
CANADA / JUDGMENT

I.J.G.P.G. v. K.M.

2020 BCSC 673

COURT

Supreme Court of British Columbia

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2020 BCSC 673 I.J.G.P.G. v. K.M.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

I.J.G.P.G. v. K.M.,

2020 BCSC 673

Date: 20200501

Docket: E44091

Registry: New Westminster

Between:

I.J.G.P.G.

Claimant

And

K.M.

Respondent

Corrected Judgment: Correction is made to paragraph 8 of the Judgment on May 5, 2020.

Before: The Honourable Madam Justice Jackson

Reasons for Judgment

Counsel for the Claimant:

N. Kulusic

The Respondent, appearing in person:

K.M.

Place and Dates of Hearing:

New Westminster, B.C.

February 19-20, 2020

Place and Date of Judgment:

New Westminster, B.C.

May 1, 2020

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I. BACKGROUND

- [1] These reasons address three applications - one brought by the claimant and two brought by the respondent - in the context of family law proceedings under the Family Law Act, S.B.C. 2011, c. 25 [FLA].
- [2] The trial of this family law case occurred over the course of ten days between November 2015 and April 2016. In reasons for judgment issued on June 10, 2016, indexed at 2016 BCSC 1072 (the "Trial Reasons"), Justice Arnold-Bailey made a number of orders including parenting time and child support (the "Trial Order"). The Trial Order included a term directing the parties to jointly retain a parenting coordinator from the British Columbia Parenting Coordinators Roster Society to assist in reaching decisions concerning their child (the "Child") if they were unable to agree on parenting decisions. The Trial Order was not appealed.
- [3] On December 21, 2018, I heard and delivered oral reasons indexed at 2018 BCSC 2468 (the "December 2018 Reasons") in relation to three notices of application that arose from the Trial Reasons. Two of those notices of application were filed by the claimant and sought orders that, among other things, the respondent produce various financial statements and documents.
- [4] Pursuant to the December 2018 Reasons, I ordered the respondent to produce all of the documents requested in the claimant's notices of application within 45 days. Both parties also sought the appointment of a parenting coordinator. I ordered each of the parties to provide me with the names, qualifications, and hourly rates of two parenting coordinators they would be prepared to accept by January 14, 2019 (the "December 2018 Order").

- [5] I received this information from the claimant. I did not receive this information from the respondent, nor did I receive any explanation, either from him or his lawyer, as to why the information was not provided as ordered.
- [6] On April 4, 2019, I issued supplemental reasons, indexed at 2019 BCSC 508, pertaining to the appointment of a parenting coordinator. Pursuant to these reasons, I directed the parties to jointly retain Leanne Harder as a parenting coordinator (the "April 4, 2019 Order"). Neither the December 2018 Order nor the April 4, 2019 Order were appealed.
- [7] On May 21, 2019, I heard another notice of application brought by the claimant seeking orders relating to alleged breaches of the December 2018 Order by the respondent and changes to the respondent's child support obligations (the "First Imputing Income Application"). The First Imputing Income Application was filed on April 5, 2019, and set for hearing on April 18, 2019. The respondent sought, and I granted, two adjournments prior to the ultimate May 21, 2019 hearing.
- [8] On June 4, 2019, I delivered my oral reasons for judgment, indexed at 2019 BCSC 2398 (the "June 2019 Reasons"), with respect to the First Imputing Income Application. Pursuant to the June 2019 Reasons, I dismissed all aspects of the claimant's application except for a \$3,000 fine under s. 213 of the FLA, which I imposed on the respondent as a consequence for his delay in providing financial disclosure (the "June 2019 Order").

II. THE PRESENT APPLICATIONS

- [9] The hearing of these three applications proceeded before me on February 19 and 20, 2020, although I am no longer seized of applications in this matter. Between them, the parties' applications sought 22 orders, in addition to costs. The relief sought can be grouped into the following categories:
- a) imputation of income and a corresponding order for retroactive child support;
 - b) relief related to the parenting coordinator;
 - c) fines and conduct orders;
 - d) relief related to travel with the Child and custody of his passport; and
 - e) other.
- [10] In addition to the notices of application and corresponding responses (including multiple responses filed by the respondent to one application), there were ten affidavits as well as the Form F8 Financial Statements of the parties.
- [11] At the hearing, the respondent sought to rely on three further affidavits: Affidavit #5 made on November 26, 2019; Affidavit #6 made on January 24, 2020; and Affidavit #7 made on February 14, 2020 (the "Three Additional Affidavits"). The claimant objected to me considering the Three Additional Affidavits on the basis that they had been filed after the

responses to application and were, therefore, outside of the time for service prescribed by R. 10-6(8), (8.1), and (13) of the Supreme Court Family Rules [Rules]. At the hearing I advised the parties I would receive the Three Additional Affidavits and later provide my ruling on whether I would consider them.

- [12] Rule 10-6(13) confirms the court's discretion to permit the service of affidavits outside time periods established by the Rules. Two of the Three Additional Affidavits were made and, as I understand it, served well before the February hearing dates. While the third affidavit was made very close to the hearing date, and although all Three Additional Affidavits were served outside the time periods required by the Rules without any valid explanation by the respondent for the delay in their service, I am not aware of any prejudice that would accrue to the claimant from my consideration of them. Therefore, I am prepared to exercise my discretion to permit the respondent to rely on the Three Additional Affidavits.
- [13] At the hearing, the respondent also sought to argue a further notice of application (filed February 18, 2020) seeking an order under s. 18 (Vexatious Proceedings) of the Supreme Court Act, R.S.B.C. 1996, c. 443, prohibiting the claimant from instituting further legal proceedings without leave of the court. Because the respondent had not served this additional notice of application in the time period specified by the Rules and I was not satisfied the claimant would not be prejudiced by the inadequate notice, I did not permit that application to proceed.

III. CHILD SUPPORT

A. Is the claimant's Imputing Income Application *res judicata* and an abuse of process?

- [14] The respondent argues the issue of whether income should be imputed to him was fully considered, and rejected, both by Arnold-Bailey J. in her Trial Reasons (at para. 172) and by me in my June 2019 Order (based on the respondent's reading of paras. 33 and 34 of the June 2019 Reasons). He argues this application is simply a do-over. Based on those submissions, I will assume the respondent is relying on the doctrines of issue estoppel and abuse of process.
- [15] In response, the claimant argues the June 2019 Order only addressed (by dismissing) the interim relief she sought pending the respondent's provision of financial disclosure. The claimant submits the respondent has provided further financial disclosure and she has now reviewed it, and this is the resulting application for a retroactive award of child support based on an imputing of income to the respondent.
1. Legal Principles
- [16] The doctrines of *res judicata* and abuse of process were recently reviewed by Justice Butler for the Court of Appeal in *Liu v. Borden Ladner Gervais LLP*, 2020 BCCA 50:

Issue Estoppel

- [34] In *Erschbamer v. Wallster*, 2013 BCCA 76, Justice Tysoe succinctly summarized the general principles of *res judicata* at para. 12:
- [12] The general principles of the doctrine of *res judicata* were reviewed by this Court relatively recently in *Cliffs Over Maple Bay [Investments Ltd. (Re)]*, 2011 BCCA 180]. The doctrine has two aspects, issue estoppel and cause of action estoppel. In brief terms, issue estoppel prevents a litigant from raising an issue that has already been decided in a previous proceeding. Cause of action estoppel prevents a litigant from pursuing a matter that was or should have been the subject of a previous proceeding. If the technical requirements of issue estoppel or cause of action estoppel are not met, it may be possible to invoke the doctrine of abuse of process to prevent relitigation of matters.
- [35] BLG's application to strike is not based on cause of action estoppel. Rather it says that issue estoppel should prevent the Notaries from raising the claims advanced in the NCC against it and that it would be an abuse of process to permit the claims to proceed.
- [36] Issue estoppel arises when three criteria are met:
- (1) that the same question has been decided;
 - (2) that the judicial decision which is said to create the estoppel was final; and,
 - (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised, or their privies....

The issue that gives rise to the estoppel must be central or fundamental to the decision in the earlier proceeding: *Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248 at 255. Here, the issue must be "so fundamental" that decision in *Mao* could not stand without it.

- [37] Another expression of the principle is found in *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44 at para. 24:
24. Issue estoppel was more particularly defined by Middleton J.A. of the Ontario Court of Appeal in *McIntosh v. Parent*, [1924] 4 D.L.R. 420 (Ont. C.A.), at p. 422:

When a question is litigated, the judgment of the Court is a final determination as between the parties and their privies. Any right, question, or fact distinctly put in issue and directly determined by a Court of competent jurisdiction as a ground of recovery, or as an answer to a claim set up, cannot be re-tried in a subsequent suit between the same parties or their privies, though for a different cause of action. The right, question, or fact, once determined, must, as between them, be taken to be conclusively established so long as the judgment remains.
[Emphasis added by Butler J.A.]

[38] However, these "rules" of issue estoppel must not be applied too rigidly. The guiding question should be the balance between the public interest in the finality of litigation and the public interest in ensuring justice is done on the facts of the case. Even if a moving party establishes the three criteria, a court may still exercise its discretion to determine whether issue estoppel ought to be applied: Danyluk at para. 33.

2. Analysis

[17] It is clear that the parties are the same in this application, the trial before Arnold-Bailey J., and the First Imputing Income Application, and that the Trial Order was a final order. The issues are: (a) whether this application seeks the same relief dismissed at trial or the First Imputing Income Application, and (b) whether the June 2019 Order was a final decision.

[18] The Trial Reasons reflect that the claimant sought, unsuccessfully, to have income imputed to the respondent for the period leading up to the trial. That finding is reflected in the Trial Order. As noted, Arnold-Bailey J.'s Trial Order was not appealed.

[19] The Trial Order included the following terms with respect to child support:

31. The total amount of child support owed to the Claimant by the Respondent in accordance with the Guidelines from June 1, 2014, to May 31st, 2016, up to the commencement of the shared parenting regime, is \$1,957 (the \$2,569 owed less the credit of \$612).
32. Commencing June 1st, 2016, the Respondent shall pay to the Claimant the sum of \$8.00 per month for the support and maintenance of [the Child] pursuant to section 9 of the Child Support Guidelines, and continuing on the first day of every month thereafter for so long as [the Child] is a "child" as defined in the Family Law Act.
33. The parties will exchange their filed income tax return with copies of all attachments and schedules and their notices of assessment by July 1 of each year, and adjust child support accordingly.

[20] Absent an appeal, the respondent's child support obligations were resolved through the Trial Order, and could only be revisited annually and adjusted if necessary beginning on July 1, 2017. Therefore, the doctrine of issue estoppel prevents the claimant from seeking the imputation of income to the respondent for the period between July 1, 2016 and July 1, 2017.

[21] That leaves the question of whether issue estoppel also prevents the claimant from seeking relief related to child support retroactive to July 1, 2017.

[22] In the First Imputing Income Application, the claimant sought the following relief:

1. pursuant to s. 213(2)(b) of the FLA, that the court impute an income of \$100,000 per year to the respondent; and

2. pursuant to the respondent's imputed income of \$100,000 and the claimant's 2017 income of \$30,977, an order that the respondent shall pay to the claimant child support in the amount of \$657.23 per month, which is based on a set-off, retroactive to June 1, 2018 and payable on the first day of each month thereafter until such time as the respondent complies in full with the terms of the December 2018 Order.
- [23] I do not consider the difference in the level of income the claimant seeks to have imputed to be a factor that sufficiently distinguishes the two applications to negate the application of the doctrine of issue estoppel. However, I agree with the claimant that the relief sought in the First Imputing Income Application was limited to the period from June 1, 2018 until such time as the respondent complied with the financial disclosure obligations as I had ordered.
- [24] In my June 2019 Reasons, I noted that some financial disclosure had been made but that it was unclear whether all of the documents ordered to be disclosed had been provided to the claimant. My recollection is that she had not yet had an opportunity to survey everything that had been provided because it was produced so close to the date of the hearing. While counsel for the claimant confirmed she was not relying on a failure to provide disclosure as a basis for seeking what I referred to in the June 2019 Reasons as the "Late Disclosure Fine", no representation was made by the claimant that all of the documentation I had ordered the respondent to produce had in fact been provided.
- [25] My June 4, 2019 Order was interlocutory in nature and not final. Therefore, the doctrine of issue estoppel does not prevent the claimant from seeking the imputation of income to the respondent for the period beginning July 1, 2017. As I have concluded this application is not a re-litigation of the First Imputing Income Application, it follows that I find this application does not undermine the adjudicative process and therefore it is not abusive: *Lamb v. Canada (Attorney General)*, 2018 BCCA 266 at para. 48. I will proceed to address the substance of the claimant's application.

B. Calculating the Parties' Respective Incomes

- [26] The claimant seeks to vary the child support order contained in the Trial Order. Although not expressly articulated, the respondent also appears to be of the view that the child support term of the Trial Order should be varied. I make that conclusion based on the fact that the respondent stopped paying child support to the claimant as of July 1, 2017, expressing the view that based on the parties' incomes at that time, the claimant was required to pay him child support instead.
- [27] The claimant seeks to have me impute income to the respondent and order child support based on an imputed annual income of \$150,000.00.
- [28] The respondent also seeks an order that I impute \$5,000.00 of additional income to the claimant.

1. Claimant's Position

- [29] In her notice of application, the claimant seeks an order under s. 213(2)(b) of the FLA imputing income to the respondent in the amount of \$150,000 per year, and a consequent order that the respondent pay child support to the claimant in the amount of \$1,030 per month, based on a set-off amount between the respondent's imputed income of \$150,000 per year and the claimant's income of \$34,683.32 per year, retroactive to July 1, 2016 and payable on the first day of each month thereafter until the Child is no longer a child as defined in the FLA.
- [30] According to the claimant, the respondent resides in a newer custom-made 4,500 square-foot home overlooking the ocean with a 2019 assessed value of \$1,629,000 and a \$550,000 mortgage. The claimant's evidence is that the respondent also takes the Child on international vacations each year and manages to afford to register the Child in private art, singing, and tennis lessons and camps.
- [31] In essence, the claimant's position is that the level of income reported by the respondent simply does not match up with his lifestyle. She argues she has been seeking documentation to support the respondent's claimed level of business deductions for years without success. For example, she points out that the respondent has claimed deductions from his business income for subcontractor fees, but there is no documentation to support the use of any subcontractors or the fees associated with that expense.
- [32] The claimant argues the respondent has claimed deductions from his self-employment earned through the plumbing business he operates as a sole proprietorship without providing explanation or supporting documentation. The claimant points out that the respondent reported his income for child support purposes as \$24,237.08 in 2017, \$27,740 in 2018, and \$24,237.08 in 2019, all of which equate to an annual income that is less than minimum-wage. For income tax purposes, the respondent reported gross self-employment business income of \$93,904.77 in 2017 and \$130,409.53 in 2018. Those amounts roughly correspond to the amounts the respondent deposited into the bank account he acknowledges he uses to track his business income. While the respondent's net business income in both 2017 and 2018 was significantly lower, the claimant argues the respondent has continually failed to provide information and documentation to support the business expenses he claimed for income tax purposes. Since the determination of income for tax purposes and for child support purposes involves different considerations, the claimant argues the respondent has failed to adequately establish his income for child support purposes is the same as his net business income: *Murphy v. Murphy*, 2000 BCSC 974 at para. 11. The claimant argues I should exercise my discretion to impute income to the respondent in the amount equal to the average of the respondent's gross business income over the last three years and order retroactive child support based on that average income.
- [33] The claimant also argues the evidence supports a finding that the respondent earned rental income from the suite in his home.

[34] With respect to her income, the claimant says she has no income she has not declared and her expenses are as listed on her Form F8 Financial Statement.

2. Respondent's Position

[35] With respect to the claimant's request for imputed income, the respondent indicates he was simply unaware until now that the claimant was seeking financial statements from his plumbing business to support the reduced level of income which he has reported. He indicates the expenses are organized by his accountant. He acknowledges he has not disclosed the financial statements for his plumbing business.

[36] In his notices of application, the respondent seeks an order imputing \$5,000 of additional income to the claimant. The respondent says the claimant has failed to disclose rental income from her apartment in Venezuela on her Form F8 Financial Statement. He relies on the fact that in an order dated October 3, 2019, BC Provincial Court Judge T. MacDonald imputed income of \$47,459 to the claimant, despite the fact that the claimant declared less than \$5,000 income for income tax purposes. The respondent argues I should impute an additional \$5,000 in income to the claimant for the same reasons Macdonald P.C.J. did. However, I was not advised what evidence was before Macdonald P.C.J. or the reasons underlying that order.

3. Analysis

[37] Section 152 of the FLA governs variation of child support orders made under the FLA:

152 (1) On application, a court may change, suspend or terminate an order respecting child support, and may do so prospectively or retroactively.

(2) Before making an order under subsection (1), the court must be satisfied that at least one of the following exists, and take it into consideration:

- (a) a change in circumstances, as provided for in the child support guidelines, has occurred since the order respecting child support was made;
- (b) evidence of a substantial nature that was not available during the previous hearing has become available;
- (c) evidence of a lack of financial disclosure by a party was discovered after the last order was made.

[38] In this case, the claimant relies on a change in circumstances. She argues the respondent's income has changed from his income as determined at the time of trial and relied on by Arnold-Bailey J. in determining the respondent's child support obligations.

- [39] In determining this aspect of the claimant's application, I must consider whether there has been a change in circumstances warranting a variation of the child support terms of the Trial Order and, if so, what the proper child support obligations are and whether any retroactive award of child support should be made.
- a) Has there been a change in circumstances?
- [40] Where the court makes an order respecting child support under the FLA, the amount of child support must be determined in accordance with the child support guidelines established by regulation under s. 247 of the FLA, being the Family Law Act Regulation, B.C. Reg. 347/2012 [FLA Regulation]: FLA, s. 150(1). The FLA Regulation adopts, for all intents and purposes, the federal child support guidelines established by regulation under s. 26.1 of the Divorce Act, R.S.C. 1985, c. 3, being the Federal Child Support Guidelines, SOR/97-175 [Guidelines]: FLA Regulation, ss. 8 and 9.
- [41] Income for purposes of the Guidelines ("Guideline Income") is to be determined in accordance with ss. 15-20 of the Guidelines. Where the court considers it appropriate, the Guidelines permit the court to impute income in various circumstances, including: (a) where a spouse has failed to provide income information when they have a legal obligation to do so, or (b) the spouse unreasonably deducts expenses from income: Guidelines, s. 19(1) (f) and (g). The reasonableness of an expense deduction is not solely governed by whether the deduction is permitted for income tax purposes: Guidelines, s. 19(2).
- [42] Where a self-employed parent against whom a child support order has been made (such as the respondent in this case) receives a written request from the other parent, they are obliged to provide the financial statements of their business for the three preceding taxation years: Guidelines, ss. 25(1)(a) and 21(1)(d)(i).
- [43] The claimant has requested the financial statements for the respondent's plumbing business. He has not provided them, although at the hearing he acknowledged they are with his accountant.
- [44] As noted by Justice Forth in *D.N. v. M.R.*, 2019 BCSC 537:
- [134] The party seeking to impute income bears the onus of showing, on a balance of probabilities and rational and evidentiary basis, that income should be imputed: *D.M.B. v. D.W.A.L.*, 2018 BCSC 1254 at para. 140. It is sufficient to show that the other party has deducted business expenses to meet this initial evidentiary burden on the claimant: *C.M. v. V.M.*, 2016 BCSC 2144 at paras. 39-40; *Sobiegraj v. Sobiegraj*, 2014 ONSC 2030 at paras. 65-67.
- [135] Once the claimant establishes this evidentiary foundation, the onus shifts to the responding party to show that his business expenses are a reasonable deduction from his income for child support purposes: *C.M.* at para. 39, citing *Sobiegraj*.

- [45] The income tax returns of the respondent reflect that he has claimed sizable deductions from his business income. On that basis, I find the claimant has established a rational and evidentiary basis for income being imputed to the respondent. As a result, the onus shifts to the respondent to establish on a balance of probabilities that his business expenses are reasonable deductions from his income for child support purposes. The respondent failed to do so. The respondent failed to provide documentation that explains the nature and basis of the significant deductions from his business income which he claimed for income tax purposes.
- [46] Further, the respondent's 2019 Form F8 Financial Statement is both incomplete and inconsistent with the documentary disclosure he has provided. Although his Form F8 Financial Statement reports \$1,300 per month for his mortgage, his bank statements reflect a mortgage payment of \$2,648.22 per month. The respondent's Form F8 Financial Statement also reports a lease payment of \$600 per month for a personal car, but he has also deducted that expense from his income. This has the effect of duplicating that reduction in calculating his Guideline Income. Further, his Form F8 Financial Statement reports no vacation expenses, yet there is evidence he regularly travels internationally with the Child. In addition, his Form F8 Financial Statement reports a monthly expense of \$300 for credit cards but his credit card and bank statements reflect thousands of dollars being paid towards credit card purchases each month. The respondent also failed to list all of his bank accounts on his Form F8 Financial Statement. This was pointed out to him by counsel for the claimant. These are just some of the deficiencies and inconsistencies in how the respondent has reported his income on his Form F8 Financial Statement and what is revealed by the documentary disclosure provided to date (which, as I will address later on, is still incomplete).
- [47] There was some evidence the respondent's former lawyer, Aaron Lessing, was renting the suite in the respondent's home. While the respondent denied this, the evidence before me included a copy of a cheque for \$2,000 made out to the respondent and drawn on the account of Aaron Lessing Law Corporation dated December 21, 2018. On the face of the cheque it is noted to be "RE Rent". The respondent argued this was a retainer refund but there was no evidence to support that explanation, and I reject it. Nonetheless, while there is some evidence to suggest the respondent received some rental income from his former lawyer, the evidence was unclear with respect to when, for how long, and in what amount and therefore I am not prepared to include any rental income in determining the respondent's Guideline Income.
- [48] In *Pang v. Wu*, 2017 BCSC 396 [Pang], Justice Kelleher said the following about non-disclosure of financial information:

- [51] Where there is non-disclosure at any stage of a family law proceeding, the non-disclosing party bears the onus to show that there has been full disclosure: *Cunha v. Cunha*, (1994) 99 B.C.L.R. (2d) 93. Where a party fails to comply with an order for disclosure, or provides information that is incomplete, false or misleading, the court may draw an adverse inference. The result may be an attributing of income or an inference that there are undisclosed assets: *Cunha and Laxton v. Coglon*, 2008 BCSC 42.
- [49] I conclude it is appropriate to grant the claimant's application to impute income to the respondent for the following reasons: there are significant inconsistencies in the financial information provided by the respondent, there is an absence of documentation to support the business income deductions claimed by the respondent, and the respondent failed to provide the financial statements for his business (which he has an ongoing legal obligation to provide).
- [50] The evidence does not establish there has been a drop in the level of the respondent's business income since the end of 2018. While the respondent's gross business income fluctuated over the past few years, I find \$130,409.53 is a fair and reasonable level of income to impute to the respondent in the circumstances.
- [51] The claimant worked three jobs and was paid by direct deposit for each. Her evidence is that she has no further income. The claimant acknowledges she owns an apartment in Venezuela which she permits family members to live in rent-free. The respondent argues that she is receiving rent, but I find that has not been established on a balance of probabilities based on the evidence before me. Further, I was given no information that would assist me in determining what, if any, rental income would be reasonable to impute to the claimant on the basis that she had not reasonably utilized that property to generate income. The respondent's application for an order that I impute income to the claimant is dismissed.
- [52] At trial, Arnold-Bailey J. found the claimant's and respondent's Guideline Incomes to be \$23,986 and \$25,089 respectively. As a result of my findings, I conclude there has been a material change in circumstances since the trial, namely an increase in the respondent's Guideline Income, which warrants a variation of the Trial Order: FLA, s. 152.
- b) Based on the change in circumstances, what are the parties' child support obligations?
- [53] The Guidelines apply to orders varying a child support order: Guidelines, s. 2(4)(b). The Guidelines establish a presumptive quantum of child support, as set out in the applicable table, according to the number of minor children and the income of the spouse against whom the order is sought: Guidelines, s. 3(1)(a). I see no reason to depart from the quantum of child support presumptively payable by the respondent under the Guidelines.
- [54] Where custody is shared, the amount of the child support order must be determined by taking into account the amounts set out in the applicable tables for each of the spouses, the increased costs of shared custody arrangements and the conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought: Guidelines, s.9.

Based on a set-off amount between the respondent's imputed income of \$130,409.53 per year (resulting in a child support award of \$1,198.52 per month according to the applicable table in the Guidelines) and the claimant's income of \$34,683.32 per year (resulting in a child support award of \$325.70 per month according to the applicable table in the Guidelines), I order the respondent to pay child support to the claimant for the Child in the amount of \$872.82 per month, payable on the first day of each month beginning June 2020 and continuing monthly thereafter.

c) Should the variation of the child support order be retroactive to July 1, 2017?

[55] In *D.B.S. v. S.R.G.*, 2006 SCC 37, Justice Bastarache, writing for the majority of the Court, provided the following summary of the legal principles applicable to retroactive awards of child support. As I view them as being an important reminder for the respondent, I have set out them out in full below:

[131] Child support has long been recognized as a crucial obligation that parents owe to their children. Based on this strong foundation, contemporary statutory schemes and jurisprudence have confirmed the legal responsibility of parents to support their children in a way that is commensurate to their income. Combined with an evolving child support paradigm that moves away from a need-based approach, a child's right to increased support payments given a parental rise in income can be deduced.

[132] In the context of retroactive support, this means that a parent will not have fulfilled his/her obligation to his/her children if (s)he does not increase child support payments when his/her income increases significantly. Thus, previous enunciations of the payor parent's obligations may cease to apply as the circumstances that underlay them continue to change. Once parents are in front of a court with jurisdiction over their dispute, that court will generally have the power to order a retroactive award that enforces the unfulfilled obligations that have accrued over time.

[133] In determining whether to make a retroactive award, a court will need to look at all the relevant circumstances of the case in front of it. The payor parent's interest in certainty must be balanced with the need for fairness and for flexibility. In doing so, a court should consider whether the recipient parent has supplied a reasonable excuse for his/her delay, the conduct of the payor parent, the circumstances of the child, and the hardship the retroactive award might entail.

[134] Once a court decides to make a retroactive award, it should generally make the award retroactive to the date when effective notice was given to the payor parent. But where the payor parent engaged in blameworthy conduct, the date when circumstances changed materially will be the presumptive start date of the award. It will then remain for the court to determine the quantum of the retroactive award consistent with the statutory scheme under which it is operating.

- [135] The question of retroactive child support awards is a challenging one because it only arises when at least one parent has paid insufficient attention to the payments his/her child was owed. Courts must strive to resolve such situations in the fairest way possible, with utmost sensitivity to the situation at hand. But there is unfortunately little that can be done to remedy the fact that the child in question did not receive the support payments (s)he was due at the time when (s)he was entitled to them. Thus, while retroactive child support awards should be available to help correct these situations when they occur, the true responsibility of parents is to ensure that the situation never reaches a point when a retroactive award is needed.
- [56] This case differs from many cases where a retroactive award of child support is sought because the Trial Order contemplated adjustments to child support obligations if they were necessary based on changes in the parties' financial circumstances. The claimant has acted diligently since November 2017 in attempting to gather the documentation necessary to determine whether any variation of the Trial Order was necessary, but the respondent has frustrated her attempts. The fact that he is self-represented is no excuse. The Child has had the benefit of various extracurricular activities and other financial privileges while in the respondent's care but not while he was with the claimant because she lacked the financial means to provide them. The evidence does not establish hardship that would accrue to the respondent from a retroactive award of child support.
- [57] In all of the circumstances, I find a retroactive award of child support is appropriate. Accordingly, I order the respondent to pay the claimant the lump sum amount of \$30,548.70, which I have calculated based on 35 months of the \$872.82 monthly amount (\$872.82 x 6 months in 2017, 24 months over 2018 and 2019 and 5 months in 2020). The respondent shall pay the claimant the lump sum retroactive child support award before June 30, 2020.

IV. RELIEF RELATED TO THE PARENTING COORDINATOR

- [58] In her notice of application, the claimant seeks an order under s. 223(1)(d) of the FLA that the respondent be prohibited from making any application respecting any matter over which the parenting coordinator has authority by virtue of my April 4, 2019 Order, without leave of the court. The claimant also seeks orders that the respondent contact the parenting coordinator to schedule his intake appointment with her and that he pay the \$3,500 initial retainer to the parenting coordinator by a specified date.
- [59] In his notices of application, the respondent takes the position that he contacted the parenting coordinator to tell her he did not have the money to pay her retainer. He also seeks to vary my April 4, 2019 Order with regards to hiring the parenting coordinator on the basis of what he describes as his "limited, unpredictable and sometimes precarious financial situation". He asks for the variation to include an order that all parenting issues be considered and resolved with the justice court counsellor, and also asks to have a Views of the Child Report done.

[60] The claimant opposes the respondent's notices of application and says there has been no change in circumstances that would warrant a variation of my April 4, 2019 Order.

A. Is there a basis to vary my April 4, 2019 Order?

[61] The Trial Order includes the following term:

28. In the event the parties are unable to agree on parenting decisions in relation to [the Child], they will jointly retain a parenting coordinator from the BC Parenting Coordinators Roster Society to assist in reaching decisions concerning [the Child], particularly with respect to any changes to the parenting schedule, but also on other matters. They will share the cost of the services of a parenting coordinator equally regardless of their incomes and the parenting coordinator's decision will be binding on the parties pursuant to s. 18 of the FLA.

[62] My December 2018 Order includes the following term:

10. By January 14, 2019, each party shall provide to the Court with the names of two parenting coordinators from the BC Parenting Coordination Roster Society that they would accept and with whom they have inquired, who are willing to take on the responsibility of the parties' case, along with information about their credentials and their hourly rates.

[63] My April 4, 2019 Order includes the following term:

1. The parties shall jointly execute a retainer for Ms. Leanne Harder as a Parenting Coordinator.

[64] None of these orders were appealed.

[65] The FLA permits the court to change, suspend, or terminate an order if there has been a change of circumstances since the order was made: s. 215(1).

[66] At the December 21, 2018 hearing, both parties sought to have a parenting coordinator appointed and the respondent did not indicate the cost of a parenting coordinator was any impediment. Indeed, the respondent proposed parenting coordinators with substantially higher rates than Ms. Harder and it was the claimant who expressed a desire to retain a parenting coordinator with the lower hourly rate. The respondent had the opportunity to participate in my determination of who the parenting coordinator would be, but failed to provide any submissions despite my order that he do so. He provided no explanation for why he failed to participate. I made the April 4, 2019 Order on the basis of the information I was provided. The claimant signed the parenting coordination agreement on June 10, 2019. The respondent never signed the agreement.

[67] The respondent now says he would like a different form of dispute resolution. However, I view this new position advanced by the respondent as an attempt to frustrate the timely, efficient, and orderly resolution of disputes between the parties without the court's involvement.

- [68] Although his notice of application makes reference to a "limited, unpredictable and sometimes precarious financial situation", the notice of application attributes that to an injury in 2013. I am not satisfied the respondent's financial circumstances have worsened since the December 21, 2018 hearing or my April 4, 2019 Order. I am not satisfied there has been a change in circumstances since the April 4, 2019 Order was made that warrant a change to my order that the parties retain Ms. Harder as their parenting coordinator. The respondent's applications to vary para. 1 of the April 4, 2019 Order and for an order that all parenting issues be considered and resolved by a family justice counsellor are dismissed.
- [69] The respondent also sought to have a Views of the Child Report done. Both parties expressed an interest in having such a report and they are free to take steps to obtain one. A court order is not necessary and I decline to make such an order. The history of this family law case demonstrates that the more orders there are, the more the parties have to fight about. I do not intend to contribute more fodder for them to disagree on than is necessary.
- [70] The current applications before me reflect that the circumstances are such that I must make orders to support my April 4, 2019 Order regarding the appointment of Ms. Harder as the parenting coordinator. Therefore, I order that before May 15, 2020, the respondent must contact Ms. Harder to schedule his intake appointment with her and provide evidence of that contact to the claimant or her counsel. I further order that before May 15, 2020, the respondent must provide a \$3,500 initial retainer to Ms. Harder.

V. CHANGE IN PARENTING ARRANGEMENTS

- [71] The Trial Order includes (at para. 3) a term requiring the parties to discuss and agree on all major decisions affecting the Child, including enrolment in any activities that may interfere with either parent's parenting time. In his notice of application filed November 8, 2019, the respondent seeks the following orders:
3. An order to allow [the Child] to attend activities when he was with the other parent, if there is an offer for time exchange or compensation. It is in [the Child's] best interest to participate in beneficial activities.
 4. An order to allow [the Child] to attend tennis lessons, when he is with the other parent on long weekends, or other activities [the Child] would like to attend, and that was fully paid by a parent, and there is an offer for time compensation from the other parent.
- [72] The Trial Order clearly permits the relief the respondent is seeking in his application, where the parties agree. In essence, the respondent is asking the court to vary the Trial Order to dispense with the requirement for the claimant's consent.
- [73] The mosaic of parenting arrangements set out in the Trial Order, including para. 3, reflect the delicate balance achieved by the trial judge following a highly contested ten-day trial. Based on the evidence before me, I find there has not been a change of circumstances since trial that warrants the variation of the Trial Order sought by the respondent.

- [74] Each parent is of course free to allow the child to attend whatever activities they wish during their parenting time, including activities for which the other parent would like to register him. If the parties are unable to agree on variations to the minutiae of the parenting arrangements, these are precisely the types of disputes the parties, or either of them, can raise with the parenting coordinator. That is the purpose of a parenting coordinator.
- [75] The respondent's decision to pursue this relief in application to the court, rather than negotiating an agreement with the claimant or seeking assistance from the parenting coordinator, substantiates the need for the order under s. 223(1)(d) of the FLA as requested by the claimant, that the respondent be prohibited from making an application without leave of the court respecting any matter over which a parenting coordinator has authority to act.
- [76] For greater clarity, the parties may find the following excerpts from the FLA and the FLA Regulation useful:

FLA

Information sharing for parenting coordination

16 A party must, for the purposes of facilitating parenting coordination, provide the parenting coordinator with

- (a) information requested by the parenting coordinator, and
- (b) authorization to request and receive information, respecting a child or a party, from a person who is not a party.

Assistance from parenting coordinators

17 A parenting coordinator may assist the parties in the following manner:

- (a) by building consensus between the parties, including by
 - (i) creating guidelines respecting how an agreement or order will be implemented,
 - (ii) creating guidelines respecting communication between the parties,
 - (iii) identifying, and creating strategies for resolving, conflicts between the parties, and
 - (iv) providing information respecting resources available to the parties for the purposes of improving communication or parenting skills;
- (b) by making determinations respecting the matters prescribed for the purposes of section 18 [determinations by parenting coordinators].

Determinations by parenting coordinators

18 (1) A parenting coordinator

- (a) may make determinations respecting prescribed matters only, subject to any limits or conditions set out in the regulations,
 - (b) must not make a determination respecting any matter excluded by the parenting coordination agreement or order, even if the matter is a prescribed matter, and
 - (c) must not make a determination that would affect the division or possession of property, or the division of family debt.
- (2) In making a determination respecting parenting arrangements or contact with a child, a parenting coordinator must consider the best interests of the child only, as set out in section 37 [best interests of child].
- (3) A parenting coordinator may make a determination at any time.
- (4) A parenting coordinator may make an oral determination, but must put the determination into writing and sign it as soon as practicable after the oral determination is made.
- (5) Subject to section 19 [changing or setting aside determinations], a determination
- (a) is binding on the parties, effective on the date the determination is made or on a later date specified by the parenting coordinator, and
 - (b) if filed in the court, is enforceable under this Act as if it were an order of the court.

FLA Regulation

6 (3) The following are the matters in respect of which a parenting coordinator may make determinations:

- (a) parenting arrangements;
 - (b) contact with a child.
- (4) For the purposes of subsection (3), a parenting coordinator
- (a) may make determinations in respect of
 - (i) a child's daily routine, including a child's schedule in relation to parenting time or contact with the child,
 - (ii) the education of a child, including in relation to the child's special needs,
 - (iii) the participation of a child in extracurricular activities and special events,
 - (iv) the temporary care of a child by a person other than
 - (A) the child's guardian, or
 - (B) a person who has contact with the child under an agreement or order,
 - (v) the provision of routine medical, dental or other health care to a child,

- (vi) the discipline of a child,
 - (vii) the transportation and exchange of a child for the purposes of exercising parenting time or contact with the child,
 - (viii) parenting time or contact with a child during vacations and special occasions, and
 - (ix) any other matters, other than matters referred to in paragraph (b), that are agreed on by the parties and the parenting coordinator, and
- (b) must not make determinations in respect of
- (i) a change to the guardianship of a child,
 - (ii) a change to the allocation of parental responsibilities,
 - (iii) giving parenting time or contact with a child to a person who does not have parenting time or contact with the child,
 - (iv) a substantial change to the parenting time or contact with a child, or
 - (v) the relocation of a child.

VI. FINES, PENALTIES, AND CONDUCT ORDERS

- [77] The claimant seeks two orders imposing fines on the respondent. The respondent seeks one order imposing a penalty on the claimant.

A. The Parenting Coordinator Penalty

- [78] The claimant applies for an order under s. 230(2)(b)(ii) of the FLA that the respondent pay her \$5,000 for breaching my April 4, 2019 Order which required the parties to retain Ms. Harder as the court-appointed parenting coordinator (the "Parenting Coordinator Fine"). The respondent takes the position he contacted Ms. Harder to tell her he did not have the money to retain her. In his material, the respondent also seems to suggest that because Ms. Harder had a preliminary conversation with the claimant, she would somehow not be sufficiently unbiased or independent to serve as a parenting coordinator for the parties. In further response, the respondent relies on his application to vary my April 4, 2019 Order ordering the parties to retain Ms. Harder.
- [79] As set out above, at the December 21, 2018 hearing, the respondent sought to have a parenting coordinator appointed. He had an opportunity to participate in my determination of who the parenting coordinator would be, but did not do so. I have rejected the respondent's submission that his financial situation has deteriorated since the December 21, 2018 hearing or the April 4, 2019 Order. I find that he did breach my April 4, 2019 Order by failing to effect my order that the parties retain Ms. Harder as their parenting coordinator. I further find he has no excuse for breaching the order. Instead, I find that the respondent's failure to retain Ms. Harder was an attempt to frustrate and delay the resolution of disputes between the parties and place additional burdens and costs on the claimant. This has been a

consistent pattern of behaviour by the respondent and dates back at least to May 23, 2019, when he threatened in an email to file a 500-page affidavit so that the claimant's "lawyer will not have any other option but to read all 500 pages and reply to it."

- [80] This behaviour warrants the imposition of a financial consequence. In my view a fine will assist in drawing to the respondent's attention the importance of complying with court orders. I order the respondent to pay a fine to the claimant in the amount of \$5,000 before June 30, 2020.

B. Penalty for Failing to Disclose the Financial Statements of his Business

- [81] The claimant also seeks an order under s. 213(2)(d)(iii) of the FLA, imposing a penalty of up to \$5,000 on the respondent for failing to disclose his financial business statements in breach of my December 21, 2018 Order (the "Failing to Disclose Fine"). The respondent argues this was addressed in my June 2019 Order, wherein I ordered a \$3,000 fine. In his application response, he says that fine was paid.
- [82] However, the claimant seeks an additional penalty because the respondent's failure to produce the financial statements of his business has continued, despite an order that he produce them and despite one fine already being imposed.
- [83] I agree the respondent's failure to provide the financial statements for his business has continued after my June 2019 Order.
- [84] In my June 2019 Reasons at paras. 22 to 25, I set out an overview of the jurisprudence involving enforcement orders respecting disclosure and I will not repeat that summary here. I will add that in *Pang, Kelleher J.* imposed a \$5,000 fine on the respondent in circumstances similar to this case:
- [60] Here, unlike in *Armstrong*, [the respondent] had ample opportunity to comply with the disclosure requirements imposed by court order and that she is still in breach of the order. She has not been able to explain in any plausible manner why she has been unable to comply. As such, I conclude this is an appropriate case to impose a fine of \$5,000 to be paid by [the respondent] to the claimant.
- [85] In the circumstances, I conclude the respondent's ongoing failure to provide the financial statements of his business warrants a further and increased financial penalty. Despite a notice of application filed by the claimant in November 2017, multiple follow-up requests in 2018, my December 2018 Order, the fine I imposed in my June 2019 Order, and further follow up in July 2019, the respondent still has not provided the financial statements for his business. As a result, the claimant was forced to attempt to manually calculate the respondent's income by sifting through hundreds of pages of credit card, bank, and line of credit statements.

[86] Under section s. 213(2)(d)(iii) of the FLA, I order the respondent to pay \$5,000 to the claimant before June 30, 2020.

C. Penalty for Registering the Child in School

[87] The respondent seeks an order imposing a penalty on the claimant for registering the child in a particular school without the respondent's consent. He argues the claimant is in breach of para. 3 of the Trial Order and my June 2019 Order, based on his interpretation of para. 21 of my June 2019 Reasons. The respondent did not identify a particular provision of the FLA upon which he relied in seeking that order, but I have assumed he is relying on the provision dealing with the enforcement of orders generally: FLA, s. 230(2).

[88] Although the claimant took steps to register the child in a religious school, she did so over the summer months to secure a place for the child in the event that the parties agreed he would attend. She communicated to the respondent that the choice of the school was simply her proposal. The respondent agreed to the proposal and confirmed his consent in an email to the claimant's lawyer dated July 15, 2019. In the circumstances, I am not prepared to impose a penalty on the claimant for those actions.

VII. THE CHILD'S PASSPORT AND TRAVEL

[89] The Trial Order includes the following terms with respect to the child's passport and travel:

14. The parties shall each be entitled to have a consecutive one-week vacation with [the Child] twice in each calendar year, such times to be worked out and agreed upon in writing by the parties at least one month in advance. The parent exercising vacation time will pick up [the Child] at 11:00 a.m. on the first day and will drop off [the Child] at 11:00 a.m. on the eighth day, at which time the regular parenting schedule will resume. Neither parent shall be entitled to take two one-week vacations in the same month, nor will he or she be entitled to a consecutive two-week vacation, unless otherwise agreed to between the parties in writing and in advance.
15. If the vacation involves travel outside the Lower Mainland of BC, the vacationing parent will advise the other parent at least two weeks in advance of the dates, destination, and an emergency contact number.
16. If the vacation involves travel outside of Canada then the vacationing parent will advise the other parent at least six weeks in advance of the date, destination and an emergency contact number, and will obtain the other parent's written consent for [the Child] to travel. Neither parent will unreasonably withhold their consent for [the Child] to travel outside of Canada with the other parent and will sign the required consent.
17. [The Child's] passport is to be held in safekeeping by Mr. Aaron Lessing, at his office, for the first 12 months after this order, and it is then to be kept by a third party as agreed upon by the parties.

18. Each parent will sign all necessary forms at the request of the other parent in a timely manner to enable [the Child] to travel, and provide all the necessary documents required to renew [the Child's] passport when it expires

[90] The April 18, 2019 order pursuant to the hearing on April 18, 2019 (the "April 18, 2019 Order") includes the following term:

Within 14 days of this order, the Respondent shall deliver to the Claimant's lawyer's office the passport for [the Child], born May 4, 2009.

[91] The respondent seeks to vary the Trial Order to allow him to travel outside Canada with the Child during the respondent's parenting time without notice to or the consent of the claimant, as required by the Trial Order.

A. Travelling with the Child

[92] The evidence does not establish the claimant has unreasonably interfered with the respondent's ability to travel with the Child, or that she has unreasonably withheld her consent to his numerous requests to travel. I find there has been no change in circumstances since the trial that justifies a change of the Trial Order.

B. Custody of the Child's Passport

[93] The respondent seeks an order varying my April 18, 2019 Order by allowing him to keep the child's passport at his residence.

[94] I find it is not appropriate for the respondent to hold the Child's passport. I make this finding based on the pronounced lack of trust and absence of consensus between the parties on even the smallest of matters in this case. While I am sympathetic to the concern expressed by the respondent that it is inconvenient for him to retrieve the Child's passport from the claimant's counsel every time he wants to travel with the Child, the potential for that inconvenience exists regardless of what third party holds the Child's passport.

[95] In keeping with the terms of the Trial Order, the parties are free to agree on a third party who could hold the Child's passport, either through their own negotiation or with the assistance of the parenting coordinator. Until then, as per my April 18, 2019 Order, the Child's passport will continue to be held by Ms. Kulusic, counsel for the claimant, who is an officer of the court.

VIII. FURTHER ORDERS SOUGHT

[96] The respondent also sought an order that the claimant disclose financial documents to clarify the source of a \$60,000 partial payment she made to the respondent in compliance with the February 22, 2017 costs order of Arnold-Bailey J. The respondent did not articulate any basis for such an order and I see no purpose served by the order, given that it relates to the claimant's financial circumstances over three years ago. The court will generally not make orders that have no practical utility: *Wall v. Judicial Committee of the Highwood*

Congregation of Jehovah's Witnesses, 2016 ABCA 255 at para. 80.

[97] This aspect of the respondent's notice of application is dismissed.

[98] The respondent also seeks an order prohibiting the parties from discussing litigation matters with the Child or questioning him about the other parent's activities or private matters.

[99] I agree with the claimant that para. 2 of my December 2018 Order addresses that issue. It reads:

BY CONSENT, the parties shall not (a) question [the Child] about the other party or time spent with the other party beyond simple conversational questions; (b) discuss with [the Child] any inappropriate adult, court or legal matters; (c) blame, criticize or disparage the other party to [the Child].

[100] A further duplicate order is not necessary. That aspect of the respondent's notice of application is dismissed.

IX. SUMMARY OF ORDERS

[101] In summary, for the reasons set out above I make the following orders:

A. Claimant's Notice of Application filed October 28, 2019

1. I impute an annual income of \$130,409.53 to the respondent.
2. I order that based on the respondent's imputed Guideline Income of \$130,409.53 and the respondent's Guideline Income of \$34,683.32, the respondent will pay to the claimant child support in the amount of \$872.82 per month, beginning June 1, 2020, and payable on the first day of each month thereafter until the Child is no longer a "child" under the FLA. I further order that the respondent pay to the claimant a lump-sum payment of \$30,548.70 before June 30, 2020 for the retroactive child support award.
3. Under s. 213(2)(d)(iii) of the FLA, I order the respondent to pay the claimant \$5,000 before June 30, 2020.
4. Under s. 230(2)(b)(ii) of the FLA, I order the respondent to pay the claimant \$5,000 before June 30, 2020.
5. Under s. 223(1)(d) of the FLA, I order that the respondent is prohibited from making application respecting any matter over which the parenting coordinator has authority to act without leave of the court.
6. I order the respondent to contact Leanne Harder to schedule his intake appointment with her, and provide proof to the claimant that he has done so, before May 15, 2020.
7. I order the respondent to provide the \$3,500 initial retainer to Leanne Harder before May 15, 2020.

B. Respondent's Notice of Application filed November 8, 2019

1. The application to vary para. 1 of my April 4, 2019 Order is dismissed.
2. The application for an order that all parenting issues be considered and resolved by a family justice counsellor is dismissed. The application requiring a Views of the Child Report be done is also dismissed.
3. The application to allow the Child to attend activities under certain conditions is dismissed.
4. The application to allow the Child to attend certain lessons under certain conditions is dismissed.
5. The application to allow the respondent to hold the Child's passport at his residence is dismissed.
6. The application for an order to impose a penalty on the claimant for registering the Child in school is dismissed.
7. The application for a conduct order is dismissed as being unnecessary given it was addressed in my December 2018 Order.
8. The application for an order dismissing the claimant's application to have income imputed to the respondent is dismissed.
9. The application for an order to impute income to the claimant is dismissed.
10. The application for an order that the claimant disclose documents dating back to February 2017 is dismissed.

C. Respondent's Notice of Application filed January 14, 2020

1. The application to vary para. 16 of the Trial Order is dismissed.
2. The application to vary para. 4 of my April 18, 2019 Order is dismissed.
3. The application to vary para. 18 of the Trial Order is dismissed.
4. The further application to allow the respondent to hold the Child's passport at his residence is dismissed.
5. The application to allow the Child to travel in the United States with the respondent during the respondent's parenting time and vacations without the consent of the claimant is dismissed.

X. COSTS

[102] The claimant was the successful party in all three applications, all of which I determine were of ordinary difficulty. She is entitled to her costs payable by the respondent to be assessed in accordance with Appendix B of the Supreme Court Family Rules.

"Jackson J."

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