

CANADA / JUDGMENT

Hall v. Zaidel

2017 BCSC 2045

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Supreme Court of British Columbia

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2017 BCSC 2045 Hall v. Zaidel

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Hall v. Zaidel,

2017 BCSC 2045

Date: 20171110

Docket: E113566

Registry: Vancouver

Between:

Shannon Lee Hall also known as Shannon Lee Zaidel

Claimant

And:

Patrick Zaidel also known as Patrick Albert Zaidel

also known as Patrick Zajdel

Respondent

Before: The Honourable Mr. Justice B. D. MacKenzie

Reasons for Judgment

Counsel for the Claimant:

K. L. Basran

Counsel for the Respondent:

S. L. Booth

Place and Dates of Hearing:

Vancouver, B.C.

August 22-25, 2017

Place and Date of Judgment:

Vancouver, B.C.

November 10, 2017

Introduction

- [1] In this matrimonial litigation, Ms. Hall says Dr. Zaidel has failed to meet his support obligations for the last five years. Dr. Zaidel thinks he has overpaid. As a result, in support of their respective applications, the parties have produced conflicting affidavit material and many texts and e-mails sent between them and their children since separation, due to the fact they agree on very little. What is encouraging, however, is the children are doing relatively well, even though the two youngest have been brought directly into the dispute, with both parents accusing the other of pressuring the children about the parenting arrangements, as the question of whether Dr. Zaidel has been meeting his child support obligations depends on where the children have been residing and the amount of parenting time each has had with their two youngest daughters.

Background

- [2] The parties were married on May 1, 1992. They separated in August 2009. Ms. Hall is 49 years old and Dr. Zaidel is 50. There are three children of the marriage: Brie-Anna, who is 21; Bianca, who is 19; and Taylor, who is 17.
- [3] Upon the breakdown of the marriage, Ms. Hall and Dr. Zaidel tried to settle the various issues through mediation but were initially unsuccessful. They did however reach a mediated settlement in April 2012 and entered into a Consent Order on June 26, 2012, (the "Order"), providing for joint custody and guardianship, an agreement as to who would reside primarily with Ms. Hall and who would reside with Dr. Zaidel, as well as child and spousal support. At the time of the agreement and Order, Dr. Zaidel's support obligations were based on an income of \$445,000, with income of \$30,000 imputed to Ms. Hall, who has a law degree and practised for two years prior to her marriage to Dr. Zaidel. Ms. Hall has not, however, worked outside of the home since 1997, describing herself as "a traditional homemaker." There is no doubt this marriage can be characterized as a lengthy traditional marriage. In addition, Ms. Hall says she is not yet economically independent, primarily because Brie-Anna must deal with significant mental health issues, which Ms. Hall says has precluded Brie-Anna from withdrawing from the charge of her parents.

- [4] Ms. Hall now brings an application seeking: an order that Brie-Anna remains a child of the marriage given her mental health issues, even though she is now 21 years of age; clarification of the parenting arrangements for their youngest daughter Taylor; and an order that Bianca, the middle daughter, remains a child of the marriage even though she is almost 20, as she is a full-time third-year student at McGill University.
- [5] In addition, given that Dr. Zaidel's income has increased since the Order, Ms. Hall seeks significant retroactive orders in child and spousal support to reflect the amount of support she submits Dr. Zaidel should have paid since 2012 (approximately \$500,000), indemnification of s. 7 expenses, prospective child support for Taylor and Brie-Anna, and ongoing spousal support commensurate with Dr. Zaidel's Federal Child Support Guidelines, S.O.R./97-175, ("Guidelines"), income. Ms. Hall concedes that the only issue as far as spousal support is concerned is quantum, not duration. She accepts that spousal support will end on May 1, 2021, as agreed to by the parties in the Order.
- [6] Dr. Zaidel opposes most of Ms. Hall's application, primarily the claim for a variation in spousal support, and Ms. Hall's contention that the parties have had a shared parenting regime with Taylor and Bianca for some years. On this latter point, it is Dr. Zaidel's position that both Bianca and Taylor have been living primarily with him since January 2013 and September 2015 respectively. As a result, in addition to a recalculation of his support obligations, he seeks a variation in the Order stipulating that Taylor will reside primarily with him going forward.
- [7] Dr. Zaidel does acknowledge his income has increased significantly since the Order but says that if there is to be any order for retroactive child support, the relevant start time should be May 1, 2013, given the Order specifically mandates a review of the parties' financial circumstances as of that time and then on an annual basis. For the purpose of calculating his ongoing child support obligations, Dr. Zaidel opposes any retroactive order going back to June 2012.
- [8] The question of the amount of any retroactive order for child support depends of course on what the parenting arrangements pertaining to Taylor and Bianca have been since the Order, in particular, whether Taylor's primary residence has been and continues to be with Dr. Zaidel or, as Ms. Hall submits, whether parenting time with Taylor has been shared since September 2015 to the present time. At the same time, Dr. Zaidel acknowledges that as Brie-Anna has been residing with Ms. Hall for almost five years, and because of his increase in income, some amount of retroactive child support as it pertains to Brie-Anna is inevitable. However, Dr. Zaidel seeks an offsetting order for reimbursement of what he says is his overpayment of child support, based on his submission that Taylor and Bianca have been residing primarily with him for some time, contrary to Ms. Hall's submission that the parenting of these children has been shared.

Is Brie-Anna a Child of the Marriage?

- [9] I will first deal with the question of whether Brie-Anna remains a child of the marriage.
- [10] On this point Ms. Hall says Brie-Anna is unable to withdraw from the charge of her parents or obtain the necessities of life. As support for this submission, Ms. Hall emphasizes that Brie-Anna resides at home, has ongoing significant mental health issues, has achieved only a Grade 10 education due to these issues, and has been unable to maintain regular full-time employment, as illustrated by her recent termination from a Keg restaurant for not being able to perform to a minimum standard.
- [11] In determining this question it is not necessary to go into any great detail as to Brie-Anna's longstanding difficulties other than to point out that prior to the parties' separation, sometime in 2005, Brie-Anna was diagnosed with Attention Deficit Disorder ("ADD"), and with bipolar disorder in March 2011. As a result, she was under the care of a mental health team for several years. Given these significant difficulties, in October 2012, Dr. Ferrari, a child psychologist, recommended in an e-mail that Brie-Anna not be left alone at home if she is not attending school. In addition, Brie-Anna required hospitalization on five occasions between March 2011 and April 2015, including six weeks at Children's Hospital from September 2013 to mid-October 2013, was the subject of several missing persons reports, and was involuntarily held at Vancouver General Hospital Psychiatric Unit in May 2014. Up to March 2017, Brie-Anna was an involuntary patient living in the community receiving injections in order to stabilize her condition, and now continues to receive monthly injections, albeit on a voluntary basis.
- [12] In his application response Dr. Zaidel consented to Ms. Hall's application that Brie-Anna remains a child of the marriage due to her difficulties, although Ms. Hall points out that his position seems to shift back and forth. However, during the hearing, Dr. Zaidel accepted Brie-Anna is still a child of the marriage. Given the totality of the circumstances and Dr. Zaidel's position, I am satisfied Ms. Hall has established that due to Brie-Anna's mental health issues, at the present time she is unable to withdraw from the charge of her parents and as a result, I find she remains a child of the marriage. Dr. Zaidel does, however, say that because Brie-Anna is doing relatively well at present, has had some recent employment, even though she was not kept on at the Keg, and is expressing a clear desire to move out of her mother's home, sooner rather than later, it would be inappropriate for him to continue to pay the full table amount of child support for Brie-Anna, and that an "appropriate" amount of support would be something less than the table amount, pursuant to s. 3(2)(b) of the Guidelines.

Is Bianca a Child of the Marriage?

- [13] Dr. Zaidel agrees that Bianca remains a child of the marriage, as she is in full-time attendance at McGill. At the same time both parties agree that "most of" Bianca's expenses are currently being met by the parties' registered education savings plan ("RESP") and Bianca's employment income, although Dr. Zaidel says Bianca has additional summer and travel expenses that are not covered by the RESP. Be that as it may, I confirm Bianca remains at the present time a child of the marriage.

Parenting Time

- [14] The more difficult issue is when and for how long each child has resided with each of their parents, as this affects Dr. Zaidel's child support obligations and whether any retroactive adjustment is required. Following their parents' separation in May 2010, all three children initially resided with Ms. Hall, with Dr. Zaidel having parenting time every second weekend and separately with each child one evening a week. Things have evolved since then, starting with the Order, followed by these parents eventually acknowledging a change in the residence of Brie-Anna was necessary.
- [15] In this analysis, s. 9 of the Guidelines stipulates that in order for a parenting arrangement to be considered "shared" a party must have access to or physical custody of the child for not less than 40 per cent of the time over the course of a year. However, this section does not require a "tight accounting" (*Berry v. Hart*, 2003 BCCA 659 at para. 10).
- [16] On this issue, for perhaps obvious reasons, neither party was able to descend into a meticulous and precise accounting of where the children have spent their time during the last four years, but rather introduced general and often somewhat equivocal evidence of what they say was their respective parenting time. Therefore, it was necessary to "draw reasonable inferences from evidence that is less than certain or precise in order to do justice between the parties" (*Shih v. Shih*, 2017 BCCA 37 at para. 44).

Brie-Anna's Primary Residence

- [17] Turning first to Brie-Anna, she began living with Dr. Zaidel around November 2011, and pursuant to the Order continued to live with him until the parties agreed that it would be in her best interests if she resided full-time with Ms. Hall. There is no question Brie-Anna has been residing with Ms. Hall for several years; the issue is, when exactly did Brie-Anna commence residing primarily with her mother. Ms. Hall says that in October 2012, the parties agreed that it would be best if Brie-Anna lived with her and that as of November 1, 2012 she did so. Dr. Zaidel however, says that Brie-Anna commenced living full-time with Ms. Hall in January 2013, not November 2012.

- [18] To support her position, Ms. Hall relies on the October 17, 2012 e-mail from Dr. Ferrari, stating that Brie-Anna should not be left alone at home if she refuses to attend school. This e-mail was however also sent to Dr. Zaidel. Ms. Hall also relies on an e-mail she sent to Brie-Anna's school counsellor on October 19, 2012, confirming that Brie-Anna was having challenges attending school and completing her schoolwork.
- [19] Dr. Zaidel also refers to several e-mails to support his position that Brie-Anna lived with him until January 2013. He refers to an e-mail he sent to Dr. Ferrari's office on November 26, 2012, in which he asks to book an appointment with Dr. Ferrari because he was having "increasing difficulty getting Brie-Anna to school." Dr. Zaidel also refers to e-mails between himself and Ms. Lynn Savoie, a mental health worker. On October 10, 2012 Dr. Zaidel e-mailed Ms. Savoie expressing concern about his ability to get Brie-Anna to school the next day. On November 26, 2012, Dr. Zaidel informed Ms. Savoie that Brie-Anna had gone to Ms. Hall's "for the first time in about 5-6 weekends". Finally, Dr. Zaidel also refers to e-mails he sent to Ms. Hall on January 6 and September 10, 2013. In the first, he confirmed that the "tentative plan is for a change in the living arrangement of Brie starting this month." In the second, he referenced the "changes in living arrangements for Brie and Bianca" that occurred in January 2013. Dr. Zaidel says these e-mails support his position that Brie-Anna was living with him until January 2013.
- [20] While neither party's documentary evidence is definitive, I find the evidence presented by Dr. Zaidel is more persuasive. Given the totality of the circumstances, and for the purposes of calculating Dr. Zaidel's child support obligations, I find that Brie-Anna commenced residing with Ms. Hall as of January 1, 2013.

Bianca's Primary Residence

- [21] Pursuant to the terms of the Order, Bianca was originally residing with Ms. Hall. However, Ms. Hall says the parenting schedule with respect to Bianca began changing, and became more "fluid", sometime in the Spring of 2013. As a result, Ms. Hall says the dispute as to where Bianca was primarily residing is focused on the period between May 2013 and September 2015, when Bianca left for McGill. Ms. Hall submits that during this period the parties had a shared parenting arrangement with Bianca. In her written submissions, Ms. Hall says "[f]rom May 2013 until September 2015, Bianca began sleeping more at the Respondent's home but still spent most of her daytime hours outside of school at the Claimant's." Dr. Zaidel disputes this assertion. He says Bianca resided primarily with him during this time. In fact, Dr. Zaidel submits Bianca has been residing full-time with him since January 2013, before leaving to attend McGill in September 2015.
- [22] On this point, Ms. Hall acknowledged in one of her affidavits that in April 2013 Bianca was sleeping five out of seven nights at Dr. Zaidel's home but that Bianca would spend most of her daytime hours outside of school at the claimant's home. She notes that between October 2013 and March 2014, because she lived close to Bianca's school, she would make lunch, prepare dinner for Bianca three times a week, and take her to work at a local restaurant. In

addition, she says Bianca would spend the night one weekday per week, usually Tuesday, and one weekend night. Ms. Hall then deposed that "[a]lthough Bianca was sleeping primarily at the Respondent's home, I was the on-call parent for Bianca from April 2013 on."

- [23] Ms. Hall adds that from March 2014 to November 2014 Bianca had significant back pain, which resulted in her spending breaks from school at Ms. Hall's home, and that up to March 2015, the daytime hours that Bianca spent at Ms. Hall's increased. Ms. Hall says this continued for all intents and purposes into June 2015, when Ms. Hall says, "Bianca spent at least half the sleeping hours at my home in June, July and August 2015" until she left for McGill in late August. While I accept Ms. Hall's evidence with respect to the care and support she provided Bianca, I have concerns about the somewhat equivocal nature of Ms. Hall's evidence as to how often Bianca would spend nights at Ms. Hall's residence or how much time she would spend there in general. Indeed, in a text response to her mother's assertions, Bianca states, "I don't remember coming over when I had back problems. I remember laying on the ground at dad's lol."
- [24] Dr. Zaidel's response is straightforward. He submits that Bianca has lived with him full-time since January 2013 and remained living full-time with him until leaving for McGill. Dr. Zaidel refers to two e-mails he sent to Ms. Hall in 2013 to support this submission. The first is an e-mail sent on January 6, 2013 in which he confirms that the effect of Brie-Anna's move on Bianca and Taylor's living arrangements should be discussed at their meeting with Dr. Ferrari on January 9. The second e-mail was sent on September 10, 2013, and in it he refers to the changes in living arrangements that occurred for Brie-Anna and Bianca in January 2013.
- [25] Moreover, Bianca has deposed in an affidavit that she began residing with her father "full-time" in January 2013. In my view, this evidence is significant, given the direct conflict between Ms. Hall and Dr. Zaidel. In response to Bianca's evidence, Ms. Hall expressed her displeasure with Bianca for apparently siding with her father, and in one text, stated, "You totally betrayed me." Even with her mother telling her that she should be apologizing for "throwing [Ms. Hall] under the bus" and that she should "own" what Ms. Hall says was Bianca's one-sided, inaccurate version of events, Bianca confirmed in reply texts to her mother that her recollection of where she was living during this period of time was correct.
- [26] Given the conflicts in the parties' evidence, and my acceptance of Bianca's evidence, I find that Dr. Zaidel has established that while Bianca was residing primarily with Ms. Hall until January 2013, from then on she was living primarily with him, until she went to McGill in September 2015.
- [27] For the purpose of determining any retroactive readjustment of Dr. Zaidel's child support obligations due to his increases in income, counsel have agreed they can do the requisite calculations now that I have concluded that Bianca was primarily residing with Dr. Zaidel from January 2013 to September 2015, subject to my determination as to the start date of any retroactive order.

Taylor's Primary Residence

- [28] Trying to ascertain where Taylor has been primarily residing is again somewhat of a challenge. Again, both parties rely on texts between each other and Taylor to establish where Taylor stayed on many occasions. These various texts however did not always actually prove what they were offered to prove, and therefore were not always helpful in attempting to determine where Taylor has been primarily residing for the last four years.
- [29] On this issue, Ms. Hall submits that from June 2012 to September 2013 Taylor continued to reside primarily with her pursuant to the Order. Dr. Zaidel does not suggest otherwise. Ms. Hall then says the parenting schedule for Taylor changed in September 2013 and says this has lasted to the present time. Ms. Hall says this is a "rough week-on week-off schedule". As a result even though she suggests that Taylor has been residing with her for a greater time than with Dr. Zaidel, to be "reasonable", she says it can be properly considered a shared parenting regime. On this issue, Ms. Hall's notice of application succinctly outlines her position: "The Respondent has refused to acknowledge that Taylor has lived part-time with the Claimant and pressures Taylor to lie about the fact that she lives with the Claimant half-time."
- [30] Conversely, while Dr. Zaidel agrees that between September 2013 and September 2015 he and Ms. Hall shared parenting time with Taylor, he says since September 2015 Taylor has been primarily residing with him. In support of his position, Dr. Zaidel emphasizes that Taylor has stated in her Views of the Child Statement, that she has been residing "full-time" with her father since September 2015 and she has also expressed, according to Dr. Zaidel, "cogent reasons" why she wishes to continue to live primarily with her father, and have parenting time with her mother at her discretion. Dr. Zaidel says that as Taylor is an articulate, intelligent 17-year-old, her views on this issue should be given significant weight. I agree with this submission. In fact, both parents accept that Taylor will determine where she lives and when she will visit her parents.
- [31] Ms. Hall has provided calendars and text messages to support her position that the parties have a shared parenting regime with Taylor, especially when, as with Bianca, one takes into consideration the daytime hours Taylor spent at her mother's home, in addition to overnights. On this point, Ms. Hall notes that Taylor's job, school, and soccer practices are all 10-15 minutes away from her home, while Dr. Zaidel moved to North Vancouver in 2014. As such, Ms. Hall says, given the daytime hours Taylor has spent at Ms. Hall's, home, I should conclude that the parties have enjoyed a shared parenting regime with Taylor, when calculating Dr. Zaidel's retroactive and prospective support obligations.
- [32] At the same time, Dr. Zaidel has also provided calendars and text messages between himself and Taylor to support his position that Taylor has been primarily residing with him since September 2015. Not surprisingly, Dr. Zaidel takes issue with many of Ms. Hall's notations as to when Taylor was staying with Ms. Hall.

- [33] Additionally, Dr. Zaidel says some of the notations on Ms. Hall's calendars are inaccurate or equivocal, as are some of the text messages. Moreover, I agree with Dr. Zaidel when he says there are some after-the-fact insertions in portions of her parenting calendar for November 2016 and February 2017. Similarly, Ms. Hall acknowledges errors in several of her assertions pertaining to Taylor's activities in February 2017. It is not necessary to review these errors in depth, but a few references are instructive. For example, in Ms. Hall's calendar for November 2016, she recorded Taylor staying overnight at her house on the 9th and 10th (Wednesday and Thursday). However, Dr. Zaidel submitted a screen shot of a text from Taylor on November 12, 2016 (Saturday) in which Taylor stated she was "probably gonna go to mom's later cause I haven't seen her all week." I also note that Ms. Hall used the same screen-shot of a text message to assert that Taylor was in her care on two different dates (September 1, 2015 and January 9, 2016). While Ms. Hall has explained the reasons for some of these errors, they necessarily affect the reliability of her evidence as to how often and for how long Taylor spent time with her mother.
- [34] Most importantly however, I am satisfied Taylor, at 17 years of age, like Bianca, knows where she has been living and whether it was part-time or full-time. In this regard, Taylor advised Dr. Chotem that between January 2013 and the end of the school year in 2015 "she alternated one week with mom and one week with dad," although in the second interview Taylor acknowledged she was not sure when the "week on/week off" started. In my view, this is not inconsistent in any meaningful way with her parents' submission that the shared parenting arrangement with Taylor commenced in September 2013, not in January 2013. More importantly, Taylor then went on to state that at the start of the school year in September 2015 she began staying with Dr. Zaidel "full time," spending weekends with her mother and overnight once a month on a Tuesday or Thursday night after soccer practice. She also stated that she liked to spend one weekend night with her friend Emily at Emily's house.
- [35] Ms. Hall alleges that in respect of this last point, Taylor understated the time that she spent in Ms. Hall's care during the week. I accept that while Taylor may have understated to a certain degree the extent to which she stayed at Ms. Hall's residence in 2015 to 2016, I am satisfied that Taylor knew that she was residing primarily with her father, rather than having a shared parenting arrangement with her parents.
- [36] In other words, I am satisfied this was not an uninformed accounting by Taylor, let alone a fabrication as suggested by Ms. Hall, as to where Taylor has been primarily residing since September 2015. Moreover, Taylor did not demonstrate any indication that she intentionally made her Views of the Child Statement one-sided in favour of Dr. Zaidel. In fact, she acknowledged in the Statement that she loved her mother and wished to continue a relationship with her. Nevertheless, I am mindful of Taylor's comments in her interviews with the registered psychologist, Dr. Marilyn Chotem ("Views of the Child Statement"), where she described the stress she experiences about the "whole situation." Taylor also stated that Ms. Hall was angry about "half the time" that Taylor was at her residence, leading to Taylor being considerably anxious about spending more time with her mother.

- [37] In my view, even though I appreciate Ms. Hall's submission that children generally might be incapable of accurately determining the legal meaning of "primary residence," when I consider Taylor's statements, and the evidence as a whole, I am persuaded the totality of the evidence establishes that Taylor has been residing primarily with her father since September 2015, and continues to do so, spending time with her mother as she wishes. Moreover, I accept that Taylor's position is clear and unequivocal as to the future: she wishes to stay living "full-time" at her father's residence.
- [38] For the purposes of determining what amount of support for Taylor Dr. Zaidel should have paid, I find that Taylor has been residing primarily with her father from September 2015 to the present. At the same time I find that Taylor was primarily residing with Ms. Hall from June 2012 to August 2013 and in a shared parenting regime from September 2013 to August 2015.

Dr. Zaidel's Income

- [39] Dr. Zaidel acknowledges his income has increased significantly since June 2012. However, there has been some disagreement over the course of these proceedings as to the amount of this increase.
- [40] As a result, Ms. Hall introduced a comprehensive Guidelines income report prepared by a Ms. Patti Daum, an accountant, which concluded that Dr. Zaidel's Guidelines income for support calculations should be as follows:

2012

\$507,000

2013

\$631,000

2014

\$712,000

2015

\$555,000

2016

\$642,000

- [41] While Ms. Hall says Dr. Zaidel's position on his income has "evolved" since his application response, at present Dr. Zaidel does not take great exception to these calculations, and agrees with almost all of Ms. Daum's analysis, but does say his income for the relevant years should be:

2012

\$505,313

2013

\$628,227

2014

\$707,854

2015

\$550,162

2016

\$634,938

[42] The primary reason for the relatively modest difference in these calculations is Ms. Daum was of the view that Dr. Zaidel's automobile deductions were not reasonable, and "to a lesser extent," a disagreement as to "health trust" expenses. As far as the automobile expenses are concerned, Dr. Zaidel says they reflect the distance he has to travel from home, the office, and the hospital, and are reasonable and accurate. I accept Dr. Zaidel's evidence on this point, rather than the assumption made by Ms. Daum that these expenses were too high. Accepting the evidence of Dr. Zaidel with respect to his legitimate and reasonable deductions for these expenses, I find that for the years 2012 to 2016, Dr. Zaidel's income for support purposes is as calculated by Dr. Zaidel.

Retroactive Child Support

The Date for Retroactive Child Support Orders

[43] As Dr. Zaidel has consented to a retroactive assessment of child support given the increased income he has enjoyed, it is unnecessary to consider the issues of non-disclosure, delay, blameworthy conduct or hardship as outlined in the Supreme Court of Canada decision in *D.B.S. v. S.R.G.*, 2006 SCC 37. The question is when should any retroactive order commence.

[44] In this regard, the Order provides for an annual review of Dr. Zaidel's child support obligations, commencing May 1, 2013. This is the basis for Dr. Zaidel's submission that any retroactive child support order should not go back beyond that date. In response, Ms. Hall says it is clear there was an increase in Dr. Zaidel's actual income for the year 2012 and as such it only makes sense that any retroactive order should run from June 1, 2012, not May 1, 2013. I agree with Ms. Hall on this point. Any readjustment as to Dr. Zaidel's total child support obligations will be calculated from June 1, 2012, based on Dr. Zaidel's actual income for each specific year.

Retroactive Child Support Orders

- [45] As I have noted, Dr. Zaidel agrees that because of the increase in his income since the Order, he is obligated to rectify the underpayment of child support for Brie-Anna commencing January 2013. Counsel agree they can make the necessary calculations in order to determine what amount is owing.
- [46] Similarly, counsel can calculate what adjustment should be made one way or the other as far as child support for Bianca is concerned, given my conclusion that Bianca was residing primarily with her mother until January 2013, and after that, primarily with her father.
- [47] Dr. Zaidel also acknowledges that Taylor's child support payments should be readjusted to reflect the increase in his income since the Order. How much, if any, is owing will be affected by my conclusion that Taylor's primary residence since September 2015 has been with her father. Again, counsel agree they can make the necessary calculations and determine whether there has been an overpayment or underpayment of child support as it pertains to Taylor.
- [48] If there is a shortfall in Dr. Zaidel's support obligations, he is to pay whatever is owing within three months of the date of the release of this judgment. If counsel's calculations conclude that Dr. Zaidel has overpaid child support, his monthly child support payments for Brie-Anna will be reduced in equal amounts over the next 12 months, or pursuant to any other agreement between the parties, until such overpayment is cancelled out.

Ongoing Child Support and Primary Residence

Taylor's Primary Residence

- [49] Finally, I accept that Taylor is excelling at school, happy living "full-time" with her father and is generally doing well. Under both s. 16(8) of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) and s. 37(1) of the Family Law Act, S.B.C. 2011, c. 25, the only question for consideration is what is in the best interests of the child. There are several non-exhaustive factors noted in s. 37(1) which the court must consider in determining this question, including:
- (a) the child's health and emotional well-being;
 - (b) the child's views, unless it would be inappropriate to consider them;
 - (c) the nature and strength of the relationships between the child and significant persons in the child's life;
 - (d) the history of the child's care;
 - (e) the child's need for stability, given the child's age and stage of development;

- [50] As far as (a) and (b) are concerned, as I have already mentioned, given Taylor's age and relative maturity, her views should be determinative absent an extraordinary circumstance. As Dr. Zaidel says, Taylor has given "cogent" reasons for wishing to live full-time with her father, as set out in her Views of the Child Statement. Her Statement indicates that while she loves her mother and wishes to remain close to her, she feels generally more comfortable living primarily with Dr. Zaidel.
- [51] Given the totality of the evidence, especially Taylor's own views, and the other factors outlined in s. 37(1), I am satisfied it is in Taylor's best interest that she continues to reside primarily with Dr. Zaidel. Finally, the one thing the parties do agree on is that Ms. Hall's parenting time with Taylor should be in accordance with Taylor's wishes. Whether or not this includes weekends, and how often, will be up to Taylor, as both her mother and father have agreed. However, while both parties agree it is inappropriate to specifically order any parenting schedule, they do ask that there be a specific order as to where Taylor will be primarily residing. Taylor's primary residence will be with her father.

Child Support for Taylor

- [52] Dr. Zaidel seeks an order that as Taylor has been and continues to be living primarily with him, Ms. Hall should pay \$269 per month in child support for Taylor, commencing August 1, 2017, as claimed in his application, based on imputed income of \$30,000 to Ms. Hall. For whatever reason, Ms. Hall is content to have this imputed income continue, even though she has had no gainful employment since the marriage breakdown. Whether this is an acknowledgement by Ms. Hall that she has not made proper efforts to become economically independent and that the imputation of income to her is appropriate matters not, as Dr. Zaidel has resiled from his initial application to have an income of \$60,000 imputed to Ms. Hall and has agreed that \$269 is the proper amount of child support for Taylor given the terms of the Order. This concession by Ms. Hall might also simply be an acknowledgement that the terms of the Order should be followed. In any event, Ms. Hall does not contest this aspect of Dr. Zaidel's application. As a result, I find that commencing August 1, 2017, the \$269 child support payable by Ms. Hall for Taylor will be set-off against any amount Dr. Zaidel pays to Ms. Hall for Brie-Anna's support.

Child Support for Brie-Anna

- [53] As Brie-Anna remains a child of the marriage, there is no issue that Dr. Zaidel has on-going support obligations to Brie-Anna. The question is whether Dr. Zaidel should pay the full table amount of support or whether this would be "inappropriate" pursuant to the provisions of s. 3(2) of the Guidelines. In this regard, s. 3(2) of the Guidelines reads:

Child the age of majority or over

3(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 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) 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.

[54] On this issue, both parties refer to *Wesemann v. Wesemann* (1999), 49 R.F.L (4th) 435 (B.C.S.C.) (QL), where the court formulated a four-step test for determining support for children over the age of majority. First, the child must be a child of the marriage. Second, the application of the usual Guidelines amount must be challenged. Third, the party who challenges the usual Guidelines approach has the onus to demonstrate that the approach is inappropriate. Fourth, if the Guidelines approach is inappropriate the court must determine the appropriate amount of support, considering 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.

[55] Here, it is clear that steps one and two of the *Wesemann* test are met, as I have concluded that Brie-Anna is unable to withdraw from the charge of her parents. Turning to the third step, in *Wesemann* the court noted that the closer the circumstances of the child are to those of a child to whom the usual Guidelines approach applies, the more likely it is that the Guidelines approach is appropriate (para. 18). Dr. Zaidel submits however that because Brie-Anna is doing relatively well at present, has demonstrated some ability to work independently and has some savings from past employment, the Guidelines approach is inappropriate. Dr. Zaidel concedes that Brie-Anna will need some ongoing support, and he is prepared to provide this, the only issue is what amount is "appropriate." Dr. Zaidel submits that a reasonable "budget" for Brie-Anna would be in the area of \$3,200, not the full table amount of \$4,912, with his share being \$2,400 based on the current levels of spousal support and his direct payment of Brie-Anna's MSP and cell phone bills.

[56] As Brie-Anna is living with her mother and currently not working, either part or full-time, and has expressed interest in continuing to pursue her high school diploma, I find her circumstances are closer to those of a child to whom the usual Guidelines approach would apply. Balancing the factors outlined in s. 3(2)(b), and Brie-Anna's particular circumstances, I am satisfied that the full table amount of child support is justified. The table amount of child support for 2017 for Brie-Anna will be based on Dr. Zaidel's 2016 income. The issue of quantum will be reviewed May 1, 2018, as stipulated in the Order. Child support will be continuing so long as Brie-Anna remains a child of the marriage.

Child Support for Bianca

[57] As I have noted, Ms. Hall says that Bianca's expenses are fully covered by the parties' RESP. Dr. Zaidel generally agrees but contends there are remaining expenses in excess of those covered by the RESP and Bianca's earnings -- some \$13,032 for housing, food, transportation, clothing and "travel/vacations" for the summer months. Dr. Zaidel does not seek an order requiring the proportionate sharing of these expenses, only that they be "taken into consideration" if Ms. Hall is awarded increased spousal support. I make no order on these expenses at this time.

Spousal Support

[58] Ms. Hall seeks orders varying the spousal support payable by Dr. Zaidel "both retroactively and ongoing," on the basis there has been a material change in circumstances since the mediated agreement, the terms then being incorporated into the Order (Willick v. Willick, [1994] 3 S.C.R. 670 (Willick)). In addition, Ms. Hall simply asks the court to also "take into account whether the Agreement reached is objectively fair," having regard to the objectives of spousal support in the Divorce Act, citing Miglin v. Miglin, 2003 SCC 24. Ms. Hall now seeks \$321,410 in retroactive support, and on-going monthly payments of \$14,286, based on Dr. Zaidel's actual income and her position on the alleged shared parenting regimes. Dr. Zaidel opposes Ms. Hall's application to vary spousal support, saying there has been no material change in circumstances.

[59] In this regard, the Order stipulated that Dr. Zaidel was to pay Ms. Hall \$7,500 per month in spousal support from May 1, 2012 to April 30, 2016, increasing to \$8,000 per month from May 1, 2016 to April 30, 2021. In addition, in 2011 Ms. Hall received \$300,000 as "a credit against future spousal support", as well as some level of support prior to the Order.

[60] The Order also contained a clause at para. 22 stating:

BY CONSENT. Neither party may apply for a variation of Spousal Support regardless of any change in the circumstances of the parties, whether foreseen or unforeseen, radical, catastrophic, causally connected to the marriage, or otherwise, including a change resulting from increasing age or declining health.

[61] An order for spousal support can be varied under s. 17 of the Divorce Act, which states:

Order for variation, rescission or suspension

17 (1) A court of competent jurisdiction may make an order varying, rescinding or suspending, prospectively or retroactively,

(a) a support order or any provision thereof on application by either or both former spouses; or

...

[62] In *L.M.P. v. L.S.*, 2011 SCC 64 ("*L.M.P.*"), the Supreme Court reiterated the two-step test for variation of a spousal support order that was set out in *Willick and G.(L.) v. B.(G.)*, [1995] 3 S.C.R. 370. In its analysis, a court should "determine first, whether the conditions for variation exist and if they do exist what variation of the existing order ought to be made in light of the change in circumstances" (*L.M.P.* at para. 31, citing *Willick* at 688). When determining if the conditions for variation exist, "the court must be satisfied that there has been a change in circumstance since the making of the prior order or variation" (*L.M.P.* at para. 31).

[63] This threshold requirement for variation of a spousal support order is set out in s. 17(4.1) of the Divorce Act :

(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.

[64] The party seeking the variation has the onus to prove that a material change in the conditions, means, needs or other circumstances of either of the parties has occurred since the original order (*L.M.P.* at paras. 29 and 31). To be a material change, the change must be one that if known at the time would likely have resulted in different terms: *L.M.P.* at para 32, referencing *Willick* at 688. This means that " if the matter which is relied on as constituting a change was known at the relevant time it cannot be relied on as the basis for variation" (*Willick* at 688). The change must "have some degree of continuity, and not merely be a temporary set of circumstances" (*L.M.P.* at para. 35). The focus of this determination is on the actual circumstances of the parties when the order was made, and the terms of the order (*L.M.P.* at para 42). The court can also consider other factors to determine if a change is material, including subsequent conduct of the parties (*L.M.P.* at para. 35).

[65] In *Dedes v. Dedes*, 2015 BCCA 194, the Court of Appeal stated that the test is based on "what the parties actually contemplated" when an order is entered by agreement, rather than on what one party knew or reasonably foresaw (para. 25). The Court then observed that the "function of the material change threshold is to prevent parties from re-litigating issues that were already considered and rejected" because "in such cases, an application to vary would amount to an appeal of the original order" (para. 25).

[66] With respect to terms in an order that assert its finality, as in the present case at para. 22, or delineate what will constitute a material change in circumstances, *Abella and Rothstein JJ.* for the majority in *L.M.P.* made the following comments:

[39] Parties may either contemplate that a specific type of change will or will not give rise to variation. When a given change is specified in the agreement incorporated into the order as giving rise to, or not giving rise to, variation (either expressly or by necessary implication), the answer to the *Willick* question may well be found in the terms of the order itself. That is,

the parties, through their agreement, which has already received prior judicial approval, have provided the answer to the Willick inquiry required to determine if a material change has occurred under s. 17(4.1). Even significant changes may not be material for the purposes of s. 17(4.1) if they were actually contemplated by the parties by the terms of the order at the time of the order. The degree of specificity with which the terms of the order provide for a particular change is evidence of whether the parties or court contemplated the situation raised on an application for variation, and whether the order was intended to capture the particular changed circumstances. Courts should give effect to these intentions, bearing in mind that the agreement was incorporated into a court order, and that the terms can therefore be presumed, as of that time, to have been in compliance with the objectives of the Divorce Act when the order was made.

- [41] Finally, an agreement incorporated into a s. 15.2 order may simply include a general term providing that it is final, or finality may be necessarily implied. But even where an agreement incorporated into an order includes a term providing that it is final, the court's jurisdiction under s. 17 cannot be ousted (Miglin; G. (L.); Leskun). A provision indicating that the order is final merely states the obvious: the order of the court is final subject to s. 17 of the Divorce Act. Courts will always apply the Willick inquiry to determine if a material change of circumstances exists.
- [42] Ultimately, courts are tasked with determining if a material change of circumstances has occurred so as to justify a variation of a s. 15.2 order under s. 17. The analysis is always grounded in the actual circumstances of the parties and the terms of the s. 15.2 order; what meaning a court will give any general statement of finality found in an order will be a question to be resolved on that basis. As we have explained, in some situations, the agreement incorporated into the order may help shape what is meant by a "material change of circumstances". Where a s. 15.2 order deals with a specific change, it assists courts by answering the Willick inquiry through its terms. Conversely, when the order is general, or simply purports to be final, these less specific terms provide less assistance to courts in answering the Willick inquiry. Sometimes, in such cases, the circumstances of the parties may be such that courts will give little weight to a general statement of finality and conclude that a material change exists. However, at other times, in such cases, the circumstances of the parties may also be such that the courts will give effect to a general statement of finality and conclude that a material change does not exist.
- [67] In her application, Ms. Hall says there have been three material changes in the circumstances of the parties such that a variation in spousal support is justified. First, Dr. Zaidel has acknowledged that his income has increased since 2012. The Order set Dr. Zaidel's income as \$445,000 for the purposes of support, which Ms. Hall submits was based on his statements to her that after June 2012, his income would be decreasing due to his responsibilities in caring for Brie-Anna and his unwillingness to continue to work long hours. Ms. Hall submits that contrary to Dr. Zaidel's submission, there is no evidence to establish that either the increase in spousal support set out in the Order, or the annual

review of child support mandated by the Order, meant that the parties contemplated that Dr. Zaidel's income would increase. Ms. Hall referred to one authority, *Sandy v. Sandy*, 2016 BCSC 1684, in support of her submission that a change in income can be a material change in circumstances and can, in appropriate circumstances, justify variation of a spousal support order. I accept the correctness of this general proposition. I am not satisfied, however, that an increase in the payor's income automatically equates to a material change in circumstances. For example, Dr. Zaidel relies on *Dextraze v. Dextraze*, 2004 BCSC 215, where Edwards, J. found that an increase in a spouse's income did not, in and of itself, constitute a basis for an increase in spousal support (para. 40).

- [68] Secondly, Ms. Hall contends that the parties did not contemplate that Brie-Anna would return to live full-time with her while experiencing significant mental health issues, thus preventing Ms. Hall from returning to work as contemplated by the parties at the time of the Order. In this regard, Ms. Hall notes that she has not earned any income, let alone the \$30,000 she agreed could be imputed to her in the Order, due to her care for Brie-Anna, and that it would be "unreasonable to expect that she obtain employment earning greater than that." Ms. Hall further submits that Brie-Anna will require her care and supervision into the future. On this point, she relies on *C.(D.A.) v. C.(D.J.)*, 2016 BCCA 130, where the Court of Appeal found that it could not have been the intention of the parties that the entire risk of one child's future health problems would be placed on one parent's shoulders (para. 59).
- [69] Thirdly, Ms. Hall submits that the change in quantum of child support due to the change in residence of Taylor, Bianca and Brie-Anna constitutes a material change in circumstances that should justify a variation in the quantum of spousal support. Citing s. 15.3 of the Divorce Act, she submits that if I were to find that Bianca and Taylor resided primarily with Dr. Zaidel at the relevant times and will reside with him in the future, then this would mean she would receive no child support for two of their three children and as a result, the quantum of spousal support would increase accordingly, given that child support is given priority over spousal support. On this point, it is true that the presence or absence of child support will affect the amount of spousal support calculated under the Spousal Support Advisory Guidelines (Ottawa: Dept. of Justice, 2008), ("SSAG"). For example, Ms. Hall points out that "[i]f the court were to accept the Respondent's submissions that there is no child support payable for Brie-Anna, or Bianca and that Taylor resides with the Respondent," by inserting the parties' respective Guidelines incomes into the formula set out in the SSAG, Ms. Hall should receive \$17,163 per month as spousal support at the mid-range.
- [70] With respect to the finality clause at para. 22 of the Order, Ms. Hall's position is that, as the Supreme Court held in *L.M.P.* at para. 41, general non-variation terms that do not specify what is or is not a material change do not oust the Court's jurisdiction to vary the order pursuant to s. 17 of the Divorce Act. Dr. Zaidel agrees with this general proposition, but emphasizes the principle of finality when it comes to agreements between spouses relating to spousal support.

[71] At the outset, however, Dr. Zaidel denies Ms. Hall's claim that he anticipated his income decreasing. He submits just the opposite, that at the time the Order was entered into the parties contemplated that his income may increase, and as a result he and Ms. Hall agreed the monthly spousal support payments would increase in May 2016 from \$7,500 per month to \$8,000 accordingly. In furtherance of his position, he notes that the Order contains terms for annual income reviews for the purposes of child support in anticipation of a change in income.

[72] Changing income and how it relates to a potential variation in spousal support has been commented on by Prof. R. Thompson in "To Vary, to Review, Perchance to Change: Changing Spousal Support" (2012), 31 C.F.L.Q. 355 at 372-3, as follows:

Where a child support payor's income increases after separation, the child automatically gets to share the full benefit of the parent's improved income by way of child support. There is no "entitlement" issue there. In the law of spousal support, there is an intervening entitlement question, as one spouse does not automatically get to share in the post-separation good fortune of the other spouse. On variation or review, a recipient may get to share none, some or all of the payor's post-separation income increase. The SSAG cannot simply be applied to the income increase, without more careful analysis.

[73] Dr. Zaidel also submits that Brie-Anna's change in living arrangements and mental health issues do not constitute a material change in circumstances. He refers to Ms. Hall's statements on cross-examination on her affidavit on August 17, 2017, where she acknowledged that she understood at the time of the agreement that her daughters might want to change residences in the future, and would have significant say in doing so. He also argues that the parties knew at the time the Order was entered into of the potential for Brie-Anna to have future difficulties. Dr. Zaidel emphasizes that Brie-Anna was diagnosed with bipolar disorder in March 2011, and was hospitalized around that time. He also submits that Brie-Anna has not been hospitalized since 2015 and requires only one appointment per month as a follow-up to her monthly injections.

[74] With respect to Ms. Hall's claim that a change in the quantum of child support for the children constitutes a material change in circumstances justifying a variation in spousal support, Dr. Zaidel submits that such a wide proposition is not supportable. He submits that in the absence of any authority, it is "not logical" to suggest that an Order which provides for finality of spousal support but at the same time stipulates ongoing review of child support in anticipation of income changes, should necessarily be varied, if and when child support changes.

[75] Alternatively, Dr. Zaidel concedes that while para. 22 of the Order cannot oust the Court's jurisdiction to vary, it should be ascribed appropriate weight. Dr. Zaidel argues that it is clear that Ms. Hall would have contemplated and received advice about what constitutes a radical or unforeseen change, and that this would have included considerations of changes in income and changes in the children's residences. Contrary to Ms. Hall's suggestion that

finality or non-variation clauses are inserted in agreements and orders out of "habit", Dr. Zaidel says these provisions are there for a reason, as parties want certainty as to their future financial circumstances, as far as is reasonably possible.

- [76] On this issue, I am again faced with conflicting evidence. Ms. Hall states that Dr. Zaidel's position at the time the Order was entered into was that his income was going to decrease. Dr. Zaidel states the discussion centered on his income likely increasing. Ms. Hall bears the onus of asserting that a material change has occurred. Given the totality of the circumstances, I am not persuaded that she has done so. Given the terms of the Order, it was clear the parties specifically discussed a change in income (whether up or down, depending on who you believe). On this point, as the spousal support provision in the Order specified an increase in 2016 of \$500 per month, and given Dr. Zaidel's age at the time (approximately 45) and occupation as a physician specializing in internal medicine, I am satisfied the only reasonable inference is that the parties contemplated that Dr. Zaidel's income would increase, which it has done, thereby distinguishing the case at hand from the facts in *Sandy*. In these particular circumstances, I am not persuaded Ms. Hall has established she is entitled to benefit from Dr. Zaidel's increased income by way of a variation in spousal support.
- [77] With respect to Brie-Anna's change in residence and mental health issues, I accept Dr. Zaidel's submissions and Ms. Hall's own statements from her cross-examination and conclude that Brie-Anna's change in residence and mental health issues are not a material change in circumstances justifying a variation in spousal support. Ms. Hall admitted that she knew it was possible that the children would change residences after the Order was made. Furthermore, I cannot accept that she did not contemplate the magnitude of Brie-Anna's mental health issues given that Brie-Anna was hospitalized in March of 2011 and was diagnosed with bipolar disorder at that time, along with continuing to suffer the effects of her previous ADD diagnosis. This differentiates the case at hand from the circumstances in *C.(D.A.)*, where the parties agreed there were no concerns about their child's health before the final order was made (see para. 8). Furthermore, Ms. Hall has not submitted any recent expert evidence that indicates that Brie-Anna continues to need around-the-clock support and educational assistance, such that Brie-Anna's circumstances are preventing Ms. Hall from returning to work, even on a part-time basis.
- [78] Further, I am unable to agree that the provisions of s. 15.3 of the Divorce Act advance Ms. Hall's case for finding there has been a material change in circumstances. Section 15.3 reads:

Priority to child support

15.3(1) Where a court is considering an application for a child support order and an application for a spousal support order, the court shall give priority to child support in determining the applications.

Reasons

- (2) Where, as a result of giving priority to child support, the court is unable to make a spousal support order or the court makes a spousal support order in an amount that is less than it otherwise would have been, the court shall record its reasons for having done so.

Consequences of reduction or termination of child support order

- (3) Where, as a result of giving priority to child support, a spousal support order was not made, or the amount of a spousal support order is less than it otherwise would have been, any subsequent reduction or termination of that child support constitutes a change of circumstances for the purposes of applying for a spousal support order, or a variation order in respect of the spousal support order, as the case may be.

[79] There is nothing in the terms of the Order that indicates that Ms. Hall's spousal support award was less than it would have otherwise have been. Further, there were no reasons given by the court to this effect. Therefore there is no indication that s. 15.3 applies. As a result, I am not satisfied a change in the amount of child support constitutes a material change in circumstances in this particular case.

[80] In conclusion, I am not persuaded Ms. Hall has established a material change in circumstances such as to justify a variation of the spousal support she agreed to in the Order.

[81] Finally, notwithstanding my finding that there is no material change in circumstances justifying a variation of spousal support, for the sake of completeness I will address Dr. Zaidel's submission on the principles of finality and certainty, pursuant to para. 22 of the Order. On this point, the Court's remarks in *Reid v. Reid*, 2017 BCCA 73, even though in the context of a separation agreement, are instructive. In *Reid*, Groberman J.A. concluded that "[i]t is evident that the parties placed considerable emphasis on certainty and finality in entering into the agreement," relying on such phrases as, "[t]he Parties intend this Agreement to be the final settlement and release of their respective rights" and "the final settlement of any claim for spousal support " (para. 77). He concluded, at para. 80, that:

I do not suggest that all of the provisions were strictly enforceable, nor that they constitute a complete answer to Ms. Reid's claim [for an increase in spousal support]. They do, however, indicate a strong intention toward finality, and affirm that the parties understood the objectives of the applicable legislation.

[82] Further, Groberman J.A. also observed the critical difference in the approach taken when considering a variation in child support versus a variation in spousal support. At para. 87 of *Reid*, he notes "child support provisions in separation agreements are not subject to the same level of deference that spousal support provisions enjoy" (referencing *Kopp v. Kopp*, 2012 BCCA 140 at paras. 35-37).

- [83] Although again in the context of a separation agreement, not a consent order, the following remarks of the Supreme Court in *Miglin* are relevant:
- [55] To impose on all separating or divorcing persons an obligation to adhere strictly and exclusively to the statutory spousal support objectives denies them the autonomy to organize their lives as they see fit and to pursue their own sense of what is mutually acceptable in their individual circumstances. Accordingly, the spousal support objectives should not operate so as to preclude parties from bringing their own concerns, desires and objectives to the table in negotiating what they view as a mutually acceptable agreement, an agreement they consider to comply substantially with the objectives of the Act. In that way, the policy goals of autonomy and certainty will be rendered consistent with Parliament's recognition of "the diverse dynamics of the many unique marital relationships" (*Bracklow*, *supra*, at para. 35).
- [84] Finally, as set out earlier, the Supreme Court acknowledged in *L.M.P.* that in some circumstances a general statement of finality should be given deference (para. 42). Here, although para. 22 is a relatively general statement, it precludes varying spousal support even in the event of "catastrophic" changes. As a result, in addition to my conclusions that Ms. Hall has not satisfied the threshold onus to prove that a material change has occurred, I find para. 22 of the Order is clear; the parties intended finality with regards to the issue of Ms. Hall's spousal support. Their agreement and subsequent Order should be given deference.
- [85] While Ms. Hall made only a passing reference to the question of fairness, stating simply in written submissions that "the court should take into account whether the agreement reached is objectively fair taking into account the provisions of the Divorce Act," and even though I have found Ms. Hall has not established a material change in circumstances, again for the sake of completeness, brief remarks are appropriate.
- [86] If the threshold for a variation of spousal support is met, a court "must determine what variation to the order needs to be made in light of the change in circumstances" (*L.M.P.* at para. 47). This requires the court to consider the four objectives of spousal support enumerated in s. 17(7) of the Divorce Act (*Hickey v. Hickey*, [1999] 2 S.C.R. 518 at para. 20). In this analysis, the court is to presume that the judge who granted the original order "knew and applied the law, and that, accordingly, the prior support order met the objectives set out in s. 15.2(6)" (*L.M.P.* at para. 33). This means that in an application to vary a spousal support award, the approach "requires appropriate deference to the terms of the prior order, whether or not that order incorporates an agreement" (*L.M.P.* at para. 33). As a result, the court "should not lightly disturb" an order (*Oakley v. Oakley* (1985), 48 R.F.L. (2d) 307 (B.C.C.A.) at 313, cited with approval in *Walters v. Walters*, 2011 BCCA 331 at para. 48).
- [87] The four objectives of a variation order are:
- 17(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;
- (c) 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.

[88] Although Ms. Hall did not specifically reference any of the objectives of spousal support, I infer that she is submitting that because she needs to continue to care for Brie-Anna, this is preventing her from working outside the home and becoming economically self-sufficient, and combined with Dr. Zaidel's increased income, the objectives of spousal support are not achieved in these particular circumstances.

[89] In this analysis, I accept that generally speaking where there has been a long traditional marriage and a strong compensatory claim based on the recipient assuming primary responsibility for raising the children, it would be unfair to conclude that a recipient should not be entitled to share part of the payor's income increase if the threshold test of a material change in circumstances has been met. In these particular circumstances, there is no doubt that Ms. Hall was entitled to significant support given her strong compensatory claim.

[90] However, without progressing too far into this now alternative analysis, given Brie-Anna's relative stabilization since 2015, and the similarities in the parties' respective net worth as set out in their financial statements, including Ms. Hall's equity of at least \$2.2 million in the home she purchased in July 2011, I find that the Order Ms. Hall agreed to is fair and satisfies the objectives of spousal support outlined in s. 17(7). Other evidence I have relied on in reaching this decision includes the fact that each party received \$777,527 from the sale of the matrimonial home, with \$300,000 of Dr. Zaidel's share going to Ms. Hall to be accounted for as a credit against future spousal support, and the continuing annual payments of \$96,000 in spousal support until 2021. In addition, Ms. Hall has conceded her spousal support should end in 2021 as per the Order, and has agreed to continue to have an income of \$30,000 imputed to her, despite her assertions that she will not be able to work in the foreseeable future, given her requirements to care for Brie-Anna. In my view, Ms. Hall's continued acceptance of these terms undermines any suggestion that the agreement the parties entered into with the assistance of legal counsel over two separate lengthy mediations was unfair, or does not satisfy the objectives of spousal support outlined in s. 17(7).

Section 7 Expenses

- [91] Section 7(1) of the Guidelines provides that a court may order spouses to pay a portion of "special and extraordinary expenses."
- [92] Both parties have provided documentation in support of their respective positions as to who owes how much to the other for past s. 7 expenses. The Order stipulated that special expenses incurred between 2010 and 2012 "shall be paid 25% by the Claimant and 75% by the Respondent, upon production of receipts and shall be adjusted for the net after tax costs to either party." For expenses incurred from 2012 onwards, the Order stipulated simply that "[s]ection 7 special expenses going forward shall be shared 25% by the Claimant and 75% by the Respondent."
- [93] What is causing significant problems is how the parties say the "net" expense should be calculated for expenses that Dr. Zaidel pays for through the use of a Health and Welfare Trust in his corporation, (the "Trust"). Ms. Hall says she is entitled to receive \$10,113. Dr. Zaidel submits that he only owes Ms. Hall \$3,278, because the accounting report prepared by Grant Thornton on behalf of Ms. Hall inappropriately "double counts tax deductions".
- [94] Although the Order does not stipulate that special expenses incurred after 2012 should be adjusted for net cost, the parties agreed in mediation in November 2012 that on-going special expenses paid by Dr. Zaidel's corporation using the Trust should be discounted by 13.5 per cent (although Ms. Hall testified that she agreed to this based on the mistaken assumption her accountant had agreed to it). Ms. Hall submits that the Grant Thornton report uses this 13.5 per cent discount to reflect the "corporate tax shelter" that Dr. Zaidel's corporation gets from deducting the health payments from its gross revenue. The Grant Thornton report then applies an additional discount of 47.7 per cent which Ms. Hall submits reflects the "personal tax shelter" that Dr. Zaidel receives from not having to draw any funds personally to pay the health expense, given that his personal income tax rate is 47.7 per cent.
- [95] Dr. Zaidel submits that the parties previously agreed to the 13.5 per cent discount to reflect the "tax benefit" provided by the use of the Trust. Therefore, because the 47.7 per cent discount applied in the Grant Thornton report replaces the previously agreed to 13.5 per cent discount, it is "clearly inappropriate" to combine the two, and doing so leads to double counting. Further he submits that the Grant Thornton report does not provide an explanation for the 13.5 per cent discount beyond referring to it as the "corporate tax shelter", and applies it only because he previously agreed to it.
- [96] Dr. Zaidel conceded that the tax benefit he receives from the use of the Trust is more than the previously agreed upon 13.5 per cent discount. Correspondingly, his calculations apply a 47.7 per cent discount, and generally mirror the Grant Thornton report aside from its application of the additional 13.5 per cent discount.
- [97] Therefore, if I understand the parties' respective positions correctly, this dispute turns on whether the 13.5 per cent discount reflects Dr. Zaidel's "corporate tax shelter" and should be applied in addition to the 47.7 per cent discount for his "personal tax shelter", or, whether it

represents the amount previously agreed to by the parties to represent his general "tax benefit" from using the Trust and should therefore not be applied in addition to the 47.7 per cent discount. Once again, the parties disagree with each other. This is actually quite understandable as this particular dispute has turned into a rather complex and somewhat perplexing issue.

- [98] In this analysis, I note the terms of settlement from the November 2012 mediation indicate that the parties agreed that they would "apply a 13.5% discount to all Section 7 expenses" that Dr. Zaidel incurred. As acknowledged by its author, Mr. Nicholson, the Grant Thornton report was requested by Ms. Hall to "estimate the personal tax shelter benefit to her former husband that resulted from his use of a Health and Welfare Trust inside of his corporation for eligible expenses". The report references the 13.5 per cent discount as representing the "corporate tax shelter" several times. It does not provide any explanation as to how that discount was arrived at or why it was applied in addition to the 47.7 per cent discount.
- [99] However, in an e-mail from Mr. Nicholson to Ms. Hall dated July 13, 2017, he provides further explanation for this 13.5 per cent discount. Mr. Nicholson observes that "[i]n reading the correspondence from [Dr. Zaidel's] accountant I agree with him that if the medical expenses are being run through the corporation and are fully deductible then his calculation of a tax shelter of 13.5% is correct provided that income in the corporation is under \$500,000." Mr. Nicholson then went on to state that "I believe that [Dr. Zaidel's] accountant has not addressed the personal tax shelter and the benefit of making these medical expenses deductible inside the corporation." Based on a hypothetical example of how this personal shelter would be calculated, Mr. Nicholson concluded the personal shelter would be "31%-35.9% in addition to the corporate tax shelter" (emphasis added). Although Mr. Nicholson acknowledged that this preliminary analysis is not conclusive, and that he made some assumptions, it is still helpful in that it provides some justification for his application of both discounts in his subsequent report.
- [100] As a result, given the Grant Thornton report and the explanation provided by Mr. Nicholson, coupled with the fact that Dr. Zaidel has consented to the "personal tax shelter" provided for in the Grant Thornton report, I accept Ms. Hall's submission on this issue and order that Dr. Zaidel is to reimburse Ms. Hall \$10,113 for the difference in what is owed in s. 7 expenses.
- [101] At the same time, the parties agree that the \$7,500 advanced by Dr. Zaidel to Ms. Hall pursuant to a court order in May 2017 needs to be set off against any amount either party might owe the other for s. 7 expenses, or as against any other amount either party is required to pay by way of any retroactive orders. As a result, the \$7,500 Ms. Hall has received will be set off against the \$10,113 Dr. Zaidel owes Ms. Hall for past s. 7 expenses. The balance can be satisfied by way of a direct payment or simply included in whatever amount is owing once counsel have calculated the amount either party is owed at the end of the day.

[102] Going forward, both parties initially invited me to craft some new "methodology" for s. 7 expenses. However, it appears that the methodology applied by the Grant Thornton report is generally agreeable between the parties aside from Dr. Zaidel's argument to remove the additional 13.5 per cent discount which I have rejected. Whether or not that is the case, I will leave this specific issue to the parties.

[103] I do however find it is appropriate to delete the 75/25 per cent formula when calculating the parties' share of the net future s. 7 expenses, and instead order that these expenses will be shared in proportion to the parties' respective incomes. In Ms. Hall's case, pursuant to the terms of the Order, this will be income of \$30,000. As an aside, if there is future disagreement, it might be in the parties' best interests, in an attempt to prevent future litigation over this issue, to agree to an independent assessment as to the net cost of future s. 7 expenses.

Conclusion

[104] As a result of these conclusions, the June 2012 Order should be varied as follows:

1. Para. 2 is varied such that the primary residence for Brie-Anna will be with Ms. Hall, and Bianca and Taylor will reside primarily with Dr. Zaidel.
2. Para. 19 is varied such that s. 7 expenses will be shared in proportion to the parties' respective incomes.
3. Paras. 3, 4, 5, 7, 8, 9 and 10 are deleted.

[105] If for any reason the parties wish to vary any further conditions by consent, or to rectify any errors I may have made, they are at liberty to do so.

Costs

[106] Both parties seek costs. While it could be argued each party has achieved partial success, if after receipt of these reasons the parties are unable to reach an agreement, arrangements can be made for counsel to make submissions.

"B. D. MacKenzie, J."

The Honourable Mr. Justice B. D. MacKenzie

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