

CANADA / JUDGMENT

Gilchrist v. Gilchrist

2015 BCSC 1636

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Supreme Court of British Columbia

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2015 BCSC 1636 Gilchrist v. Gilchrist

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Gilchrist v. Gilchrist,

2015 BCSC 1636

Date: 20150911

Docket: E110056

Registry: Vancouver

Between:

Tanya Jane Gilchrist

Claimant

And

Todd Norman Gilchrist

Respondent

Before: The Honourable Mr. Justice Skolrood

Reasons for Judgment

Counsel for Claimant:

S. L. Stepney

Counsel for Respondent:

M. D. Mennie

Place and Date of Trial/Hearing:

Vancouver, B.C.

March 27 and July 31, 2015

Place and Date of Judgment:

Vancouver, B.C.

September 11, 2015

Introduction

- [1] There are cross-applications before the Court in this family law matter. Both concern the respondent's obligation to pay basic child support and extraordinary expenses for the parties' three children.
- [2] The respondent filed his notice of application on October 29, 2014. He seeks orders terminating his obligation to pay child support and extraordinary expenses and declaring that there are no arrears of child support or extraordinary expenses owing. He seeks a further order that the parties' two eldest children, both of whom are of the age of majority, are no longer children of the marriage and an order that neither party is obligated to pay child support or extraordinary expenses for the youngest child, currently 16 years old.
- [3] The claimant filed her notice of application on November 19, 2014. She seeks orders requiring the respondent to pay retroactive and ongoing child support and extraordinary expenses for all three of the parties' children. As part of her claim for arrears, she seeks a retroactive variation of child support to reflect a change in the respondent's income in recent years.
- [4] At the heart of the dispute between the parties is the issue of the extent to which parents are obligated to continue to financially support adult children in their pursuit of post-secondary education. This issue is particularly sensitive in the circumstances of this case, where the respondent who is being asked to contribute alleges that he had little input into the decisions giving rise to the claimed expenses.
- [5] The parties rely on the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), the Family Law Act, S.B.C. 2011, c. 25 (the "FLA"), and the Federal Child Support Guidelines, SOR/1997-175 (the "Guidelines").

Background

- [6] The parties were married on May 11, 1991.
- [7] They separated in February of 2009 and were divorced on May 13, 2011.
- [8] The parties have three daughters together:

- a) Jessie, born September 2, 1992 (currently 23);
- b) Jamey, born April 6, 1995 (currently 20); and
- c) Drew, born June 13, 1999 (currently 16).

[9] The parties entered into a separation agreement dated November 5, 2010 with the intent of resolving all outstanding issues between them (the "Separation Agreement"). Both parties were represented by counsel at the time the Separation Agreement was negotiated and finalized. The Separation Agreement was subsequently filed with the court on June 11, 2014 pursuant to section 148(2) of the FLA.

[10] Relevant provisions of the Separation Agreement include the following:

- a) Recital E:

Tanya's T4 income for 2009 is \$86,162 and Todd's T4 income is \$98,227.

- b) Paragraph. 4:

The children will be ordinarily resident with Tanya and Todd will have reasonable access. Todd will have access to Drew for up to three out of every eight days.

- c) Paragraph. 6:

Commencing November 1, 2010 and continuing on the first day of each month thereafter, Todd will pay to Tanya basic child support in the amount of \$1,650 per month. Extraordinary expenses of the children will be paid by the parties in proportion to their incomes. For the purposes of this provision, the parties agree that the current extraordinary expenses include costs relating to sports and sports equipment, tournaments, school fees, tutors, friend's birthday gifts and cellular phones. No extraordinary expenses will be incurred by either parent without obtaining the agreement of the other.

- d) Paragraph 7:

The quantum of child support will be reviewed and adjusted:

- i. annually on May 1 of each year after exchange of the parties' respective T1 general tax returns;
- ii. forthwith in the event of a change in the primary residence of the children;
- iii. forthwith in the event that any of the children spend in excess of 40% of the time with Todd, leaving aside the summer months; and
- iv. forthwith when each of the children turn 19.

- [11] Following the execution of the Separation Agreement, the respondent paid child support in the specified amount of \$1,650 for the first seven months of 2011, but since then he has paid support in varying amounts. The respondent says that the parties agreed that child support would be varied periodically depending on how many children were living at home with the claimant.
- [12] The claimant denies there was any such agreement. She says that the respondent unilaterally determined how much he was prepared to pay and he regularly withheld amounts that were required pursuant to the Separation Agreement. She says further that whenever she tried to discuss the issue with the respondent, he would yell and swear at her.
- [13] According to the claimant, the respondent paid the following child support in the years 2011 - 2014:
- 2011 \$19,250
- 2012 \$17,100
- 2013 \$13,525
- 2014 \$2,400
- [14] It is common ground that the respondent ceased paying any child support as of March 1, 2014, including for Drew who was 14 at the time. The respondent says that he did so because by that time Drew was spending 40% of the time with him and he was paying many of her expenses. In contrast, the claimant characterizes this as another unilateral decision made by the respondent in breach of the Separation Agreement.
- [15] The respondent presented similar figures to the claimant in terms of the child support paid from 2011 to 2014, except he says he paid \$18,700 in 2011 and \$2,900 in 2014.
- [16] The claimant registered with the Family Maintenance Enforcement Program ("FMEP") in or about June 2013 and FMEP has determined that the respondent was in arrears of child support in the amount of \$19,225 as of July 14, 2014. As noted at the outset of these Reasons, the claimant is seeking an order requiring the respondent to pay the arrears of child support.
- [17] In addition to basic child support, the parties also disagree on the issue of special or extraordinary expenses. The claimant says that she has incurred extraordinary expenses for the children and that the respondent has refused to contribute to these expenses. For his part, the respondent submits that many of the expenses claimed by the claimant are not in fact extraordinary and that, in any event, she incurred numerous expenses without his consent. He says further that the claimant has ignored the considerable contributions that he has made directly to the children for many of their expenses.

Circumstances of the Children

Jessie

- [18] From September 2010 to April 2011, Jessie attended Douglas College and lived with the claimant. Jessie turned 19 on September 2, 2011.
- [19] In September 2011, Jessie moved to Kamloops to attend a respiratory technician program at Thompson River University ("TRU"). According to the claimant, Jessie returned home to her house in Port Moody every second weekend in September and October, after which the drive became too dangerous. However, Jessie returned home for the Christmas holiday and for reading break.
- [20] In the summer of 2012, Jessie lived at a recreational property in Shuswap owned by the claimant's new spouse.
- [21] Jessie returned to TRU in September 2012. The respondent says that he was opposed to her doing so because she had done poorly in the first year of the respiratory technician program, failing many of her courses. As she did the previous school year, Jessie returned home every second weekend in the fall, for the Christmas holidays and during reading break.
- [22] Jessie was in a car accident in August of 2013. Shortly after the accident, she was diagnosed with Bipolar Disorder 2.
- [23] Jessie did not return to TRU in September of 2013. The claimant says that was because Jessie was not well enough, physically or mentally, to continue with her studies. The respondent suggests it was because Jessie again did poorly in her second year of studies.
- [24] Jessie lived with the claimant from September to December of 2013 and worked at two part-time jobs.
- [25] Jessie returned to TRU from January to April 2014 and then again from September 2014 to April 2015. In the summer of 2014, she worked full-time as a park ranger in the Shuswap.
- [26] In the summer of 2015, she has been working part-time as an online tutor. She also had a part-time job at Safeway, but she quit because the hours conflicted with her tutoring job. She is also scheduled to teach skating for three weeks in August.
- [27] Jessie plans to return to TRU in September 2015 and intends to take four courses.

Jamey

- [28] Jamey graduated high school in June 2012, one year early. In September 2012, she commenced studies at the University of British Columbia ("UBC") and lived in residence.

- [29] Shortly after beginning university, Jamey was diagnosed with Bipolar Disorder 1 and an eating disorder. On the advice of her doctor, Jamey reduced her course load to three courses per semester. The claimant says that during the 2012 - 2013 school year, Jamey lived in residence three to four days per week and then spent the rest of the week in Port Moody with the claimant.
- [30] In the summer of 2013, Jamey lived in Port Moody at the claimant's home and worked at two part-time jobs.
- [31] Jamey returned to UBC in September 2013 for the 2013 - 2014 school year. The claimant says that Jamey again spent three to four days per week in residence and the balance of her time at the Port Moody house with the claimant.
- [32] Jamey turned 19 on April 6, 2014.
- [33] She was hospitalized for about a month in April / May 2014 due to a major depressive episode. In May and June 2014, Jamey lived with the claimant in Port Moody. In July and August 2014, she lived at the Shuswap property and worked full time as a park ranger.
- [34] Jamey returned to UBC in September 2014 and transferred from the science program to arts. She lived off campus with a number of other students. The respondent says that he thought it would be better for Jamey to live with him or the claimant and attend SFU as she would have more support. However, he recognized that Jamey was an adult and could make her own decisions.
- [35] Jamey was hospitalized two more times in February and March 2015 and then resumed living with the claimant on March 27, 2015, on her release from the UBC Mood Disorder Clinic.
- [36] She began working part-time at Safeway in mid May 2015, but could not handle the late hours and quit in the middle of June. She continues to work part-time at Booster Juice and since July has also worked part-time at a sushi restaurant.
- [37] It is unlikely that Jamey will return to university in September of 2015, but is looking into the journalism program at the British Columbia Institute of Technology for the fall of 2016.

Drew

- [38] The respondent says that since February of 2014, Drew has been with him three of every eight days, which is what was contemplated in clause 4 of the Separation Agreement. In addition, he says that he has coached her lacrosse and hockey teams and thus was with her during practices and games. He also drove her to and from her sports and job most days. The respondent submits that this adds up to at least 40% of her time being spent with him. He says as well that he has paid many of her expenses, including the cost of her sports activities.

- [39] The respondent alleges that Drew would like to spend more time with him, but that the claimant is opposed to her doing so.
- [40] The claimant denies that Drew spends at least 40% of her time with the respondent. She notes that under the Separation Agreement, the summer months were excluded from the calculation of whether Drew spends 40% of her time with the respondent because the parties were aware that she would primarily be with the claimant at the Shuswap property during those months.
- [41] The claimant submits that many of the expenses which the respondent claims to have paid are extraordinary expenses. Thus, she says the appropriate course of action would have been for the respondent to seek a contribution from her towards those expenses rather than to unilaterally terminate child support.

Discussion

Legal Framework

- [42] Pursuant to s. 15.1 of the Divorce Act, this court has jurisdiction to make an order requiring a parent to pay child support for any or all children of the marriage. Such an order should be in accordance with the Guidelines, but the court may order a different amount if the conditions set out in s. 15.1(5) are satisfied. The relevant portions of s. 15.1 state:

15.1 (1) A court of competent jurisdiction may, on application by either or both spouses, make an order requiring a spouse to pay for the support of any or all children of the marriage.

- (3) A court making an order under subsection (1) or an interim order under subsection (2) shall do so in accordance with the applicable guidelines.
- (5) Notwithstanding subsection (3), a court may award an amount that is different from the amount that would be determined in accordance with the applicable guidelines if the court is satisfied
- (a) that special provisions in an order, a judgment or a written agreement respecting the financial obligations of the spouses, or the division or transfer of their property, directly or indirectly benefit a child, or that special provisions have otherwise been made for the benefit of a child; and
- (b) that the application of the applicable guidelines would result in an amount of child support that is inequitable given those special provisions.
- (7) Notwithstanding subsection (3), a court may award an amount that is different from the amount that would be determined in accordance with the applicable guidelines on the consent of both spouses if it is satisfied that reasonable arrangements have been made for the support of the child to whom the order relates.

(8) For the purposes of subsection (7), in determining whether reasonable arrangements have been made for the support of a child, the court shall have regard to the applicable guidelines. However, the court shall not consider the arrangements to be unreasonable solely because the amount of support agreed to is not the same as the amount that would otherwise have been determined in accordance with the applicable guidelines.

[43] As noted, the respondent initially paid child support under the terms of the Separation Agreement, which was filed with the court on June 11, 2014. Pursuant to s. 148(2) of the FLA, the Separation Agreement is enforceable under the FLA as if it were a court order. However, pursuant to s. 148(3), the Separation Agreement may be replaced with a court order if the court would make a different order on consideration of the matters set out in s. 150, including the support that would be payable under the Guidelines and whether the agreement as a whole is in the best interests of the children. For reference, s. 150 states:

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 consent under section 219 [persons may consent to order being made] or 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.

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

(a) an agreement or order respecting the financial duties of the parents or guardians or the division or transfer of property, other than an agreement respecting child support, benefits the child directly or indirectly, or that special provisions have otherwise been made for the benefit of the child, and

(b) applying the child support guidelines would be inequitable on consideration of the agreement, order or special provisions.

(5) If a court makes an order respecting child support in an amount different from that required under the child support guidelines, it must give reasons for doing so.

[44] The parties have relied on both the Divorce Act and the FLA, although in her notice of application the claimant seeks an order replacing paragraph 6 of the Separation Agreement with an order requiring the respondent to pay child support in accordance with the Guidelines, as contemplated under s. 148(3) of the FLA. The respondent's notice of application does not specify whether he is relying on the Divorce Act or the FLA in support of his application to terminate his support obligation. Regardless, the relevant provisions of both statutes are principally concerned with ensuring that the children of the marriage are adequately supported and accordingly, my analysis would not be materially different under either statute in the circumstances of this case.

Basic Child Support

- [45] As noted at the outset, the respondent seeks an order that he is not obligated to pay child support for any of the three children and a declaration that there are no arrears of child support owing.
- [46] The central thrust of his position is that child support has been varied by agreement in accordance with the terms of the Separation Agreement and that he has made significant contributions to the children's ordinary and extraordinary expenses.
- [47] The claimant seeks an order that the respondent pay ongoing child support for all three children as well as arrears. As part of her claim for arrears, she seeks a retroactive variation of the child support owing based on increases in the respondent's income.
- [48] The first issue to address in determining the respondent's child support obligation is whether, as he alleges, there was an agreement between the parties that child support would be varied depending on how many children were living at home with the claimant.
- [49] In support of his allegation, the respondent points to his pattern of payments from 2011 to 2014 where the amounts paid varied from month to month. He also points to a series of emails between the parties in which they discuss responsibility for various expenses and he notes that the claimant does not raise the issue of basic child support, other than to say at one point that "Drew per month is 1086 according to calculator."
- [50] The claimant again says that there was no such agreement and that the respondent simply paid what he determined appropriate at any given time.
- [51] In considering this issue, the starting point is clause 7 of the Separation Agreement. As set out above, that agreement contemplated that the quantum of child support would be "reviewed and adjusted" in certain enumerated circumstances, including annually following the exchange of income tax information, forthwith in the event of a change in primary residence and forthwith when each child turned 19.

- [52] As I read clause 7, the intention of the parties was that upon the occurrence of one of the listed triggering events, the parties would exchange relevant information and reach an agreement on an appropriate adjustment to the quantum of child support, if any. Were that to occur, one would expect there to be some written communication or other record of the agreement, particularly given that the parties made a point of committing their original settlement to writing in the form of the Separation Agreement.
- [53] The respondent however can point to no such written communication or record in which the parties clearly agreed as he suggests. Rather, he submits that such an agreement can be inferred from email correspondence in which the parties discuss their respective shares of the children's expenses.
- [54] In my view, the emails relied on by the respondent do not give rise to the inference that he advances and, in any event, much clearer evidence of an agreement would be required before I would vary the child support obligation to the extent sought by the respondent.
- [55] Further, the pattern of child support paid by the respondent is in fact more consistent with him making periodic ad hoc adjustments than with a process of review and agreement as contemplated by the Separation Agreement. For example, on the respondent's own evidence, he paid child support in 2013 as follows:

January

\$1,000

February

\$1,225

March

\$1,000

April

\$1,150

May

\$650

June

\$1,300

July

\$1,650

August

\$1,600

September

\$800

October

\$1,400

November

\$600

December

\$1,200

[56] As can be seen, the amount of child support paid by the respondent varied month to month which, on its face, is inconsistent with the agreement he alleges. Even if the parties had agreed to vary child support from month-to-month based on the amount of time their children were residing with the claimant, which I do not find, then the evidence nonetheless indicates that the respondent unilaterally decreased support at arbitrary times. For example, he paid \$600 more in October 2013 than in September 2013 even though the children seemed to reside with the mother for the same amount of time in both these months. In the circumstances, I am not satisfied that the parties agreed to vary the child support payable by the respondent as he alleges.

[57] Thus, in my view, the respondent was obligated to continue to pay child support in accordance with the terms of the Separation Agreement until such time as there was a review and adjustment as contemplated by that agreement or until the court ordered otherwise.

[58] This brings us to the respondent's application to terminate his child support obligation, both retroactively and prospectively, and the claimant's application to retroactively vary the quantum of child support payable by the respondent based on his increased income since the date of the Separation Agreement.

[59] As noted, child support under the Divorce Act is governed by s. 15.1 which provides that a court may make an order requiring a spouse to pay for the support of any or all children of the marriage.

[60] "Child of the marriage" is defined in s. 2(1) of the Divorce Act to mean a child of two spouses or former spouses who, at the material time,

- (a) is under the age of majority and who has not withdrawn from their charge, or
- (b) is age of majority or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain necessities of life.

- [61] As set out above, Jesse reached the age of majority (19) on September 2, 2011 and Jamey on April 16, 2014. Drew does not turn 19 until June 13, 2018.
- [62] Both parties' applications turn in large part on whether Jesse and Jamey continue to be children of the marriage. The respondent argues that Jesse and Jamey have reached the age of majority and are no longer children of the marriage. The claimant submits that they have been engaged in post-secondary studies and also have significant health issues and thus are still children of the marriage.
- [63] In *Neufeld v. Neufeld*, 2005 BCCA 7, the Court of Appeal endorsed the list of factors set out by Master Joyce (as he then was) in *Farden v. Farden*, (1983), 48 R.F.L. (3d) 60 para. 15 that inform the determination of whether a child pursuing further education remains a child of the marriage. Speaking for the Court, Madam Justice Levine said:
- [19] A list of relevant circumstances was formulated by Master Joyce (as he then was) in *Farden v. Farden* (1993), 48 R.F.L. (3d) 60 at para. 15 (B.C.S.C.) and referred to by this Court in *Darlington v. Darlington* (1997), 32 R.F.L. (4th) 406 at para. 14 (B.C.C.A.). These factors were considered by the chambers judge, who noted that in *Darlington*, this Court made it clear that there does not have to be evidence on all of the factors in order to establish that a child is a "child of the marriage" because she is pursuing an education. Nor should this list be considered to be exhaustive of the relevant factors.
- [20] The factors outlined in *Farden* are:
- (1) whether the child is in fact enrolled in a course of studies and whether it is a full-time or part-time course of studies;
 - (2) whether or not the child has applied for or is eligible for student loans or other financial assistance;
 - (3) the career plans of the child, i.e. whether the child has some reasonable and appropriate plan or is simply going to college because there is nothing better to do;
 - (4) the ability of the child to contribute to his own support through part-time employment;
 - (5) the age of the child;
 - (6) the child's past academic performance, whether the child is demonstrating success in the chosen course of studies;
 - (7) what plans the parents made for the education of their children, particularly where those plans were made during cohabitation;
 - (8) at least in the case of a mature child who has reached the age of majority, whether or not the child has unilaterally terminated a relationship from the parent from whom support is sought.

- [64] As noted by Madam Justice Levine in para. 19, there need not be evidence of each of the enumerated factors in every case nor should the list be considered exhaustive.
- [65] As I understand the respondent's position, notwithstanding that Jesse and Jamey have been at school, he says that they have withdrawn from their parents' charge and are no longer children of the marriage for a number of reasons:
- a) the claimant, and the children, have failed to provide him with complete and current financial information as well as information concerning their studies and the costs associated with those studies;
 - b) the claimant failed to adhere to the provision of the Separation Agreement which required that child support be reviewed and adjusted forthwith on each child turning 19;
 - c) Jesse and Jamey made their own decisions about their education and even though the respondent disagreed with some of those decisions, he respected their right to make the decisions as adults;
 - d) both Jesse and Jamey have taken reduced course loads, as a result of which Jesse has been at school for five years and has not completed a degree and Jamey is unlikely to complete a degree in four years; and
 - e) Many of the expenses incurred by the claimant and/or the children were not necessary or reasonable and he was not consulted about those expenses in advance.
- [66] I do not accept the respondent's position. Many of the points he raises go to the issue of what expenses should he be required to contribute to, particularly retroactively, and the quantum of child support, as distinct from the issue of whether Jesse and Jamey continue to be children of the marriage and whether he continues to be obligated to pay child support.
- [67] I am satisfied that Jesse and Jamey continued to be children of the marriage throughout the period in which they have been pursuing further education and up to the date of the hearing. Without going through each of the Farden factors in detail, I rely on the following in support of my conclusion:
- a) Both Jesse and Jaime have registered for a full course load but have had to reduce their load due to mental health issues;
 - b) Both have applied for and received student loans and bursaries which they have used to contribute towards their expenses;
 - c) Both have worked when possible, although their ability to work has also been compromised somewhat by their health issues;
 - d) Both continue to reside with the claimant for over 50% of the year, including at various times in the school year and for much of the summer; and
 - e) Both clearly remain financially dependent on their parents.

- [68] With respect to Jesse and Jamey's mental health issues, the respondent acknowledges their diagnoses and the fact that their schooling has been affected as a result, but he submits that this does not mean that they did not withdraw from their parents' charge "or that the Claimant is somehow entitled to more money from the Respondent" (respondent's written submission, para. 118).
- [69] This position reflects a fundamental misapprehension on the part of the respondent that runs through his submission, in that it ignores the fact that child support is the right of the children, not the receiving spouse (see *S.(L.) v. P.(E.)*, 1999 BCCA 393 at paras. 58-59). Payment of the child support amount to the receiving spouse is simply the mechanism by which the support is provided to the children and to characterize it as a means for the payee to get more money from the payor is misconceived.
- [70] Again, I am satisfied that Jesse and Jamey have continued to be children of the marriage and thus entitled to ongoing child support. Their status as children of the marriage may be reviewed if there is any material change to their educational status, their health issues, or otherwise. However, for the purpose of calculating the respondent's arrears, all three children were children of the marriage during the relevant period up to the date of the hearing.
- [71] The issue then becomes the quantum of the support.
- [72] Sections 3(1) and (2) of the Child Support Guidelines provide:
- Presumptive rule
3. (1) Unless otherwise provided under these Guidelines, the amount of a child support order for children under the age of majority is
 - (a) the amount set out in the applicable table, according to the number of children under the age of majority to whom the order relates and the income of the spouse against whom the order is sought; and
 - (b) the amount, if any, determined under section 7.
 - (2) Unless otherwise provided under these Guidelines, where a child to whom a child support order relates is the age of majority or over, the amount of the child support order is
 - (a) the amount determined by applying these Guidelines as if the child were under the age of majority; or
 - (b) if the court considers that approach to be inappropriate, the amount that it considers appropriate, having regard to the condition, means, needs and other circumstances of the child and the financial ability of each spouse to contribute to the support of the child.

- [73] As can be seen, the presumptive rule for children under the age of majority is child support in the Guidelines amount. For children over the age of majority, support is payable in the Guidelines amount or such other amount as the court considers appropriate.
- [74] In *P.R.M. v. B.J.M.*, 2012 BCSC 1795, Madam Justice Arnold-Bailey held that the Guidelines amount continues to apply to children under the age of majority who live away from home for part of the year attending post-secondary education (citing *Bockhold v. Bockhold*, 2006 BCCA 472).
- [75] Thus I am satisfied that the respondent was obligated to pay the Guidelines amount for Jesse until at least September 2, 2011 and for Jamey at least until April 6, 2014.
- [76] Pursuant to clause 6 of the Separation Agreement, the respondent was required to pay child support in the amount of \$1,650 per month based on the parties' incomes at the time, which was \$98,227 for the respondent and \$86,162 for the claimant.
- [77] The claimant now seeks to vary that amount retroactively based on subsequent increases to the respondent's income.
- [78] The claimant says that the respondent's income for the years 2011 to 2013, grossed up to include undeclared rental income, was:
- a) 2011: \$124,600
 - b) 2012: \$113,644
 - c) 2013: \$128,186
- [79] The respondent deposed that his employment income for 2014 was approximately \$117,000.
- [80] According to the claimant, her income from 2011 to 2013 was as follows:
- a) 2011: \$87,404
 - b) 2012: \$85,878
 - c) 2013: \$81,964
 - d) 2014: \$76,403
- [81] The 2014 figure reflects the fact that there was a teacher's strike for part of the school year, but it also includes a signing bonus paid to teachers upon settlement of the strike.
- [82] The claimant submits that based on these income figures, the respondent owes a total of \$73,116 in arrears of child support up to and including July of 2015. Again, that is based on a retroactive variation of the child support set out in the Separation Agreement. The total amount of this variation was calculated by adjusting the respondent's child support to the appropriate Guidelines amount that would have applied to his income in each respective year, based on three children of the marriage.

- [83] Retroactive variation of child support does not however occur automatically.
- [84] The Supreme Court of Canada decision in *D.B.S. v. S.R.G.*, 2006 SCC 37 is the leading authority on claims for retroactive child support. There, Mr. Justice Bastarache identified four factors that the court should consider when determining whether to make a retroactive award of child support, at para. 133:
- a) whether the recipient parent has supplied a reasonable excuse for the delay in seeking retroactive support;
 - b) the conduct of the payor parent;
 - c) the circumstances of the child; and
 - d) the hardship that a retroactive award might entail.
- [85] Mr. Justice Bastarache stressed however that none of the factors is decisive and that "a court should strive for a holistic view of the matter and decide each case on the basis of its particular factual matrix" (at para. 99).
- [86] Notwithstanding the fact that no one factor is determinative, it is useful to consider each in turn in the specific circumstances of this case.

Delay in Bringing the Application

- [87] The claimant explains her delay in bringing the application by saying that she was concerned about how the respondent would react given his aggressive and unpredictable behavior in the past which at one point led her to contact the police and have her home flagged for quick response in the event of a call. She says further that she lacked the financial resources to bring a court application.
- [88] The respondent does not deny that at times he has been angry with the claimant due to the breakdown of the marriage but he denies acting in a threatening manner. He points to one email exchange with the claimant in January of 2013 when the claimant told him where she kept a spare key to her house and gave him the garage security code so that he could go to her house and walk the dogs. He submits that this is wholly inconsistent with the claimant's allegation that she was afraid of him.
- [89] In my view, the claimant has not provided a reasonable excuse for her delay in bringing her application. While there have no doubt been incidents of tension between the parties, the evidence falls short of establishing that the claimant was too afraid to bring her application more promptly. With respect to her finances, her allegation that she could not afford to bring an application lacks detail and, in any event, is belied somewhat by the timing of her application, which was brought approximately nine months after the respondent stopped paying child support and at a time when presumably she was worse off financially due to the lack of support.

Blameworthy Conduct

- [90] The claimant submits that the respondent engaged in blameworthy conduct by failing to inform her of his increase in income after the Separation Agreement and in failing to increase child support accordingly.
- [91] The respondent says that the claimant was well aware of his income, as evidenced by the fact that in an email dated June 3, 2012, the claimant advised him that the table amount of support for Drew was \$1,086. That accords with a Guidelines income of \$120,000 and in fact the respondent's 2011 income was \$119,502.
- [92] Whether or not the claimant in fact knew the respondent's income from year to year, it is clear that the respondent did not provide his tax return to the claimant each year, as required by the Separation Agreement. However, there is no evidence that the claimant complied with that requirement either. To the extent that neither party was particularly observant of the formalities of this reporting requirement, I am not satisfied that the respondent actively tried to frustrate the reporting and review process, or that he failed to provide his tax returns with the intent to avoid paying increased support.
- [93] I am satisfied that the respondent engaged in blameworthy conduct by unilaterally reducing and then terminating child support when there clearly was no agreement to that effect. However, this conduct goes more to the question of whether the arrears of child support should be cancelled than to the issue of whether there should be a retroactive increase in support.

Circumstances of the Children

- [94] In D.B.S., Mr. Justice Bastarache noted at para. 113 that the argument for retroactive support will be less convincing where the child has already enjoyed the advantages he or she would have received had both parents been supporting him or her, compared to a situation where the child has endured hardship resulting from the lack of support.
- [95] In this case, both Jesse and Jamey have pursued post-secondary education, to which the respondent has contributed. While there is a dispute about the relative contributions of the respondent and the claimant, which I will address below, this is not a hardship case that warrants a significant retroactive increase in child support. It is apparent that Jesse and Jamey have had access to resources to help them finance their education and their relatively consistent standard of living.

Hardship Resulting From a Retroactive Award

- [96] As noted, the claimant seeks an award of retroactive child support in the amount of \$73,116.
- [97] The respondent submits that an award of this amount would work a hardship on him given his current financial circumstances and the fact that he has contributed in a significant way to the children's expenses all along.

- [98] As noted by Mr. Justice Bastarache in D.B.S. at para. 115, courts must be conscious of the potentially disruptive effect on the payor parent's ability to manage his or her financial affairs given that retroactive awards, unlike prospective awards, are not intrinsically linked to what the payor can currently afford.
- [99] I am satisfied on the evidence that an award in the amount claimed by the claimant would cause a hardship to the respondent.
- [100] In summary on the issue of retroactive variation, having considered the evidence and the factors set out in D.B.S., I find that a retroactive variation of the respondent's child support obligation is not warranted.

Arrears

- [101] While I am not prepared to retroactively increase the child support, I am also not prepared to cancel the arrears owing by the respondent based on the child support established under the Settlement Agreement.
- [102] An applicant seeking to reduce or cancel arrears must establish i) that there has been a material i.e. significant and long-lasting change in circumstances and ii) that it would be grossly unfair not to reduce or cancel the arrears: *Semancik v. Saunders*, 2011 BCCA 264, at para. 25.
- [103] In my view, the respondent has satisfied neither of these requirements. In terms of a change in circumstances, it is quite clear that his income has in fact increased since the date of the Separation Agreement. While I accept that he has made significant contributions towards Jesse and Jamey's education and other expenses, that again goes more to the issue of s. 7 expenses. Further, the respondent has not shown how it would be grossly unfair to pay the child support that he agreed to in the Separation Agreement, particularly since he unilaterally reduced and then terminated that support.

Drew

- [104] The onus is on the respondent to establish that Drew is in his care for more than 40% of the time: *Crofton v. Sturko*, [1998] B.C.J. No. 38 (S.C.). In my view, the respondent has not met that burden.
- [105] On his own evidence, the respondent asserts that he spends three of every eight days with Drew. While he says further that he spends considerable time driving her to and from her various activities and coaching her sports teams, he does not quantify that time.
- [106] There is also no evidence to support the respondent's contention that the claimant frustrates his time with Drew. The reality is that Drew is now 16 years of age and able to make her own decisions about who she spends time with. The respondent agrees with that proposition.

[107] Accordingly, I find that the respondent continues to be obligated to pay child support in respect of Drew for so long as she remains a child of the marriage.

Child Support Post Hearing Date

[108] I am satisfied that at the present time, each of Jesse, Jamey and Drew continue to be children of the marriage.

[109] With respect to Jesse, as noted, she plans to return to university in September and intends on taking four classes. Given her educational history and health problems, it is not clear when she will complete her program of studies. However, her status should be reviewed at the end of the 2015-2016 academic year.

[110] While Jamey is not returning to school in September, I find that she is still a child of the marriage due to her health issues. She was hospitalized as recently as March of 2015 and was accepted into the North Fraser Eating Disorder Clinic on June 29, 2015. I note that the respondent agrees that Jamey should take a year off school and work on improving her health. In the circumstances, she has not withdrawn from her parents' charge.

[111] Drew is currently 16 years old and, as I have found, spends less than 40% of her time with the respondent

[112] While I have declined to retroactively vary the respondent's child support, the claimant also seeks to adjust child support going forward based on the respondent's current income. As set out above, pursuant to s. 3(2)(b) of the Guidelines, once a child reaches the age of majority but remains as a child of the marriage, the quantum of child support may be set at the Guidelines amount or at some other amount the court considers appropriate having regard to the condition, means, needs and other circumstances of the child and the financial ability of each spouse to contribute and support the child.

[113] In *De Beck v. De Beck*, 2012 BCCA 465, the Court of Appeal stated at para. 56 that the choice between applying s. 3(2)(a) and 3(2)(b) to a child attending post-secondary education will be a discretionary one that will be governed by the circumstances of that case. In *Wesermann v. Wesermann*, [1999] B.C.J. No 1387 (S.C.) Madam Justice Martinson held at para. 18:

The closer the circumstances of the child to those upon which the usual Guidelines approach is based, the less likely it is that the usual Guidelines calculation will be inappropriate. The opposite is also true. Children over the age of majority may reside away from home and/or earn a significant income. If a child is not residing at home, the nature of the contribution towards the child's expenses may be quite different.

[114] The claimant submits that Jesse and Jamey's circumstances are very close to the circumstances on which the usual Guidelines approach is based, specifically:

- a) they live with the claimant for over 50% of the year;

- b) her expenses in relation to Jesse and Jamey are not reduced while they attend school as the claimant continues to pay all of the expenses relating to the Port Moody house as well as sometimes for their car insurance and maintenance and she contributes to their groceries, hair care and clothing; and
- c) their health issues have impeded their ability to work more and earn greater incomes;
- d) while both Jesse and Jamey have obtained student loans, they would still suffer a shortfall if required to rely solely on their own resources.

[115] Based on this analysis, the claimant seeks ongoing child support based on the full Guidelines amount. Specifically, she seeks an order that the respondent pay monthly child support in the amount of \$2,301 based on income of \$122,942. As I understand her position, that income figure is derived from the respondent's line 150 income tax income adjusted to reflect undeclared rental income. I am satisfied on the evidence that the proposed income figure is reasonable

[116] However, taking account of the factors set out in s. 3(2)(b) of the Guidelines, I am not satisfied that support should be in the full Guidelines amount for Jesse and Jamey. When Jesse returns to university in September, she will be living away from home for much of the time. Further, she has worked in the summer and, in the past, has contributed towards her expenses by way of her earnings and student loans. She should be expected to continue to do so.

[117] While Jamey will be living at home and not attending school, the expectation is that she will have some employment, while at the same time working on her health. Again, in these circumstances, at the age of 20, she should be expected to contribute towards her own expenses. Further, when considering the financial circumstances of the parties, I find that requiring the respondent to pay ongoing child support at the full Guideline amount, in addition to contributing towards s. 7 expenses, would impose an undue hardship on him.

[118] As submitted by the claimant, using an income figure for the respondent of \$122,942 results in support in the amount of \$2,301 for three children. For two children, it would be \$1,772 and for one child, \$1,110.

[119] In my view, a reasonable figure in the circumstances of this case is \$1,850.

Summary of Basic Child Support

[120] Based on the above, I find that Jesse and Jamey have continued as children of the marriage up to the date of the hearing and that Drew has not been in the care of the respondent for at least 40% of her time. I find further that the respondent has been obligated to pay child support as established under the Separation Agreement in the amount of \$1,650 up to the time of the hearing. I have declined to vary that amount but I have also declined to cancel the arrears that are owing.

- [121] By my count, the total amount of child support owing from January 1, 2011 through to July 31, 2015 was \$90,750. According to the respondent's figures, he paid \$52,225 over that period, leaving a balance owing of \$38,525. However, given that there was a slight discrepancy in the parties' figures about what was actually paid, I leave it to counsel to come up with the final amount, with leave to come back before me if they cannot agree.
- [122] From the date of the hearing forward, each of Jesse, Jamey and Drew continue to be children of the marriage, and, effective August 1, 2015, the respondent will pay monthly child support in the amount of \$1,850.
- [123] As submitted by the claimant, the situation with Jesse and Jamey is "fluid" and it is not possible to anticipate with certainty what their situations will be over the coming years. It is incumbent upon the parties to communicate and cooperate to ensure that the children are adequately supported, yet at the same time encouraged to move towards self-sufficiency. This order is not intended to determine support for the indefinite future, and the parties will be able to revisit the issue as the children's circumstances evolve.

Section 7 Expenses

- [124] The claimant seeks an order that the respondent pay her the amount of \$6,307.15 which she says is his proportionate share of retroactive extraordinary expenses incurred for the children.
- [125] The respondent challenges whether many of the expenses claimed are in fact "extraordinary" and he says that the claimant regularly incurred or approved expenses without his agreement. He points to clause 6 of the Separation Agreement which states that "no extraordinary expense will be incurred by either parent without obtaining the agreement of the other parent." He says further that he has, in any event, made significant direct contributions to the children for their expenses that are not accounted for by the claimant.
- [126] Section 7 of the Guidelines provides that both parents may request a proportionate sharing of special and extraordinary expenses incurred for the benefit of a child of the marriage.
- [127] These expenses are described in s. 7(1) as follows:
7. (1) In a child support order the court may, on either spouse's request, provide for an amount to cover all or any portion of the following expenses, which expenses may be estimated, taking into account the necessity of the expense in relation to the child's best interests and the reasonableness of the expense in relation to the means of the spouses and those of the child and to the family's spending pattern prior to the separation:

- (c) health-related expenses that exceed insurance reimbursement by at least \$100 annually, including orthodontic treatment, professional counselling provided by a psychologist, social worker, psychiatrist or any other person, physiotherapy, occupational therapy, speech therapy and prescription drugs, hearing aids, glasses and contact lenses;
- (d) extraordinary expenses for primary or secondary school education or for any other educational programs that meet the child's particular needs;
- (e) expenses for post-secondary education; and
- (f) extraordinary expenses for extracurricular activities.

[128] "Extraordinary expenses" are defined in s. 7(1.1) as follows:

- (a) expenses that exceed those that the spouse requesting an amount for the extraordinary expenses can reasonably cover, taking into account that spouse's income and the amount that the spouse would receive under the applicable table or, where the court has determined that the table amount is inappropriate, the amount that the court has otherwise determined is appropriate; or
- (b) where paragraph (a) is not applicable, expenses that the court considers are extraordinary taking into account
 - (i) the amount of the expense in relation to the income of the spouse requesting the amount, including the amount that the spouse would receive under the applicable table or, where the court has determined that the table amount is inappropriate, the amount that the court has otherwise determined is appropriate,
 - (ii) the nature and number of the educational programs and extracurricular activities,
 - (iii) any special needs and talents of the child or children,
 - (iv) the overall cost of the programs and activities, and
 - (v) any other similar factor that the court considers relevant.

[129] In the Separation Agreement, the parties identified the then current extraordinary expenses to include "costs relating to sports and sports equipment, tournaments, school fees, tutors, friends' birthday gifts and cellular phones." The Separation Agreement also states that "[n]o extraordinary expense will be incurred by either parent without obtaining the agreement of the other parent."

[130] The claimant submits that since the date of the Separation Agreement, the list of extraordinary expenses has expanded. She says that it now includes expenses relating to Jesse and Jamey's post-secondary education, as well as other expenses that reflect the children's status as young adults, such as automobile expenses.

- [131] Both parties have adduced extensive evidence of what they say that they have paid towards the children's expenses.
- [132] It is apparent from reviewing this evidence that many of the alleged extraordinary expenses are in fact ordinary or basic expenses. For example, the claimant attaches to her Affidavit No. 3 an email exchange between her and the respondent in which she says the respondent agreed to certain extraordinary expenses. In that exchange, the parties address items such as "grad hair," "nails," "bus," and "corsage", all of which are arguably ordinary expenses, as well as items such as tuition, summer school and tutoring, which would qualify as special or extraordinary expenses.
- [133] Similarly, in the respondent's summary of what he has paid directly to the children, there is a mix of extraordinary expenses (student housing, tournament fees, cell phones etc.) and ordinary expenses (clothes, concerts, groceries, cash etc.).
- [134] A central difficulty with the claimant's position, as submitted by the respondent, is that since the date of the Separation Agreement, both parties contributed on a somewhat ad hoc basis to the children's expenses. Then, in November of 2014, the claimant brought her application seeking retroactive contributions, thus requiring the respondent to review and recreate four years' worth of expenditures.
- [135] In this regard, there is some similarity between this case and the decision of Mr. Justice Macintosh in *Scherk v. Nixon*, 2015 BCSC 1150 where the respondent sought an order that the parties' daughter had ceased to be a child of the marriage as of the date of her 25th birthday. He also sought an order carving out periods of time prior to that date when the daughter had not been attending post-secondary studies full time. The evidence established that the daughter had taken time off school due to mental health problems.
- [136] Mr. Justice Macintosh rejected the respondent's position and held that the daughter ceased to be a child of the marriage as of the date of her graduation from university. He also held that it was inappropriate to retroactively assess whether there were periods of time in which the daughter had ceased being a child of the marriage. Mr. Justice Macintosh said at para. 24:

The so-called Farden factors for child support during a child's higher education contemplate either a prospective or contemporary assessment of the facts, or at least one conducted soon after the relevant events have occurred. They include considerations such as the child's ability to financially contribute, including whether the child is or was entitled to student loans. The court and the respondent in such an analysis should not be required to engage in a seven-year retrospective examination of what occurred over the extended course of the child's education, punctuated, as in this case, with periods when she was unable to study because of health problems.

- [137] While the circumstances of Scherk differ somewhat from the case at bar, Mr. Justice Macintosh's observations apply with equal force to the claimant's application for a retroactive assessment of extraordinary expenses, particularly since many of the expenses claimed, for example automobile expenses, were incurred without the respondent's agreement as required by the Separation Agreement. I therefore decline to grant the order sought.
- [138] However, that does not mean that the respondent has no obligation to contribute to extraordinary expenses going forward. Having found that Jesse, Jamey and Drew all continue as children of the marriage, the respondent's obligation to contribute to their extraordinary expenses continues as well.
- [139] In this regard, the claimant seeks an order that the respondent pay \$409 per month as his proportionate share of anticipated future extraordinary expenses including:
- a) medical and dental expenses;
 - b) tutoring;
 - c) post-secondary expenses;
 - d) driving lessons and licensing fees for Drew;
 - e) Horseback riding lessons and riding gear for Drew;
 - f) wrestling for Drew; and
 - g) yoga for all of the children.
- [140] I am not prepared to set a specific amount for the respondent's share of extraordinary expenses. For one thing, it is not certain that such expenses will in fact be incurred. For example, the claimant lists Drew's wrestling as an extraordinary expense yet she deposes in her Affidavit No. 3 that Drew seems to be stepping away from wrestling and the claimant does not know if she will continue.
- [141] The dispute about extraordinary expenses appears on the evidence to have arisen as a result of a failure on the part of both parties to communicate properly concerning their children's expenses. Each points to the other as being at fault for the lack of communication. The claimant says that the respondent gets angry whenever she raised the issue of expenses whereas the respondent says that the claimant incurs expenses without consulting him and then seeks contribution after the fact.
- [142] Regardless of where fault lies, it is clear that there needs to be greater communication and cooperation between the parties. For the purposes of dealing with extraordinary expenses going forward, I refer to clause 6 of the Separation Agreement which again identifies certain specific items that will be considered extraordinary expenses. Added to that list must be post-secondary expenses, including tuition, books, housing and related travel.

- [143] Clause 6 also provides that the parties will contribute to the extraordinary expenses in proportion to their incomes and that no such expenses will be incurred by either parent without the agreement of the other. Those provisions continue to apply. Thus, going forward, to the extent that one or the other parent proposes to incur extraordinary expenses on behalf of one of the children, that parent will provide information to the other in advance as to the expected cost and also the rationale supporting the intended expense. This will permit the parties to engage in the prospective or contemporaneous assessment of the expense referred to by Mr. Justice Macintosh in Scherk.
- [144] Lastly, I have set the respondent's current income at \$122,942. I accept the claimant's figure of \$87,484 as her current income. These figures will be used for the purpose of setting the parties' proportionate shares of the extraordinary expenses.

Summary and Conclusion

- [145] In summary, I find that the respondent owes arrears of child support to the claimant in the amount of \$38,525, subject to that figure being confirmed by the parties upon reviewing their records of actual payments made. This figure is based on a monthly support payment of \$1,650 to the date of the hearing as established under the Separation Agreement.
- [146] Effective August 1, 2015, the respondent will pay child support in the amount of \$1,850 per month for so long as the children remain children of the marriage. I decline to retroactively vary the respondent's child support and I further decline to order that the respondent pay arrears of extraordinary expenses. Future extraordinary expenses will be shared in accordance with the terms of the Separation Agreement.
- [147] As success on the two applications was largely divided, the parties will bear their own costs.

"Skolrood J."

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