in the previous year.
- [49] Pursuant to this most recent (in relation to the trial dates) of annual revisions, M. was paying J. \$813.82 per month in child support.

c. Parent Earnings and the Financial Situation in Each Home

i. J.'s situation

- [50] J. has been with the same employer since the separation. Before her back injury her salary was in the \$90,000 per year range. That injury eventually required her to go on short-term disability in December of 2013, followed by long-term disability until February 2014. She then went back to work on a reduced work week of 30 hours, consisting of two days at the office and two days working from home, which her employer was willing to allow. Her earnings and work-related financial benefits (consisting of a contribution by the employer of 5% of her salary towards the purchase of RRSPs and her ability to use up to 10% of her salary to purchase company shares at a 15% discount) were pro-rated accordingly.
- [51] She agreed during cross-examination that as soon as she is able to handle it physically, she can return immediately to full-time work.
- [52] According to her financial statement, filed in April of 2015, her income for child support purposes was \$57,733.91. This was the situation that she found herself in when she gave her direct evidence in May 2015.
- [53] The assessed value of J.'s home at that point was \$687,000. Her mortgage on it was about \$200,000.
- [54] B. had put approximately \$130,000 towards the mortgage when he moved in, which came from the sale of his own home following his divorce. They now each pay \$1,873.82 per month towards the mortgage. This doubling of contributions means that they have a low amortization rate--four years and ten months as of May 2015.
- [55] B. was not listed as a registered owner of the home, despite his contributions, but J. said that they have "an understanding" in relation to those contributions, which I took to mean an agreement that he will be able to recover them if something happens to their relationship.
- [56] B. also loaned her money to contribute to her RRSPs, which they documented by demand notes. The first one was \$30,000 in 2012. She repaid \$12,000 of it when she received her tax refund. In cross-examination she was unable to be certain of the disposition of her refund that year, as she had also owed \$15,000 to her mother and repaid it, but she was certain that she repaid \$12,000 to B. "at some point". Her total RRSP contribution that year was \$48,358.62. The balance may have come from final distribution of the proceeds of the sale of the family home.
- [57] B. loaned her \$20,000 for RRSP contributions in 2013, but she was unable to describe precisely where the additional \$24,235 that she contributed that year was drawn from.
- [58] The idea behind these loans for RRSPs was to maximize her tax benefits, which also helps her cash flow. J. pointed out that when she and B. reach the status of a common law relationship, some of her current tax benefits will be lost as a result.

- [59] Her RRSPs totalled \$282,000.
- [60] A critical problem for J. is that her rehabilitation from her back injury requires her to be involved in ongoing physiotherapy and Pilates sessions, the cost of which greatly exceeds the extended health benefits that are provided by her employer. When asked why B. had not put her on his extended health plan she said that she had not even considered it, because in her view she and B. were not yet in a common law relationship. They have not yet reached the stage that they are considering any form of marriage, although she hopes that they stay together.
- [61] Because of the injury, which occurred within a month of B. moving in, J. has never been at her full salary at any time since then. B.'s financial input was required immediately to assist her in meeting expenses and their finances have become linked completely, to a greater extent than they would otherwise have intended. Before her injury, the plan was for her to cover all of the expenses in relation to the children.
- [62] They have a joint bank account, for the purpose of transferring money between each other's own accounts, and a joint credit card.
- [63] J. stressed that B. has no obligation towards the children and the plan had been that he would contribute only capital, in the form of paying off the mortgage in preparation for his retirement, so that their lifestyle is sustainable once he retires.
- [64] As a result of this unforeseen reliance on B., it was initially difficult for her to say which of the various household expenses that she had listed in her financial statement she paid entirely on her own and which ones B. contributed to. She explained that they were paying expenses out of whosoever account had money in it at the time. She had tried to complete the financial statement on the basis of what expenses she would be responsible for regardless of B.'s presence.
- [65] After some further questioning by me, J. was able to say that the amounts that she had identified for such expenses as food (although B. treats them to some meals outside the home and she conceded that there was "some mixing" with respect to groceries), property taxes, insurance, and furnishings, represented her own contribution. She initially listed water, sewer and garbage as matters for which she was solely responsible, but later indicated that B. provided a "share" of "utilities".
- [66] However, she emphasized that what she had listed under the "children's expenses" heading were the amounts that she herself pays, separate from any of B.'s contributions.
- [67] She agreed with the suggestion on cross-examination that if B. were paying her rent instead of contributing to the mortgage that would assist with her cash flow issues. However, she stressed that B. had only three years to go until his retirement and should not be precluded from saving for his future by M.'s reduced child support payments.

- [68] In essence, the shortfall between her income and the expenses for which she was to have been solely responsible has been covered by an additional contribution from B., as well as the sale of some of her shares in her employer company that she had been permitted to buy at a discount as an employment benefit.
- [69] In relation to the effects of the injury specifically, she testified that she sold \$15,000 of shares in 2013, which is shown in her 2014 tax return. However, she also purchased \$15,467.20 worth of RRSPs that year, and said that she obtained the funds to do so by selling off investments, something that she cannot afford to do anymore. As of the time she testified, she had sold all of her shares except those she had bought most recently through the employee plan. She described this situation as having "no more buffer".
- [70] Some of the tangible effects of B.'s contributions are that she and the children are able to dine out more than they would otherwise and she has been able to maintain her contributions to expenses like the children's summer camps.
- [71] In relation to the \$325 per month that she has allocated in her financial statement for outside meals just for her and the children, which she acknowledged "sounds high", J. explained that with the children living in Ladner but having activities in Richmond (on the other side of the Massey Tunnel), makes it difficult to get them home for meals on some nights. She also maintained that the \$800 per month that she budgets for food within the home does not include B.
- [72] She also has had to hire a cleaner to cover the housework that she is physically unable to perform herself.
- [73] She has been unable to contribute to the cost of the children's tutoring (which M. had to cover entirely), and could not commit to contributing to a deposit for a school trip to Quebec for their twins in the upcoming year. Her pending tax refunds were also already committed to upcoming expenses.
- [74] J.'s bottom line is that while the standards of living of the children in both parents' homes have been fairly similar, she is spending her capital to achieve that, while in her view M. has resources to spare.
- [75] From her perspective, the main additional expense of shared parenting is that she and M. are both required to maintain homes large enough for all of the children to live in during their time with that parent.
- [76] At the conclusion of the evidence in November of 2015 I allowed her to be re-called to testify about a further change in her employment situation.

- [77] Despite significant rehabilitative efforts, by that point her back pain had reached a level at which she could no longer continue working, and so she had gone back on short-term disability in September, after last working in August. She was continuing to pursue various treatments to improve her condition, including through a specialized pain clinic. She had allowed the children to spend all of August with M., in an attempt to make it easier to keep working despite her pain, but to no avail.
- [78] The ongoing nature of this trial has also been very stressful, which made her physical condition worse.
- [79] Unfortunately, her disability insurer was treating her reduced workload of 30 hours per week following her previous return from disability as her usual full-time hours, with the result that her disability payments were being based on two-thirds of that already-reduced amount (which had been \$2,597 gross per two-week pay period) instead of on the 40 hours that she had been capable of working before her injury occurred. A pay slip for the October 30 pay period showed a gross amount of \$1,761.67, which accords roughly with the two-thirds figure that she predicted. Although she had questioned the disability insurer about its decision, as of the time of her testimony she had not yet received any response.
- [80] After 180 days on short-term disability she expected to go on long-term disability again, at the same rate of two-thirds of what her salary had been at 30 hours per week.
- [81] In the summer of 2015 the estate of B.'s mother was settled and they had been using the money that B. had received from it to "keep going", which I took to mean survive financially.
- [82] In further cross-examination, J. agreed that she is continuing to have income deducted to purchase employee shares even though she is on disability and that, using capital, she and B. are continuing to "double up" on their mortgage payments.
- [83] She had still not investigated the possibility of going on B.'s extended health plan. Her own extended health plan continues to apply while she is on disability.

ii. B.'s Role and Contributions

- [84] B. was called as a witness by M.'s counsel, in order to illustrate the extent of his financial contributions to the household he shares with J. He said that he moved in with J. in June of 2013.
- [85] He is 61 years old. He is divorced and his children from that marriage are adults, so he has no support obligations to them.
- [86] Like J. and M., he works in the technology field. Before his current position he worked for many years in the same company as J.

- [87] His 2014 notice of assessment showed an income of \$123,970 for that year. This figure includes a matching RRSP contribution by the employer. He expected to earn about the same in 2015. His 2013 employment income was \$117,517 but he had received a small merit increase since then.
- [88] Neither his current employer nor his previous one provides him with a pension. He does have extended health benefits in his current position however, which includes coverage for things like physiotherapy. He would be prepared to include J. in his benefits, depending on what the "implications" are (which I infer means the financial implications) of him doing so.
- [89] In addition to their shared bank account and the ability to transfer money from their own separate accounts, as J. had described in her evidence, he agreed that they share a Costco card and do not separately allocate responsibility for each of the purchases made on it.
- [90] He confirmed that J. has had to hire a housecleaner to come every two weeks because of the physical limitations caused by her injury. Because they use a common credit card he was unable to say whether he contributed to the specific cost of the cleaner or not.
- [91] He and J. have had neither the time nor money to do any significant home repairs.
- [92] B. also elaborated on his financial contribution to the home. He loaned J. \$130,000 to pay down the mortgage. They have documented this with a loan agreement that provides for him to receive his money back if the house is sold, plus what I understood to be a small amount of interest.
- [93] He also confirmed what he recalled were \$30,000-32,000 in RRSP-purchase loans to J. and his matching monthly mortgage payments.
- [94] His evidence was that J. had not repaid him for any portion of the amounts he has loaned her. He has not been asked by her to contribute to a specific household expense, nor has he offered. While B. said that he paid for his own household expenses and groceries he agreed that it is hard to distinguish from their bank accounts what amounts went to each expense, and that "his" food and household supplies are not separated out from what is available for the other occupants to use. Similarly, they do not distinguish between which of them buys something that is necessary for the house. However, in response to a question from me, he emphasized that his contributions are definitely sufficient to cover the portions of food and other items that he uses himself.
- [95] A previous order in this litigation requiring that he disclose his banking records had permitted him to redact his own personal expenses, but he agreed that it was difficult to determine which of them had some family element to them. Things on J.'s "side of the ledger", such as the newspaper subscription, could also be seen as partially for his benefit.
- [96] Under cross-examination from J., he elaborated further on his financial situation. He had reached a settlement of his divorce that involved a lump sum payment to his former spouse, which significantly diminished his financial standing. He has only about three years of pre-

retirement earning power left and at the same time has to make sure that J., who has depleted her savings, "gets through" financially. He described himself as being very worried about setting himself up for retirement and asserted that he was not about to assume responsibility for J.'s children's expenses while he was in that situation. Despite these worries, he has contributed to making up the shortfall that results from J.'s additional expenses, such as her lawyer's fees and her various physical rehabilitation programs.

iii. M.'s Situation

[97] M.'s incomes from Line 150 of his income tax returns for the post-separation period were:

2011: \$146,422

2012: \$138,598

2013: \$138,297

2014: \$164,846

His March 2015 financial statement listed his income for support purposes as \$138,298.

[98] He changed employers in 2014. His base salary was approximately the same as in his previous job. The overall compensation plan when he joined this new employer included commissions that were calculated monthly on the basis of the company's success. However, as of the time he gave evidence, this commission structure was changing--to be based on individual performance and issued quarterly. He did not know yet what the effect of that change would be on his income.

[99] When he took the new job he was required to exercise the options that he held to purchase shares in his former employer, and turning them into shares resulted in a capital gain to him of \$10,000 for that year. This partly accounts for his higher income figure for 2014.

[100] In cross-examination, J. pressed him on the implausibility of having changed jobs without knowing what the bonus structure would be. He maintained that he had no idea what he was going to receive and pointed out, as a reason for making the change, that his new employer provides better career opportunities because its headquarters are in Vancouver.

[101] The other benefits of this position, such as an employee share purchase plan of 4-5% of his income, with a matching employer contribution--are similar to his previous job.

[102] He expected his salary and bonus structure to continue along the same lines as it had in the past, but he did not foresee redeeming shares at the same level. He had done it for specific purposes--taking advantage of RRSP contribution room and replacing his older vehicle, as I will discuss--but it is "not a sustainable pattern going forward".

- [103] Although his new job involves a slight increase in compensation, it has so far required three trips out of town of seven to ten days each, so M. was considering levelling off or decreasing his compensation in return for more time with the children. He clarified in cross-examination that he had done "three or four" such trips so far that year, "of which each trip was on the order of four to seven days." There was nothing else planned of that nature for the rest of the calendar year.
- [104] The document showing his April 15, 2015 pay period showed a year-to-date income of \$41,011, of which \$4,583 was for commissions. In cross-examination J. focused on the fact that this extrapolated to an annual income of \$159,663.30, including a projection of \$3,452.85 in commissions. She noted the absence of any indication in the terms of his employment that he had disclosed to her of how these commissions or other non-salary compensation were to be determined.
- [105] She also pointed out the disparity in M.'s income as claimed in his financial statement filed for the September 2014 chambers application (\$138,000) and his actual income for that year based on his income tax return (approximately \$165,000).
- [106] M. subsequently produced a pay stub from October 30, 2015, showing a year-to-date income of \$118,498 including commissions of \$6,510. This extrapolates to approximately \$142,000 per year, but the year-to-date total in October included about \$5,775 in expense claims, so his projected income in his financial statement appears roughly accurate.
- [107] As of his most recent financial statement in March of 2015, M. had about \$257,000 in equity in his home, which he valued at \$557,000, and \$329,000 in cash, stocks and RRSPs. His only secured debt was his mortgage and he had no unsecured debt.
- [108] An important consideration for him when purchasing a new home after the sale of the family home was continuity for the children. His townhouse is a block from where the younger children attend elementary school and within walking distance of the elder child's high school. The size of this home is not ideal--he would prefer it if the male children did not have to share a room and there was a den.
- [109] He purchased it for \$604,000-605,000. He ended up with a mortgage of \$330,000 after adding \$30,000 to it for anticipated renovations and other expenses, such as furniture and carpet replacement. The renovations cost \$5,000-7,000. He initially included the cost of replacing his vehicle in his evidence for the purpose of this additional mortgage amount, but later attributed that cost to a different transaction.
- [110] Renovations to the kitchen and other areas are also needed, but M. said that he needed to save up for them and also resolve the uncertainty about his future cash flow that arises from this litigation.

- [111] He made a sizeable RRSP purchase in 2013--\$32,541.66, which he financed by a loan, other money he had put aside and \$5,000-6,000 in matching funds from his employer. He is generally averse to carrying debt and had paid the loan off by the time he gave his evidence. In 2014 he sold \$55,000 of his shares in his former employer to buy a new vehicle and take the children on a trip to New York and Quebec. In cross-examination he said that the trip cost \$5,000-6,000.
- [112] M. prepared a budget specifically for the children's expenses, by means of which he concluded that 60% of his annual expenses (which in the most recent financial statement were \$126,607) were attributable to them.
- [113] In contrast to J.'s more substantial monthly food bill, M. estimated his at \$432 per month. He arrived at this figure by dividing his yearly food receipts by 12.
- [114] He agreed with the suggestion on cross-examination that he pays about \$1,800 per month for housing, including strata fees.
- [115] In addition to the shared common expenses for the children, he concluded that two of the children required tutors because of academic difficulties and, after J. said she could not afford it, he organized and paid for the tutoring himself. This costs him \$312 per month. This may increase because their third child also has some subjects in which she may need assistance.
- [116] His monthly total for child-related expenses that he covers himself, including tutoring, is \$802. He contributes \$375 to registered education savings plans (RESPs) for the children as well. His parents contribute to a separate RESP and they coordinate their respective amounts so as not to exceed the amount that attracts a corresponding government grant.
- [117] He agreed that his parents give the children dinner twice per month, on the nights they have dance classes. He does not repay his parents for the food but takes them out for lunch on the weekends to thank them.
- [118] The children's MSP premiums are covered through M.'s employment. This is a taxable benefit to him but J. does not contribute anything to him to cover it. He kept J. on his extended medical plan until 2014, when the change in his employment prevented him from including her in his new benefits. In cross-examination he clarified that J.'s own extended health plan had covered her prescriptions, and that his plan has a \$500 annual limit on alternative care such as physiotherapy. What he had meant to say in his direct evidence, he explained, was that he had submitted claims for her under his plan after her limits had been reached. He also agreed that the children's prescriptions are submitted through her plan first, which remains in place despite the fact she is on disability.

3. THE PARTIES' POSITIONS

- [119] The essential points argued by each party can be distilled as follows.

a. J.'s Submission

- (i) She only agreed to use the half set-off formula in the separation agreement at M.'s insistence. The amount of support that it provides has turned out to be insufficient to meet the children's needs and ensure an appropriate standard of living when they are in her care. She has repeatedly advised M. of this difficulty over the years since then, without effect.
- (ii) Although the review provision of the agreement could have allowed the parties to arrive at a new formula for child support by consent, in view of M.'s ongoing resistance to meaningful changes she is seeking an initial order, pursuant to s. 15. 1 of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), or s. 148 of the Family Law Act, S.B.C. 2011, c. 25 [FLA], that applies the full set-off amount.
- (iii) She relies on "Section 9 and Second Families", a paper that was prepared by E. Birnboim and D. Muryinka in 2014 for the Ontario Bar Association Family Law Section, for the proposition that "in the vastly overwhelming majority of cases" courts applying s. 9 have awarded support somewhere between the set-off amount and the full table amount for the higher income-earning parent.
- (iv) There are no special circumstances present in this case that should result in M. paying an amount below the set-off.
- (v) Courts have repeatedly pointed out that an agreement cannot override the proper application of the Guidelines and that support is the right of the child and cannot be bargained away--for example, *Kopp v. Kopp*, 2012 BCCA 140 at para. 37.
- (vi) B.'s income should not be taken into account when determining the amount of child support. This is not a claim for undue hardship, where that income would be relevant. B.'s involvement in J.'s finances was unintentional, necessitated by her injury, and, because it is directed to household expenses that she is otherwise unable to cover and mortgage payments, it does not leave her with more disposable income. B. is entitled to give priority to his own retirement needs by maximizing his contribution to the equity in the home.
- (vii) Most importantly, the objective of the s. 9 analysis is an equitable division of child support costs between the parents, not an equalization of household incomes when one parent has re-partnered. Awarding less than the set-off in that situation is effectively to shift the child support obligation to the new spouse: *Evans v. Watson*, 2010 ONSC 1550 at para.18.
- (viii) In future, the incomes of the parties for Guidelines purposes should be based on their Line 150 income (subject, I infer, to the permitted deductions under Schedule III) and the various exemptions from that figure that they have agreed to over the years under the agreement should be eliminated. J. submits that M. has not made reliable disclosure of his financial affairs and so a return to the default means of income determination under the Guidelines is needed to ensure accuracy.

(ix) In addition, there needs to be an order that adjusts their proportional sharing of special and extraordinary expenses, as well as the broader common ones that they have been sharing, according to their current incomes. M. refused to do this after the interim order in 2014. The order also has to require timely reconciliation of expense claims, which M. has also refused to do.

(x) Finally, there needs to be an order "reconciling" the child support payments back to June 2013, when she advised M. of her intention to seek the set-off in her notice of family claim, in accordance with the decision of the Supreme Court of Canada in *D.B.S. v. S.R.G.; L.J.W. v. T.A.R.*; *Henry v. Henry*; *Hiemstra v. Hiemstra*, 2006 SCC 37 [D.B.S.].

b. M.'s Submission

(i) The parties reached a separation agreement that both believed was fair, after receiving independent legal advice.

(ii) This included sharing a broader range of common expenses than would be covered by special and extraordinary expenses under s. 7 of the Guidelines. This has benefitted the children.

(iii) Section 150(2) of the FLA has created an enhanced basis for upholding child support agreements that was available under the Family Relations Act. That section permits a court to uphold the agreement if it concludes that "reasonable arrangements" for support of the children have been made by the parties, even though the amounts may differ from the Guidelines.

(iv) Another judge of this Court, in *R.M. v. N.M.*, 2014 BCSC 1755, at paras. 146, 150-152, has concluded that s. 148 of the FLA, which J. relies on, does not permit child support agreements to be varied retroactively.

(v) When determining whether reasonable arrangements have been made, the court must consider the amount of support that would be ordered pursuant to the Guidelines. In the case of shared parenting, that involves an application of s. 9 of the Guidelines. Its application is governed by the leading case of *Contino v. Leonelli-Contino*, [2005] 3 S.C.R. 217.

(vi) Under a proper s. 9 analysis, there is no presumption that any particular amount of child support should be awarded--set-off, full table amount or otherwise. In particular, no "special circumstances" are required before arriving at something other than the set-off, as J. asserts. All of the financial circumstances of the parents must be considered, including the contribution of any new spouses of the parents.

(vii) The cases relied on by J. that assert that child support agreements will be subordinated to the Guidelines as a matter of course were not dealing with situations of shared parenting, which call for the more nuanced s. 9 analysis.

(viii) In this case, there is no evidence that the children's needs are not being met or will not be met in future, if the agreement is upheld. Absent evidence that the children's interests are being compromised by the agreement, it should not be changed.

(ix) J.'s cash flow problems are a consequence of her taking on a more expensive house than she could afford and continuing to contribute to her employee share-purchase plan even while she is on disability. In contrast, M.'s housing choices were more attuned to his financial situation and, in terms of location, the needs of the children.

(x) When they adjusted income annually for support purposes, J. has received all of the material that M. is required to provide under the agreement, so there is no substance to her claim that he has not been forthcoming. She herself does not come to the disclosure process with clean hands, he argues, because of her resistance to providing information about B.'s income until she was required to do so by a court order. On that note, B. never did provide any indication of what his assets and liabilities are, which would also have formed a relevant part of the s. 9 analysis.

(xi) Because her income is uncertain due to the disability issue, J.'s previous year's income should be used for Guidelines purposes. This is consistent with the approach under the agreement, which adjusts income and support payments annually based on information from the previous tax year.

(xii) M.'s income was unusually high in 2014 because of the requirement that he exercise his options on the shares from his previous employer once he changed jobs, resulting in a capital gain. An average of the two previous years yields an income for 2014 that is more in keeping with his history of earnings.

(xiii) In adjusting M.'s income in that manner, the set-off of the parties' respective table amounts for 2014 would be \$1,148.

(xiv) Because of the broad sharing of common expenses, which was not fully explored in the documentary evidence, it is difficult to "parse out" the expenses of each party in relation to the children.

(xv) M.'s "children's budget" indicates that he spends \$3,245.60 per month on the children. J. did not prepare a children's budget. In addition, because all of her financial statements post-date B.'s arrival in her home, J.'s own contributions to the children's requirements cannot be separated from his in those statements.

(xvi) J.'s net worth actually increased by about \$44,000 between the time of her two financial statements, which tends to undermine her claim to be struggling. M.'s net worth is slightly higher, but did not increase as much as J.'s over that same period. What can be gleaned from the budgets is that J. has been able to meet the needs of the children while still increasing her asset base somewhat.

(xvii) Courts have repeatedly considered the income of the parents' new partners when assessing the overall standard of living for the children in each household.

(xviii) In *M.D.H. v. M.N.H.*, 2013 BCSC 248, as part of his s. 9 analysis, the chambers judge used the "standard of living algorithms" found in Schedule II of the Guidelines (for use in hardship claims pursuant to s. 10) to calculate the ratio of each household income--meaning the proportion that the total household income, adjusted for the payment or receipt of child support, bears to the poverty line standard for the number of people in each home. The higher the ratio, the higher the standard of living. Measured in that manner, taking into account M.'s payment of support and B.'s income, J. has a higher standard than M. does.

(xix) Thus, "reasonable arrangements" for the support of the children, as envisioned in s. 150(2) of the FLA, have certainly been made here, and the agreement should not be disturbed. The parties are situated similarly once B.'s income is taken into account. Indeed, if the support regime were to be changed from what is required in the agreement, it might actually result in lower support payments by M.

(xx) With respect to special and extraordinary expenses, Contino permits these expenses to be included in the s. 9 analysis. In this case the broad range of common expenses that are shared by the parties should be seen as part of the overall support regime between them, and it is one of the reasons that the payment of the half set-off is appropriate. Quite aside from its financial justification, this arrangement is in the children's best interests, because it allows greater certainty on which expenses will be shared and shields the children from conflict between parents about what is included or not that would otherwise result.

(xxi) If a straight set-off of child support is granted as J. seeks, M. would then prefer to see the expenses that are shared between the parties restricted to only those that are properly justifiable within s. 7 of the Guidelines.

(xxii) With respect to a potential retroactive award to J. if the support is changed, M.'s counsel points out, taking into account the relevant factors identified in *D.B.S.*, that there has been no blameworthy conduct on M.'s part; B. has been in J.'s household and contributing for the entire period for which retroactive support is claimed; there has been insufficient financial disclosure to fully assess his contribution; M. has relied on the existing agreement to structure his affairs; J. has previously described the agreement as fair; she has taken inconsistent positions about the effective date she is claiming from, and she has already benefitted from the retroactive award to January 2014 that was made on the interim application.

c. J.'s Reply Submission

- (i) Her request to have the changes to the support amounts made effective as of June 2013 should not be characterized as an application for retroactive support, but only as a "reconciliation" of those amounts, from the date of notice to M. that an increase was needed.
- (ii) Her past comments about the fairness of the agreement should be seen in the context of her trying to achieve something that was fairer than the initial half set-off arrangement, not as an acceptance of something short of what she now seeks.

- (iii) An agreement that requires her to reduce her assets and depend on B. to contribute in areas where his involvement was not foreseen, in order to uphold the same standard of living for the children in her home as in M.'s, cannot be considered fair.
- (iv) She disputes that a significant number of the currently-shared expenses would actually fall outside the ambit of s. 7 of the Guidelines.
- (v) If it is considered at all, the effect of B.'s financial input should be moderated somewhat by the fact that as a dual-income family she and B. are in a less advantageous tax position than M.
- (vi) Maximizing her employee share purchases is a financially prudent action for her family, including the children, not a self-interested act, as M. portrays it. And her supposed increase in net worth is illusory--it was created solely by B.'s efforts to pay down the mortgage to increase his pre-retirement equity. In any case, asset values are unhelpful when considering the amount of money that is available to each parent to uphold the necessary standard of living.
- (vii) For all his emphasis on her having an extravagant home relative to her means, M.'s monthly housing costs, including strata fees, are about the same as hers. M. has also renovated his home, which she has been unable to do.
- (viii) The most reasonable conclusion to be drawn from the evidence is that the cost of food, clothing and personal items is substantially the same in both households.

4. DISCUSSION

a. Principles

i. Varying Child Support Agreements

[120] In her notice of family claim, J.'s application to vary the separation agreement was based on ss. 148 and 150 of the FLA, so it will not be necessary to consider s. 15.1 of the Divorce Act. The relevant portions of these FLA provisions are:

Agreements respecting child support

148(3) On application by a party, the court may set aside or replace with an order all or part of an agreement respecting child support if the court would make a different order on consideration of the matters set out in section 150

Determining child support

150(1) If a court makes an order respecting child support, the amount of child support must be determined in accordance with the child support guidelines.

- (2) Despite subsection (1), a court may order child support in an amount different from that required by the child support guidelines if

- (a) the parties have an agreement respecting child support, and
- (b) the court is satisfied that reasonable arrangements have been made for the support of the child.
- (3) The court must consider the child support guidelines for the purposes of subsection (2), but must not consider arrangements made for the support of the child to be unreasonable only because the amount required under the child support guidelines differs from those arrangements.

[121] By regulation, the Guidelines have been adopted as the "guidelines" for determining child support under s. 150 of the FLA.

[122] As a result, when considering whether to change a child support agreement, it is necessary to consider all of the matters in s. 150. The first step is to proceed under s-s (1) and determine what an application of the Guidelines would produce. That is what the court will initially consider in deciding whether it "would make a different order" than what is provided in the agreement. However, it is also open to the party seeking to uphold the agreement to refer the court to s-s (2) and ask it to find that reasonable arrangements have been made for the support of the children. If it makes that finding then it is not a situation in which it would "make a different order" and set aside the agreement or replace it with an order[5].

[123] Because this is a shared custody situation, an application of s. 9 of the Guidelines will produce the amount of child support against which the amount in the agreement should be compared. Even if that amount is higher than the agreement amount, it is still open to me to be satisfied that "reasonable arrangements" are in place for the children and uphold the agreement.

[124] I mention this last point because M.'s submissions, and a case cited in support of them-- P.A.B.H. v. C.A.B., 2015 BCPC 348, seem to suggest that one goes straight to the question of reasonable arrangements and applies s. 9 to decide if they are reasonable or not. In my opinion, s-s (2) and its concept of reasonable arrangements offers an exception to the usual result of a s. 9 analysis, to allow courts to uphold those agreements that still provide sufficient support despite falling short under that analysis.

ii. Child Support in Shared Custody Situations

[125] Section 9 provides:

Shared custody

9 Where a spouse exercises a right of access to, or has physical custody of, a child for not less than 40 per cent of the time over the course of a year, the amount of the child support order must be determined by taking into account

- (a) the amounts set out in the applicable tables for each of the spouses;
- (b) the increased costs of shared custody arrangements; and
- (c) the conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought.

[126] As I mentioned when summarizing M.'s submissions, Contino is the leading case on the application of s. 9. In his annotation of that case, at (2005) 19 R.F.L. (6th) 272 at 277-284 Professor D.A. Rollie Thompson provided a helpful explanation of the essential principles that it establishes.

[127] First, Professor Thompson set out the previous misconceptions about s. 9 that Contino dispelled:

- (1) No Presumption of Table Amount Section 9 is not a deviation or departure provision, like ss. 3(2)(b) or 4, which require the payor to convince the court to depart from the presumptive full table amount (plus any section 7 contributions). Section 9 explicitly creates a separate and different method to determine support in shared custody cases (paras. 22-29).
- (2) No Automatic Reduction for Shared Custody. Equally, there is no presumption in favour of reducing child support downward from the Guidelines amount. After a proper application of s. 9, a court may conclude the full amount is justified. The "deviation" is one of method, not amount (paras. 30-31).
- (3) No Formula Is Mandated. A "formulaic" or "mathematical" approach, such as that employed by the motions judge, is rejected (paras. 38, 74). Even the simple set-off "serves as the starting point, but it cannot be the end of the inquiry. It has no presumptive value." (para. 49) "Any attempt to apply strict formulae will fail to recognize the reality of various families." (para. 82)
- (4) No Use of Pro-rated Set-off. The straight or simple set-off of table amounts is the proper starting point under s. 9. The pro-rated set-off should not be used as it has a disproportionate impact upon the lower income spouse (para. 44) .
- (5) No Multipliers. Multipliers of any kind are rejected, whether 50 per cent or any other percentage, as they make assumptions about additional costs An adjustment for increased costs is already reflected in the use of the full (rather than pro-rated) table amounts in the simple set-off.
- (6) No Need to Separate Out Section 7 Expenses. Section 9(c) confers a broad discretion, one which allows direct examination of special or extraordinary expenses along with all the other factors. In a shared custody case, section 9(c) is "conspicuously broader" than s. 7 (para. 71), which enables a court to allow expenses that would not fit the exhaustive listing of s. 7

- (7) No Need to Resort to Section 10. The Ontario Court of Appeal was wrong to suggest that a reduction in support under s. 9 might cause "undue hardship", which in turn might require the use of s. 10 of the Guidelines. A court has full discretion under s. 9(c) to do the right thing, to exercise its discretion to avoid undue hardship, apart from "an extraordinary situation" (para. 72).

[Emphasis in original.]

[128] He then summarized the procedure for applying the three subsections of s. 9:

- (1) Determine the Simple Set-Off Amount. The starting point under s. 9(a) is the simple or straight set-off of each parent's table amount for the number of children involved in the shared custody arrangement. No pro-rating, no multiplier (paras. 40-51).
- (2) Review the Child Expense Budgets. A court must look at the parents' actual spending patterns, based upon child expense budgets, and not just make assumptions about spending. Further, a court should look at all the expenses of both parents under s. 9(b): not just the additional expenses resulting from an increase in access, not just the variable or fixed expenses, not just the expenses of the recipient parent. Under s. 9(b), a court has two concerns: (i) the overall increased total costs of child-rearing for both parents, especially duplicated costs; and (ii) any disproportionate assumption of spending by one parent or the other (paras. 52-53).

These expenses should be "apportioned between the parents in accordance with their respective incomes" (para. 53), to "verify" the set-off (para. 77) and to determine "the need for significant adjustments to the set-off amounts" (para. 78).

- (3) Consider the Ability of Each Parent to Bear the Increased Costs of Shared Custody and the Standard of Living for the Children in Each Household. The consideration of these two factors lies at the heart of the s. 9(c) analysis, set out at paras. 54-72, especially paras. 69-70. In assessing each parent's ability to bear the increased costs of shared custody, a court should look at the income levels of each parent, the disparity in incomes, and the assets and liabilities of each.

The child's standard of living in each household is "particularly useful for the exercise of discretion in a predictable manner" (para. 70). The children should not experience "a significant variation in the standard of living ... as they move from one household to another" (para. 51). As the term "household" is used, the incomes and resources of new partners in each household would presumably be relevant.

- (4) Distinguish Between Initial Orders or Agreements and Variations. "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." (para. 55) A recipient parent "may have validly incurred expenses based on legitimate expectations about how much child support would be provided", especially for fixed costs (para. 55).

The first three steps should then make it easier to resolve child support in initial shared custody arrangements.

A few points about this method... First, the budgets and apportionment in Step No. 2 is not the method of calculating child support under s. 9 but a cross-check to verify the amount derived from the simple set-off of table amounts, to determine whether there should be an adjustment up or down from the set-off. Second, in assembling the child expense budgets under s. 9, there is no need to separate out s. 7 expenses and the analysis is not restricted to s. 7's exhaustive list of expenses, e.g. "ordinary" expenses for extracurricular activities can be taken into account. Third, it would appear that the simple set-off amount looms larger "in cases where there is limited information and the incomes of the parties are not widely divergent" and a variation is not involved (para. 41). Fourth, the precise allocation of the last three steps between factors (b) and (c) of section 9 is not always clear and consistent, even if the steps are clear[6].

[Emphasis in original.]

- [129] A question left unanswered by Contino was the precise extent to which the income provided by a new spouse of one of the parents is to be taken into account in this process. The recent decision of *B.P.E. v. A.E.*, 2016 BCCA 335 brought some clarity to this issue:
- [51] There has been limited consideration of the weight to be afforded to a new partner's income in shared custody situations, particularly at the appellate level
- [52] If the new partner's income is to be taken into account, it is under the rubric of "the conditions, means, needs and other circumstances of each spouse" considered in s. 9(c).
- [54] Household income is properly taken into account at the stage when the court considers the effect of payment of table amounts of child support on comparative living standards, as in *Corsie v. Taylor*, 2006 BCSC 528, where the payor was ordered to pay more than the set-off amount because the substantial income of her second spouse resulted in her financial situation being "considerably better" than that of the children's father. Similarly, in *L.A.B. v. M.L.B.*, 2012 BCSC 1066, the court found there was a significant (and growing) divergence in the standards of living between the father's and mother's households. Attempting "to attenuate the discrepancies between the two homes and yet remain alive to the realities of the financial situation" Barrow J. ordered the payor to pay two-thirds of the set-off amount despite approximately equal household incomes.
- [55] Where payment of the set-off amounts will not cause or contribute to disparity, as in *Franke v. Franke*, 2008 BCSC 1145 household income is less relevant. In *Franke, Joyce J.*, correctly, in my opinion, required the payor spouse to pay the full set-off amount, based on the very disparate incomes of the spouses, despite the fact household incomes were roughly equivalent. He held:

- [59] With regard to the current income available to support [the child of the marriage] while the incomes of the plaintiff and defendant are in a ratio of 72:28, the household incomes of the parties are not as disparate. The income of the plaintiff and her spouse combined is about \$113,000 and that of the defendant and his fiancé is about \$148,000, a ratio of about 57:43. They have ample income to meet the expenses in relation to Matthew that they claim.
- [62] The set-off amount calculable under s. 9(a) accounts for two incomes: the earnings of the biological parents. Establishing the quantum of these incomes on the evidence may be difficult, but the framework is clear and the outcome predictable. Varying support to account for third and fourth incomes under s. 9(c) as a matter of course would degrade the certainty and predictability of the legislative scheme and risk returning us to the ad hoc unpredictability of the old child support regime. It tends to increase the volatility of child support obligations. By contrast, giving weight to total household incomes for a more limited purpose -- that is, to assess whether basic needs can be met and whether disparate standards of living between households can be avoided -- maintains the flexibility of the s. 9 scheme while drawing predictable boundaries around the s. 9(c) enquiry.
- [65] Limiting the consideration of household incomes, to some extent, should alleviate Professor Thompson's concern about requiring a payee parent to show they have limited or no access to their new partner's income. That second spouse's income or assets will not be relevant to the s. 9(c) enquiry unless it can be said that payment of the set-off amount to the payee's household will create or exacerbate a disparity.

[Italics in original; underline emphasis added.]

iii. Retroactive Claims for Child Support

- [130] M.'s counsel cited R.M., which, as I have mentioned, held that s. 148 does not permit a court to vary an agreement retroactively, as J. seeks here. The trial judge in that case attached significance to the absence of the word "retroactively" in the section, in contrast to its inclusion in s. 152, which deals with the variation of orders. However, he also concluded, after applying the considerations in s. 150, that he would not make a different order than the agreement between the parties provided for in any event.
- [131] Although M.'s counsel has also provided a full analysis of the principles governing a retroactive support order pursuant to the D.B.S. decision, if I am bound to follow R.M. then regardless of D.B.S. it would not be open to me to vary this separation agreement under the FLA in a way that has a retroactive effect on support.
- [132] However, the decision of T.L.A. v. M.R., 2015 BCPC 151 points out that because the judge in R.M. concluded that the claimant had not met the burden of justifying a variation pursuant to s. 148(3), his additional conclusion that the section could not operate retroactively was actually obiter dicta.

- [133] T.L.A. also points out that the Ministry of Justice, in its explanatory material accompanying the proclamation of the FLA, has stated that the inclusion of the word "retroactively" in s. 152, governing support orders, was intended to overcome the effect of a Court of Appeal decision under the Family Relations Act which had doubted the ability of courts to make orders retroactively reducing arrears. Thus, the omission of that word from s. 148 may not have the significance that the judge in R.M. attached to it.
- [134] T.L.A. also noted that s. 164(5), which also does not contain any reference to retroactivity, was applied with retroactive effect in this Court in *Megson v. Megson*, 2014 BCSC 2467.
- [135] T.L.A. was followed in *S.J.D. v. S.A.G.*, 2015 BCPC 370, which also pointed out that another decision of this Court--*Isacson v. Isacson*, 2014 BCSC 2351, decided shortly after R.M., varied child support payable under an agreement with retroactive effect, without mentioning R.M.
- [136] I agree that the conclusion in R.M. about the inability to apply s.148 retroactively is obiter. Even if I am incorrect, I conclude that there is a sufficient divergence of opinion in this Court on the issue that, notwithstanding the usual principles of judicial comity, it is open to me to depart from R.M. and award retroactive child support pursuant to s. 148, if J. is successful in varying the agreement and the pre-conditions for a retroactive award are otherwise met.
- [137] As to the principles governing a retroactive award under D.B.S., for the sake of convenience only I will refer to the summary of them that I provided in *Steward v. Ferguson*, 2012 BCSC 279:
- [60] An obligation to pay retroactive support arises when the payor parent receives effective notice, which is defined at para. 121 as "any indication by the recipient parent that child support ... needs to be re-negotiated." Formal notice or the institution of legal proceedings is not required to trigger that obligation.
- [61] Specific factors that should be taken into account in deciding whether an award of retroactive child support is appropriate are: (1) the circumstances surrounding any delay in seeking the support; (2) the conduct of the payor parent; (3) the child's circumstances; and (4) any hardship to the payor parent resulting from the retroactive award.
- [62] Normally an award will not go back farther than three years to the date of effective notice. However, where the payor parent has engaged in blameworthy conduct, the date when the circumstances changed materially will be the presumptive start date of any award.
- b. Application
- i. Whether to Vary the Support Provisions of the Separation Agreement
- [138] First of all, it is well established that the most current information about income should be used when calculating support: *Fuzi v. Fuzi*, [1999] B.C.J. No. 2263 (S.C.). Thus I intend to rely on the parties' most recent respective pay slips, which were entered at the end of the

evidence in November 2015, and extrapolate them to a yearly income, rather than on their notices of assessment for the previous calendar year. In my opinion, it begs the question to use the separation agreement's formula for calculating changes to income for support purposes in the s. 9 analysis, as M.'s counsel suggested, when the very issue I have to decide is the adequacy of support available under the agreement. I also disagree with M.'s counsel that there was anything in J.'s evidence about going back onto disability status that suggested that it would necessarily be a brief process, especially when it is considered in light of her entire post-injury work history. I found that her evidence supports quite a pessimistic outlook, unfortunately.

- [139] Her disability income at the time she gave evidence last works out to \$45,803 per year. As I have said previously, M.'s most recent pay slip minus reimbursement for expenses is in keeping with the annual income of \$138,000 declared in his most recent financial statement.
- [140] The set-off of their table amounts at these incomes would be \$1,622.22 (\$2,540 - \$917.78). This is the amount that must be "verified" or "cross-checked" against the actual expenses of the parents in the Contino process, as Professor Thompson puts it.
- [141] I agree with M.'s counsel that on the current evidence it is not possible to determine with any certainty the dollar amount of the additional common expenses that are shared proportionally by the parties. We only have an example of the type of spreadsheets that are used, not the entire record of these expenses and their reconciliation. Clearly they are quite complex documents and it would be unsafe for me to draw any broad conclusions about what gets spent based on what has been provided. What is clear is that these expenses extend well beyond what would be required pursuant to s. 7 of the Guidelines and the effect of sharing them is to reduce the duplication of clothing and personal items in each parent's home. As a result, the costs of maintaining two homes for the children, a relevant consideration in the Contino analysis, has been shared more fully and equitably between the parents than in many cases. I also conclude that this arrangement offers some net benefit to J., in the sense that she receives a contribution from M. that exceeds her own (albeit not in the proportions of their current incomes) for children's items that would otherwise be her sole responsibility and would have to be covered out of her main child support payment.
- [142] M. provided a children's budget allocating 60% of his general household expenses (which total \$10,555.65 per month) to the children, plus 100% of the \$760 per month for expenses that are specifically required for them. (These specific children's expenses total \$802 per month in his most recent financial statement, which I will rely on.)

[143] The monthly children's expenses in J.'s latest financial statement have the very similar total of \$749 per month. Her total monthly expenses are also quite similar--\$9,900.37. She did not allocate a specific percentage of those expenses to the children as M. did. While she referred to B.'s assistance with making ends meet (and his income will be relevant at the next stage of the analysis), when she went through her expenses on a line-item basis she took responsibility for almost all of them.

[144] I do not think that it is appropriate to simply apply a 60% figure to M.'s overall costs to arrive at the portion required for the children, or to accept everything that he has included under his children's budget. He includes items like homeowner's insurance, strata fees and utilities, but has not demonstrated that they would be meaningfully lower if he was not required to shelter the children. As another example, I am not convinced that he would live in a home that cost him only 40% of his current mortgage payments if the children did not live with him half of the time.

[145] Instead, I will add some additional expenses from his last financial statement that I am certain are increased as a result of the children's requirements, using the percentages that he has given them in his children's budget. This results in adding:

50% of food ($\$432.83 \times 50\%$) \$216.42

60% of meals outside the home ($\$389.35 \times 60\%$) \$233.61

[146] That totals \$450.03. To his specific child-related totals in his list of expenses in that financial statement I would also add a RESP contribution of \$375 per month (which was listed under "Savings" but seems to me to be a child-related expense[7]) and the \$375 per month for school trips that he listed in his children's budget. This results in a more focused and realistic child-related budget of \$2,002.03 per month.

[147] Engaging in the same exercise with respect to J.'s entire budget, and using M.'s proposed percentages for the sake of comparison yields the following additional expenses:

50% of food ($\$812.50 \times 50\%$) \$406.25

60% of meals outside the home ($\$325 \times 60\%$) \$195

[148] This totals \$601.25. Like M., she should also have the \$312.50 per month that she pays for the children's RESPs added to her budget. When these two figures are added to her specifically child-related totals in her list of expenses in the last financial statement (\$749) it results in a total child-related budget of \$1,662.75.

- [149] The current incomes I have found for M. and J. are \$138,000 and \$45,803 respectively. M.'s current income is therefore in a ratio of approximately 75:25 to J.'s. Allocating the specific monthly expenses for the children (total \$3,664.78) between them would result in him paying \$2,748.58 of them and J. paying \$916.19. The difference between those amounts is \$1,832.39, which is \$207.17 more than the set-off at their table amounts of income of \$1,622.22.
- [150] Finally there is the inquiry under s. 9(c), which, as Professor Thompson explains, concerns the ability of each parent to bear the increased costs of shared custody and the standard of living of the children in each household.
- [151] As I have mentioned, M.'s income is in a ratio of 75:25 to J.'s. When B.'s income, based on the most recent information provided at the trial, of \$123,970 is added to J.'s, the overall household incomes are at a ratio of 45:55.
- [152] Despite the extent to which each party dwelled on the other's finances in their submissions, I do not find that there is really that great a disparity in their overall financial positions, aside from their respective current incomes. J.'s home has a higher assessed value and because of B.'s contributions her mortgage is smaller. M. has a more valuable vehicle, significantly more liquid assets (due in part to J.'s past sales of her company shares to make ends meet) and a somewhat lower total of pensions and RRSPs. J. appears more focused on enhancing the equity in her home ahead of B.'s retirement while M. seems to be more frugal and debt-averse. Neither approach is necessarily preferable. To that extent the positions taken by both parties in this trial miss the mark somewhat. Neither J.'s cash flow problems nor M.'s allegations of her profligate spending are helpful considerations here, except to the extent that they shed light on the equitable sharing of their financial responsibility for the support of the children.
- [153] Nor was there any evidence of a disparity in the standards of living experienced by the children in each home. J.'s cash flow difficulties have required M. to shoulder the burden of the children's required tutoring and a major school trip, but these are benefits that the children experience at large, not just in his home, and in any event his responsibility for them was shown to his credit when the set-off was verified in the comparison of budgets under s. 9(b). Similarly M.'s ability to take the children on a major holiday seems to have been a reflection of good financial planning on his part and staying with family members for part of it to reduce accommodation costs, rather than a reflection of a significantly higher standard of living under his care.
- [154] The ratio of the parties' respective contributions to the total special and extraordinary expenses listed in their latest financial statements (\$3,002.88 for J. and \$7,622.72 for M.) is 72:28--close to the ratio of their incomes as I have found them. While these amounts are already largely, if not completely, reflected in the overall child-related expenses of each party, the proportion of each party's contribution to them, broken out as discrete amounts, tends to confirm that the sharing of these expenses between them is not a reason to

question the general accuracy of the set-off amount of child support, in terms of the children's standard of living in each home.

- [155] I conclude, based on a consideration of these various factors, that there would be no disparity in comparative living standards if M. were to pay the set-off amount to J. Indeed, absent B.'s contribution to J.'s household expenses, an order in excess of the set-off amount, closer to full table support, might have been appropriate. The set-off is about \$207 less per month than the amount he would pay her under an apportionment of their child-related expenses strictly according to their current incomes, but any remaining divergence in living standards as a result is at least partly mitigated by the slightly higher overall household income that she currently has, and the fact that she is the net beneficiary, although at an undefined amount on the available evidence, of their sharing of common expenses[8]. And in the absence of any indication that the children would be disadvantaged otherwise, I would be reluctant, as a matter of fairness, to order a higher payment than J. sought at trial.
- [156] Accordingly, I conclude that based on the considerations set out in s.150 of the FLA, I would make a different order concerning child support than is set out in the agreement. Pursuant to s.148(3) I will replace that portion of the agreement with an order that M. pay J. the set-off amount of \$1,622 per month, effective September 1, 2015, when her disability income took effect. From the start of the trial in May of 2015 to September 1 he will pay the set-off, based on J.'s previous income of \$77,644.91[9], of \$1,100.88 per month[10].
- [157] Obviously the net amount payable to J. under both of these orders is only the difference between the amounts that I have ordered and the amounts that he has paid pursuant to the agreement.

ii. A System for Determining Income for Child Support Purposes

- [158] While I do not necessarily agree that there have been shortcomings in M.'s financial disclosure that make it necessary, and while many of the departures from the original formula in the agreement were actually for J.'s benefit, it would still greatly assist these parties in maintaining their largely constructive post-separation relationship to revert to the much simpler and clearer income-determination formula provided by the Guidelines.
- [159] Accordingly, I will replace those provisions of the agreement, as it has been amended by the parties from time to time, with an order that the parties' incomes for the purposes of child support and special and extraordinary expenses will be determined in accordance with s. 16 of the Guidelines (Line 150 incomes, as modified by any permissible changes under Schedule III).
- [160] I also consider it advisable, for the same purposes, to supplement the provisions of the agreement dealing with disclosure of income information and the review of amounts payable with the following additional orders:

- Each party will immediately advise the other of any change in their income and provide all available supporting documentation concerning it;
- Unless a material change of circumstances occurs that requires a further review of child support pursuant to s. 9 of the Guidelines, the parties will automatically adjust child support to the set-off of their respective table amounts of support whenever there is a change in their income, effective the month following the change.

iii. Proportional Sharing of Special and Extraordinary Expenses and Timely Reconciliation

- [161] It is worth pointing out that the sharing of common expenses to avoid duplication that the parties have been engaging in is not a term of the separation agreement; in fact the agreement requires them each to bear the costs of duplication. The lack of evidence about exactly what has been included in these common expenses from time to time and the evidence that there have been ongoing disagreements about what was legitimate to include mean that I am unable to find that the parties subsequently incorporated it as a term of the agreement.
- [162] The agreement already provides that the parties will share the special and extraordinary expenses defined in the agreement in proportion to their incomes. To make the process as fair and efficient as possible, I will simply add a term that in addition to the yearly adjustment of special and extraordinary expenses contemplated in the agreement, the parties will also adjust their proportionate shares of those expenses whenever there is a change in either of their incomes.
- [163] I see no need to expand on the definitions of these expenses as provided in the agreement, since it already contemplates the sharing of expenses for those extracurricular activities on which they agree.
- [164] Through his counsel's submissions, M. has raised the spectre of withdrawing from the payment of the broader common expenses and adhering strictly to what is covered by the agreement if I award something in excess of the amount of child support in the agreement, which of course I have done. I make no comment on the wisdom of such a response, but simply point out that the net benefit to J. of their system of significant sharing was a factor that I weighed in M.'s favour when determining the overall costs of shared parenting and declining to increase his support payments above the set-off.
- [165] The proportion of shared costs of special expenses under the agreement from September 2015 onwards is 25% for J. and 75% for M. From the start of the trial in May 2015 to September it is 36% for J. and 64% for M.
- [166] As in the case of child support, any amounts payable by J. as a result of these adjustments will only be the difference between the resulting amounts and what he has already paid to J., either under the agreement or for agreed-upon common expenses.

[167] As to the timing of the reconciliation of these expenses, this was the only aspect of the trial in which there was a marked divergence in the credibility of the parties' evidence. M. became evasive, argumentative and ultimately quite hostile when confronted with the inescapable fact that he had let large amounts of unpaid common expenses accumulate. I was driven to the inescapable conclusion that he attaches no particular urgency to this process and that unfortunately some hostility, which to the parties' credit does not dominate most of their interactions, has made its way into these transactions with her.

[168] I therefore consider that it would be beneficial to add orders that all expense claims by a party related to the children, whether made pursuant to the agreement or otherwise, will be paid within 30 days of the claim being made. If the payor party requires more information in order to respond to the claim, they will request it in writing within seven days of receiving the claim. The payee party will respond within seven days and the payor will then have to either pay the claim or decline it. If they decline to pay it, in whole or part, they must provide a detailed written explanation for that decision to the payee within a further seven days.

iv. Retroactive Payment

[169] While there does not seem to be any dispute that M. was aware by June of 2013 that J. intended to amend her pleadings to seek retroactive support at the table amounts, she did not seek that effective date in her amended notice of family claim. Given that it was filed with the assistance of counsel and that J. has otherwise shown herself to be quite legally adept in pursuing her claim, I see no basis to relieve her from the consequence of that pleading, which is that any retroactive claim is only effective as of September 1, 2013. The amount to be paid pursuant to that effective date would be \$11,082.

[170] M. has certainly not engaged in any blameworthy conduct as defined in D.B.S., but I do not think it is reasonable for him to claim that after he received the amended notice of family claim he still based his financial affairs on the expectation that the half set-off arrangement would necessarily continue. Similarly, any comments by J. to the effect that the original agreement or her subsequent proposed versions of it were fair cannot reasonably be said to have survived her beginning court proceedings to recover a higher amount. I do not see how Smith J.'s interim award retroactive to January 2014 could affect her claim either, since it was still at the half set-off amount, which appears to be slightly less than she had been receiving under the amended agreement. Finally, in light of M.'s overall circumstances I can see no hardship resulting to him from a payment in this amount.

[171] Therefore I will order that M. pay retroactive child support to J. of \$11,082.

v. Divorce

[172] Finally, the parties will be granted a divorce, to take effect on the 31st day following the release of these reasons. Given the orders that I have made I am obviously satisfied that reasonable arrangements have been made for the support of the children, as required by s. 15(1)(b) of the Divorce Act.

vi. Costs

[173] J. has asked for the opportunity to make further submissions about costs. If either party ends up wishing to do so they should either agree on a schedule for making them in writing, or arrange an oral hearing through Supreme Court Scheduling. In the absence of submissions my preliminary view is that J. has had substantial success and should be entitled to receive her costs at the ordinary scale of difficulty, even though she was self-represented in the trial: *Harrison v. British Columbia (Information and Privacy Commissioner)*, 2008 BCSC 979 at para. 23.

The Honourable Mr. Justice T.A. Schultes

- [1] An amount that is actually slightly more than half of the set-off
- [2] By January 2013 the children were old enough that outside childcare was no longer needed and this expense ended. The parties now share any available tax credits in relation to the children equally.
- [3] J. gave evidence of earlier communications with M. in which she had conveyed her dissatisfaction with the amount of child support, as well as comments by M. indicating his awareness of it as an issue to be resolved between them. But since she ultimately sought increased support retroactive only to June 2013, there is no benefit to recounting that evidence.
- [4] It does not appear from the notices of application or his reasons for judgement that the previous slight modification to the half set-off was brought to Smith J.'s attention.
- [5] Subsection (4) offers another exception to the application of the Guidelines that does not arise in this case.
- [6] While it may be implicit in my reliance on these passages, I should say that I do not think that the use in M.D.H. of the Schedule II hardship budget from s. 10 of the Guidelines to determine household income is supported by Contino.
- [7] I do not feel comfortable including a further "unregistered" education savings plan that is also listed in M.'s financial statement in the absence of any evidence of restrictions on its use for other purposes.
- [8] Which I am prepared to infer are shared in approximately the same proportions as the special and extraordinary expenses.

- [9] I did not accept J.'s claimed deduction of \$14,911 for legal fees from her most recent financial statement. This is not a "carrying charge" pursuant to Schedule III of the Guidelines, as she claims.
- [10] If any further "verification" of the general accuracy of the set-off in the parties' situation is needed, an allocation of the total child-related expenses that I have found according to their previous income ratio of 64:36 produces a difference of \$1,026.47 in J.'s favour--a difference of only \$74.41 from the set-off amount.

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