

CANADA / JUDGMENT

Gauthier v. Gauthier

2022 BCCA 193

COURT

British Columbia Court of Appeal

DECIDED

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2022 BCCA 193 Gauthier v. Gauthier

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Gauthier v. Gauthier,

2022 BCCA 193

Date: 20220603

Docket: CA47477

Between:

Melanie Lynn Gauthier

Appellant

(Claimant)

And

Kenneth Gerald Gauthier

Respondent

(Respondent)

Before:

The Honourable Madam Justice Newbury

The Honourable Mr. Justice Fitch

The Honourable Mr. Justice Abrioux

On appeal from: An order of the Supreme Court of British Columbia, dated

April 14, 2021 (M.L.G. v. K.G.G., 2021 BCSC 682, Kelowna Docket E128427).

Counsel for the Appellant

(via videoconference):

M.A. Koochin

Counsel for the Respondent

(via videoconference):

D.R. Bloor

B.M. Hunt

Place and Date of Hearing:

Vancouver, British Columbia

February 4, 2022

Place and Date of Judgment:

Vancouver, British Columbia

June 3, 2022

Written Reasons by:

The Honourable Mr. Justice Abrioux

Concurred in by:

The Honourable Madam Justice Newbury

The Honourable Mr. Justice Fitch

Summary:

The appellant applied for variation of a separation agreement and for an order that her former spouse pay her retroactive child support dating back to 2008. The judge varied the agreement but ordered the respondent to pay retroactive child support from July 1, 2017-December 1, 2019. Given a change in the residence of the children, the appellant was ordered to pay retroactive child support to the respondent for the older child from July 1, 2017-December 31, 2020, and for the younger child commencing December 1, 2019. She was also ordered to pay ongoing child support for the younger child. The result was that the appellant owed the respondent \$37,701. The appellant appeals on the basis that the judge erred by failing to find that the respondent engaged in blameworthy conduct justifying a departure from the presumed three-year period for a retroactive award.

Held: Appeal dismissed. There were no reviewable errors committed by the judge. His reasons were detailed and he followed the proper framework in reaching his conclusions. Contrary to the appellant's assertion that the judge erred in considering subjective factors, these may play a role in deciding whether blameworthy conduct exists; moreover, the judge did not restrict his analysis to subjective factors. In this case, the parties had a shared parenting arrangement and both had ongoing obligations in relation to financial disclosure; the judge found that the fact they had not done so was due to their mistaken belief that this was not required. The parties had a reasonable expectation that the separation agreement had settled matters and that they were both meeting their obligations.

Reasons for Judgment of the Honourable Mr. Justice Abrioux:

I. Introduction

- [1] This appeal arises from the appellant Melanie Gauthier's application to vary a separation agreement entered into in 2008 with her former spouse, the respondent Kenneth Gauthier (the "Separation Agreement"). In this application, she also sought an order that Mr. Gauthier pay retroactive child support from 2008 in the amount of \$142,730.
- [2] The notice of family claim ("NOFC") was filed on August 11, 2020 with the relief sought, based on both the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) and the Family Law Act, S.B.C. 2011, c. 25 [FLA] limited to the variation of the Separation Agreement and an order for the payment of retroactive child support including special or extraordinary expenses.
- [3] On January 26, 2021, Ms. Gauthier filed a notice of application seeking substantially the same relief as set out in the NOFC. While the notice of application did not specifically cite the family summary trial rule--Rule 11-3 of the Supreme Court Family Rules, B.C. Reg. 169/2009--it is clear from a review of the record and the reasons for judgment that the parties and the judge essentially proceeded on the basis that all issues raised in the NOFC were before the Court. In other words, the application was, in effect, a summary trial.
- [4] The chambers judge varied the agreement and ordered that the respondent pay retroactive child support for the younger child of the marriage, N.J., from July 1, 2017 to December 1, 2019. The appellant was ordered to pay retroactive child support to the respondent for the older child, L.M., from July 1, 2017 to December 31, 2020, the date she ceased to be a child of the marriage, together with ongoing support until N.J. was no longer a child of the marriage. The respondent's retroactive child support was to be set off against the claimant's retroactive child support and vice versa.
- [5] The order also provided that the parties were to calculate the respective child support owing and to the extent the respondent's retroactive child support exceeded the appellant's, he was to hold the amount in trust for the children to be used for their respective post-secondary education once certain Registered Education Savings Plans ("RESPs") had been exhausted.

- [6] The parties, by consent, then agreed to the amounts owing for retroactive support with the net result being that the appellant owed the respondent \$37,701, for the years 2017 through 2020, with that amount incorporated into the order under appeal.
- [7] The appellant appeals both the terms of the variation as ordered by the judge, as well as the order that any excess amount owing by the respondent be held in trust by him for the purposes of the children's post-secondary education.
- [8] For the reasons that follow, I would dismiss the appeal.

II. Background

- [9] The parties were married in 1999 and had two children together, L.M. and N.J. They separated in 2008 and divorced in August 2009. On September 17, 2008 they entered into the comprehensive Separation Agreement resolving all issues between them, including 50/50 shared parenting and child support for their then six- and five-year-old children. Using the Federal Child Support Guidelines ("Guidelines") and setting off their respective incomes in accordance with the Guidelines, they agreed that the respondent would pay the appellant \$2,000 per month for ongoing child support.
- [10] Strangely, as noted by the judge, although the parties each had access to legal advice, no court orders were made and the Separation Agreement contained no provision for the parties to exchange tax returns and/or disclose their respective incomes annually and adjust child support accordingly. They were unaware that child support should be reviewed on an annual basis to account for fluctuations in income.
- [11] The joint parenting arrangement continued for several years but eventually both children began living with the respondent: L.M. in December 2015, and N.J. in December 2019. The judge found that Mr. Gauthier had supported all of L.M.'s financial needs since January 2016, and all of N.J.'s financial needs since December 2019. L.M. turned 19 in December 2020. Although the parties agreed she was no longer a child of the marriage as at the date of the hearing of the application, they disagreed on when she ceased to be so.
- [12] The judge also found that, at the time of the hearing, it was apparent that the children had nearly severed all ties with their mother, rarely replying to her text messages or answering her phone calls.
- [13] Although both children were living with him as of December 2019, Mr. Gauthier continued paying \$2,000 per month in child support to Ms. Gauthier until July 2020 when he informed her he would cease making payments and that he wanted her to pay child support to him.

III. Reasons for Judgment

- [14] In his reasons for judgment, indexed as 2021 BCSC 682, the judge began by reviewing the facts, financial circumstances, and positions of both parties, including that:

- a) Once Ms. Gauthier sought legal advice, she obtained Mr. Gauthier's 2008 income tax information, which disclosed that he had earned substantially more income than the amount upon which the \$2,000 child support was originally based;
 - b) Ms. Gauthier claimed that Mr. Gauthier owed her \$142,730 in retroactive child support, based on the 50/50 parenting time scheme and the setoff calculation of the parties' incomes as required by the Guidelines;
 - c) Ms. Gauthier acknowledged that now that N.J. was residing full-time with Mr. Gauthier, she had an obligation to pay child support, which she calculated to be \$1,282 per month based on her 2019 income; and
 - d) The current financial circumstances of the parties were as follows:
 - i. The appellant owned a business (formerly the joint business of the parties) which she intended to sell for approximately \$150,000, as well as a home valued at \$441,000 with a mortgage of \$283,500, a \$5,000 Tax Free Savings Account ("TFSA"), a Registered Retirement Savings Plan ("RRSP") of \$18,000, and a small municipal pension. She was engaged and her fiancé was receiving long-term disability.
 - ii. The respondent had an interest in his employer, Urban Systems Ltd., in the amount of \$372,000, his net worth was valued at approximately \$1.45 million, he owned a home valued at \$882,000 with a mortgage of \$443,000, and he had an RRSP and Locked-in Retirement Account of \$517,000, and a TFSA of \$105,000.
- [15] The judge identified four issues: (1) the parties' incomes for 2009 through 2019; (2) the date on which L.M. ceased to be a child of the marriage; (3) Ms. Gauthier's entitlement to retroactive child support; and (4) child support payable from Ms. Gauthier to Mr. Gauthier. The issues on appeal relate to the third issue, that is the appellant's entitlement to retroactive child support.
- [16] Ms. Gauthier's position was that Mr. Gauthier ought to have known the child support he was paying was "woefully low" in light of his income. She said Mr. Gauthier had a positive obligation to disclose his income and that his failure to do so constituted blameworthy conduct, justifying an order for retroactive child support.
- [17] Mr. Gauthier submitted that the child support amount he has paid pursuant to the Separation Agreement was appropriate, and that the presumption in favour of the Guidelines was rebutted in this case. He further argued that, following the test in *D.B.S. v. S.R.G.*, 2006 SCC 37, retroactive child support was not warranted. However, in the event that child support was to be ordered, it should be confined to the three-year period as set out in *D.B.S.* and that it should be paid into trust for the benefit of the children for their future post-secondary educational needs, not to the appellant.

- [18] The judge began his analysis by noting several of the applicable principles and considerations. He reviewed the relevant sections of the Guidelines and canvassed the leading authorities on the issue of retroactive child support, specifically *D.B.S. and Michel v. Graydon*, 2020 SCC 24. He also noted that the Separation Agreement was an agreement, as opposed to a court order, and that neither of the parties had sought to make the terms of the agreement the subject of an order.
- [19] As this was an application to vary the Separation Agreement, the judge canvassed the D.B.S. factors, as well as the jurisdiction to vary the Separation Agreement respecting child support as found in s. 148(3) of the FLA. He noted that because this case involved an agreement, not an order, the court had the jurisdiction to order an amount of child support that varied from the Guidelines if it was satisfied that reasonable arrangements were provided for the children's support, pursuant to s. 150(2) of the FLA.
- [20] According to the judge, the core of the application was the appellant's demand for retroactive child support of \$142,730 from January 1, 2009 to July 1, 2020 and that because the parties had a 50/50 shared parenting arrangement, he must determine the parties' income during that time period.
- [21] On that issue, the judge noted that the appellant owned a business, which she operated through a corporation of which she was the sole shareholder. Accordingly, s. 18 of the Guidelines applied, thereby permitting him to lift the corporate veil to ensure that all money available for the purpose of child support calculations was reflected. Having reviewed the appellant's evidence and that of her accountant, as well as the respondent's submissions, the judge imputed an additional \$10,000 to the appellant's income for each year since 2008 in order to account for personal expenses she had expensed through her business. As for the respondent, the judge determined his income from his annual tax returns.
- [22] The second question was when L.M. ceased to be a child of the marriage. The appellant's position was that, although L.M. commenced living with the respondent in January 2016, she left for England in September 2020 and ceased to be a child of the marriage at that time. The respondent argued that L.M. moved in with him full-time in November 2015 and that, despite her travels in England from September to December of 2020, he continued to support her throughout that time. He conceded, however, that she ceased to be a child of the marriage upon her return. The judge concluded that January 1, 2016 was the latest that L.M. moved in with the respondent full-time and that she ceased being a child of the marriage effective January 1, 2021.
- [23] Turning to the question of child support arrears, the judge rejected the appellant's submission that her situation was analogous to that in *Michel*. He concluded that her application for retroactive child support was, in reality, a counter-attack to the respondent's position that he would cease paying child support and was asking her to pay him child support instead. Moreover, he found that her delay in bringing her application was not reasonable and militated against a lengthy retroactive child support award. He was not

persuaded that the conduct of either party was blameworthy.

- [24] The judge further noted that the respondent's only liquid asset was a \$105,000 TFSA earmarked for the children's post-secondary education. If a retroactive award was ordered, Mr. Gauthier would either have to use those funds or borrow money to satisfy that obligation. He concluded that a retroactive child support award to the appellant (who, he noted did not propose to use any portion to fund the children's education) would do nothing to help them. This also militated against such an order.
- [25] The judge recognized that he was also required to balance predictability, consistency and efficiency against fairness, flexibility and recognition of the children's actual condition, means, needs and other circumstances, taking into account their position as the children of the respondent who earns well in excess of \$150,000.
- [26] He concluded that, given all the evidence, a retroactive child support award was warranted but should be limited, in accordance with D.B.S., to the three years prior to when the appellant notified the respondent that retroactive child support had become an issue, being July 2017. Moreover, to balance the respondent's interest in certainty and fairness to the children, the respondent's TFSA was to be held by the respondent in trust for the children to assist in funding their education once the RESPs held by the appellant have been exhausted. Accordingly, he made the orders I have summarized at paras. 4 and 5 above.

IV. On Appeal

- [27] The appellant argues that the judge erred in law in not finding that the respondent engaged in blameworthy conduct by failing to disclose the additional income he had earned after entering into the Separation Agreement.
- [28] On this ground of appeal Ms. Gauthier submits that, as a result of the Court's decisions in *Michel and Colucci v. Colucci*, 2021 SCC 24, the test for blameworthy conduct is purely an objective one. Accordingly, she says the fact that additional income was not disclosed amounts to blameworthy conduct, such that the "three-year rule" arising from D.B.S does not apply. In the alternative, Ms. Gauthier submits that the judge committed an error of mixed fact and law in not ordering retroactive child support to January 1, 2009, i.e., beyond the three-year period.
- [29] Mr. Gauthier's position is that the judge's decision is entitled to a high degree of deference and that no error in law or extricable question of law has been established. Specifically, he says the judge's conclusion that neither party engaged in blameworthy conduct was a finding of mixed fact and law, that there is no extricable question of law and that the decision is amply supported by the evidence and the findings of fact.

- [30] In this regard, Mr. Gauthier emphasizes the judge's consideration of two important factors: (1) that the obligation to pay child support arose from the Separation Agreement, not a court order; and (2) that this was a shared parenting arrangement which imposed obligations on both parties to provide updated financial information over the years.

Discussion

Legal framework

- [31] I will first briefly comment on the standard of review.
- [32] The Supreme Court of Canada has made it clear that child and spousal support orders are highly discretionary and that the judge's findings and inferences of fact may not be disturbed unless there is a material error, a serious misapprehension of the evidence, or an error in law. An appellate court should not overturn a support order simply because it would have made a different decision or balanced the appropriate factors differently: *Hickey v. Hickey*, [1999] 2 S.C.R. 518 at paras. 11-12; *Jean Louis v. Jean Louis*, 2020 BCCA 220, leave to appeal to SCC ref'd [2021] S.C.C.A. No. 513 at para. 24.
- [33] This Court has also confirmed that balancing the D.B.S. factors involves an exercise of discretion by the judge of first instance. There are many factors to be considered, such that there may be more than one "right" conclusion: *Brown v. Kucher*, 2016 BCCA 267 at para. 6.
- [34] In light of the parties' submissions regarding the legal test for blameworthy conduct and whether it is subjective, objective, or a combination of the two, it is necessary to review the key statements of the Court from D.B.S., *Michel and Colucci*.
- [35] The starting point is D.B.S. where Justice Bastarache, for the majority, stated:
- [106] Courts should not hesitate to take into account a payor parent's blameworthy conduct in considering the propriety of a retroactive award. Further, I believe courts should take an expansive view of what constitutes blameworthy conduct in this context. I would characterize as blameworthy conduct anything that privileges the payor parent's own interests over his/her children's right to an appropriate amount of support
- [108] On the other hand, a payor parent who does not increase support payments automatically is not necessarily engaging in blameworthy behaviour. Whether a payor parent is engaging in blameworthy conduct is a subjective question. But I would not deny that objective indicators remain helpful in determining whether a payor parent is blameworthy. For instance, the existence of a reasonably held belief that (s)he is meeting his/her support obligations may be a good indicator of whether or not the payor parent is engaging in blameworthy conduct. In this context, a court could compare how much the payor parent should have been paying and how much (s)he actually did pay; generally, the closer the two amounts, the more reasonable the payor parent's belief that his/her obligations were being met. Equally, where applicable, a court should consider the previous court order or agreement that the payor parent was following. Because the order (and, usually, the

agreement) is presumed valid, a payor parent should be presumed to be acting reasonably by conforming to the order. However, this presumption may be rebutted where a change in circumstances is shown to be sufficiently pronounced that the payor parent was no longer reasonable in relying on the order and not disclosing a revised ability to pay.

[Emphasis added.]

[36] Concerning the presumptive three-year rule, the majority in D.B.S. stated:

[124] The date when increased support should have been paid, however, will sometimes be a more appropriate date from which the retroactive order should start. This situation can most notably arise where the payor parent engages in blameworthy conduct. Once the payor parent engages in such conduct, there can be no claim that (s)he reasonably believed his/her child's support entitlement was being met. This will not only be the case where the payor parent intimidates and lies to the recipient parent, but also where (s)he withholds information. Not disclosing a material change in circumstances -- including an increase in income that one would expect to alter the amount of child support payable -- is itself blameworthy conduct. The presence of such blameworthy conduct will move the presumptive date of retroactivity back to the time when circumstances changed materially. A payor parent cannot use his/her informational advantage to justify his/her deficient child support payments.

[125] The proper approach can therefore be summarized in the following way: payor parents will have their interest in certainty protected only up to the point when that interest becomes unreasonable. In the majority of circumstances, that interest will be reasonable up to the point when the recipient parent broaches the subject, up to three years in the past. However, in order to avoid having the presumptive date of retroactivity set prior to the date of effective notice, the payor parent must act responsibly: (s)he must disclose the material change in circumstances to the recipient parent. Where the payor parent does not do so, and thus engages in blameworthy behaviour, I see no reason to continue to protect his/her interest in certainty beyond the date when circumstances changed materially. A payor parent should not be permitted to profit from his/her wrongdoing.

[37] In Michel, the Court unanimously allowed the appeal on the basis that s. 152 of the FLA allows a court to vary a child support order retroactively, regardless of whether the beneficiary is a "child" at the time of the application or whether the order has expired.

[38] In concurring minority reasons, Justice Martin (Wagner C.J.C. agreeing) expanded the analysis to consider other policy considerations supporting such an interpretation of s. 152. In doing so she commented on the development of the law regarding blameworthy conduct post-D.B.S.:

[115] ... D.B.S. purposively provided an expansive definition of blameworthy conduct, being "anything that privileges the payor parent's own interests over[their] children's right to an appropriate amount of support" (para. 106).

- [116] Despite its intentional breadth, some courts have been hesitant to apply this expansive definition, out of fear that any change in the payor's income which was not disclosed to the recipient would constitute blameworthy conduct. The failure to disclose actual income, a fact within the knowledge of the payor, is a failure of a significant obligation and is often the root cause of a delayed application. Indeed, in *D.B.S.*, the Court recognized at para. 124 that "[n]ot disclosing a material change in circumstances -- including an increase in income that one would expect to alter the amount of child support payable -- is itself blameworthy conduct." It further commented that "a payor parent cannot use [their] informational advantage to justify [their] deficient child support payments" and at para. 106 that "[a] payor parent cannot hide [their] income increases from the recipient parent in the hopes of avoiding larger child support payments".
- [117] The nature and objective of the post-Guidelines child support system provide payor parents with the certainty and predictability that any material change in income should be disclosed and lead to a change in child support payments. ... It is also notable that s. 3(1)(a) of the Guidelines makes the presumptive amount of a child support order the amount set out in the applicable table. Therefore, a payor's conduct may be presumptively reasonable if they conform to an order or agreement, but only if there is no change in their income
- [118] While a subjective approach to the reasons for the recipient's delay in applying for child support should be explicitly endorsed, the same is no longer true of the payor's conduct. Since *D.B.S.*, Canadian courts have gradually steered away from a focus on what the payor meant by what they did, in light of the problems posed by a "subjective" inquiry into the payor's intention. Intent can be a basis on which to increase blameworthiness but the primary focus needs to be on the payor's actions and their consequences. Today, "[t]he payor's subjective intention is rarely relevant -- the real question is whether the payor's conduct had the effect of privileging [their] interests over the child's right to support" (*Goulding*, at para. 44).
- [Underline emphasis added; italic emphasis in original.]
- [39] In *Colucci*, which was decided after the order under appeal was pronounced, Justice Martin, writing this time for a unanimous Court, summarized the approach to be followed to applications for retroactive child support pursuant to s. 17 of the Divorce Act. Without including the entire summary in these reasons, the following should be emphasized in light of the parties' submissions on appeal:
- a) Where a recipient parent seeks to increase child support retroactively, they have the onus to meet the threshold of establishing a past material change in circumstances. Once this threshold is met, there is a presumption in favour of retroactively increasing child support to the date the recipient gave the payor effective notice of the request for an increase, up to three years before formal notice of the application to vary;

- b) The court retains the discretion to depart from the presumptive date of retroactivity where the result would otherwise be unfair. This exercise of discretion continues to be guided by the D.B.S. factors as described in Michel;
 - c) Once a court has determined that support should be retroactively increased to a particular date, the increase must be quantified in accordance with the Guidelines;
 - d) In order to recalculate support according to the Guidelines accurately, reliable and complete income information is required; the failure to disclose accurate income information may constitute blameworthy conduct, as Martin J. noted in Michel at paras. 50 and 116-117; and
 - e) The subjective intentions of the payor are rarely relevant; at para. 101.
- [40] It also bears noting that D.B.S., Michel and Colucci were all cases where the support obligations were premised on either a court order, or an agreement that had been formalized by consent order. The significance of the difference between an agreement and a court order was explained in D.B.S., where Bastarache J., noted that "a payor parent who adheres to a separation agreement that has not been endorsed by a court should not have the same expectation that (s)he is fulfilling his/her legal obligations as does a payor parent acting pursuant to a court order": at para. 77. It is also important to note that, in the case at bar, although the NOFC refers to both the FLA and the Divorce Act, the application before Weatherill J. was grounded in s. 148(3) of the FLA, whereby the Court may set aside or replace an agreement respecting child support; the Court had jurisdiction to order an amount of child support that varies from the Guidelines, per s. 150(2) of the FLA.
- [41] Unlike the present case, neither Michel nor Colucci involved shared parenting. In fact, the absence of shared parenting was specifically referred to in Michel:
- [32] Apart from shared parenting arrangements, the Guidelines calculate child support payments solely from the payor parent's income. At any given point in time, therefore, the payor parent has the information required to determine the appropriate amount of child support owing, while the recipient parent may not. Quite simply, the payor parent is the one who holds the cards. While an application-based regime places responsibility on both parents in relation to child support (D.B.S., at para. 56), the practical reality is that, without adequate disclosure, the recipient parent will not be well-positioned to marshal [sic] the case for variation.
- [42] In D.B.S., the Court noted the following with respect to disclosure requirements:
- [58] The Guidelines provide, at s. 25, that a payor parent must disclose his/her income not more than once per year upon request by the recipient parent. (Though I assume a single custody situation in my discussion here, I should note that this rule will apply to both parents in a shared custody context, as both of their incomes are relevant in determining the amount of child support due: s. 9 of the Guidelines.) Thus the scheme in the Guidelines does not burden a payor parent with an automatic disclosure obligation every time his/her income increases.... In crafting this system, Parliament was obviously concerned with the balance

between the privacy of payor parents and the expectation of recipient parents that they will be paid the appropriate Guidelines amount based on the true income of the payor parent. This is not to suggest that court orders or separation agreements cannot themselves provide for automatic disclosure; to the contrary, if the circumstances so demand, courts may even find disclosure obligations implicit in separation agreements. But it is not for this Court to second-guess Parliament's policy choice, absent indication that a court ordered, or the parties agreed, otherwise.

- [43] In *Colucci* the Court also noted that any framework for decreased child support must account for the "informational asymmetry between the parties and the resulting need for full and frank disclosure of the payor's income": at para. 47. The Court continued:
- [49] The pivotal role of disclosure comes as no surprise since the premise underlying the Guidelines "is that the support obligation itself should fluctuate with the payor parent's income" (D.B.S., at para. 45). The structure of the Guidelines thus creates an informational asymmetry between the parties. In a system that ties support to payor income, it is the payor who knows and controls the information needed to calculate the appropriate amount of support. The recipient does not have access to this information, except to the extent that the payor chooses or is made to share it. It would thus be illogical, unfair and contrary to the child's best interests to make the recipient solely responsible for policing the payor's ongoing compliance with their support obligation.
- [50] This is why frank disclosure of income information by the payor lies at the foundation of the child support regime. Without proper disclosure, the system simply cannot function and the objective of establishing a fair standard of support for children that ensures they benefit from the means of both parents will be out of reach.

Analysis

- [44] I have concluded that the appellant has not demonstrated any reviewable error by the judge.
- [45] To the contrary, the reasons contain a detailed analysis of the issues engaged in the application, a thorough and accurate review of the applicable legal framework, a review of the pertinent evidence and a proper evidentiary basis for the judge's findings of fact. The judge followed the proper framework in relation to the application of the D.B.S. factors, ss. 148 and 150 of the Family Law Act with respect to the Separation Agreement, and ss. 3, 4, 9, 16, 21, 22 and 25 of the Guidelines.
- [46] The appellant argues that following the Court's decisions in *Michel* and *Colucci*, it was an error in law for the judge to consider subjective intention in his analysis of whether the respondent had engaged in blameworthy conduct.

- [47] I disagree. While recognizing a marked move towards objective factors, in particular the failure to disclose financial information in the context of a material change in circumstances, in my view it is clear from both Michel and Colucci that subjective factors may still play a role in a judge's consideration of blameworthy conduct. This is shown by the use of the term "rarely" in Colucci at para. 101 and Michel at para. 118, in relation to the relevance of the payor's subjective intention.
- [48] It also bears emphasizing that, unlike Michel and Colucci, this case involved shared parenting, where both parents had the obligation to make ongoing financial disclosure. The financial asymmetry which arises when there is only one payor spouse, not two, should not arise.
- [49] The judge was careful to note the many distinguishing features of Michel, including, at para. 90:
- a) the case did not involve a shared parenting arrangement, and the child lived exclusively with the payee mother;
 - b) the mother was financially strapped and had to rely on social assistance to survive;
 - c) the father not only knew about the child's hardships, but made disparaging remarks about her standard of living rather than increasing his child support payments;
 - d) the consent order provided for child support was based on the father's misrepresentation that his income that year was \$39,832, when, to his knowledge, it was \$45,580;
 - e) the father repeatedly misrepresented his income to the respondent in each year but one since the consent order was made until his child support obligations terminated by court order effective April 2012 when the child was 20 years old;
 - f) the child was unable to attend post-secondary schooling as a result of the father woefully underpaying child support; and
 - g) the case involved an application under s. 152 of the FLA, which provides an avenue for the court to retroactively change a child support order only after considering:
 - i. a change in circumstances since the order was made;
 - ii. evidence of a substantial nature that was not previously available becoming available; and
 - iii. evidence of a lack of financial disclosure after the order was made.
- [50] In comparison, the judge in this case found there was no blameworthy conduct by either party given that:
- a) they were engaged in a 50/50 shared parenting regime and were both obliged to disclose their respective earnings. Neither did due to "an honest, but mistaken, belief on the part of both parties" (at para. 98);

- b) both parties had reasonable expectations that the child support issue had been settled by the Separation Agreement and that they could go on with their separate lives (at para. 100); and
 - c) this was not a case where either party actively hid or misrepresented their respective incomes from the other. Nor was this a case where either party consciously chose to ignore the obligations owed to the children in a blameworthy manner. The respondent reasonably believed that he was meeting his support obligations by following the terms of the Separation Agreement, which he presumed to be valid despite the annual increase in his income, and by supporting the children in other ways including s. 7 special and extraordinary expenses. Each party respected the Separation Agreement and lived by its terms. They were not actively withholding information: at para. 101.
- [51] Furthermore, the judge did not restrict his analysis to subjective factors. This is seen by his frequent use of the word "reasonably" in the reasons, which imports an objective assessment to the conduct of both parties.
- [52] I would add that the parties' non-blameworthy conduct nonetheless resulted in the judge increasing both their incomes for child support purposes over the period in question.
- [53] The appellant's challenge to the three-year period of retroactivity and whether the judge erred in ordering that the retroactive amount should be held in trust by the respondent for the purposes of the children's post-secondary education must also be considered within the context of two significant findings of fact, which the appellant does not challenge on appeal, being:
- [63] The evidence suggests, and I infer, that since separation, the parties' living circumstances were comparable. There is no suggestion that either the claimant or the Children suffered financially or otherwise. Throughout the years, both parties were able to care for and meet the Children's needs while under their respective care.

and:

- [102] Respecting the circumstances of the Children, D.B.S. directs that I consider both their past and current circumstances. The evidence discloses that the Children did not suffer hardship or deprivation growing up and enjoyed a standard of living approximately the same as they did before the parties' separation. The Children are both living with the respondent and are enjoying a relatively high standard of living. The Children did well in school, were active, were involved in various team sports; L.M. even had her own horse (that the claimant paid \$500 per month for). Further, the Claimant purchased a vehicle for them after they were eligible to drive that neither now uses. The Claimant deposes that she "could have done a lot more with the children (e.g. travelling) and could have provided them a better lifestyle in [her] home". In my view, this is not evidence of deprivation or hardship or that the Claimant had to make sacrifices. This is not evidence that the Children were needy or were wanting. To the contrary, the evidence suggests the Children enjoyed all the advantages they would have received had the respondent been paying full-table child

support as the claimant suggests.

- [54] The judge also commented on the claimant's knowledge over the years that the respondent's income had increased significantly, noting:
- [95] Further, the claimant does not deny referring to the respondent as a "millionaire" when speaking to the Children over the years nor does she deny telling the Children that she "could have taken him to the cleaners". This contradicts her suggestion that she was oblivious to their income disparity.
- [96] I conclude that the claimant's application for retroactive child support is in reality a counter-attack to the respondent informing her that he would cease paying child support and was asking her to pay him child support instead.
- [55] Finally, regarding the children's post-secondary plans, the judge observed:
- [103] L.M. aspires to study veterinary sciences commencing in 2022 pending her physical and mental health stabilizing. Her tuition is expected to be \$10,000 per year for a three-year program.
- [104] N.J. has been accepted to study Biomedical Engineering at several universities in Ontario and expects to matriculate in September 2021. The respondent anticipates that N.J.'s tuition, room and board will cost approximately \$25,000 per year. In total, the four-year program will cost \$100,000.
- [105] The claimant has indicated that, save for whatever each has in RESPs, she has no intention of assisting the Children with their respective post-secondary expenses. The respondent is not only prepared to fund these expenses, he has set aside his TFSA for that purpose.
- [106] Respecting the hardship that the respondent might suffer if a retroactive child support award is made, his only liquid asset is a \$105,000 TFSA that he has earmarked to fund the Children's post-secondary education, which will fully absorb those funds. If a retroactive order is made, he will either use the TFSA money (and the Children's education will suffer accordingly) or he will have to borrow the money from a bank or refinance the mortgage on his home. A retroactive child support award to the claimant, who does not propose to use any of it to fund the Children's education, would not only disrupt the respondent's management of his financial affairs, but would do nothing to help the Children. This militates against such an order.
- [56] Thus there was a sound basis for the judge to make the orders he did, both in respect of the three-year period of retroactivity and that the respondent hold the amount in trust for the children's benefit.
- [57] What the appellant and respondent, and for that matter the judge, did not know at the time the reasons were rendered, was the net effect of the calculations to be performed by the parties regarding their respective arrears of support obligations.

- [58] This resulted in a term made by consent in the final order that the appellant pay the respondent \$37,701.
- [59] Although the respondent had not brought his own application for retroactive child support to be paid by the appellant, I am of the view that the judgment in his favour in that amount should be upheld. This is because the appellant's application sought to vary the Separation Agreement and, as I have noted, the application essentially proceeded as a summary trial. That being the case, the appellant risked a judgment being rendered against her. Where a party applies to vary or cancel a support order, he or she may nonetheless be found responsible for outstanding amounts, two examples being *Gilchrist v. Gilchrist*, 2015 BCSC 1636 and *T. (C.A.M.) v. T. (A.P.G.)*, 2011 BCSC 1456. I would add that the appellant did not argue in this Court that complying with the order would result in hardship to her.
- [60] The respondent agrees, and I would order that the amount of \$37,701 be held in trust by him to be used to fund the children's respective post-secondary education expenses once their RESPs have been exhausted.

V. Disposition

- [61] I would dismiss the appeal and order that the sum of \$37,701 be held in trust by the respondent to be used to fund the children's respective post-secondary education expenses once their RESPs have been exhausted.

"The Honourable Mr. Justice Abrioux"

I AGREE:

"The Honourable Madam Justice Newbury"

I AGREE:

"The Honourable Mr. Justice Fitch"

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Prepared on 29 October 2026 · Esheria