
CANADA / JUDGMENT

Jaggs v. Jaggs

2020 BCSC 2116

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Supreme Court of British Columbia

DECIDED

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2020 BCSC 2116 Jaggs v. Jaggs

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Jaggs v. Jaggs,

2020 BCSC 2116

Date: 20201218

Docket: E171518

Registry: Victoria

Between:

Clara Jane Jaggs also known as Clara Jane Burke

Claimant

And

Timothy Arthur Laker Jaggs

Respondent

Before: The Honourable Mr. Justice Veenstra

(via teleconference)

Oral Reasons for Judgment

In Chambers

Counsel for the Claimant:

E. Raponi, Q.C.

Counsel for the Respondent:

B.J. Ingram

Counsel for the Director of Family Maintenance Enforcement Program:

J.S. Platt

Place and Date of Hearing:

Victoria, B.C.

December 15, 2020

Place and Date of Judgment:

Victoria, B.C.

December 18, 2020

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- [1] THE COURT: The respondent in this family law matter seeks to vary provisions of a final order made on August 28, 2019, with respect to child and spousal support based on what the respondent says is a material change in circumstances.

Background Facts

- [2] The parties began to live together in 2002 at a time when both were living in England. They were married in 2004. There are two children of the marriage, M.J., born in 2006, and A.J., born in 2007.
- [3] The parties moved to Vancouver Island in 2012 in order to be closer to the claimant's elderly parents. Particularly after they moved to Vancouver Island, their financial affairs became intertwined with those of the claimant's parents. The claimant's father passed away in 2016, but their ongoing dealings with the claimant's mother, R.B., continued.

- [4] The respondent is an insurance broker. He has specific experience in dealing with professional liability insurance as well as a specialty in placing coverage and providing risk management service in connection with sexual abuse claims. At the time of separation, he was employed by a London-based firm known as Integro which had Canadian operations. His ongoing work with Integro primarily involved clients in Canada and the United States with insurance coverage primarily placed in England. At the time of separation, his base salary was \$150,000 per annum with the potential for additional income based on volume of business.
- [5] The parties separated in October 2016 and the present action was commenced in 2017. In October 2017, a consent order was pronounced that, among other things, provided for payment of child and spousal support on an interim basis, with that order being made without prejudice as to the amounts ultimately determined to be payable.
- [6] In 2017, there were changes at Integro, at which time it no longer fit their business model to have remotely-based employees like the respondent. The respondent, who wanted to continue to live on Vancouver Island, negotiated an arrangement by which he would become an independent consultant working in association with Integro, effective as of September 1, 2017. He incorporated Jeama Risk Holdings Ltd ("Jeama"), a company wholly owned by him, to contract with Integro for this purpose. The consulting contract provided for a base consulting fee at \$150,000 per annum with the potential for additional income based on the volume of business.
- [7] In late 2017, the respondent lost a major client which had generated the majority of his fee income. This resulted in a substantial decrease in income for 2018 and future years.
- [8] In late 2018, the parties agreed to resolve their outstanding disputes by arbitration. Prior to commencement of the arbitration, the parties were able to resolve all parenting issues. As a result, the arbitration proceedings focused on financial issues, including the division of family property and debt and the payment of support. R.B. was a party to the arbitration, given that there were significant issues as to certain assets and debts involving her.
- [9] The arbitration hearing was held in Victoria in mid-March 2019. A partial award was issued in May 2019. Various corrections were addressed and an amended award was issued on July 5, 2019 (the "Amended Award"). Among the conclusions were that family debt of over \$2 million was owed to R.B. In the Amended Award, the arbitrator asked the parties to make further submissions on the division of family assets and debt in light of various tax issues that arose. I gather that once tax issues were reviewed (including the tax consequences of cashing out substantial pension funds), and in light of this large debt to R.B., it became apparent that there were insufficient assets to pay the debts.
- [10] In June 2019, shortly before the resumption of the arbitration to deal with these issues, the respondent filed a notice of intention to make a proposal pursuant to the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3. After reviewing the impact of this proposal, the arbitrator concluded that an unequal division of family assets and liabilities was appropriate. By way

of an amended supplemental award made August 9, 2019 (the "Supplemental Award"), the arbitrator awarded the claimant the bulk of the assets and liabilities, notwithstanding that the net value was in the negative. The respondent was left with excluded property from a pre-relationship pension valued at less than \$200,000.

- [11] The arbitrator determined that the respondent's income in recent years had been \$146,863 in 2014, \$398,165 in 2015, \$410,362 in 2016, \$364,207 in 2017, and \$271,466 in 2018. Given the variability and in accordance with s. 17 of the Federal Child Support Guidelines, SOR /97-175, the arbitrator concluded that, for each year, the income to be attributed to the respondent should be the average of his taxable income from the previous three years.
- [12] The arbitrator accepted the claimant's submission that she be imputed income of \$35,000 per year while recognizing that she had not worked outside of the home in many years and there was no guarantee she would be able to find employment.
- [13] The arbitrator gave direction for an automatic annual review and adjustment to support payments based on a sharing of income tax information for each party for each year including the ongoing use of a three-year average for the respondent's income.
- [14] The respondent had been paying child and spousal support in accordance with the interim, without prejudice order of October 2017. The arbitrator concluded that the amounts provided for in that order were lower than what should have been paid. He calculated the arrears of support as being \$245,484. He directed that those arrears would be deemed to be satisfied upon the respondent having transferred the family assets that were in his name to the claimant. This involved cashing out various pension plans, some of which were in England, and paying the associated taxes, which was a complicated exercise that took several months to accomplish.
- [15] I pause to note the somewhat unusual nature of this last part of the order. Having decided that the family assets would belong to the claimant and not to the respondent, and having assessed an amount of arrears that he concluded were "owing", the arbitrator provided that the arrears would be cancelled upon completion of the transactions required to place the assets that were to be the claimant's into her name.
- [16] On August 28, 2019, some 19 days after the amended Supplemental Award was issued, the claimant made application to the court and obtained an order of Steeves J. (the "Final Order") granting the parties a divorce, incorporating their agreement as to parenting matters, and implementing the final decisions of the arbitrator as to family assets and debts and as for the payment of support. Relevant provisions of that order include the following:
 - 7. The Respondent's Guideline income is as follows:
 - a. \$318,464.00 from November 2016 to December 2017 based on the average of his taxable income from 2014, 2015 and 2016;

- b. \$390,911.00 in the year 2018 based on the average of his taxable income in 2015, 2016, 2017; and
- c. \$348,670.00 in the year 2019, based on the average of his taxable income in 2016, 2017 and 2018; and
- 8. The Claimant's Guideline income is imputed and determined to be \$35,000.00.
- 15. The Respondent will commence paying spousal support and child support to the Claimant as of November 1, 2016;
- 16. The Respondent will pay child support to the Claimant for the support of the Children, as follows:
 - a. in the amount of \$4,147 per month for the period November 1, 2016 to December 31, 2018, inclusive;
 - b. in the amount of \$5,002 per month for the period January 1, 2018 to December 31, 2018, inclusive; and
 - c. in the amount of \$4,503 per month commencing January 1, 2019 going forward;
- 17. The Respondent will pay 91% of the net after-tax cost of the Children's special and/or extraordinary expenses and the Claimant will pay the remaining 9% of the cost of those expenses from the date of separation onwards;
- 18. The Respondent will pay spousal support to the Claimant as follows:
 - a. in the amount of \$6,064 per month for the period November 1, 2016 to December 31, 2017, inclusive;
 - b. in the amount of \$7,842 per month for the period January 1, 2018 to December 31, 2018, inclusive;
 - c. in the amount of \$6,797 per month commencing January 1, 2019 going forward;
- 19. Spousal support is payable from the Respondent to the Claimant for a period of fourteen (14) years from the date of separation which ends September 2030;
- 20. The amounts of support paid by the Respondent in and after August 2017, including under the Order made by the Honourable Justice Forth made October 5, 2017 (the "Forth Order") as well as the \$30,000 payment made under the Order of Justice Bracken made April 17, 2018 (the "Bracken Order"), will be deducted from the calculation of the Respondent's retroactive support obligations between November 1, 2016 and July 31, 2019;
- 21. The Respondent owes the Claimant \$245,484.00 in arrears for outstanding child support, spousal support and his share of contributions to the special and/or extraordinary expenses of the Children from the date of separation to July 31, 2019 (the "Support Arrears");

24. The Claimant and the Respondent will exchange their income tax returns, complete with all schedules, slips and attachments, and adjust the amount of child support payable, using the tables for the Province of British Columbia, and their respective shares of the Children's expenses if necessary, on the first day of May of each year;
25. The Claimant's Guideline income in 2020 and the years following will be the greater of \$35,000 or her actual income from employment or self-employment, whichever is greater;
26. The Respondent's Guideline income in 2020 will be calculated as the average of his taxable income in 2017, 2018 and 2019, and his Guideline income in each year thereafter will be calculated as the average of his taxable income in the three previous years;
32. The Support Arrears will be deemed to be wholly satisfied and extinguished upon the completion of the disposition of the Manulife RRSP, the Scottish Life Pension and Integro Pension to the Claimant as required by this order;
- [17] The claimant registered with the Family Maintenance Enforcement Program ("FMEP") in September 2019. FMEP has been actively pursuing the respondent for payment of his support obligations.
- [18] The arbitration award reflected agreement of the parties that the claimant would be moving to Ireland with the children. That has since occurred.
- [19] The respondent initially continued to live in British Columbia. However, over the course of 2020, he has now remarried and lives with his new wife in California. He continues to work with clients in both Canada and the United States and with insurance markets in England.
- [20] The respondent's consumer proposal failed and, as a result, he was deemed to be bankrupt. I understand that as a result of recent proceedings in the bankruptcy he has been conditionally discharged, but is required to make payments for the benefit of his creditors of \$545 per month over a three-year period.
- [21] The respondent also continues to make payments of \$200 per month in support for a child of a previous marriage.
- [22] Thus, the respondent came out of the family and bankruptcy proceedings with only one asset of substance (an RSP worth less than \$200,000), with monthly obligations, including support payments to the claimant, totalling some \$11,300 plus special expenses, payments to his bankruptcy trustee of \$545 per month, and payments of \$200 per month in support for his child from a previous relationship.

Application to Vary Spousal and Child Support

- [23] The respondent seeks an order varying the provisions of the Final Order governing spousal and child support. He argues that for the period commencing January 1, 2020, support should be calculated solely on the previous year's income and not based on a three-year average. He asserts that there has been a material change in circumstances since the Final Order that would justify such variation.
- [24] I note that the notice of application was filed on February 10, 2020. It has taken some time to come to a hearing which is not uncommon in this very unusual year.
- [25] The claimant argues that there has been no material change and that the use of a three-year average to calculate income for support purposes should continue.

Applicable Law

- [26] The parties do not differ on the applicable legal principles. The orders governing support payments in this matter are governed by the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.). Variation orders under that Act are governed by s. 17. Section 17(1) permits a court to vary, rescind, or suspend a support order either prospectively or retroactively. For variation of a child support order, s. 17(4) requires that:
- (4) Before the court makes a variation order in respect of a child support order, the court shall satisfy itself that a change of circumstances as provided for in the applicable guidelines has occurred since the making of the child support order or the last variation order made in respect of that order.

For variation of a spousal support order, s. 17(4.1) requires that:

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

- [27] Variation of a child support order is to be made in accordance with the Federal Child Support Guidelines, SOR /97-175 [FCSG], s. 17(6.1). The objectives that govern an initial spousal support order are made applicable to variation of a spousal support order pursuant to s. 17(7) of the Divorce Act.
- [28] The governing legal principles were concisely summarized in *Hausmann v Klukas*, 2016 BCSC 853, at paras. 41 to 45, 48 to 49, and 51:
- [41] Section 14 of the Guidelines provides in part:

Circumstances for variation

14. For the purposes of subsection 17(4) of the Act, any one of the following constitutes a change of circumstances that gives rise to the making of a variation order in respect of a child support order:

(b) in the case where the amount of child support does not include a determination made in accordance with a table, any change in the condition, means, needs or other circumstance of either spouse or of any child who is entitled to support

[42] Prior to the Guidelines, *Willick v. Willick*, [1994] 3 SCR 670, established that a material change of circumstances is required before a court may vary a child support order made under the Divorce Act, meaning a change, if known at the time the order was made, would likely have resulted in different terms.

[43] In *Bockhold v. Bockhold*, 2006 BCCA 472, the court confirmed s. 14 does not supplant the Willick test which governs applications under the FLA, as well as the Divorce Act: *L.M.P. v. L.S.*, 2011 SCC 64; and *Cotter v. Cotter*, 2015 BCSC 1730.

[44] The material change test also applies to spousal support variation requests (*L.M.P.*, at para 32).

[45] The court focuses on the actual circumstances of the parties at the time the initial order was made. The initial order is assumed to be correct, and is not to be departed from lightly: *Willick*, at p. 687; *L.M.P.*, at para. 33. Where the court finds a material change, it may only vary the order to the extent justified by that change: *L.M.P.*, at para. 47. A material change must have some degree of continuity. The court may be assisted by considering the subsequent conduct of the parties and whether it indicates they considered a particular change to be material (*L.M.P.*, at para. 35).

[48] The Willick test had been interpreted as requiring a finding that at the time the initial order was made, the change now relied upon was unknown and could not have been reasonably foreseen (*Kollmuss v. Kollmuss*, 2015 BCSC 1101 at para. 12).

[49] *Dedes v. Dedes*, 2015 BCCA 194, clarified however, what it means for a change to have been "contemplated" at the time of a previous (consent) order. Justice Bennett concluded the test for material change examines what the parties actually contemplated at the time of the initial order, rather than what was known or could have been reasonably foreseen, noting the comments of L'Heureux-Dube J. in *Willick*, at p. 734:

the diversity of possible scenarios in family law dictates that courts maintain a flexible standard of judicial discretion which does not artificially limit the adaptability of the Divorce Act provisions.

- [51] In light of Dedes, in relation to an order that was not by consent, the threshold for a material change of circumstances may be met where the change was reasonably foreseeable but not actually contemplated by the court when making the initial order.
- [29] The full relevant excerpt from Dedes is found at para. 25:
- [25] As articulated in L.M.P., the test for material change is based not on what one party knew or reasonably foresaw, but rather on what the parties actually contemplated at the time the order was entered by agreement. A function of the material change threshold is to prevent parties from re-litigating issues that were already considered and rejected; in such cases, an application to vary would amount to an appeal of the original order (see Gordon at para. 15). As was stated by L'Heureux-Dube J. in Willick at p. 734, "the diversity of possible scenarios in family law dictates that courts maintain a flexible standard of judicial discretion which does not artificially limit the adaptability of the Divorce Act provisions". See also G. (L.) v. B. (G.), [1995] 3 S.C.R. 370 at paras. 49–51 and Jakob v. Jakob, 2010 BCCA 136 at para. 40.
- [30] In the circumstances of this case, given that the Final Order simply enacted the decisions of the arbitrator, I conclude that what actually needs to be considered is what was known to the parties and to the arbitrator at the time of the Amended Award.

Positions of the Parties

- [31] The respondent argues that his financial circumstances have materially changed. As a result of the loss of a major client, the premiums he generates are substantially reduced and he is having to rebuild his insurance brokerage practice. He asserts that the rebuilding is taking longer than was anticipated. As a result, his income is insufficient to pay support at the levels mandated by the Final Order.
- [32] The respondent argues that the decision of the arbitrator to use a three-year rolling average of income levels to establish the respondent's income, although certainly permitted by FCSS s. 17, is appropriate in cases where the payor has a sustained elevated income that fluctuates within a reasonable range. The respondent asserts that the course of events subsequent to the arbitration hearings has established that this is not such a case. The respondent argues that the arbitrator must have assumed that the respondent's 2018 income was an exception and that it would bounce back in 2019 or 2020, an assumption that has turned out to be inaccurate.
- [33] The respondent argues that the consulting agreement between Jeama and Integro provides a base monthly income of only \$12,500 less business expenses, which is insufficient to meet his current support and bankruptcy-related monthly costs. He argues that there is no practical utility in leaving in place a support burden that cannot be satisfied. Given that his Guidelines income for 2019 and 2020 is going to be substantially less than the amount that will be generated by the three-year averaging formula, the court should conclude that a material change exists and intervene.

- [34] The claimant disagrees. The claimant argues that the arbitrator was well aware that the respondent had lost a major client and that his income was going to be lower for a period of time. The claimant asserts that the evidence shows that the respondent's income is, in fact, on an upward trend and demonstrates a successful rebuilding of the respondent's client base. As a result, the claimant argues that the fact that the respondent is paying higher levels of support in 2020 under a three-year rolling average than if support was simply being determined based on the previous year's income is a result contemplated by the arbitrator. The claimant points out that if the respondent's income continues to increase, then in a year or two the respondent will actually be paying less on a three-year rolling average than on a year-by-year determination. The effect of the approach adopted by the arbitrator is to even out the yearly variations for the benefit of the claimant, but overall, things will even out over time.
- [35] Thus, the claimant argues that there has been no change in circumstances not contemplated by the parties and the arbitrator and there is no basis for a variation. Rather, the parties should be recalculating the income for 2020 and 2021 - which the claimant acknowledges will result in a decrease of support - based on the annual adjustment provisions of the Final Order.

Analysis

- [36] Both parties drew my attention to the analysis of the arbitrator at page 56 of the Amended Award. The arbitrator commented that:

[The respondent's] income is more difficult to assess as a result of: significant variances in his income between 2015 and 2018, especially his income in 2018 which he admitted was a "historic low"; the tenuous nature of his ongoing relationship with Integro; the loss of business from [a major client]; and, the uncertainties involved in the new business he is pursuing underwriting conduct liability.

...

In my view, using [the respondent's] income from 2018, \$271,466, as the basis of his child support and spousal support obligations would be unfair in light of his earnings in the previous three years, in each of which he earned between \$364,207 and \$410,362, and his general pattern of income prior to 2015.

...

Averaging [the respondent's] income over the last three years, pursuant to section 17, seems to me to strike the right balance between the precipitous drop in his income after separation, his higher income in previous years, and the uncertainty involved in starting a new business. Counsel for [the claimant] is correct that this approach is not representative of [the respondent's] earnings in the past, however [the respondent] is starting a new business and no evidence has been presented that he is doing so in bad faith or for the purposes of reducing his income to

lower his support obligation.

- [37] The Final Order already contains a provision for automatic annual review of and adjustment to support amounts based on revised income levels. As noted above, the law requires that an order be varied only to the extent justified by a material change. It is difficult to see how an order that provides for automatic annual adjustments could be varied to reflect a material change beyond the adjustments that are already inherent in the order. The respondent attempts to meet this concern by arguing that the adjustment mechanism itself is fundamentally flawed in its reliance on a three-year average.
- [38] Having reviewed the Amended Award, I conclude that the arbitrator clearly understood and contemplated that the respondent was in a rebuilding mode and that his income would be reduced moving forward. As will be noted below, the respondent's income appears to be on the rebound, and while he is not likely to immediately return to his previous income highs, the effect of the three-year averaging will gradually reduce his income for support purposes in 2020 and 2021, after which, his income for support purposes will no longer be impacted at all by those earlier high income levels.
- [39] In these circumstances, I cannot conclude that there has been a material change requiring variation of the Final Order. I dismiss the application to vary the provisions governing child and spousal support.

Annual Adjustments to Support Payments

- [40] In the alternative, the respondent seeks an order setting support payments for 2020 and 2021 in accordance with the automatic annual adjustment provisions. The parties are agreed that I should do so, albeit on an interim basis given some uncertainties that will be discussed below.
- [41] The evidence included a financial statement for Jeama for the fiscal year ending August 31, 2019. The claimant argued that this was the most appropriate basis to assess 2019 income. The respondent initially proposed the use of actual dividends declared by Jeama as reported by the respondent on his 2019 income tax return. However, the dividends declared for the 2019 personal tax year appear to exceed the net income for the year and do not appear to relate to the actual income generated. Given that the respondent is the sole director and shareholder of Jeama, I will proceed on the basis that the net income its financial statements reflect, with appropriate adjustments, provides the best means to assess the income available to the respondent.
- [42] The claimant argues that, from the income before taxes, the expense lines for amortization, rent, and telephone and utilities should all be backed out. The respondent did not make any specific objection to these adjustments. This approach gives a 2019 income level of \$145,108. Averaging this with the 2017 and 2018 income amounts set out above gives rise to a three-year average income of \$260,260. Table child support at that income level is \$3,460. Spousal support at the midrange, assuming no special expenses, is \$4,510. If there were no special

expenses, the monthly support would be \$7,970, down substantially from the \$11,300 currently being paid.

- [43] There is an outstanding issue between the parties as to the appropriateness of certain special expenses including private school tuition in Ireland. I am not asked to decide that issue. The amount of special expenses will impact on the spousal support amount. Once the parties have resolved their issue as to special expenses, the amount will presumably be recalculated.
- [44] Assessing 2020 income for purposes of 2021 support payments is more difficult. Not only is the calendar year not yet complete, but the August 31, 2020, financial statement has not yet been produced. The respondent's evidence indicates the Jeama's gross income to date is approximately \$277,000. Using the same allowable expense amount from the 2019 financial statement (i.e., \$60,214) generates a net income before tax of \$216,786. Averaging the 2018, 2019, and 2020 income amounts gives rise to a three year average income of \$211,120. Table child support at that income level is \$2,880. Spousal support at the midrange, assuming no special expenses, is \$3,261. The total of these amounts is \$6,141. Again, this will presumably be adjusted once issues as to special expenses are resolved.
- [45] Subject to the caveats noted above, and on an interim basis, I set support payments for 2020 as \$7,970 per month, being child support of \$3,460 and spousal support of \$4,510; with support payments for 2021 as \$6,141 per month, being child support of \$2,880 and spousal support of \$3,261.
- [46] The parties and FMEP will have to recalculate the amount of support arrears. This will reduce those arrears to a much more manageable level.
- [47] As well, an interesting issue arose during argument as to whether the accrual of interest by FMEP in respect of pre-arbitration arrears which were cancelled on completion of the transactions directed by the arbitrator was appropriate. That issue was not before me for decision. Resolution of that issue may further impact on the arrears.

Stay of Enforcement/Cancellation of Arrears

- [48] The notice of application included an alternative claim for cancellation of arrears. This was not pursued during argument other than in the context of the variation that was sought, and I do not intend to deal with it.
- [49] The respondent did press his claim for a stay of enforcement action, making various complaints about the steps taken by FMEP. FMEP has actively pursued any and all assets and income and taken various other steps to pressure the respondent. The respondent complains that these have interfered with and threaten his ability to continue his work as an insurance broker. Specific examples included the garnishment of an amount paid to Jeama for commission, of which Jeama was actually only entitled to a portion, and as to which the bulk was to be paid to Integro. As well, steps have been taken to cancel the respondent's

driver's licence and passport. As someone who depends on travel to engage in business in Canada, the United States, and England, such steps threaten his ability to earn income and rebuild his business.

- [50] I note that, depending on how the interest issue is dealt with, the arrears after recalculation could be as low as \$35,000.
- [51] Counsel for FMEP attended the hearing and argued that the Director, as a matter of practice, takes a "level-headed, gradual" approach to enforcement. She noted that in this case specific steps that have been objectionable to the respondent have been withdrawn upon discussion with him. She noted that s. 14.3 of the Family Maintenance Enforcement Act, R.S.B.C. 1996, c. 127, specifically requires a balanced approach to enforcement against a corporation (in this case, Jeama), while other provisions of the Act provide mechanisms by which specific steps taken by the Director can be challenged in the courts.
- [52] There was extensive discussion as to the steps taken that could lead to cancellation of the respondent's passport. Apparently such steps were requested by the FMEP once before, then cancelled, and then reinstated. When asked how a person in the respondent's business is to generate the income necessary to pay support if his ability to travel is cut off, counsel for the FMEP suggested that he may still have a British passport that would allow him to travel. I found this answer difficult to understand.
- [53] Overall, however, while I am satisfied that this court has the jurisdiction to stay execution on an order [Supreme Court Family Rule 15-4(31)], I am not persuaded that any such step is appropriate in this case. The magnitude of the arrears is such that it may well be realistic for the respondent to retire the arrears in the near future.
- [54] The notice of application does not include a request for a payment plan and, although it was discussed during submissions, I would not make such an order in the absence of such an application. In any event, I would not want to determine whether a payment plan was appropriate until the actual arrears have been recalculated with a fair degree of certainty, including determination of the interest issue noted above.

Conclusion

- [55] I dismiss the application to vary the provisions of the Final Order as to child and spousal support.
- [56] However, in accordance with the automatic recalculation provisions of the Final Order, I have concluded that on an interim basis, support payments for 2020 are to be calculated on the basis of a three-year rolling average income of \$260,260 and the support payments for 2021 are to be calculated on a three-year rolling average of \$211,120.

- [57] The application for a stay of execution is dismissed. However, I would grant liberty to reapply once arrears have been recalculated and the respondent has had preliminary discussions with FMEP as to appropriate steps moving forward.
- [58] These reasons for judgment reflect several mathematical calculations. I invite counsel to review them carefully and advise as to any errors. I reserve the right to correct any mathematical errors that may be drawn to my attention.
- [59] As well, these reasons for judgment are delivered orally. Should a transcript be ordered, I reserve the right to edit for flow and language and to include additional case references if appropriate. However, the result will not change.
- [60] Are there any issues arising that I should deal with today?
- [61] MR. RAPONI: My Lord, I would ask that the claimant/respondent in this application be entitled to costs. In the circumstances, she has been entirely successful, and moreover, there was a late concession brought to the attention of Your Lordship at the beginning of this application, which was that the application be amended from the July 1, 2019, start to the January 1, 2020, start which, in my submission, was a significant concession and may well have led to the ability of the parties to resolve this by agreement. Moreover, there was an application that had to be brought on short notice to adjourn the initial setting down of this application. It was set down at a time that was not -- where I was not available, I was out of the country at the time, and rather than agree to the adjournment to a mutually agreeable date, we were forced to bring an application. Madam Justice Power heard that and put the issue as to costs over to this hearing and so, in my submission, there ought to be costs to Ms. Jaggs and, rather than put that matter to an assessment of costs before the registrar, the Family Court Rules are very easy to deal with in terms of costs. It is essentially \$1,000 for a half-day. There were two half-days occupied this week, there was one-half day occupied to bring the application to adjourn, and I am not sure whether or not this would be considered a half-day. I think it is. So, in total, those would be \$4,000, and it would be, in my submission, most cost-efficient to simply put it at that. I can tell you that the costs to my client are significantly higher than that, as you are aware.
- [62] THE COURT: Ms. Platt, do you have any submissions on costs?
- [63] MS. PLATT: If it assists, the Director will not seek costs, and I will note that if costs are assessed to the recipient, those can be enforced by FMEP as support.
- [64] THE COURT: Mr. Ingram?
- [65] MR. INGRAM: My Lord, I agree with Mr. Raponi that it would be efficient if costs are awarded in his client's favour to go with the number he is suggesting, but I do say that, when you look at what relief was being sought, it was an order varying monthly child support and spousal support effective as of July 1, 2019, and what we have done is arrive at a varied child and spousal support amount as of January 1, 2020, and also, because of the time of year, we have dealt on an interim basis with 2021. So I say there is no substantial success by one party

or the other and each party should bear their own costs.

[66] THE COURT: I disagree, Mr. Ingram. I think the variation that was made is a recalculation in accordance with the automatic annual adjustment provisions in the order. That is something different from what you sought. Your argument was that the entire mechanism needed to be rethought because of the impact of the three-year averaging. That was the primary matter that was argued, and the claimant was entirely successful on that. In my view, the claimant has been substantially successful on this application and is entitled to her costs. If the parties are agreed as to the assessment of \$4,000 as costs, I accept that it is appropriate to make a summary assessment in that amount.

"Veenstra J."

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