
CANADA / JUDGMENT

J. C. H. v. S. M. B. H.

2022 BCSC 1403

COURT

Supreme Court of British Columbia

DECIDED

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2022 BCSC 1403 J. C. H. v. S. M. B. H.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

J. C. H. v. S. M. B. H.,

2022 BCSC 1403

Date: 20220816

Docket: E153011

Registry: Vancouver

Between:

J. C. H.

Claimant

And:

S. M. B. H.

Respondent

Before: The Honourable Mr. Justice Punnett

Reasons for Judgment

In Chambers

Counsel for the Claimant:

E. Walker

Counsel for the Respondent:

S. Stanislaus

Place and Date of Hearing:

Vancouver, B.C.

April 14, 2022

Place and Date of Judgment:

Vancouver, B.C.

August 16, 2022

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Introduction

- [1] In this application, S. M. B.-H. (the "respondent") has re-set for hearing her notice of application filed January 17, 2018, to enforce a separation agreement between the parties regarding quantum of ongoing and retroactive child support payable by J. C. H. (the "claimant"). An application of the claimant relating to the appointment of a parenting coordinator was adjourned.
- [2] The specific relief sought in the notice of application is:
4. A review of the child support payable by the Claimant to the Respondent commencing July 1, 2016, and payable on the first day of each and every month thereafter, and a determination of the parties' Guideline incomes.
 5. An order that the Claimant pay the Respondent arrears of child support for 2015, 2016 and a recalculation of the child support owing with respect to 2017 [now to current date].
12. Costs of the application.
- [3] There is no application by the claimant to vary the separation agreement.

Background

- [4] The claimant and the respondent commenced their relationship in approximately 1995 and began cohabitating in 1998. They married on May 20, 2000 and separated in November 2013. They were divorced on January 15, 2016.
- [5] There are three children of the marriage. The eldest, L., was born in 2003 and turns 19 this year. The second child, G., was born in 2005, and the youngest, B., in 2009.
- [6] The parties entered into a separation agreement on August 5, 2015 (the "Separation Agreement"). Under the Separation Agreement they shared equal parenting time. In January of 2016, they entered into a Parenting Coordination Agreement with a parenting coordinator. Between 2016 and 2017, various coordinators made determinations regarding the transitioning of the children. Since then, the parenting schedule has continued with equal parenting time except for the eldest child. This changed in February 2017, when L. commenced residing solely with the claimant. On March 20, 2017, Masuhara J. ordered that the regular parenting schedule was not to be enforced regarding L. as his relationship with his mother had broken down. He also ordered that L. was to continue with counselling and would have flexibility as to when he wished to see or communicate with the respondent.

- [7] In September 2018, L. commenced grade 10 at a boarding school on Vancouver Island. He continued to attend there until he graduated in 2021. In September 2021, he began first year university in Ontario.
- [8] The support of the children in the shared custody regime was to be calculated on a set-off of child support payments under s. 9 of the Federal Child Support Guidelines, SOR/97-175, with extraordinary expenses under s. 7 of the Guidelines to be divided based on a 70/30 split given the parties' then incomes.
- [9] When the Separation Agreement was signed, the claimant was employed as Vice President of Marketing for a company in Vancouver and the respondent as a chiropractor through her own corporation. It was agreed the claimant's line 150 income in 2014 of \$263,993 comprised of his base salary of \$180,000, his bonus of \$66,000 for 2013 received in June 2014, and \$17,993 in taxable benefits consisting of a \$10,800 car allowance, auto expenses of \$2,509.35, cell phone benefit of \$1,456.59, parking expenses of \$1,960.20, and health benefits of \$1,267.01.
- [10] The respondent's Guideline income was agreed to be approximately \$96,000.
- [11] During the time the parties were sharing parenting of the children equally, the set-off child support payable by the claimant to the respondent was \$2,074 per month.
- [12] They further agreed that if at the end of any month the children were not in one or the other parent's care for at least 40% of the time, then no child support would be payable to that parent for that month. The calculation of the 40% is addressed in paragraph 20.3 of the Separation Agreement:

20.3 The following guidelines shall apply to determine whether [the claimant] or [the respondent] has the Children in his or her care at least 40% of the time during any given month:

- (a) The parties shall calculate the total number of overnights in the month and shall subtract from that amount any overnights that fall within:
- (i) The Children's Christmas Holiday Period (and for the purposes of this paragraph, the Christmas Holiday Period will be deemed to commence on the last day of school before the Christmas holidays and to end on the morning that the Children return to school);
- (ii) The Children's Spring Break Period (and for the purposes of this paragraph, the Spring Break Period will be deemed to commence on the last day of school before spring break and to end on the morning that the Children return to school); and
- (iii) Either parent's two week summer holiday with the Children.
- (b) If [the claimant] has had the Children in his care for less than 40% of the remaining overnights, then [the respondent] will be deemed to have had "primary residence" of the Children for that month.

[13] Under Section 19.2 of the Separation Agreement, there was to be an annual a review of child support commencing on July 1, 2016. No such reviews occurred.

[14] The Separation Agreement terms regarding the annual review are:

19. ANNUAL REVIEW OF CHILD SUPPORT AND PROPORTIONATE SHARING OF SPECIAL EXPENSES

19.1 Commencing on July 1, 2016 and continuing on or before June 1 of each year thereafter, [the claimant] and [the respondent] shall exchange income tax returns and all information required by the Federal Child Support Guidelines to determine each of their respective incomes pursuant to the Federal Child Support Guidelines ("Guidelines Incomes").

19.2 Each year, commencing in 2016, after exchanging the financial information as set out in the preceding paragraph, [the claimant] and [the respondent] shall adjust the basic child support based on their respective Guidelines Incomes, and the adjusted child support amount shall be based on the set-off formula, as follows:

Amount of support payable by [the claimant]

- Amount of support payable by [the respondent]

= Amount of child support to be paid by [the claimant] to [the respondent]

19.3 For the purposes of the review of child support each July, [the claimant's] Guidelines income shall be calculated based on the following:

- (a) [the claimant's] base salary; plus
- (b) [the claimant's] bonus for the preceding calendar year (thus, for the review in July, 2016, the parties shall use the amount of [the claimant's] bonus for the 2015 calendar year which [the claimant] expects to have received by June 30, 2016); plus
- (c) [the claimant's] car allowance; plus
- (d) [the claimant's] auto expenses that are paid for by his employer and treated as a taxable benefit to him; plus
- (e) any other income [the claimant] derives from other sources including but not limited to interest and investment income, dividends, and the like.

19.4 The new amount of basic child support shall be effective as of July 1 each year, and if the parties are unable to determine the quantum of basic child support by June 1 after exchanging financial information, the new amount of basic child support shall be retroactive to July 1 of each year.

19.5 Each year, commencing in 2016, after exchanging financial information as set in paragraph 20.1, [the claimant] and [the respondent] shall also re-calculate their respective shares of the Special Expenses in proportion to their respective incomes as calculated in accordance with paragraph 19.2.

19.6 The calculation of the proportionate share each party shall pay for Special Expenses shall be effective as of July 1 each year. If the parties are unable to determine their proportionate shares by July 1, after exchanging financial information, the new proportionate shares of Special Expenses shall be retroactive to June 1 of each year.

19.7 If [the claimant] fails to disclose any bonus or other income to [the respondent], [the respondent] shall be entitled to obtain a retroactive adjustment of the basic child support and the parties' proportionate shares of the Special Expenses to the date that [the claimant] failed to make the disclosure, provided that there is no double counting.

19.8 If the parties cannot agree at the annual review on the calculation of their adjusted child support obligations or proportionate shares of the Special Expenses, the dispute shall be resolved in accordance with the Dispute Resolution Mechanism set out in paragraph 38.3 herein.

[15] The respondent wrote to the claimant through her counsel regarding a review of child support on December 20, 2016, January 30, 2017, February 7, 2017, February 20, 2017, March 20, 2017, March 29, 2017 and May 29, 2017. Those efforts were unsuccessful and the requested financial disclosure not forthcoming, hence these proceedings.

[16] On February 1, 2018, Mr. Justice Groves ordered that the respondent file a Form 8 Financial Statement by February 14, 2018, and that cross-examination on that financial statement and her affidavit occur.

[17] On April 10, 2019, Master Bouck ordered by consent, that both parties produce extensive income-related documentation and information.

[18] Since then, counsel have exchanged letters and information and made efforts to set the matter for hearing. There were delays in arranging a hearing date, including delays related to COVID-19. The claimant does not raise delay as an issue on the retroactive support claim.

Issues

[19] There are three issues to be decided:

1. The claimant's income for child support purposes from July 2016 to June 2022.
2. The respondent's income for child support purposes from July 2016 to June 2022.
3. Whether the claimant should pay child support for L. while L. attended boarding school and first year university.

Position of the respondent

- [20] The respondent submits the claimant's income has increased significantly since 2015 and his child support payments have not. Further, that her income has decreased because of moving her clinic, difficulty securing practitioners to work in her clinic, loss of existing practitioners, a fire damaging her clinic and a major reduction in patient numbers due to the COVID-19 pandemic. In addition, she submits that her ability to work has been affected by an injury to her wrist suffered in a motor vehicle accident in 2016 and the resulting surgery, as well as time off for the birth of her youngest son with her current partner in 2018.
- [21] She also submits the claimant's obligation to pay support for L. continued while L. was at boarding school and while he is away at university and under the age of majority.

Position of the claimant

- [22] The claimant submits his income is not as high as the respondent claims as she is improperly including pre-tax income and payments made on capital debt.
- [23] He further submits that the Separation Agreement provided for a formula to recalculate his income but not the respondent's. He states that formula has since 2015 produced results closely comparable to his line 150 income, and as a result his line 150 income should be relied on for the purposes of this application. Regarding the respondent's income, he states it was set at \$96,000 to avoid disputes over the respondent's business deductions and what should or should not be added back for Guideline income purposes. He submits the reported income of the respondent from 2016 onward is artificially low because the respondent is running her personal expenses through her corporation and showing a loss as a result. He disputes that the respondent's income has decreased materially from the \$96,000 per year agreed to for reasons that would merit an increase in his child support obligation.
- [24] Finally, he does not agree that the respondent is entitled to child support for their eldest child during the months L. was in boarding school, nor that she is entitled to child support for L. when he is away at university.

Legal framework and analysis

- [25] The claimant does not dispute that the reviews required by the Separation Agreement have not occurred, that there has been non-disclosure, and that retroactive support is due. The dispute over their respective incomes for child support purposes arises from both parties earning income through closely-held corporations and the application of the income determination provisions of the Guidelines.

[26] I will first address the claimant's pre-tax corporate income and his Guideline income, then turn to the respondent's Guideline income. I will then address the issue of whether support is payable for the period L. attended boarding school and first year university.

Claimant's income

[27] The claimant was employed as a vice president at the time of separation. Shortly thereafter, in 2016, he became chief executive officer. In May 2017 he incorporated 1117217 B.C. Ltd., (the "Holding Company"), a closely-held corporation that holds a 10% interest in his employer. The claimant purchased this interest in 2017 for \$500,000, financing the investment through personal savings, the remaining proceeds from the sale of the former family home and a \$250,000 loan from RBC Dominion Securities.

[28] After the investment was made in 2017, the debt was reduced to \$497,000, and in 2018 it was reduced to \$310,000, then in 2019 to \$207,356 and completely repaid by the end of 2020.

[29] The Holding Company now generates dividend income payable to the claimant, hence the claimant's income sources now are his T-4 income from his employer and funds received from his Holding Company.

Allocation of pre-tax income of the claimant's holding company

[30] In issue is the pre-tax income of the Holding Company. The respondent submits it should be included in the claimant's Guideline income, the claimant says it is not. The claimant characterizes the pre-tax corporate income of the Holding Company from 2017 to 2020 as a return of capital until the debt used to invest in the company was paid off at the end of 2020.

[31] The claimant explains his debt repayment obligation by reference to a letter from his then counsel in 2018 that states:

3. (3) Once all the debt is repaid and Class E Shares are redeemed, then the Class A Shares will pay dividends. This will not happen for several years and the loan repayment/redemptions will occur when 1115716 BC Ltd. has excess cash available .
4. The source of funds for Mr. Hoffmeister's investment in 1115716 BC Ltd. was \$250,000 of his personal savings, the remainder of the proceeds of sale of the former family residence, and a \$250,000 loan from RBC DS.
5. The dividend income will be available as Guideline Income after the \$500,000 has been repaid.

Law on pre-tax income

[32] The relevant portions of the Guidelines are:

Calculation of annual income

16 Subject to sections 17 to 20, a spouse's annual income is determined using the sources of income set out under the heading "Total income" in the T1 General form issued by the Canada Revenue Agency and is adjusted in accordance with Schedule III.

...

Shareholder, director or officer

18 (1) Where a spouse is a shareholder, director or officer of a corporation and the court is of the opinion that the amount of the spouse's annual income as determined under section 16 does not fairly reflect all the money available to the spouse for the payment of child support, the court may consider the situations described in section 17 and determine the spouse's annual income to include

- (a) all or part of the pre-tax income of the corporation, and of any corporation that is related to that corporation, for the most recent taxation year; or
- (b) an amount commensurate with the services that the spouse provides to the corporation, provided that the amount does not exceed the corporation's pre-tax income.

Adjustment to corporation's pre-tax income

- (2) In determining the pre-tax income of a corporation for the purposes of subsection (1), all amounts paid by the corporation as salaries, wages or management fees, or other payments or benefits, to or on behalf of persons with whom the corporation does not deal at arm's length must be added to the pre-tax income, unless the spouse establishes that the payments were reasonable in the circumstances.

[33] In *Kowalewich v. Kowalewich*, 2001 BCCA 450, the British Columbia Court of Appeal first addressed pre-tax income and the principles that apply:

40 ... A court need not look for signs of bad faith or undeclared personal benefits to support a conclusion of intentional avoidance of a child support obligation before reaching the opinion required to trigger an adjustment under ss. 17 or 18. Nor should it look only to the value of a payor's services to a company that parent owns or controls.

41 I note the use of pre-tax corporate income as a basis for the determination of child support does not strip a spouse of his available money. It is to use available money as a measuring rod for the purpose of fixing annual income and thus the amount of child support.

42 I suggest that at the root of these provisions is a concept not unlike that of income earning capacity well known to the law of support obligations in the pre-Guidelines era, as this Court noted in *Van Gool v. Van Gool* (1998), 59 B.C.L.R. (3d) 395 (B.C.C.A.). Courts have long imputed to underemployed parents the amount they could earn if working to capacity. The Guidelines affirm that approach in s. 19(1)(a) and (e). The purpose of the Guidelines is to permit an impartial

assessment of "money" available to a spouse to pay child support. They are not just about actual income as a parent directly or indirectly determines it to be.

43 In this regard, I find helpful the view Justice Martinson expressed in *Baum v. Baum* (1999), 182 D.L.R. (4th) 715 (B.C. S.C.) at para. 28:

Valid corporate objectives may differ from valid child support objectives. The purpose of s. 18 is to allow the court to "lift the corporate veil" to ensure that the money received as income by the paying parent fairly reflects all of the money available for the payment of child support. This is particularly important in the case of a sole shareholder as that shareholder has the ability to control the income of the corporation. See *Bhopal v. Bhopal*, [1997] B.C.J. No. 1746 (S.C.) , *Blackburn v. Elmitt* (1997), 34 R.F.L. (4th) (B.C.S.C.) and *McCrea v. McCrea* .

44 A court's efforts to ensure fairness does not require a court to second-guess business decisions nor, as Justice Pitfield so colourfully noted in *S. (L.)*, supra, at para. 44, to "place the largest available shovel in the company store." What it does require is that a spouse's allocation of pre-tax corporate income between business and family purposes be assessed for fairness by an impartial tribunal when parents cannot reach agreement on priorities as they would in an intact family and may upon separation under s. 15(2).

45 To determine whether "Total income" fairly reflects money available for child support, a court might ask what an objective well-informed parent would make available for child support in the circumstances of a particular business over which the parent exercised control, having regard to the objectives of the Guidelines , the underlying parental obligation to support children in accordance with one's means, and any applicable situation in s. 17.

[34] In support of her submission that the pre-tax income of the claimant's company should be included in the claimant's Guideline income, the respondent relies on *Barker v. Barker*, 2002 BCCA 345, where the Court added the entire pre-tax corporate income to the Guideline income of the respondent. Counsel for the claimant wife in *Barker* had also sought to adjust that income upward to include a sum recorded as an amortization expense for the tax year. The Court found the latter to be a legitimate corporate expense hence it was not to be added back (para. 71).

[35] In *Hausmann v. Klukas*, 2009 BCCA 32, the British Columbia Court of Appeal again addressed "what amounts (if any) of the pre-tax corporate income of the respondent payor's company, should be included in his annual income for the purpose of calculating child support..." (para.1).

[36] Kirkpatrick J.A. for the Court, stated:

51 While the purpose and application of s. 18 were outlined in *Kowalewich*, this Court has not heretofore established an onus test. Some post *Kowalewich* authorities from this province, however, have concluded that there is an "emerging presumption" that pre-tax corporate income will be assumed to be available to a payor unless evidence is led to the contrary. These authorities state that the onus in the circumstances is on the payor. As discussed in *Jeffrey v. Motherwell*,

2006 BCSC 140, 36 R.F.L. (6th) 377 (B.C. S.C. [In Chambers]), at para. 13 Kowalewich has been applied on other occasions by judges of this court and is binding authority. One of those cases *Bartkowski v. Bartkowski* (2003), 37 R.F.L. (5th) 242 (B.C.S.C. [In Chambers]), albeit dealing with very different factual circumstances in that the payor contended that his line 150 income was inflated to take advantage of tax benefits, the court said this about the authorities post Kowalewich:

I am of the view that these cases reveal an emerging presumption that the corporation's pre-tax income will be assumed to be available to the shareholder payor for the payment of child support unless compelling evidence is led by the payor spouse to support the conclusion that reinvestment is necessary to sustain the company as a viable enterprise. ... (para. 51)

The onus is on the payor to provide the necessary evidence that the corporation's pre-tax income is not available to the payor. The court should not have to ferret out the necessary information from inadequate or incomplete financial disclosure. While *Bartkowski* says the evidence of the payor must be compelling, I prefer to use the word clear when discussing the necessary evidence of business circumstances as the former word might be taken to suggest a higher standard of proof than is called for by Kowalewich.

52 I respectfully agree with the above comments in *Jeffrey v. Motherwell*.

53 In contrast to British Columbia, courts in Manitoba have applied an onus test since 2001. In *Nesbitt*, the Manitoba Court of Appeal concluded that in circumstances where a payor spouse has retained earnings in his company, and has failed to provide any explanation for the necessity to retain corporate earnings, the onus is on that spouse to convince the court there are valid business reasons for doing so.

54 In *Nesbitt*, the court stated it was in "entire agreement" with the following comments cited at para. 19:

Particularly helpful is Professor James McLeod's annotation to the decision in *Fost v. Hood* (2000), 2 R.F.L. (5th) 399 (N.S.C.A.), in which the author comments on the decision of *Adams v. Adams* (2000), 5 R.F.L. (5th) 9, 2000 ABQB 153 (Alta. Q.B. [In Chambers]), and opines (at 401):

One of the more common allegations made by payees to convince a court to impute income is that a payor has retained earnings in his or her business that he or she refuses to take as income in order to reduce child support. In *Adams v. Adams* . . ., Rowbotham J. noted that retained earnings represent money that the business has earned and the shareholders can take out as income. A spouse who controls the business and chooses to leave the money in the business must be prepared to explain why his or her decision is reasonable from a business point of view.

Sometimes a company's creditors insist that the business retain a minimum amount of money as security for financing, or a company may carry on substantial cash operations and require a business "float" to maintain access to liquid funds. Whatever the reason alleged for retaining earnings in a business, most courts assume that a spouse should take as much money as is available as income from his or her business and a spouse who does not do so is trying to avoid

his or her family obligations. The onus is on a payor who has retained earnings in his or her company to convince the court that there are valid business reasons for leaving the money in the company. In *Adams*, Rowbotham J. was satisfied that the husband could justify leaving part but not all of the retained earnings in the company for business reasons and imputed income pursuant to the Guidelines.

...

61 As I have noted, the evidence tendered by Mr. Klukas as to the needs of the company is unclear and unsubstantiated. At the hearing of the appeal we asked counsel for Mr. Klukas on at least two occasions to identify the legitimate calls on Pioneer's pre-tax corporate income, with no satisfactory answer. In these circumstances, the court is left with essentially two options: attribute all of the pre-tax corporate income to Mr. Klukas in keeping with the onus developed in the cases referred to above or refer the matter back to the Supreme Court for a re-hearing.

62 Counsel for Ms. Hausmann urged us not to refer the matter for re-hearing, citing the lengthy delay in determining the amount of child support that has been properly payable since July 2003. Counsel for Ms. Hausmann noted that because the order appealed from addresses only the years up to 2005, it will be open to Mr. Klukas to provide clear evidence as to the legitimate calls on Pioneer's pre-tax income when child support is reviewed in future under the terms of the July 2001 order.

...

67 Having regard to the onus referred to above, the evidence, the absence of a clear explanation of the legitimate calls on Pioneer's pre-tax corporate income, and the chambers judge's acceptance of Mr. Mynett's evidence as to the available income, I would impute to Mr. Klukas all of the pre-tax corporate income of Pioneer for the purpose of s. 18. ...

[37] As a result, the claimant bears the onus of satisfying the Court there are valid business reasons for repaying the loans to acquire an interest in his employer over the period of 2017 to 2020. That is, that it served a purpose supportive of the company's operational requirements or was contractually necessary.

[38] In *T.(J.) v. C.(K.)*, 2011 BCSC 1723, Mr. Justice Grist in considering pre-tax income of a company, stated:

31 Even with this imputed income, however, Mr. J.T.'s income was markedly greater, and until recently, stated without the full financial disclosure needed to properly assess his Guidelines income. Specifically with his latest filing it becomes apparent that the company he owns and operates with his wife has improved its net worth considerably during the time under consideration.

...

33 In this case, the material filed indicates the increase in company worth is not in cash but rather is an accumulation in equipment value in comparison to outstanding debt. There is also said to be a need to finance year round operations through slower seasons. It is not clear, however, how this would be aided by the increase in the net value of the equipment, except in marginally reducing the monthly costs of financing. The company is no doubt more secure if it owns its own equipment, but as said in *Baum v. Baum*, [1999] B.C.J. No. 3025 (B.C. S.C.) at para. 28:

28 Valid corporate objectives may differ from valid child support objectives. The purpose of s. 18 is to allow the court to "lift the corporate veil" to ensure that the money received as income by the paying parent fairly reflects all of the money available for the payment of child support. This is particularly important in the case of a sole shareholder as that shareholder has the ability to control the income of the corporation. See *Bhopal v. Bhopal*, [1997] B.C.J. No 1746 (S.C.), *Blackburn v. Elmitt* (1997), 34 R.F.L. (4th) 183, (B.C.S.C.) and *McCrea v. McCrea*, [1999] B.C.J. No. 1514 (S.C.).

34 Here, the increase in company value is an improvement in its viability, but the material does not satisfy me that this was such a compelling requirement as to trump the obligation to pay maintenance on the basis of all money available for the purpose. Of the two methods of adding to s.16 Guidelines income indicated in s.18, I think the fairest here is to include one-half of the pre-tax income for the appropriate years, commensurate with Mr. J.T.'s share in the company, in determining his Guidelines income.

[39] As noted, it is the respondent's position that the pre-tax income is to be included in the claimant's Guideline income for the purposes of child support. The claimant does acknowledge that after 2020 when the debt was repaid, pre-tax income is to be included, but submits repayment of the debt prior to that meets the onus required by the authorities above.

[40] In this matter, it is the timing and amounts of repayment that are in issue. The claimant's evidence regarding the debt does not explain why it was paid off between 2018 and 2020. There is no evidence that repayment within that period was required. No loan agreements were produced, nor were documents detailing the terms of the share purchase. The burden lies on the claimant to explain why he repaid over a three-year period, thereby reducing funds available to him for child support purposes. He has not shown the debt was given priority over child support: *Osmar v. Osmar*, 8 R.F.L. (5th) 368, at para. 5. He has failed to meet the onus on him: *Hausmann*, paras. 51-52.

[41] The issue then becomes whether all such payments should be treated as pre-tax earnings or whether a portion should be recognized as properly applied to the loan repayment. In *Kowalewich*, Huddart J.A. for the Court, stated:

58. It seems to me regard should also be had to the nature of the company's business and any evidence of legitimate calls on its corporate income for the purposes of that business. Justice Drake cautioned about not killing the goose who lays the golden eggs. Monies needed

to maintain the value of the business as a viable going concern will not be available for support purposes. In my view they should not be included in determining annual income. In *Hollenbach v. Hollenbach*, 2000 BCCA 620 (B.C. C.A.) , the trial judge recognized the need for a reserve for depreciation as an appropriate factor to be considered in a real estate business. Justice Dorgan recognized Mr. Kowalewich's business expansion plan as a valid business purpose in a retail business.

59. I do not recite these factors to suggest this Court should tinker with a trial judge's exercise of discretion, nor that a trial judge should second guess business decisions. I do say that a trial judge must have regard to the evidence of legitimate business needs in determining what portion of pre-tax corporate income to include in annual income for Guideline purposes.

[42] Here, the amounts repaid exceed the pre-tax profits of the Holding Company. Given the lack of justification for applying the pre-tax profits in full to the debt repayment over the time in issue, I conclude all the pre-tax profits should be included in the claimant's income. While the claimant concedes that now that the debt is paid off all such funds should be included in his income, the needs of the children remained a priority between 2017 and 2021.

[43] The respondent also challenges personal expenses of the claimant paid by his business, however despite requested disclosure the claimant has not produced any general ledgers for the Holding Company or his interest in his employer. Among the expenses challenged are:

1. His cellphone expense, which does not appear on his financial statement;
2. His gas, oil and maintenance expenses for his Porsche motor vehicle, which do not appear on his financial statement and for which he has historically been provided a car allowance;
3. L. and B.'s cellphones, which the respondent has been informed by the children the claimant bought them "through work;"
4. His Shaughnessy Golf & Country Club membership which the respondent believes is approximately \$300 a month;
5. His Vancouver Club membership and a spousal membership for his partner, which has monthly dues of at least \$250 and \$30 respectively; and
6. His Young Presidents' Organization membership.

[44] The lack of disclosure is problematic. Given the obligation on the claimant to disclose records of income and expenses, the lack of disclosure may lead to the imputation of income for support purposes. A review of the claimant's Form 8 Financial Statements sworn April 24, 2019 and February 2, 2022 also raises concerns. In his 2019 statement, he deposes child support income of \$253,067.42 versus annual expenses of \$395,672.64 and unsecured debts of \$381,941.70. In his 2022 statement, he relied on an income of \$264,360.55 and annual expenses of \$329,556.00 and debts of \$398,881.74. \$160,849.06 of this debt relates to the share purchase of an interest in his employer, and \$102,981.98 relates to the purchase of a \$158,000 Porsche. The material fails to explain how the claimed annual expenses have

been met from 2019 to 2022. The inference is that the claimant has more funds available to him than the income he reports for child support purposes.

Conclusion

[45] I am satisfied, for the reasons given, that the claimant's pre-tax income should be included in the claimant's Guideline income. On this basis, I find the claimant's Guideline income for the years 2016 to 2021 for each July review of child support as follows:

July 2016 Review of Child Support (for July 2016 - June 2017)

[46] The claimant's Guideline Income is \$244,734.34, consisting of:

1.

Base salary

\$180,000.00

2.

Previous year's bonus

48,000.00

3.

Car allowance

10,800.00

4.

Taxable benefits

5,934.34

5.

Other income

0.00

Total:

\$244,734.34

July 2017 Review of Child Support (for July 2017 - June 2018)

[47] The claimant's Guideline income for this period is \$274,346.00, consisting of:

1.

Base salary

\$180,000.00

2.

Previous year's bonus

75,000.00

3.

Car allowance

0.00

4.

Taxable benefits

19,346.00

5.

Other income

0.00

Total:

\$274,346.00

July 2018 Review of Child Support (for July 2018 - June 2019)

[48] For this period the claimant's Guideline income is \$284,547.41, consisting of:

1.

Base salary

\$209,333.38

2.

Previous year's bonus

48,000.00

3.

Car allowance

11,000.00

4.

Taxable benefits

7,149.92

5.

Other income

1,087.11

6.

Pre-tax corporate income in 1117217 B.C. Ltd.

7,977.00

Total:

\$284,547.41

July 2019 Review of Child Support (for July 2019 - June 2020)

[49] For this year's review the claimant's Guideline income is \$284,971.01, consisting of:

1.

Base salary

\$202,000.00

2.

Previous year's bonus

30,000.00

3.

Car allowance

12,000.00

4.

Taxable benefits

7,384.01

5.

Other income

1,863.00

6.

Pre-tax corporate income in 1117217 B.C. Ltd.

31,724.00

Total:

\$284,971.01

July 2020 review of Child Support (for July 2020 - July 2021)

[50] The claimant's Guideline income for the July 2020 review is \$308,506.68, consisting of:

1.

Line 101 income

\$284,455.68

2.

Pre-tax corporate income in 1117217 B.C. Ltd.

24,051.00

Total:

\$308,506.68

July 2021 Review of Child Support (for July 2021 - June 2022)

[51] For the 2021 Review, the claimant's Guideline income is \$340,407.55, consisting of:

1.

Line 101 income

\$240,210.55

2.

Pre-tax corporate income in 1117217 B.C. Ltd.

100,197.00

Total:

\$340,407.55

Respondent's income

[52] The respondent is employed by her closely held corporation. She was so employed when the parties separated and when they entered into the Separation Agreement. The parties agreed on her income for child support purposes in the Separation Agreement:

Recitals:

Y. [The respondent] sees patients approximately 20 hours per week through B. Chiropractic and does approximately 20 hours per week of administrative and marketing work relating to B. Chiropractic. This allows her flexibility to look after the Children after school and in the summer. [The respondent] currently earns approximately \$96,000 per year.

- [53] The Separation Agreement, unlike its provisions regarding the calculation of the claimant's income, does not address how the respondent's income will be calculated. The claimant submits no formula was agreed upon for the recalculation of the respondent's income because "add backs" were in dispute and this was resolved by simply agreeing that her income was \$96,000.
- [54] Although no formula was provided in the Separation Agreement respecting the respondent's income, pursuant to the Agreement both parties must exchange financial information annually and their incomes are to be reviewed each year and child support adjusted accordingly.
- [55] The parties do not agree on the respondent's annual income after 2015. The respondent deposes that her income has decreased since then due to a loss of practitioners, ongoing difficulties hiring practitioners, a boiler room fire causing damage to her rental space and the reduction of patient numbers due to COVID-19. She states when her income was \$96,000 she had substantial debt and increased overhead due to not sharing overhead with other practitioners, leading to a drop in her income in December 2015 to \$60,000 and in April 2016 to \$48,000, which has been her approximate yearly income since then. She states she has since operated at or close to a deficit and has regularly relied on her corporate line of credit to meet her practice's expenses.
- [56] The claimant submits factors to be considered in determining the respondent's income include her corporation's gross yearly income, her deductions from that gross, her decision to have a fourth child, the effect of injuries suffered in her motor vehicle accident and the effect of COVID-19 on her practice.
- [57] As discussed earlier in these reasons, the starting point when determining annual income is s. 16 of the Guidelines, which provides, subject to ss. 17-20, that a spouse's annual income is determined by using the sources of income under the heading "Total Income" in the T1 General form as adjusted in accordance with Schedule III. Schedule III addresses a number of adjustments including deduction of employment expenses, spousal support and universal childcare expenses.
- [58] Section 18 of the Guidelines addresses the situation "where a spouse is a shareholder, director or officer of a corporation and the court is of the opinion that the amount of the spouse's income as determined under s. 16 does not fairly reflect all the money available to the spouse for the payment of child support".
- [59] In *Wiebe v. Treissman*, 2017 BCSC 1523, Kent J. stated:

- [90] One of the "benefits" enjoyed by a spouse who is able to structure his financial affairs through a wholly-owned corporation is the ability to have what are essentially personal expenses paid by the corporation. To the extent such expenses are personal and not bona fide corporate expenses, they are properly "added back" to the corporation's pre-tax income, all or part of which can then be imputed to the spouse for Guideline income purposes.
- [91] Section 19 of the Guidelines also permits the court to impute income to a spouse for child support purposes in a wide variety of circumstances. Among other things, this section permits adjustments where a spouse has derived tax advantages by structuring his or her affairs to attract a lower overall tax rate than the rate contemplated by the Guidelines. For example, subsections 19(1)(g) and (h) include situations where a spouse has unreasonably deducted expenses from income and/or where a spouse derives a significant portion of income from dividends, capital gains or other sources which are either exempt from tax or taxed at a lower rate.
- [94] The burden of proving the reasonableness of deductions from business income, whether in the context of self-employment or within a wholly-owned corporation, lies with the spouse making the deduction. It is the obligation of that spouse to fully disclose the financial information and documentation relied upon to justify the deduction of each expense. It is not the other party's responsibility to hire, nor is it the court's obligation to appoint, an accountant or other professional to assess and challenge the reasonableness of the deduction, although of course both are at liberty to do so in appropriate circumstances. For a recent affirmation of these principles, see *Cunningham v. Seveny*, 2017 ABCA 4.
- [60] The evidence required to prove the reasonableness of deductions was considered in *Egan v. Egan*, 2002 BCCA 275, where Prowse J.A. at para. 30 noted when discussing deductibility of a contested Capital Cost Allowance claim:
- [30] I respectfully agree with the interpretation of s. 11 adopted by the Saskatchewan Court of Appeal and with the pragmatic approach taken by that court in relation to the issue of deductibility of contested CCA claims for Guidelines purposes. In my view, that approach contemplates that if there is some evidence supporting the reasonableness of the expense (beyond the fact that it allowable under the Income Tax Act), the court is unlikely to deny the deduction in calculating the payor's income. Similarly, the court will be unlikely to second-guess the rates permitted under the Income Tax Act and Regulations unless the allowable rate appears to be unusual, or based on a particular policy being pursued by the taxation authorities, rather than on the likely economic life of the asset in issue. [Emphasis added.]
- [61] The context of consideration of the reasonableness of a claimed deduction was explained by Aston, J. in *Osmar* at para. 5:

5 There is a substantial body of case-law under s. 19(1)(g) of the Guidelines, not all of it consistent. It is fair to conclude that judicial discretion in this area makes the determination of income more of an art than a science. In my view, the Guidelines require the court to examine

expenses from the perspective of balancing the business necessity against the alternative of using those funds for child support. The court should respect the right of self-employed persons to run their business as they see fit, but may, nevertheless, question whether particular expenditures ought to be indirectly subsidized by lower child support.

Corporate expenses challenged by the claimant

[62] The claimant challenges certain corporate expenses claimed by the respondent. He alleges that she takes deductions in her corporation that are personal expenses and are not reasonable. Accordingly, these should be added back and become part of her income for child support purposes. Specifically, the claimant quarrels with the respondent making the following deductions:

1. All of her gas costs;
2. All of her car lease;
3. All of her cell phone;
4. All of G.'s cell phone;
5. All of her Jericho Club dues;
6. All of her Vancouver Club dues;
7. All of her health spending, including Botox treatments;
8. All of her Apple Music and other subscription costs; and
9. Most of her restaurant spending.

[63] He submits that a review of the respondent's corporate income compared to her claimed taxable income supports his concerns. Specifically, that despite her gross corporate income remaining relatively consistent, her taxable income has dropped significantly:

Year

Gross

Personal Taxable Income: Line 150

2014

\$253,859

\$101,200.00

2015

\$254,156

\$ 86,499.79

2016

\$269,120

\$ 51,500.00

2017

\$262,902

\$53,996.00

2018

\$194,997

\$38,066.80

2019

\$207,697

\$52,148.16

2020

\$189,699

\$53,576.86 (including CERB or \$6,500)

[64] The claimant challenges the deductions on the basis of his "knowledge of her business and the financial documents" provided by her. He provides no evidentiary basis for such "knowledge". His counsel suggests that the sheer volume of deductions and their character along with the "smell test" raise concerns. He submits that normally the financial statements would total such expenses and then show a reallocation of a portion to the shareholder loan account or be addressed by dividend but hers do not.

[65] I am satisfied that on their face the deductions raise questions. It is reasonable to infer that an individual operates a business to generate income. The records produced by the respondent show that she has operated at a loss and that her income has decreased since the Separation Agreement was signed. The onus is on her to justify the deductions claimed, not for tax purposes, but for determining her income for child support purposes.

[66] While she provides detailed information and evidence supporting the deductions made, she has provided no evidence of what the usual ratio is for chiropractic practices between expenses and income, hence that overall context is, unfortunately, missing.

[67] However, the respondent has responded to each of the expenses challenged by the claimant in a detailed affidavit. I will address each item in turn.

- [68] Regarding gas costs, the respondent deposes she has a logbook noting all car use and kilometres driven for work and that work-related trips totalled 11,962.5 km out of a total of 15,950 km in 2021. She deposes that "[a]lthough this represents approximately 75% of my total mileage, my accountant advised me that I can claim a maximum of 65% as a corporate expense". The logbook is not in evidence. The respondent does state that about 50% of the expense for gas costs relates to her driving to and from her clinic. The vehicle lease and maintenance fall under the heading of travel and automotive and range from \$9,575.00 in 2017 to a high of \$13,629 in 2018, with most years being approximately \$10,000.
- [69] She deposes she uses the vehicle to make house calls, these being about two to five percent of her practice, and to drive to purchase office supplies, attend meetings such as the annual general meeting of the BC Chiropractic Association or the College of Chiropractors of BC, some of which are outside Vancouver.
- [70] The respondent's claim that about 75% of such expenses are corporate does not appear reasonable. The usage described includes commuting to and from work (acknowledged to be 50% of total use), the work-related use does not appear to be significant, it is also her personal vehicle, and she has not provided the logbook she relies on. Although somewhat arbitrary, on the evidence before me I conclude all but 25% of her vehicle-related expense claims shall be added back to her Guideline income. I leave it to counsel to calculate and add in 75% of the vehicle-related expense claims to my findings on the respondent's Guideline income below.
- [71] Regarding her cell phone, the respondent deposes she uses it for business purposes and that her monthly bill is approximately \$150 per month. The use by G. of a cell phone arose because she worked part time at the clinic and was added to the company phone plan without additional costs. In any event, G. no longer works at the clinic and is no longer on the company plan. The respondent has a separate personal account with Telus. The corporate account includes the clinic's phone line, internet and security. I am satisfied, given this explanation and the amount involved, the onus of establishing it is a reasonable deduction is met.
- [72] The Jericho Tennis Club has been a source of referrals given the physical nature of the game however the respondent only includes one month of dues as a business expense and the rest is paid personally. Again, the onus on the respondent has been met.
- [73] The respondent estimates that 20-25% of the clinic's total client base has been from either direct or indirect referrals through the Vancouver Club. She also participates in a monthly networking meeting for women at the club and other activities including taking associates to the Vancouver Club as guests. The cost of her membership is not in evidence.
- [74] Notably, the claimant also is a member of the Vancouver Club and his employer covers that cost as a non-taxable benefit to him.

- [75] I conclude the respondent has met the onus of establishing the reasonableness of this expense given, as noted in Egan at para. 30, what is required is "some evidence supporting the reasonableness of the expense."
- [76] The respondent deposes she does not get Botox treatments. As for health costs generally, she provides the expert evidence of her accountant who deposes firstly it is a legitimate business deduction using a health and welfare trust that "permits business owners to use corporate dollars to pay for medical expenses relating to themselves and their families". Those expenses are tax deductible for the corporation. The accountant notes that he has not calculated the personal tax amount saved by the business owner. He states the expenses should not be treated as personal income. The net savings to the business owner of using the health and welfare trust is not calculated.
- [77] The respondent notes the claimant also has health benefits paid by his employer and states that the majority of those expenses claimed by her relate to the children. Given each of the parties have health benefits and their use for the children, I am not prepared to find the respondent's unreasonable. In the circumstances, I decline to add such to the respondent's Guideline income.
- [78] The respondent states the Apple Music and other subscriptions all relate to her work such as providing background music in the clinic. She has provided evidence such is reasonable.
- [79] Regarding supplies, the respondent denies they are for personal use and explains what they include and provides supporting invoices. However, the claimant challenges the believability of her explanation for such noting the "general ledger includes dozens and dozens of charges at vendors such as Shoppers Drug Mart, Choices, 7-Eleven, Winners, Whole Foods, London Drugs, Lululemon, Winners [sic], the Dollar Store and the like." While the broad range of suppliers raises some questions, the respondent has in her evidence detailed the purchases and how they relate to the operations of her practice. She has met the onus of explaining them.
- [80] In respect of the meals and entertainment charges, the respondent deposes that they relate only to the clinic operations and include work meetings, meals with business partners and networking contact, staff lunches and gift cards used for marketing purposes. She provides details of various charges, their purposes and who attended. She deposes her personal food expenses are not submitted to the corporation.
- [81] The meal and entertainment charges claimed are itemized and explained in detail by the respondent. She denies they include expenses of a personal nature. There is no evidence to the contrary and as a result no add back is made in respect of these expenses.
- [82] Regarding amortization, the respondent's evidence relates to depreciation of various capital assets owned by the corporation that required replacement over time as well as major leasehold improvements. I accept such are legitimate expenses and they are not added back.

- [83] In sum, only 75% of the respondent's vehicle-related expenses are added back to her income for Guideline purposes.

Personal injury claim

- [84] The claimant submits that the respondent's drop in gross revenue does not correspond with the motor vehicle accident that occurred on March 1, 2016. He also argues that to the extent a change in her gross revenue is attributable to the accident, it has already been compensated for by the payment of a settlement in motor vehicle litigation which compensated her for future wage loss.
- [85] The respondent submits there is no evidence of such wage loss compensation before the Court. The surgery for the carpal tunnel injury from the accident occurred in 2018. The personal injury claim was settled in 2020 for \$101,601.25 plus costs and disbursements, for a total of \$117,256.80. Counsel in that matter advised that the settlement of \$101,601.25 was an all-inclusive number for general damages and special damages including wage loss, future care and other claims. The respondent had \$3,711 in special costs and her counsel stated: "[l]ikely about the same amount was included in the settlement for future care" and noted that the general damage claim was sought in the range of \$65,000 to \$100,000 for general damages and that most of the settlement amount was attributed to the general damages. He then also stated: "[t]he remainder, if any, would be attributable to her wage loss and capacity claim".
- [86] Given the above, there is no evidence of a wage loss amount, hence there is no evidence of double counting. I decline to accede to the claimant's submission that any change in the respondent's gross income attributable to the accident has been compensated already.

Effect of COVID-19 on the respondent's clinic

- [87] The claimant submits the drop in gross revenue of the respondent's corporation does not correspond to the onset of COVID-19, since all of 2018, 2019 and 2020 grossed approximately \$200,000 per year relative to the 2014 - 2017 levels of approximately \$260,000 per annum. As a result, the claimant submits the respondent has not satisfactorily established that the 2020 gross revenue is due to COVID-19 and not simply the continuation of her reduced revenue in 2018 and 2019.
- [88] The respondent submits that COVID-19 reduced 2020 patient revenue by about ten percent and that employee wages also decreased, yet there was still a net loss and only CERB assistance resulted in a positive year end. Given the evidence, the explanation is accepted.

[89] The claimant also alleges the respondent has intentionally decreased her work as she can support the lifestyle she wants on the reduced income. His evidence for such however does not establish that to be the case. She provides details of the trips referred to. The trips do not lead to the inference she is not working as much. The respondent denies she has decreased her work and I accept this is the case. The claimant's submissions on this point fail.

Pregnancy

[90] Regarding the respondent's pregnancy and birth of her fourth child, the claimant acknowledges that some period of reduced income may be reasonable: *McCaffrey v. Paleolog*, 2011 BCCA 378, paras. 57 and 58. He suggests a 20% reduction to the \$96,000 income he seeks to attribute to her for the year after the child's birth. Given the claimant's concession that a 20% reduction would be appropriate and the evidence of the respondent that she returned to work after three months running the business from home and paying for a locum to treat her patients while she was away such a reduction is reasonable for 2018. However, such reduction applies to the respondent's income as determined below.

Conclusion

- [91] The respondent's evidence explaining the deductions claimed meets the burden of showing that the majority of the challenged expenses do not have significant personal benefit. However, as indicated above the vehicle related expenses are found to be 75% personal and as such 75% of those costs are to be added back to her income.
- [92] Justice Groves considered the issue of changes in the respondent's circumstances when this matter was before him. Justice Groves was satisfied that the motor vehicle accident and the respondent's fourth pregnancy affected her ability to earn an income. He was not however able to determine the extent of such as there was insufficient financial information before the Court, hence the matter was adjourned for production of an updated F8 Financial Statement by the respondent and her possible cross-examination.
- [93] In her F8 Financial Statement sworn on February 14, 2018, the respondent deposes her income was \$48,000.00 and her expenses totalled \$148,840.40 for the year. Her business line of credit and Visa totalled \$20,541.08, and she had a personal line of credit debt of \$16,544.42 and a personal loan owed of \$9,088.48. In her F8 Financial Statement sworn on December 23, 2021, the respondent stated a Guideline income of \$55,561.92 versus annual expenses of \$108,820.44. No debts existed other than "revolving" credit card debts. The respondent's two financial statements indicate her expenses exceed her income. She deposes she has depleted \$160,000 of the net proceeds of the sale of the parties' former matrimonial home supporting her and the children. Evidence of this assertion was not provided, hence I cannot assess the accuracy of that sum.

[94] I find the respondent's income for the years 2016 to 2021 is her Guideline amount reported at line 150 of each year, subject to adjustment for the adding back of automobile expenses, a calculation left to counsel to carry out.

Payment of child support while the child attends boarding school and first year university

[95] The Separation Agreement provides at section 17.7:

17.7 The obligation of either party to pay child support ceases for a child when the child:

- (a) marries;
- (b) becomes self-supporting; or
- (c) becomes 19 years old, unless the child remains a "child of the marriage" within the meaning of the Divorce Act (Canada) because of inability to become self-supporting due to illness, disability, the pursuit of education, or other cause.

[96] The Separation Agreement addresses s. 7 expenses:

17.1 The Children have the following special or extraordinary expenses pursuant to section 7 of the Guidelines:

- (g) agreed upon post-secondary education expenses for the Children that are not covered by RESP's;

17.2 [The respondent] and [the claimant] shall incur Special Expenses in a fiscally responsible manner and shall both do their utmost to adhere to the budgets identified above.

17.3 [The claimant] and [the respondent] shall each pay their share of the Special Expenses in proportion to their respective incomes. Until further review pursuant to the terms of this Agreement or court order, [the claimant] shall pay 70% percent and [the respondent] shall pay 30% percent.

17.4 Neither parent party shall incur Special Expenses without prior consent of the other party, which consent shall not be unreasonably withheld. If the parties cannot agree on any issue relating to the Special Expenses, the dispute shall be resolved by the Parenting Coordinator appointed pursuant to paragraph 38.1.

[97] The attendance of L. at a private boarding school away from Vancouver was not contemplated by the parties in the Separation Agreement. As a result, the incurring of such a cost required the prior consent of the other party. If unable to agree the dispute was to be resolved by the parenting coordinator.

- [98] The respondent reluctantly agreed to L. attending boarding school. According to her, her contribution to the cost was restricted to \$5000 for one year. Her position had been that he could attend school in Vancouver at much lesser cost as he would be living in a shared parenting arrangement in the parties' homes and the boarding school fees were far beyond her financial ability to share with the claimant.
- [99] When L. enrolled in the boarding school there was no discussion concerning the effect of the decision on child support as at the time L. was residing full time with the claimant.
- [100] The respondent deposes that during 2017 her relationship with L. was improving, and by the time L. commenced attending boarding school the parties had resumed shared parenting for the times L. was in Vancouver.
- [101] L. attended the school for the school years commencing September 2018, when he was 15 years of age and in grade ten, and remained there until he graduated from grade twelve in the spring of 2021 at 17 years of age.
- [102] L. then chose to attend university in Ontario commencing September 21, 2021 at the age of 18. The respondent's preference had been that he attend university in the lower mainland given he could have continued to live with his parents and avoid the costs of attending an out-of-province school.
- [103] Due to the pandemic, L.'s first year of university was conducted virtually, hence he has remained in Vancouver residing in both parents' homes. The respondent states when L. resides with her, she pays for his meal costs, and contributes to his transportation expenses, entertainment and recreation including travel and vacations, clothing and spending money and his gym membership. In other words, the usual expenses a parent contributes to a child when the child resides with them.

Position of the claimant

- [104] The claimant submits the Court has jurisdiction to dismiss the respondent's application for child support while L. was away at school based on either paragraph 21.2 of the Separation Agreement or under s. 3 or s. 9 of the Guidelines.
- [105] The claimant submits the facts in this case distinguish it from the general rule that attendance at a boarding school by a child under the age of 19 does not end the payment of Guideline support. He submits he should be relieved of the obligation to pay child support for the period that L. was at boarding school as L. was residing solely with the him when he left for private school, and the claimant was not having to pay child support to the respondent for L. while living at the claimant's home it would be "absurd" to pay it while away at school.

[106] He also relies on the Separation Agreement which specifically provided that child support was not payable for any month in which a parent did not have the child living with them at least 40% of the time. Paragraph 21.2 states:

If at the end of any month, it is determined that [the respondent] did not have the Children in her care at least 40% of the time during that month, then [the respondent] shall pay child support to [the claimant] for such month such that [the claimant] receives the full table amount of basic child support payable pursuant to the Guidelines for that month based on [the respondent's] income without any set-off to subtract the table amount of basic child support payable by [the claimant] based on his income.

[107] He also submits that it would be unjust to order support in these circumstances given that the claimant paid over 90% of the boarding school costs and L.'s attendance at private school lead to reconciliation of his relationship with the respondent.

[108] The claimant acknowledges that when L. is home during the summer months a shared parenting regime support is payable as agreed.

Position of the respondent

[109] The respondent submits that before L. applied to attend boarding school she was not in communication with him, that she was informed by the claimant this was to occur and she did not consent to it. She was concerned about the cost. A parenting coordinator was involved, and they negotiated an arrangement under which the claimant would pay the private school costs except for the respondent paying \$5,000 annually, with shared parenting to resume when the child was back in Vancouver.

[110] The respondent deposes that after the order of Masuhara J. she exercised parenting time informally with L. on a schedule directed by him. They would chat several times a week and attended regular counselling together, one of the goals of which was to return to their regular parenting schedule. In January of 2018, they began spending more time together and by the summer of 2018, L. would sleepover at her home and the intention was to return to 50/50 parenting by September of 2018. After L. indicated he wished to attend boarding school and she ultimately agreed that he could, the respondent states she and the claimant agreed that during L.'s time at home over the school holidays parenting would revert to a 50/50 parenting schedule. She confirms that has occurred.

[111] The respondent submits however, that she still maintained a home and incurred expenses for L. She deposes that while attending boarding school, L. came to her home about once a month and would generally stay about five days but sometimes up to two to three weeks. Sometimes he would bring a friend. She also provided him with care packages, pocket money, funds for ferry travel and the like.

[112] The respondent says there was no agreement that while away at school child support for L. would cease. The claimant simply states he assumed that would be the case. However, throughout the years 2017 to the present the respondent has sought review of child support generally with no response from the claimant. The respondent states had she been informed that was the claimant's intention she would not have agreed to L. attending boarding school.

[113] The respondent also notes that in an email from the boarding school the school advised her that the claimant's brother was paying for the tuition in 2018. The claimant however, deposes this was a loan in his financial statement, but has provided no documents supporting such as a loan agreement.

Discussion

[114] Section 3 of the Guidelines provides:

3. Presumptive Rule - (1) Unless otherwise provided under these Guidelines, the amount of a child support order for children under the age of majority is

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

The amount, if any, determined under section 7.

[115] It is not disputed that typically child support remains payable when a child under the age of majority is away at school. That recognizes that child support is the right of a child. Counsel for the claimant advises that neither he nor counsel for the respondent have found a decision to the contrary however he submits the circumstances here justify such.

[116] In *Bockhold v. Bockhold*, 2006 BCCA 472, a child was attending an out-of-province university and the father payor submitted the Guidelines were "premised on the child actually residing with his or her parents." (Para. 1). Given it was contemplated in the divorce order in that case that the children would attend university, nothing stated they would reside at home in doing so. The child's mother maintained a home and since the order contemplated that when the child was at home, he would reside with both parents the child support remained payable.

[117] The claimant submits that the cases requiring continued payment of support when a child leaves for school are premised on the child living with the recipient parent prior to leaving. Given L. had been living solely with his father for 18 months before leaving for school, the claimant argues those authorities are distinguishable.

[118] The difficulty with that submission is that by the time L. began attending boarding school the shared parenting arrangement was, in practice, back in place. In my view, while shared parenting had been suspended immediately prior to L. attending boarding school, that was a temporary situation, not permanent. The claimant relies on *Bockhold* at para. 7 where the

Court noted that the child had been living with both parents before attending McGill, and at para. 30 that "notwithstanding [the child] was living away from home the divorce order contemplated that when at home, he [would] reside with both parents". Bockhold did not address a situation similar to the circumstances before this Court and does not establish a principle that shared parenting does not result in a continuation of child support only because it was temporarily not in place immediately prior to attendance at school.

[119] The claimant refers to reports from the parenting coordinator and Dr. Susswein, a registered psychologist, regarding the parental conflict and its effect on the respondent's parenting of L. The child's move to his father's residence was to reduce stress on him and provide him space and time with the hope of restoring his relationship with his mother.

[120] Justice Masuhara in his reasons issued February 1, 2018, stated:

Discussion

[21] Parenting difficulties between the parties have been a constant post-separation. In the period since the parenting coordinator was appointed in late January 2016, three written determinations have been made by the parenting coordinator. One determination includes the decision that the parties only communicate through the online portal of "coparently.com" (except in emergencies) for inter-parent communications. The materials indicate that the \$10,000 retainer for the parenting coordinator is almost depleted.

Conclusion

[32] At this time enforcing the parenting schedule in relation to L. is not appropriate.

[33] In my view, given the evidence of the mental/emotional state of L. and the difficulties that exist between mother and son, and that counselling has been initiated with Dr. Susswein; the best interests of L., is to continue with the stated recommendations of Dr. Susswein and Ms. McLeod, until Dr. Susswein recommends other steps; and that L. be provided the flexibility to choose when he wishes to see or otherwise communicate with his mother. This should include [the respondent] refraining from attending Vancouver College until L. expresses that he is comfortable with her being there. This is to insure that he can focus on school matters. This matter may be returned for review by the court in two months if required.

[34] While L. remains fulltime with [the claimant], [the claimant] is to be responsible for providing full reporting to [the respondent] daily (at the same time each day) as to the circumstances of L. through Coparently, including L.'s attendance at school, his activities, and identity of the responsible adult who is in charge of him. This reporting is required even when [the claimant] is out of town. In such situations, he will have to inform himself and report to [the respondent].

- [35] On another point, the recordings clearly show that [the respondent] is involving the children in her dispute with [the claimant] regarding parenting issues and is making disparaging remarks about the children's father and his parents. This is entirely inappropriate. [The respondent] is directed to stop this.
- [36] There is some indication that [the claimant] also discusses matters with L. He too is to stop it.
- [121] The claimant is of the view that the move to boarding school led to L. restoring his relationship with his mother, and that to ignore this benefit to her and the child when addressing child support would be unjust. The claimant states:

Sending him to [boarding school] worked. During the worst of it in 2017, L. was in counseling every week, was only interacting with his mother via professional counseling intermediaries, his grades were suffering, and his mental health was suffering. After three years at boarding school, L. and the Respondent are now on reasonably good terms again, he is happy, and, over the three years at [boarding school], he became, again, a successful student and was admitted [to university in Ontario] straight out of high school. He no longer feels pressure or distress going to the Respondent's home. He is comfortable again spending time with her, and going on holiday with her.

- [122] The claimant's submission is that given the positive effect L.'s boarding school attendance had on his relationship with the respondent, and that the claimant was primarily responsible for paying L.'s tuition, it would be unfair for the respondent to receive Guideline support while L. was attending school. The claimant says that support should only be payable for the months L. resided in Vancouver. The Guidelines provide under s. 4(b) that where the income of a payor exceeds \$150,000 and the Guideline amount is considered inappropriate the Court may vary the amount ordered, up or down.
- [123] However, the claimant's position fails to account for the underlying purpose that support continues to be payable while a child attends boarding school. Namely, that in situations of shared parenting both parents must maintain homes that the child may reside in when he is not at school. In addition, while his time at boarding school clearly benefited L., I am not satisfied attending a boarding school was the only alternative available to improve the respondent and L.'s relationship. Nor can I conclude that the claimant has suffered any "unfairness" such that an assessment of the appropriate support other than a financial one is appropriate or within the discretion of the Court. As the Ontario Court of Appeal decision in *Bates v. Bates*, [2000] O.J. No. 2269, Ont. C.A. makes clear, the court's discretion to deviate from the Guidelines is closely circumscribed as giving judges "open-ended discretion to refuse to apply the Guidelines does not promote fair support" and runs contrary to their objectives (para. 24).

- [124] As a result, as in Bockhold, the respondent "maintains her home in the reasonable expectation that [the child] will spend portions of his Christmas and summer holidays with her". Both parties recognize that there was a change for an 18-month period such that the claimant ceased paying child support and the respondent owes support to the claimant for that period.
- [125] The claimant also submits that s. 9 of the Guidelines applies, as opposed to the presumptive rule set out in s. 3, as the parties have a shared parenting arrangement, and that pursuant to s. 9(c) the Court may reach a just result by considering "the conditions, means, needs and other of each spouse and of any child for whom support is sought." He says a just result would be that the respondent not receive child support for the months that L. was attending boarding school and first year university.
- [126] Section 9 of the Guidelines provides:
9. Shared Custody - Where a spouse exercises a right of access to, or has physical custody of, a child for not less than 40% of the time over the course of a year, the amount of child support must be determined by taking into account
 - (a) the amounts set out in the applicable tables for each of the spouses;
 - (b) the increases costs of shared custody arrangements; and
 - (c) the conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought.
- [127] The claimant submits ss. (c) is broadly worded and entitles the Court to weigh the respondent's claim to support for L. as against the claimant bearing 93.5% of the boarding school costs, totaling what he says is a \$181,278 benefit to the respondent. The claimant acknowledges that shared parenting was restored and occurred in the summers of 2019, 2020 and 2021.
- [128] In *Contino v. Leonelli-Contino*, 2005 SCC 63, the Supreme Court of Canada considered s. 9 of the Guidelines and the quantum of support to be awarded once the threshold for shared parenting was met:

39 The specific language of s. 9 warrants emphasis on flexibility and fairness. The discretion bestowed on courts to determine the child support amount in shared custody arrangement calls for the acknowledgment of the overall situation of the parents (conditions and means) and the needs of the children. The weight of each factor under s. 9 will vary according to the particular facts of each case.

[129] And specifically with respect to s. 9(c):

68 Section 9(c) vests the court a broad discretion for conducting an analysis of the resources and needs of both the parents and the children. As mentioned earlier, this suggests that the Table amounts used in the simple set-off are not presumptively applicable and that the assumptions

they hold must be verified against the facts, since all three factors must be applied. Here again, it will be important to keep in mind the objectives of the Guidelines mentioned earlier, requiring a fair standard of support for the child and fair contributions from both parents. The court will be especially concerned here with the standard of living of the child in each household and the ability of each parent to absorb the costs required to maintain the appropriate standard of living in the circumstances.

- [130] The claimant emphasizes that s. 9 is a discretionary inquiry, in contrast to the mandatory inquiry under s. 3, and says it contemplates broader considerations such as that he paid the majority of the boarding school costs. The claimant submits it is fair and reasonable that since he paid the school costs he only pay support for the periods when L. resides in the parties' respective homes.
- [131] The difficulty with this submission is that it ignores the authorities referred to above that establish where a child is under the age of majority and is attending school away from home, the obligation to pay Guideline child support remains. The respondent has maintained a home for L., not just when he was present but throughout the year. As a result, her costs were and are not limited to when he resides with her.
- [132] In addition, while ss. (c) contemplates consideration of the "condition, means, needs and other circumstances of each spouse and of any child for whom support is sought", the claimant has the means to pay child support for L. throughout the school year, while the respondent's income is substantially less. Understandably, the claimant does not advance a claim of hardship.
- [133] The claimant also relies on section 21.2 of the Separation Agreement respecting adjustment of child support depending on L.'s primary residence to support his claim that he should not be required to pay child support for these periods. However, section 21.2 is of no assistance to the claimant. That section addresses determination of whether child support is payable for a child depending on the time spent with each parent, based on the concept of a 60/40 split as calculated in the Separation Agreement. It does not address how child support will differ if one of the children attends boarding school.
- [134] In the alternative, the claimant submits if support remains payable then the agreement that the claimant would pay 90% of the costs of L. attending boarding school should be discarded and that the set-off should be applied. The claimant says that because the respondent only paid 6.5% of those costs, a further 23.5% (\$42,600) is payable to him.
- [135] As noted earlier, the respondent reluctantly agreed to L. attending boarding school and only did so because her contribution was limited to \$5,000 per annum. She did not agree to the proposed 70/30 division the claimant advances, nor do I agree such a division is appropriate given the respondent's reduction in income and the claimant's increase in income.

[136] That said, it appears the respondent has not paid the full \$5,000 for the three years and the deficit will be set-off against the retroactive support due from the claimant.

Conclusion

[137] The rationale for child support remaining payable when a child is under the age of majority and is attending school away from home is that a child under the age of majority remains dependent on his parents, and it is in the child's best interest to have a parent or parents' homes to return to. In this case, that includes the years at boarding school and the first year at university as L. did not turn 19 until July of this year. Given the evidence establishes that joint parenting resumed in the fall of 2018, in my view that principle governs. Child support for L. is payable by the claimant for the period he attended boarding school and his first year of university. The period prior to September 2018 was addressed by the parties by their agreement that joint parenting was not in place from February 2017 to August 2018.

Child support paid to date

[138] The claimant has paid to the following periodic monthly child support:

1. July 2016 - January 2017: \$2,074;
2. February 2017 - April 2017: \$2,197;
3. May 2017: \$1,450;
4. June 2017: \$1,449;
5. July 2017 - September 2017: \$1,888;
6. October 2017: \$1,019;
7. November 2017 - April 2018: \$1,799; and
8. May 2018 onward: \$1,800.

[139] From March 2017 to August 2018, L. resided with his father. The calculation of child support from 2016 to 2021 shall include a calculation of the amount payable by the respondent to the claimant during the time L. did not reside with her.

[140] As suggested by counsel, given I have determined the Guideline income of each party, I will leave it to counsel to calculate the retroactive Guideline child support payable.

Summary

[141] The Guideline income of the claimant for July 2016 to June 2022 is as follows:

1. July 2016 - June 2017: \$245,935.13
2. July 2017 - June 2018: \$274,346.00

3. July 2018 - June 2019: \$284,557.41
4. July 2019 - June 2020: \$284,791.34
5. July 2020 - June 2021: \$284,455.68
6. July 2021 - June 2022: \$340,407.55

[142] The Guideline income of the respondent for July 2016 to June 2022 is as follows:

1. July 2016 - June 2017: \$51,500.00
2. July 2017 - June 2018: \$53,996.00
3. July 2018 - June 2019: \$38,066.80
4. July 2019 - June 2020: \$52,148.16
5. July 2020 - June 2021: \$53,576.86 (including CERB or \$6,500)

[143] Child support for L. is payable from 2016 to July 2022 when he turned 19, notwithstanding his attendance at boarding school, except for the period of March 2017 to August 2018 when he resided with his father, during which time the respondent shall pay support for him.

[144] The claimant shall pay to the respondent arrears of child support as calculated by counsel taking into the account the parties' respective Guideline incomes, shared parenting throughout except respecting L. from March 2017 to August 2018.

[145] Child support shall next be reviewed for July 2022 to June 2023.

Costs

[146] Counsel asked to address costs. Given the respondent was substantially successful, my initial view is she is entitled to her costs. If counsel do not agree, they are at liberty to apply.

"The Honourable Mr. Justice Punnett"

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