

CANADA / JUDGMENT

H.C.F. v. D.T.F.

2024 BCSC 574

COURT

Supreme Court of British Columbia

DECIDED

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2024 BCSC 574 H.C.F. v. D.T.F.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

H.C.F. v. D.T.F.,

2024 BCSC 574

Date: 20240409

Docket: E160037

Registry: Vancouver

Between:

H.C.F. aka H.C.R.

Claimant

And

D.T.F.

Respondent

Before: The Honourable Justice Fitzpatrick

Reasons for Judgment

Counsel for the Claimant:

S. Stanislaus

Counsel for the Respondent:

B. St. Pierre

Place and Date of Hearing:

Vancouver, B.C.

March 5 and 7, 2024

Place and Date of Judgment:

Vancouver, B.C.

April 9, 2024

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INTRODUCTION

- [1] In July 2017, following a trial, this Court issued a final order to dissolve the parties' marriage and resolve other family law issues (the "Final Order"). As relevant to these applications, the Final Order determined the parties' Guidelines income. The Final Order also addressed Mr. F's financial obligations for spousal support payable to the Claimant, Ms. F, and for child support payments to be paid to Ms. F for the parties' only child, K.
- [2] As with many families, circumstances over the past almost five years have changed. This is particularly so with respect to Mr. F's income, which is a central circumstance giving rise to the present applications before the Court.
- [3] At this hearing, Mr. F seeks a retroactive and prospective recalculation of child and spousal support from January 2020 and a refund for the difference between what he has paid. Ms. F seeks an order that Mr. F pay a portion of K's retroactive s. 7 expenses from January 2019 until present.

BACKGROUND

- [4] The parties are now both 54 years of age.
- [5] The parties were married in June 2004 and separated in November 2014, after an approximately 12-and-a-half-year relationship.
- [6] The parties have one son, K, who is now 18 years of age, turning 19 in August 2024. He is currently a first-year student at the University of British Columbia ("UBC").
- [7] At the time of the trial in late 2016 and early/mid 2017, the parties enjoyed a very comfortable lifestyle. This was largely as a result of Mr. F's high income from his position as a senior executive at Scotia McLeod, a position that he achieved after working for decades in the financial services industry. The parties lived in an expensive house in Vancouver's West side and owned a vacation property in Whistler.
- [8] On July 17, 2017, Justice Voith, as he then was, granted the Final Order. His reasons for judgment are indexed at H.C.F. v. D.T.F., 2017 BCSC 1226 [Trial Reasons]. The relevant portions of the Final Order and Trial Reasons are:
 - a) The parties were to be joint guardians of K (then almost 12 years old) and K was to ordinarily reside with Ms. F: Final Order, para. 14;
 - b) Both parties were jointly to make "major decisions" regarding K's medical care and treatment, educational programming and "participation in extra-curricular activities", taking K's views, preferences and talents into account: Final Order, paras. 4-6;
 - c) K was to attend regular counselling to re-establish a relationship with Mr. F, given that the father and son had become estranged from each other: Final Order, para. 10; Trial Reasons at para. 15;

- d) The family assets were, for the most part, split equally. In particular, the family home was to be sold and the proceeds divided, as was the Whistler property, although delayed for a year: Final Order, paras. 20-24;
- e) Mr. F's income was determined to be \$933,820 for the purposes of calculating child support and \$855,545 for the purpose of calculating spousal support. These amounts were based on Mr. F's yearly remuneration from his position as Managing Director, Western Canada at Scotia McLeod which, for many years before, had fluctuated between \$939,000 and \$1,093,000. These amounts represented a three-year average in accordance with s. 17(1) of the Federal Child Support Guidelines, SOR 97/175 [Guidelines]: Trial Reasons at paras. 187-189;
- f) Ms. F was not employed by choice such that she was imputed employment income of \$60,000 per year on the basis of what she had earned some 15 years ago and what she considered she could earn if she returned to the workforce: Trial Reasons at para. 197 (this amount does not include any investment income);
- g) Commencing August 1, 2017, and continuing for so long as K was a child of the marriage within the meaning of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) [DA], Mr. F was to pay Guidelines child support for K in the amount of \$7,123 per month: Final Order, para. 39; and
- h) Commencing August 1, 2017, and terminating on November 30, 2024, Mr. F was to pay spousal support to Ms. F in the amount of \$16,000 per month: Final Order, para. 41.
- [9] As a result of the division of family property in the Final Order, both parties were left with millions of dollars in assets, although Mr. F retained an additional \$558,443 as a result of his excluded property claim.
- [10] On January 28, 2018, Mr. F's position at Scotia McLeod was terminated. He received severance benefits until July 2019.
- [11] In December 2018, Ms. F purchased the Whistler property from Mr. F for \$762,500. She retains that property at this time, along with a townhome that she purchased in Vancouver's West side.
- [12] On December 20, 2018, Voith J. granted a further order regarding K participating in a family reunification counselling program (see H.C.F. v. D.T.F., 2018 BCSC 2411). The counselling program began but ultimately did not go forward because K refused to attend.
- [13] By July 2019, Mr. F had not yet secured new employment.
- [14] In July 2019, Mr. F filed an application to vary his support obligations pursuant to s. 17 of the DA.
- [15] In support of his application to vary the Final Order, Mr. F filed his Affidavit #7 sworn July 25, 2019 and Affidavit #9 sworn October 4, 2019. I accept Mr. F's counsel's description or summary of Mr. F's evidence, in that he outlined:

- a) the difficulties in the present financial services job market, and the contraction in the BC financial services industry;
 - b) the details of his job searches;
 - c) copies of his resumes;
 - d) his difficult choice to pursue job opportunities in Toronto, which would make it more difficult to reconcile with his son;
 - e) particulars of the executive career services and recruiting agencies he accessed;
 - f) the details of his networking efforts;
 - g) lists of specific employers and persons he contacted regarding a new position; and
 - h) the particulars of all potential job offers received up to that point in time, except where prohibited by a non-disclosure agreement.
- [16] In advance of the hearing, both parties prepared Form F8 Financial Statements. As of July 25, 2019, Mr. F held total assets of about \$7.4 million. As of September 23, 2019, Ms. F had still not sought out any employment. Her income was derived from investment income and spousal support. Ms. F held assets of about \$4.6 million.
- [17] On October 11, 2019, Mr. F's application was heard by Justice Branch.
- [18] On November 13, 2019, Branch J. dismissed Mr. F's application for reasons indexed at *Ferguson v. Ferguson*, 2019 BCSC 1946 [Branch Reasons]. In the Branch Reasons at para. 26, the Court described Mr. F's efforts to find a position that was as lucrative as his prior one with Scotia McLeod as "substantial", but unsuccessful. However, Branch J. determined that Mr. F's 2019 income was still anticipated to be about \$894,000, which could not be described as materially different than his previous income levels or circumstances justifying a variation of the Final Order: Branch Reasons at para. 24.
- [19] Branch J. also stated that it was premature to project what circumstances might arise in 2020 in terms of Mr. F's income:
- [25] If [Mr. F] continues to be unemployed into 2020, the facts may begin to justify a different outcome. However, [Mr. F] remains hopeful that he will find employment at or near his past income level. Indeed, he has made a decision to move to Toronto in order to maximize his opportunities to find similar work (given that, since his dismissal, more managerial functions have migrated to head offices in Toronto). As such, it is too early to say whether [Mr. F's] income will in fact be lower in 2020. I find that it is premature to determine that there will be a change in circumstances effective January 2020.

- [20] At para. 30 of the Branch Reasons, the Court outlined the evidence of Mr. F's efforts to obtain new employment to that time, referring to a number of job offers ranging in compensation from \$150,000-\$500,000 per year. At para. 32, Branch J. found that Mr. F had the capacity to earn a minimum of \$325,000 for the balance of 2019.
- [21] The upper end of the range in compensation discussed by Branch J. was based on a position with IG Wealth that Mr. F had turned down, where the projected compensation was \$500,000 per year. In one of his most recent Affidavits (#10), Mr. F now expresses his belief that this position was not as advertised. Mr. F says that he became aware that an employee who accepted this position sued IG Wealth, claiming that the actual compensation was materially lower than the projection. Mr. F also states that IG Wealth subsequently restructured its operations and abandoned the role entirely.
- [22] In late 2019, Mr. F purchased a new home for \$2.9 million in Toronto: Branch Reasons at para. 23. Since January 2020, Mr. F has lived in Toronto where he is now employed, as I will describe below.
- [23] Confirming the situation that existed in July 2019, K remains estranged from his father at this time.
- [24] Mr. F has continued to pay the child and spousal support payments in accordance with the Final Order.

MR. F'S APPLICATION

- [25] Mr. F is applying to vary the Final Order, as follows:
- a) Vary child support pursuant to ss. 17(1), (4) and (6.1) of the DA:
 - i. retroactively to January 1, 2020, to reflect Mr. F's actual Guidelines income from 2020-2024 and require that Ms. F repay to him the amount of any overpayment since January 2020 (which is stated to be \$207,528 to December 2023); and
 - ii. prospectively, in the amount of \$2,791 per month, to continue until August 21, 2024 when K turns 19, at which time child support shall end;
 - b) Vary spousal support pursuant to ss. 17 (1), (4.1) and (7) of the DA:
 - i. retroactively to January 1, 2020, to reflect the parties' actual and imputed Guidelines incomes from 2020-2024 and require that Ms. F repay to him the amount of any overpayment since January 2020 (which is calculated by him to be the sum of \$634,392 to December 2023); and
 - ii. prospectively, in the amount of \$2,754 per month, until November 30, 2024, at which time spousal support will end (per the Final Order).

Mr. F's Employment Efforts / Actual Income (2020-2024)

- [26] Mr. F's evidence as to his efforts, from early 2020 to present, are set out in his Affidavit #10 sworn February 1, 2024 and Affidavit #11 sworn February 29, 2024.
- [27] Following the issuance of the Branch Reasons, Mr. F states that he broadened his job search. In his Affidavit #10, Mr. F sets out a detailed timeline from June 2020-December 2023 with specifics of his efforts in terms of people and organizations he approached.
- [28] In May 2020, Mr. F accepted an offer of employment from Manulife to work as a Regional Director. The job came with a base salary of \$90,000 plus variable compensation and benefits. Mr. F states that this was the best job offer that he had received to that point in time.
- [29] Despite accepting the Manulife position, Mr. F continued his search for a position with greater responsibilities and/or compensation. He states that the COVID-19 pandemic in 2020 hampered his job search and affected executive variable compensation in the financial services sector. He says that the effects of both are reflected in his 2021 income tax return.
- [30] In April 2022, Mr. F was promoted to a Managing Director position at Manulife.
- [31] In September 2022, Mr. F accepted a job offer from Wellington-Altus ("WA") for the position of Senior Vice-President & Regional Manager, Ontario & Eastern Canada. Mr. F started the new position on October 1, 2022.
- [32] In May 2023, Mr. F was promoted to the position at WA of Senior Vice-President, Central and Eastern Canada. This employment offers a base salary of \$200,000 plus variable compensation and benefits based on bonuses and recruiting commissions. In addition, Mr. F was granted options to purchase certain common shares in WA entities. Mr. F was also able to obtain loans from a WA entity when exercising the options. Mr. F purchased \$500,000 of these shares, using \$250,000 of his own funds and a loan from WA for the remainder.
- [33] Mr. F has provided his tax returns for the years 2020-2022, indicating the following income levels:

Year

Employment Income

Dividend Income (Actual)

Interest/Investment Income

Other Income

Total Income

2020

\$275,628

\$47,798

\$31,641

\$355,068

2021

\$179,546

\$53,281

\$16,132

\$248,960

2022

\$252,220

\$66,625

\$21,770

\$584

\$341,200

[34] In addition, Mr. F has provided evidence as to his 2023 income.

[35] Mr. F's year-end paystub from December 2023 shows that he earned employment income of \$220,662.63, comprised of \$200,000 in regular salary, \$19,338 in bonuses, and dividends of \$1,324.71 from his WA shares. He has not yet received tax slips for his non-employment income, but expects to have earned a similar amount - \$89,000 - that he received in 2022. He says that his total income for 2023 will be approximately \$310,000.

[36] Mr. F says that most of his disposable income from 2020-2024 has been used to pay his support obligations. For example, his monthly payments of \$23,123 (\$277,476 per year) substantially reduces, if not depletes all of his net income. In 2020, he was left with \$58,790; in 2021, he was in a negative position; in 2022, he was left with \$18,248; and, in 2023, he anticipates that his net income will be \$5,524.

[37] In order to cover all of his support obligations and his personal expenses, Mr. F says that he had to deplete the capital from his investment accounts, including his Scotia margin account. Mr. F points to his most recent F8 sworn December 14, 2023, which now shows total assets valued at approximately \$6.4 million (a drop of almost \$1 million from his July 2019 F8) (and subject to Ms. F's argument that the WA shares are worth \$325,000 more).

[38] In contrast, Mr. F asserts that Ms. F's assets had grown to over \$6.1 million as of December 2023, from about \$4.6 million in September 2019, representing an increase in value of approximately \$1.4 million.

SHOULD THE FINAL ORDER BE VARIED?

[39] Mr. F relies upon s. 17 of the DA and the applicable provisions of the Guidelines and the Spousal Support Advisory Guidelines [SSAG].

[40] Section 17(1) of the DA allows the Court to vary the Final Order, retroactively or prospectively. Subsections 17(4), (4.1) and (6.1) of the DA address varying a child support or spousal support order:

(4) Before the court makes a variation order in respect of a child support order, the court shall satisfy itself that a change of circumstances as provided for in the applicable guidelines has occurred since the making of the child support order or the last variation order made in respect of that order.

(4.1) Before the court makes a variation order in respect of a spousal support order, the court shall satisfy itself that a change in the condition, means, needs or other circumstances of either former spouse has occurred since the making of the spousal support order or the last variation order made in respect of that order, and, in making the variation order, the court shall take that change into consideration.

(6.1) A court making a variation order in respect of a child support order shall do so in accordance with the applicable guidelines.

[41] The threshold question when considering an application to vary is whether there has been a material change in circumstances from the date of the previous order. This means a material change that, if known at the time, would have resulted in a different order: *Willick v. Willick*, [1994] 3 S.C.R. 670 at paras. 97-99; *L.M.P. v. L.S.*, 2011 SCC 64 at paras. 32 and 34. See also Branch Reasons at paras. 11-12.

[42] The focus is on the original order and the circumstances of the parties when it was made. The original order is treated as correct, and the court will not lightly depart from it: *L.M.P.* at para. 33.

[43] A material change must have some degree of continuity and not simply be a temporary change in circumstances: *L.M.P.* at para. 35.

[44] This approach was recently summarized in *Colucci v. Colucci*, 2021 SCC 24:

[61] Most commonly, the retroactive variation claim will be based on a material change in income. To meet the threshold, a decrease in income must be significant and have some degree of continuity, and it must be real and not one of choice (*Willick*, at pp. 687-88; *Earle v. Earle*, (B.C.S.C.), at para. 27; *MacCarthy v. MacCarthy*, 2015 BCCA 496, 380 B.C.A.C. 102, at para. 58, citing *Earle*; *L.M.P. v. L.S.*, 2011 SCC 64, [2011] 3 S.C.R. 775, at para. 33; *Gray*, at

para. 39; *Brown v. Brown*, 2010 NBCA 5, 353 N.B.R. (2d) 323 ("Brown"), at para. 2; *Templeton*, at para. 35). Trivial or short-lived changes are insufficient to justify a variation (*Templeton*, at para. 35). In this way, the threshold inquiry preserves some sense of certainty and predictability for the parties and the child, while allowing some flexibility in response to changes in the payor's income.

- [45] The onus is on the applicant to show the material change in circumstances, and that the conditions call for court intervention: *Walters v. Walters*, 2011 BCCA 331 at para. 48, citing *Oakley v. Oakley* (1985), 48 R.F.L. (2d) 307 (B.C.C.A.) at 313; *Colucci* at para. 60.
- [46] Where a determination of child support was made under the Table, under s. 3(1)(a) of the Guidelines, any change of circumstances that would result in a different child support order constitutes a change in circumstances under s. 17(4) of the DA. The child support payment in the Final Order for K was for the Table amount.
- [47] If there is a material change in circumstances, the Court then proceeds to determine what variations to the order are required in light of that change: *Willick* at para. 121; *L.M.P.* at para. 47.
- [48] In respect of child support, the considerations will include the direct and hidden costs of raising the child, the original order, the age and health of the child, and the current and reasonably anticipated needs of the child and the means of the parties: *Willick* at para. 122.
- [49] At paras. 113-114 of *Colucci*, the Court summarizes the legal framework in an application to retroactively reduce child support payments. The same analysis can be applied to spousal support: *Moazzen-Ahmadi v. Ahmadi-Far*, 2019 BCSC 1772 at para. 45; *aff'd* 2021 BCCA 126 at paras. 55-56 [*Moazzen-Ahmadi BCCA*].

a) Disclosure Issues

- [50] As was noted in *Colucci* at paras. 32, 48-55, financial disclosure is the "lynchpin" underlying the child support regime, and by analogy, the spousal support regime.
- [51] In the context of a variation application, the court must have sufficiently reliable, accurate and complete evidence to support any asserted fall in income in terms of establishing the nature of the change and time when it occurred: *Colucci* at para. 62.
- [52] Ms. F's counsel argues that Mr. F's disclosure of his efforts to obtain employment has been deficient. Ms. F argues that Mr. F has a history of non-disclosure.
- [53] Her counsel points to raising such issues in August 2019 relation to Mr. F's Affidavit #7, stating that his evidence did not set out his employment applications or employment offers.

- [54] In August 2019, Mr. F's counsel responded that the offers were made verbally, save for a confidential one from Cannacord. This advice was later confirmed in Mr. F's Affidavit #9. In that Affidavit, Mr. F states that he does not have copies of his online applications. Mr. F stated that the vast majority of his communications with people in his job searching was oral. Again, he refers to the notes of his communication as set out in his Affidavit #7.
- [55] I note that no such disclosure issues were noted or addressed by Branch J. in the Branch Reasons.
- [56] On this application. Ms. F has renewed her argument that Mr. F's disclosure of his job searching efforts has been deficient.
- [57] Her counsel points to his letter dated March 24, 2022 requesting more disclosure regarding Mr. F's income and his efforts to obtain employment after Scotia McLeod. It is difficult to see this later request by Ms. F's counsel as anything other than an attempt to raise issues of no substance; such specific disclosure was not requested in July 2019 and was only advanced three years later in the context of Mr. F indicating that he wished to renew his application to vary the Final Order.
- [58] Ms. F's counsel also refers to his December 11, 2023 letter requesting these same particulars and requesting signed copies of many documents.
- [59] In his Affidavit #11, Mr. F again addresses this allegations of non-disclosure. He states that he is unable to produce written documentation of previous jobs offers or negotiations that were not accepted because these essentially took place verbally (save for the Cannacord offer which was confidential, but also described generally). He also states that many job "offers" were usually vague or lacking specificity. Finally, he states that in the financial services industry, it is common to receive verbal offers, which are only reduced to writing once agreement is reached (such as was the case for Manulife and WA).
- [60] Further disclosure is found in Mr. F's F8 sworn December 14, 2023.
- [61] In short, Mr. F says that he has provided all appropriate disclosure of documentation regarding his income from 2020 to the present. He states that he has not retained any other written communications or record of his detailed job searching from 2019 to the present.
- [62] I have considered Ms. F's continuing objections to disclosure, but I cannot discern that Mr. F has failed to provide her with sufficient disclosure to allow her to assess his job searching efforts and the terms of the employment he has been able to obtain. She has not chosen to test Mr. F's assertions in his Affidavits beyond asking for documentation that does not exist.
- [63] More to the point, there is no doubt here that Ms. F has been provided with substantial income information as to Mr. F's actual income from 2020 to the present, which is the foundation of the support regimes: Colucci at paras. 50.

b) Underemployment Allegations

- [64] Ms. F takes the position that Mr. F is still intentionally underemployed. She suggests that he has turned down offers that would have been more lucrative, in favour of seeking out only "growth" oriented opportunities, the latter of which will benefit Mr. F in the future, when his spousal support obligations have ended under the Final Order.
- [65] Although Ms. F suggests that income should be imputed to Mr. F, no figure is proposed.
- [66] The difficulty is that no evidence is before me to support Ms. F's argument. To the contrary, the uncontradicted evidence of Mr. F is that the Manulife offer was the best he had received to that point, which he accepted in light of the clear message he received in the Branch Reasons. He also states that the WA position was an improvement of that offer and he accepted it. Finally, he states that he has never turned down a job offer that paid more than what he received at either Manulife or WA.
- [67] As was Branch J., I am satisfied that Mr. F has been making substantial efforts from 2020 to the present in terms of seeking out and obtaining employment.
- [68] In the Branch Reasons at para. 26, Branch J. stated, perhaps somewhat presciently, that the real question was:

whether, at some point, [Mr. F] must accept (at least for support purchases) that he may not be able to achieve his previous lofty income heights.

- [69] I have no doubt that Mr. F has now wrestled with his present circumstances and more limited opportunities and that he has accepted that no position similar to his previous job at Scotia McLeod is available to him. He obtained employment in mid-2020 in line with that reality, and I accept his evidence that he has taken a position that is the best one available to him, including from a compensation point of view. Despite obtaining that position, he continued to seek out better employment and he was successful in doing so with the WA position.
- [70] I see no merit in Ms. F's allegations that Mr. F has been intentionally underemployed since mid-2020.

c) Is there a Material Change?

- [71] In the Trial Reasons at paras. 198-200, Mr. F's child support obligations were clearly based on the straight application of the Table amounts based on his determined income level (which were a three-year average under s. 17(1) of the Guidelines).
- [72] Similarly, Ms. F's spousal support was set at \$16,000, which was based on Mr. F's determined Guidelines income, but at less than the SSAG low end, based in part of the "generous" child support payments that she would receive: Trial Reasons at paras. 218-225.

- [73] As I have stated above, Mr. F has been seeking employment since early 2020 and he has obtained two different positions. Even when employed by Manulife and WA, he has sought to better his circumstances by seeking out and obtaining promotions. Despite those efforts, he has been unable to secure a position that pays more than about \$350,000, which is significantly (less than 50%) below the income levels set in the Final Order.
- [74] Despite those efforts, I have concluded that this change in Mr. F's income has a permanence to it. There is nothing in the evidence to suggest that other high-level positions in the financial services industry have arisen, which Mr. F could seek out. In the words employed in *Turpin v. Clark*, 2009 BCCA 530 at para. 46, the change has become "substantial, unforeseen and continuing".
- [75] I find that there has been a material change in circumstances - being Mr. F's reduction in income - for the purposes of s. 17 of the DA.
- [76] I must also determine when the change did become material so as to trigger the application of s. 17 of the DA. After the Branch Reasons were issued, Mr. F then began to broaden his search and lessen his expectations about what employment he could achieve. He was successful some months later in obtaining the Manulife offer. Even so, he continued to seek out employment opportunities without success.
- [77] I consider that the circumstances of 2020 are such that it could still not be said that Mr. F had exhausted the market toward establishing that a material (i.e. longer lasting) drop in income had occurred. In that event, I have determined that the material change occurred in January 2021.
- [78] I have no hesitation in coming to the conclusion that a downward variation of both child and spousal support is warranted. It is open to the Court to order a repayment of support amounts that exceeded what should have been paid: *Moazzen-Ahmadi BCCA* at para. 75.

d) Notice Issues

- [79] In light of the material change in Mr. F's income, a presumption is triggered that support may be varied back to a certain date, being the "effective notice", which is up to three years before formal notice: *Colucci* at paras. 71-74.
- [80] Mr. F gave notice to Ms. F of his diminished earning capacity and diminished income earning ability after losing his position at Scotia McLeod. He has continued to provide her updates on his income for some years now. The timeline is:
- a) July 2019: Ms. F was aware from Mr. F's application to the Court that he has lost his job at Scotia McLeod and that his severance was ending;
 - b) Fall 2019: The evidence at the hearing before Branch J. disclosed offers that had been received, leading to Branch J.'s conclusion that Mr. F had the capacity to earn a minimum \$325,000, well below the income figures set out in the Final Order;

- c) July 2020: Mr. F's counsel provided Mr. F's 2019 income tax return and notice of assessment and details of his recently obtained employment with Manulife. At that time, Mr. F's counsel indicated that an application would be made to vary the Final Order, failing an agreement;
- d) January 2022: Mr. F's counsel provided Mr. F's 2019 notice of reassessment, his 2020 income tax return and notice of assessment and his projected 2021 income. Again, Mr. F's counsel indicated that an application would be made to vary the Final Order, failing an agreement;
- e) December 2023: Mr. F's new counsel advised that Mr. F still intended to seek a variation of the Final Order. At that time, he also attached all income tax documentation from 2020 to 2022, his most recent paystub, and further documentation regarding Manulife and his shareholding with WA. By this time, it appears that no agreement had been reached between the parties to resolve the issues and counsel began seeking hearing dates; and
- f) February 2024: this application was filed to vary the Final Order.

[81] I have considered the factors discussed in *D.B.S. v. S.R.G.*, 2006 SCC 37, and reiterated in *Colucci*. The factors are:

A. Reason for the Delay:

- [82] It is apparent from the above timeline that Ms. F has been aware for many years now that Mr. F has been unable to secure the high-paying employment that he had with Scotia McLeod. The reality that has been well-known to both of them since 2020 is that Mr. F has only been able to secure two positions that have paid no more than \$355,000 and well below his Scotia McLeod income.
- [83] I accept Mr. F's position that he attempted to engage Ms. F in discussions regarding a possible adjustment of his support obligations with a view to hopefully achieving consensus. A negotiated agreement is usually more effective and efficient than a contested court application and the fact that those efforts were not successful does not negatively reflect on either of the parties.
- [84] In that event, Mr. F decided that he would make the application when sufficient time has elapsed to establish that the decrease in his income was both material and longer lasting, if not permanent. There were also issues of certainty in that Mr. F's income with Manulife and WA have been variable since it is tied to performance and therefore, not entirely settled from the outset. I consider that his approach was reasonable. If he has brought an application even in 2020, there was the distinct possibility that it would have been rejected for the reason that he had still not established the change for a sufficient time to meet the material change test.
- [85] Despite Mr. F coming to grips with his present employment status and opportunities over these last four years, it is quite apparent that Ms. F has chosen to ignore it.

[86] Despite full awareness of the reality of Mr. F's income levels, it is also apparent that it was only Mr. F who was required to suffer the consequences of that reality. Ms. F's evidence is substantially to the effect that she continued to bury her head in the sand and spend money as if the support payments were "secured" in her favour. This is so despite Mr. F's application before Branch J. Even after that application, Ms. F was aware that there was the distinct possibility that Mr. F's job opportunities in 2020 would not prove more fruitful. By July 2020, that was confirmed by Mr. F having to accept the Manulife position, which was accompanied by Mr. F's counsel expressly advising that Mr. F would bring an application to vary the Final Order.

B. Conduct of Mr. F:

[87] As I have already described above, Mr. F has been diligent in bringing the change to his Scotia McLeod employment and his changed employment opportunities to Ms. F's attention in a reasonable manner and in a timely manner.

[88] He has attempted to engage Ms. F in discussions throughout the matter.

[89] Despite unsuccessfully negotiating a reduction with Ms. F and being unsuccessful in his application before Branch J., Mr. F has continued to pay the amounts in the Final Order.

[90] Ms. F argues that Mr. F is blameworthy because, in the years following the trial in 2018/2019, his line 150 income was far in excess of what was set in the Final Order. In those years, Ms. F calculates that Mr. F's Guidelines income was about \$1.4 million. She then suggests that this resulted in a slight overpayment of child support, but an approximate \$400,000 underpayment of mid-range spousal support.

[91] I see no merit in these criticisms of Mr. F. It was acknowledged at the trial that his income was variable and it was open to Ms. F to seek and the Court to order that the support payments be tied to actual reported incomes. Neither occurred.

[92] In addition, Mr. F's income levels were disclosed prior to the hearing before Branch J. Yet, Ms. F did not take any issue with it, including by seeking to vary the Final Order to reflect these increased incomes.

[93] In any event, these high levels of income were clearly tied to Mr. F's position at Scotia McLeod, which is now a very distant circumstance. It bears little resemblance to his present circumstances.

[94] There is no basis upon which to criticize Mr. F's conduct in this matter and there is no basis to suggest that he engaged in a blameworthy conduct.

C. Circumstances of Child and D. Hardship:

[95] Ms. F states that she has used the support payments (net of taxes) to:

a) Pay her and K's personal expense;

- b) Pay K's special and extraordinary expenses (although she is now seeking reimbursement from Mr. F); and
 - c) Maintain the family home and the Whistler property for her and K's use and enjoyment.
- [96] In the main, Ms. F asserts that she enjoyed a certain lifestyle and incurred expenses to support it on the basis of the support payments in the Final Order.
- [97] I am not persuaded that this impact, while real and substantial, is a complete answer to Mr. F's application. I am also not persuaded that this impact should displace the presumptive date from even after Ms. F received effective notice.
- [98] As stated above, Mr. F has pointed to his reduction in net worth as compared to Ms. F's. I am not satisfied that this amounted to a direct transfer of wealth, as he suggests. However, as a matter common sense, the fact is that Mr. F has been substantially overpaying support in relation to his income for some years now. He has met the obligations in the Final Order, only by drawing upon his savings.
- [99] To the contrary, Ms. F has been able to maintain a lifestyle and spending habits based on cash flow that she has known for some time now was premised on a set of circumstances that has not existed for some time. In the meantime, she has she been able to put away savings (presently about \$2,500 per month).
- [100] Ms. F asserts that, if the support payments are reduced and/or she is required to repay amounts to Mr. F, she will not be able to meet her and K's expenses.
- [101] However, Ms. F has the financial resources to repay the amounts sought by Mr. F. She has over \$6.1 million in assets.
- [102] Ms. F also refers to likely having to sell the Whistler property. She refers to K as likely being devastated by no longer having the Whistler property, in terms of his ability to ski competitively there and work on the mountain in the summer. Ms. F advises that K remains passionate about continuing in his ski competitions, even through university. By all accounts, he is an accomplished athlete, competing in international events.
- [103] I acknowledge that it would be an unfortunate event to sell the Whistler property. However, it is open to Ms. F to purchase a lesser priced property in Whistler, or rent yearly, which would still allow her and K to maintain a lifestyle there. These are, of course, choices that Ms. F may make.
- [104] By any measure, Ms. F has been put on notice for some years now that Mr. F's ability to obtain employment at his previous "lofty levels" has long since passed.
- [105] By coincidence, my conclusion that the material change in Mr. F's income reduction occurred in January 2021 is also consistent with the "three-year rule" discussed in Colucci in terms of the extent to which any retroactive adjustment should be made.

[106] In mid-2020, Mr. F gave "effective notice" of his new employment reality, confirming what was suspected at the hearing before Branch J. I find that the communication from Mr. F's counsel at that time was accompanied by "reasonable proof" that allowed Ms. F to assess the situation in a meaningful way: Colucci at para. 88.

[107] Therefore, the application of the "three-year rule" allows for an adjustment from January 2021, which is three-years from January 2024 when Mr. F's formal court application was filed.

e) Parties' Guidelines Incomes (2021 to Present)

[108] Having concluded that a material change occurred in early 2021, I must then consider what changes to the Final Order will arise: Willick at para. 100. In doing so, I will first address the Guidelines income of the parties.

i) Mr. F's Income

[109] Mr. F proposes using his Guidelines incomes, as has been established by his income tax returns.

[110] Ms. F suggests that Mr. F's projection for 2023 does include many items, including shares and the potential value of shares he obtained via WA. However, these are not income items, but capital items. In addition, Ms. F raised the possibility that the WA loan for the shares might be forgiven. That is true, but there is no guarantee it would happen and, in any event, any taxable benefit would be evident on Mr. F's tax return.

[111] Finally, Ms. F points to certain discretionary bonuses or recruiting compensation. However, Mr. F's figures include bonuses already and any further bonuses will be reflected in his 2023 tax return, which I propose to use for the basis for recalculation of child support.

[112] I accept that Mr. F's income should be as determined by his income tax returns for 2021-2022 and in accordance with the Guidelines. I also determine that Mr. F's Guidelines income will be set at \$310,000 for 2023, subject to any adjustment once his 2023 income tax return is filed and assessed. Once that occurs, Mr. F's income will be adjusted to that figure for the purposes of calculating his support obligations for 2024.

ii) Ms. F's Income

[113] It is somewhat ironic that, in face of Ms. F's substantial criticism of Mr. F's efforts to obtain employment and disclose those efforts, much the same, if not more, can be levelled at Ms. F.

- [114] In her Affidavit #9, Ms. F states very briefly and vaguely that she is "engaged" in efforts to obtain employment, including in "marketing efforts" by building connections with "friends and acquaintances". She is offering "project support", apparently unpaid. She refers to taking "courses" and "webinars" and "reviewing reference materials" from UBC. She is considering starting a new business and "investigating" "investment and income opportunities".
- [115] It is apparent that Ms. F has not made any real efforts to obtain any or meaningful employment since the Final Order and she remains intentionally unemployed.
- [116] In any event, Mr. F takes the position that Ms. F should continue to be imputed employment income of \$60,000 per year pursuant to s. 19(1) of the Guidelines. Ms. F does not disagree.
- [117] In addition to imputing employment income, there is an issue as to whether Ms. F should be imputed investment income.
- [118] Ms. F has chosen to use her net worth to purchase two properties as opposed to using that cash to earn income. Those properties are currently assessed at approximately \$3.9 million. In contrast, Mr. F's home is assessed about \$2.4 million and he has more income-generating assets.
- [119] Mr. F asserts that Ms. F is not reasonably utilizing her assets to garner income and should be imputed income under s. 19(1)(e) of the Guidelines. In support, he cites *Kim v. Hong*, 2013 BCSC 587 at paras. 350-376. Mr. F asserts that their income base is roughly equivalent, which results in him earning an average non-employment income of \$79,278. He submits that Ms. F should be imputed the same amount.
- [120] I would not accede to Mr. F's argument. For obvious reasons, Ms. F required a home in Vancouver for herself and K. It is located close to UBC where K attends UBC classes. In addition, Ms. F has chosen to keep the Whistler property for a variety of reasons. It is obvious that the family has been enjoying that property for some time now and it was a major aspect of their lives. Ms. F has sought to maintain it for reasons that included providing stability for K during his teen and high school years and to facilitate K's skiing and mountain biking activities. I do not consider that Ms. F's choice in that regard is unreasonable, although the longer term sustainability of that choice may need to be revisited, as I have discussed above.
- [121] I agree that Ms. F's income should include her actual investment income from 2021 to the present. She lists approximately \$1.5 million in financial assets in her F8. She has disclosed some investment income from her tax returns from 2021, approximately as follows: \$66,000 for 2020; \$61,100 for 2021; \$36,000 for 2022.

[122] Those figures should be added to Ms. F's imputed employment income in arriving at her Guidelines income, including her actual investment income once her 2023 income tax return is filed and assessed. In addition, the 2023 investment figure will be used for her Guidelines income for 2024.

f) Recalculation of Child Support

[123] I see no reason not to use the Table amounts in respect of Mr. F's child support obligations.

[124] Applying the Table amounts to Mr. F's 2021-2022 Guidelines incomes and his estimated 2023 Guidelines income at \$310,000, this yields a difference of \$159,144, which is repayable by Ms. F.

[125] Based on Mr. F's 2024 income being the same as his estimated 2023 income, the Table amount is \$2,791, or \$4,332 below the amounts he is continuing to pay Ms. F. In the circumstances, on an interim basis, Mr. F's monthly child support obligation for K will be \$2,791 going forward. The monthly amounts for 2023/2024 are to be adjusted once Mr. F's 2023 income tax return is filed and assessed.

g) Recalculation of Spousal Support

[126] A variation of spousal support requires the application of s. 17(7) of the DA:

(7) A variation order varying a spousal support order should

- (a) recognize any economic advantages or disadvantages to the former spouses arising from the marriage or its breakdown;
- (b) apportion between the former spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;

I relieve any economic hardship of the former spouses arising from the breakdown of the marriage; and

- (d) in so far as practicable, promote the economic self-sufficiency of each former spouse within a reasonable period of time.

[127] There is no suggestion that Ms. F's entitlement to spousal support or the duration of that support, as set out in the Final Order, and the Trial Reasons, are to be disturbed. The only issue is quantum.

[128] I see no reason to depart from the analysis with respect to child support in relation to spousal support.

- [129] Mr. F's counsel has provided DivorceMate calculations from 2021-2023 based on Ms. F having an imputed investment income of \$79,278 in addition to her imputed employment income. Mr. F's calculations yield mid-range spousal support under the SSAG of \$1,031 for 2021 (\$0-\$2,186); \$3,571 for 2022 (\$2,234-\$4,920); and \$2,754 for 2023 (\$1,476-\$4,041) (projected).
- [130] I have rejected imputing that level of investment income, in favour of using Ms. F's actual investment income, which is lower. That would increase the ranges set out in above calculations in favour of Ms. F.
- [131] In my view, a blended amount is appropriate to finalize the issue and provide certainty to the parties. I set the monthly spousal support amount from January 2021 to the present at \$4,000 per month. This amount will continue to apply for the remainder of the duration of spousal support to November 2024.
- [132] This would result in a monthly overpayment from 2021-2023 of \$12,000 (\$16,000 less \$4,000 x 36 months), equalling \$432,000. That overpayment would continue into 2024, as above.
- [133] Mr. F's counsel also proposes that the amount of the retroactive spousal support could be resolved through an "after-tax" payment, which would avoid the parties having to refile their tax returns from 2021. I agree that this proposal may have some merit, but I am reluctant to embark upon this exercise when the tax filings may have other tax consequences of which I am not aware.
- [134] In that event, the parties are at liberty to discuss this "after-tax" scenario to see if agreement can be reached.

CHILD SUPPORT POST-AUGUST 2024

- [135] Mr. F seeks to end his child support obligations with respect to K. in August 2024, when K. turns 19 years old, arguing that he will no longer be a child of the marriage.
- [136] Section 2(1) of the DA defines a "child of the marriage" in (b) as someone who, like K, will be over the age of majority and under the parents' charge, but who is also "unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessities of life".
- [137] There is a presumption that, once a child reaches the age of majority, the child is no longer a child of the marriage, and the parent seeking support bears the burden of proving otherwise: *Forrest v. Aerin*, 2022 BCCA 184 at para. 100, citing *Dring v. Gheyle*, 2018 BCCA 435.
- [138] There is no doubt that pursuit of a post-secondary education can qualify as an "other cause" within the definition of "child of the marriage", as discussed in *W.P.N. v. B.J.N.*, 2005 BCCA 7 [W.P.N.].

[139] Section 3(2) of the Guidelines provides:

- (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.

[140] In *W.P.N.* at para. 38, Justice Levine reproduced the four-step test for determining the "appropriate" amount of child support under s. 3(2) of the Guidelines, as set out in *Wesemann v. Wesemann* (1999), 49 R.F.L. (4th) 435 (B.C.S.C.). Step one was to ask if the child came within the definition of "child of the marriage" under the DA. If they did not, no further consideration need be made as to whether the table amount or another amount is appropriate under s. 3(2).

[141] As the court stated in *De Beck v. De Beck*, 2012 BCCA 465 at para. 56, the choice between s. 3(2)(a) and (b) of the Guidelines is a discretionary one informed by the circumstances of the case.

[142] Mr. F refers to *Nordeen v. Nordeen*, 2013 BCCA 178 at paras. 16-17 which discusses how to determine if pursuit of a post-secondary education is a valid reason for continued dependence.

[143] The first question is whether this endeavour is reasonable. In that respect, both parents support their son's pursuit of higher education. K is enrolled in the Engineering program at UBC and by all accounts, he is succeeding in that course. Come September 2024, K will be enrolled in his second year.

[144] The second - and more difficult - question here is whether those educational efforts should be financed by the parents, or more accurately, Mr. F.

[145] The matter is informed by the well-known Farden factors, which are not a checklist, but provide a useful framework to consider the issues (*Nordeen* at para. 17, citing *Farden v. Farden*, 1993 CanLII 2570 (B.C.S.C.)). Those factors 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.
- [146] No issues arise with respect to factors (1), (5), (6) and (7). There is no information before the court as to factors (2) and (3) or (4), although the present circumstances by which those could be assessed have not yet occurred since K is not yet 19 years old.
- [147] Ms. F asserts that K's circumstances will not have changed from what it was previously when he was under 19 years old, such that Table support should continue. She cites *McClement v. McClement*, 2017 BCCA 416 at para. 12 to the effect that it is less likely that the s. 3(2)(a) approach will be inappropriate where the adult child's circumstances resemble those of a minor child (similarly, see *Lafrentz v. Palmer*, 2021 BCSC 1332 at para. 108).
- [148] The issue here arises from Farden factor (8), in that K has unilaterally terminated his relationship with Mr. F. Mr. F asserts that this factor justified a termination of support for K.
- [149] In support, Mr. F cites *Marsland v. Gibb*, 2000 BCSC 471. In that case, the 19 year old daughter had not seen or had any contact with her father for nine years.
- [150] In *Marsland*, the Court stated:
- [34] After reading all of the above cases, I am satisfied that this case could be distinguished from most of the cases that have been drawn to my attention. The case at bar represents a case of complete rejection by Jennifer of her father. Although Mr. Gibb has made numerous attempts to establish a father-daughter relationship with Jennifer she has continuously rejected them in no uncertain terms since she was 11 years old. Jennifer is now an adult and must be aware of the consequences of her actions towards her father. In the unique factors of the case at bar I am not satisfied that Jennifer is any longer a "child of the marriage". The petitioner's application is therefore dismissed.
- [151] A similar estrangement was considered in *R.B.W. v C.D.W.*, 2022 BCSC 1757 [R.B.W.]. In that case, the only contact between the child and parent was to ask for financial assistance (para. 146). At paras. 154-157, Justice Hori applied Farden at para. 19 and *Marsland*, as above, and concluded that H.W. was no longer a child of the marriage.

[152] Mr. F acknowledges that estrangement does not necessarily and directly translate into a termination of child support obligations. In *Shaw v. Arndt*, 2016 BCCA 78 at paras. 26-29, the court discusses a more nuanced analysis of the circumstances in relation to why the relationship has broken down. At para. 29, the court cites with approval the conclusion that:

the better view is that if conduct is ever relevant, it should only be in truly egregious cases of misconduct by a child against a parent.

[153] Mr. F argues that K's total rejection of any relationship with him is sufficiently egregious to justify K being no longer considered a "child of the marriage" following his 19th birthday. He says that this is not a case where their relationship is simply strained or difficult. He points to having made ongoing efforts to reach out and engage with K so as to maintain a relationship with him. Mr. F says that he even applied for a court order to undertake the reunification program. I have already recounted that the reunification counselling program did not progress to any degree in early 2019, largely by reason of K's refusal to participate. To the extent that it did proceed, it certainly had no effect improving the father/son relationship.

[154] Ms. F argues that the estrangement between Mr. F and K is largely the fault of Mr. F. She refers to the tensions between them increasing as a result of Mr. F continuing to reside in the family home until Voith J. ordered that Ms. F have sole occupancy: Final Order, para. 19; Trial Reasons at para. 27. Yet, that was in 2017 and resolved under the Final Order when Mr. F moved out.

[155] It appears that Mr. F's only contact with K is when K has sent him brief emails simply requesting Mr. F's signature on travel authorization letters. Ms. F says that K was frustrated by Mr. F's failure to provide travel authorizations on a timely basis, although there is no evidence to support that contention, beyond Ms. F's statement to that effect. All of the emails attached to the Affidavits do not disclose any intransigence on the part of Mr. F; to the contrary, the emails disclose the opposite. Further, Ms. F's reference to delays in providing these letters date only to spring 2020, some four years ago. Mr. F's evidence indicates that he provided those letters to K and invited a more personal and fulsome response from K, which was not forthcoming from K.

[156] It is clear enough that, for undisclosed reasons, K refuses to have any meaningful contact with his father save to request travel authorizations. They have not seen each other for six years and only last spoke five years ago very briefly.

- [157] Since the Final Order, and in breach of its provisions, Ms. F alone has made all parenting decisions. Ms. F's communications to Mr. F concerning K can only be described as minimal. Mr. F has not been kept up to date in respect of K's life by either Ms. F or K. Mr. F only learned that K was attending UBC by reading about it in an article in the local Whistler newsmagazine (the UBC enrollment was later confirmed by Ms. F's counsel in a letter dated December 2023).
- [158] Even accepting Ms. F's assertion that she has encouraged a relationship between Mr. F and K, it is manifestly clear that K wants nothing to do with his father. Once K turns 19, he won't even need his father's permission to travel, at which time it is more than likely that even the minimal contact now will cease completely.
- [159] There is little doubt that K has made a considered decision to cease contact with Mr. F. However, at present, K is still a child under the age of majority. I note that, in Farden, Marsland, R.B.W. and Shaw, the estranged children of the relationship had all reached adulthood when the application to terminate support was brought.
- [160] Although it may be more hopeful than real, there is the possibility that, upon reaching adulthood, K will gain a more mature understanding of his circumstances in relation to his father and perhaps take steps to re-establish a relationship between them. In the above circumstances and in light of that possibility, I consider that Mr. F's application in this respect is premature.
- [161] Mr. F's application to terminate child support for K is adjourned generally. Mr. F will continue to pay Table child support after August 2024 on the same basis as I have settled it above (i.e. on an interim basis, \$2,791 per month, to be adjusted once Mr. F's 2023 income tax return is filed and assessed).
- [162] These monthly payments will continue until April 2025 at which time Mr. F may reset his application to terminate child support on the basis of the present evidence, and any new evidence as may be presented. I will be seized of that later application.

SPECIAL AND EXTRAORDINARY EXPENSES

- [163] In February 2024, Ms. F filed her application seeking a retroactive payment from Mr. F for expenses totalling \$122,217.52, which she says she incurred on K's behalf since 2019.
- [164] Broadly speaking, the categories of expenses claimed by Ms. F are: ski equipment and gear; travel to ski competitions; university expenses, health related expenses, high school fees, certifications and training; mountain biking costs and equipment and swim club fees.

- [165] She seeks 75% of those expenses, in accordance with the sharing established in the Final Order that provided that K's s. 7 expenses were to be shared in accordance with the parties' Guidelines incomes, on a 75/25 basis, based on incomes of \$741,820 for Mr. F (\$933,820 less \$192,000 spousal support) and \$252,000 for Ms. F (\$60,000 plus \$192,000 in spousal support): Final Order, para. 40.
- [166] To some degree, special expenses were addressed by Voith J. in the Trial Reasons, in the context of spousal support, as follows:
- [224] Furthermore, without in any way attaching a "budget" to the child support payments that K. will receive, the reality is that those payments are generous and bring into play the considerations expressed by the court in J.E.H.; see para. 47. K. is not in private school. He does not belong to any "elite" sports teams. Apart from his keen interest in skiing his ongoing expenses are comparatively modest. The evidence before me established, for example, that his total expenses last year, for skiing, baseball and tutoring, were approximately \$11,000 or less than \$1,000 per month. I make no comment on which, if any, of the expenses would be "special and extraordinary" within the meaning of s. 7 and 7.1 of the Guidelines.
- [167] When the trial took place, K was 11 years old. Nevertheless, Voith J.'s above comment indicates that there was the evidence that K was very much involved in various sports, which he continues to this time.

The Notice / Conduct Issue

- [168] Ms. F's application was filed in February 2024.
- [169] Mr. F says that, aside from a letter from Ms. F's counsel in 2019, he never received any notice from Ms. F, by way of information or any request for reimbursement, of special expenses over the last five years. The first notice he received that Ms. F was seeking reimbursement of these expenses was when Ms. F's application was filed.
- [170] As discussed above, the D.B.S./Colucci analysis is such that the Court must consider whether it is appropriate to order retroactive support for these claimed expenses, including the reason why the matter was not brought forward earlier; the conduct of the parties; the circumstances of the child; and any hardship: A.M. v. G.M., 2018 BCSC 942 at paras. 139-140.
- [171] Mr. F states that at no time did Ms. F consult him about the incurring of any special expenses for which she now seeks reimbursement. Again, the Final Order provided that both parties were jointly to make "major decisions" regarding K's medical care and treatment, educational programming and "participation in extra-curricular activities", taking K's views, preferences and talents into account: Final Order, paras. 4-6.
- [172] Ms. F did disclose some expenses in her September 2019 F8, although she did not seek any order for payment from Mr. F at the hearing before Branch J.

- [173] Ms. F acknowledges that she did "limit" her communications with Mr. F regarding K's expenses, which she says caused her anxiety and stress.
- [174] I do not consider that this situation absolved Ms. F from any communications with Mr. F concerning many of these claimed s. 7 expenses, which are at high levels. In particular, it did not excuse her from complying with paras. 4-6 of the Final Order which required that the parties jointly make "major decisions" regarding many of these expenses, particularly the extraordinarily high "extra-curricular activity" expenses.
- [175] Leaving aside the Final Order, Ms. F had an obligation to consult Mr. F before incurring large special expenses for which she would claim reimbursement: *Reggelsen v. Reggelsen*, 2009 BCSC 1790 at para. 25. This is particularly so in relation to certain 2023 expenses, such as K's costs for international travel to ski competitions (to Europe where the airfare alone was \$5,000): see *Reggelsen* at para. 26. Further, in June 2023, Ms. F purchased a \$8,208.61 mountain bike for K.
- [176] There are salutary benefits to both parties by requiring pre-consultation in respect of these expenses, firstly, as to whether they are indeed special and/or extraordinary and if so, at what level.
- [177] As Justice Smith stated in *Lee v. Chung*, 2011 BCSC 404:
- [35] Of greater significance, in my view, is the fact that Ms. Lee incurred all of these expenses unilaterally without consulting Mr. Chung. In *Barker v. Barker*, 2005 BCCA 177, the Court of Appeal said:
- 26 [...] When parents cannot agree on their children's reasonable and necessary special and extraordinary expenses the Guidelines require them to share, each presents evidence to the court. On the basis of that evidence the judge makes a determination of the amount they are to share.
- [36] If the parents are to present evidence as to the reasonableness and necessity of expenses, they should have equal as possible opportunities to obtain evidence at or near the time the expenses are incurred. It is neither fair nor reasonable for one party to incur the expenses and put the other in the position of having to marshal evidence long after the fact.
- [178] By failing to discuss these expenses ahead of time, Ms. F has robbed Mr. F of prior input based on what was known at the time and she has also robbed both parties of the certainty of knowing that there is agreement on the matter, or giving the parties time to seek the Court's determination as to whether an expense would or would not be shared. It was only Ms. F, as the person who incurred these expenses, who controlled this information and documentation that did not allow Mr. F to fully or at all understand what expenses were being incurred: *Semancik v. Saunders*, 2011 BCCA 264 at paras. 55-57.

- [179] Ms. F argues that she would have been more proactive in advising Mr. F of K's expenses and seek his prompt contribution if she had known that he would bring an application to vary the Final Order and reduce support based on his lowered income. However, Ms. F did not raise the issue in late 2019 when Mr. F was applying before Branch J. In addition, Ms. F has known since July 2020 that Mr. F intended to continue seeking a reduction in support, by agreement or court order, given the substantial reduction in his income. Yet, she continued to spend large amounts on these expenses for the ensuing three and-a half years before filing this application, fueled no doubt to a large degree by the substantial support payments she was continuing to receive.
- [180] In that respect, Ms. F seemingly had no intention of seeking Mr. F's contribution to these amounts and she only now seeks to do so to lessen any impact on any repayment of spousal and child support ordered.
- [181] It is no answer for Ms. F to say that these expenses are in line with the standard of living that the parties enjoyed during their marriage. Again, the reality is that the major source of the family income has declined substantially since 2020. It is a reality that both parties must face and, also, a reality that K must face.
- [182] In my view, Ms. F has not advanced any valid reason as to why she only brought this application now. The inordinate delay and her blameworthy conduct in ignoring the terms of the Final Order should not be rewarded.
- [183] Applying the "three-year rule" as discussed in those decisions is such that it is inappropriate to consider any claim for reimbursement beyond 2021. That lowers the amounts claimed to \$91,407.50.

Claimed Expenses (2021-2024)

- [184] The Guidelines set out the categories of expenses as to what are to be considered special or extraordinary expenses, which are intended to be paid beyond regular child support:

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:

- (a) child care expenses incurred as a result of the custodial parent's employment, illness, disability or education or training for employment;
- (b) that portion of the medical and dental insurance premiums attributable to the child;

- (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.

(1.1) For the purposes of paragraphs (1)(d) and (f), the term extraordinary expenses means

- (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.

[185] It remains the case that the expenses must be both "reasonable and necessary" in the circumstances: *Bodine-Shah v. Shah*, 2014 BCCA 191:

[66] Special expenses listed in ss. 7(1)(a)-(c) and (e) are distinct from extraordinary expenses referred to in ss. 7(1)(d) and (f). Special expenses are defined as relating to child care, medical or dental insurance premiums, health-related costs, and post-secondary education. They must be found to be reasonable and necessary. Extraordinary expenses are not defined. Their extraordinariness is determined in the context of the combined income of the spouses, as well as other considerations, including the nature and amount of the individual expense, the nature and number of the activities, any special needs or talents of the child, and the overall cost of the activities. They also must be found to be reasonable and necessary. Relevant considerations for the tests of necessity and reasonableness include

whether the expenses are necessary in relation to the child's best interests, and reasonable having regard to the means of the spouses, the child, and to the family's spending pattern prior to separation. See *McLaughlin v. McLaughlin* (1998), 57 B.C.L.R. (3d) 186 at paras. 81-82 (C.A.). In assessing "means", the court may consider the parties' capital assets, income distribution, debts, third-party resources, access costs, support obligations, receipt of support, and any other relevant factor: *Delichte v. Rogers*, 37 R.F.L. (7th) 81 at para. 38. Courts may consider whether the non-custodial parent was consulted regarding the expense, though a lack of consultation does not automatically preclude a finding that the expense is reasonable and necessary: *Delichte* at paras. 39, 44.

[186] I will address the claimed expenses by category, as follows:

[187] Health-Related Expenses: these total \$11,573.54 and were incurred from late 2018 forward. This includes a large amount for orthodontic treatment. Mr. F was made aware of this course of treatment in late 2018 and did not register any objection. The other expenses are related to extended health premiums and eye glass and contact lens costs. In my view, even though some of these expenses date back some years before 2021, they are special expenses within the meaning of s. 7(1)(b)(c) of the Guidelines and should be shared by the parties. The sharing prior to 2021 will be in accordance with the Final Order; the remainder of the cost will be shared based on the parties respective Guidelines incomes that I have determined, as above.

[188] University / High School Expenses: the university expenses are \$14,573.54. I agree with Mr. F that it is not necessary or reasonable for either party to directly pay for K's post-secondary expenses prior to the RESP being exhausted. The balance of the RESP is about \$83,500 and Ms. F can access it to pay for K's educational costs. The balance is more than enough to cover the K's substantial first-year expenses (including his laptop and iPad said to be necessary for his engineering course) and for the rest of the costs for his under-graduate degree.

[189] I agree with Mr. F that the claimed high school fees of \$1,979 (from 2019 to 2023) are a regular and expected expense for a high school education, rather than a special or exceptional expense, and as such they do not meet the definition of a s. 7 expense.

[190] Biking Expenses: from 2019 to 2023, these total about \$11,475. They include various biking camps, bike maintenance and, as above, the mountain bike that cost over \$8,000. There were some brief discussions between the parties concerning camps and a bike purchase in summer 2019. However, I would not allow any expenses prior to 2021 for the reasons set out above. In addition, the other costs are not special or extraordinary in the circumstances, including the first aid training programs. Finally, Ms. F has provided no reasonable explanation for the extraordinary cost of the mountain bike beyond that K partially built it himself and it helped him get a summer job (in which case it is unclear why K did not at least contribute some of his earnings to the cost). The magnitude of this cost required that she consult Mr. F beforehand.

- [191] Swimming /Sailing Expenses: these total \$2,591 for swimming and \$850 for sailing. I would not allow any expenses prior to 2021 for the reasons set out above. In addition, the other costs are not special or extraordinary in the circumstances.
- [192] Ski Expenses: By far, the claimed expenses for ski related items and activity are the largest category. These total \$74,638.54, being: skiing fees of \$23,040.72; ski equipment and gear of \$12,375.90; and ski competition costs of \$39,221.92.
- [193] There is no doubt that the history of this family has included a love of skiing. The parties purchased the Whistler property in 2009 and K was enrolled in ski programs from an early age. The evidence is that both parties, before their separation, encouraged K's participation in skiing, including by enrolling him in various training programs.
- [194] The parties had a brief discussion in April 2016 and December 2018 about K's participation in a Freeride program and also, a Freeride competition in the BC Interior. In addition, many ski-related costs were listed and disclosed in Ms. F's September 2019 F8.
- [195] By all accounts, K is an accomplished skier. Ms. F stated in her Affidavit #10 sworn February 2024 that K has excelled at regional and national competitions. He has competed in various "NorAm" championships. He qualified for the 2022 and 2023 NorAms. He also qualified for and competed in the 2023 and 2024 Freeride Junior World Championships.
- [196] Ms. F also now advises that K has moved up to adult competitions and recently competed in Salt Lake City. K tells her that he plans to keep competing while attending UBC.
- [197] The difficulty is that this is all new information to Mr. F who only learned of these post-2018 ski activities via Ms. F's Affidavit. Ms. F chose not to make Mr. F aware of the specifics of K's activities until only very recently.
- [198] For the same reasons discussed above, I am not inclined to order any repayment for the ski fee costs that were incurred prior to 2021. Many of the smaller expenses are not special or extraordinary. In addition, the larger yearly expenses from 2018 to 2020 (for the Freeride Club fees) warranted a discussion between the parties as a "major decision" under the Final Order.
- [199] Even so, I would order a sharing of the 2021 and 2022 Freeride Club fees based on the parties' adjusted Guidelines incomes.
- [200] I would not order any repayment for the ski equipment costs that were incurred prior to 2021. The smaller expenses are not special or extraordinary. I agree that these expenses commencing 2021 should be shared on the parties' adjusted Guidelines incomes.
- [201] The substantial disagreement between the parties arises from Ms. F's claim for almost \$40,000 relating to K's attendance at various ski competitions from 2018 to the present. Mr. F was aware that K has been travelling outside of BC and Canada for various competitions, by reason of the requests for travel authorizations that I have previously mentioned.

[202] The expenses claimed have increased exponentially over the years:

- a) 2018/2019 - \$1,310.22: trip to Revelstoke, BC;
- b) 2019/2020 - \$5,537.78: trips to Golden, Kelowna, Revelstoke, BC and Lake Louise, Alberta;
- c) 2021-2022 - \$10,262.42: trips to Golden, Kelowna, Revelstoke, BC and Lake Louise, Alberta and Montana;
- d) 2022/2023 - \$13,737.36; trips to Rossland, Golden, Revelstoke, BC, Lake Louise, Alberta, Washington State and Austria (flight in excess of \$5,000); and
- e) 2023/2024 - \$8,374.14: trips to Austria (flight again in excess of \$5,000) and Utah.

[203] Mr. F objects to these expenses for a number of reasons.

[204] Firstly, the pre-2021 expenses are beyond the three years before reimbursement was sought and also, Ms. F did not seek to even consult Mr. F about the proposed cost and seek his pre-approval of them. As early as November 2017, Ms. F had sought Mr. F's agreement to contribute to K's trip to Quebec. Mr. F objected, questioning whether it did qualify as an extraordinary expense, which should have alerted Ms. F that these trips may be subject to debate.

[205] Secondly, commencing in 2021, Ms. F not only did not change her approach - particularly in light of the fact that she was well aware of Mr. F's reduced income - she escalated her spending on K's travels in that year and later years. I agree that, in those circumstances, these later expenditures are not reasonable given the party's means at that time.

[206] Additionally, Mr. F argues that approximately 50% of the travel expenses are attributable to Ms. F, who appears to have accompanied K on these trips. Ms. F states in reply that the Whistler Freeride Club does not take responsibility for children outside of ski time hours, nor does it take responsibility for transportation to and from ski competitions. I agree with Mr. F that it is not reasonable for him to fund almost \$16,000 of Ms. F's personal travel to ski resorts over the past three years. Clearly, there are parents who are not available to take the time or bear the expense to accompany their children. It is well known, as mentioned in the Club's policy that families will typically rely on sharing the chaperoning costs in that event. There is no indication that Ms. F sought out this type of arrangement which would have lessened the cost substantially; nor is there any explanation why she did not do so.

[207] I decline to order any reimbursement by Mr. F in relating to any of the ski competition costs.

[208] The amounts to be paid by Mr. F toward the special and extraordinary expenses set out above are to be set-off against his overpayment of child and spousal support to Ms. F.

CONCLUSION

[209] Mr. F has been substantially successful on these applications. However, the parties wished to address costs once the outcome is known.

[210] In that event, failing agreement, the parties are at liberty to set down an application to address costs provided it is filed no later than 60 days following the issuance of these reasons. Once filed, the parties are to proceed as soon as possible to secure a hearing date.

"Fitzpatrick J."

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