

CANADA / JUDGMENT

Jinha v. Devji-Jamani

2024 BCCA 111

COURT

British Columbia Court of Appeal

DECIDED

21 March 2024

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2024 BCCA 111 Jinha v. Devji-Jamani

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Jinha v. Devji-Jamani,

2024 BCCA 111

Date: 20240321

Dockets: CA48281; CA48730

Between:

Farrah Jinha

Appellant

(Respondent)

And

Arif Devji-Jamani

Respondent

(Claimant)

Before:

The Honourable Madam Justice Fenlon

The Honourable Mr. Justice Hunter

The Honourable Mr. Justice Voith

On appeal from: Orders of the Supreme Court of British Columbia, dated

April 14, 2022 and November 10, 2022 (A.D.J. v. F.J., 2022 BCSC 600, 2022 BCSC 1974, Vancouver Docket E132356).

The Appellant, appearing in person:

F. Jinha

Counsel for the Respondent:

G. Lang

M. Guy

Place and Date of Hearing:

Vancouver, British Columbia

December 4, 2023

Place and Date of Judgment:

Vancouver, British Columbia

March 21, 2024

Written Reasons by:

The Honourable Madam Justice Fenlon

Concurred in by:

The Honourable Mr. Justice Hunter

The Honourable Mr. Justice Voith

Summary:

Following an 18-day trial and a 4-day reopening, the judge made orders addressing a multitude of issues arising from the end of the parties' marriage 11 years earlier. On appeal, the appellant contends the judge erred in denying her increased spousal support, child support arrears for 2011 and 2012, and an award of special costs.

Held: Appeal allowed only to the extent of increasing the arrears of child support. The judge overlooked a mechanism in the settlement agreement providing for an adjustment of child support prior to 2013. The judge did not err in conducting the Miglin analysis, or in finding that the respondent's significant post-separation increase in income was anticipated by the parties at the time the separation agreement was entered into. Costs awards are highly discretionary and owed deference. There is no basis to interfere with the judge's conclusion that the parties were both to blame for inappropriate conduct during the litigation and that they should bear their own costs.

Reasons for Judgment of the Honourable Madam Justice Fenlon:

- [1] The parties to this family litigation began well, entering into a settlement agreement on separation. Unfortunately, over the course of the next decade they became embroiled in a high conflict dispute, unable to agree on even the simplest matters. Over an 18-day trial and a 4-day reopening, the judge addressed a multitude of issues. On appeal, only three matters remain in dispute: the appellant Farrah Jinha's entitlement to increased spousal support from her former husband, the respondent Arif Devji-Jamani; the respondent's obligation to pay additional child support in 2011 and 2012; and the appellant's entitlement to costs of the trial.
- [2] For the reasons that follow, I would allow only the appeal of the order for child support.

Background

- [3] The parties were married in June 1996. Both were university educated and ambitious, with promising careers ahead of them. Early in the marriage, the respondent began working as an investment advisor at RBC Dominion Securities where he continues to work to this day. He built a successful business, earning about \$300,000 per year when the marriage ended in 2010, and closer to \$800,000 annually by the time of trial in 2021.
- [4] Early in the marriage, the appellant had a successful career in public relations, earning about \$100,000 annually. She continued to work full-time after the birth of the parties' first two children. When their third son was born in 2005, the parties made the decision to have the appellant leave the work force to look after the home and the children full-time, which she did for the last six years of the marriage.
- [5] When they separated in March 2011, the appellant was 41 and the respondent 43 years old. They retained counsel and in June 2011, entered into minutes of settlement dealing with child support, spousal support, guardianship, parenting time and parenting responsibilities as well as division of some family property (the "MOS"). Although the MOS contemplated that its terms would be incorporated into a more complete separation agreement and order, that did not occur.
- [6] When the parties entered into the MOS, it was expected the appellant would return to the workforce full-time. She made two failed attempts to start businesses and had a period of not working due to surgery and treatment for cancer. It was not until 2019 that she obtained a full-time position working at a private school in Toronto, earning about \$68,000 per year.
- [7] Under the terms of the MOS, the appellant was to receive nine years of spousal support at \$4,000 per month, and child support at \$4,000 per month, to be adjusted in keeping with the Federal Child Support Guidelines ("Guidelines") and the parties' changing incomes. The proceeds from the sale of the family home were divided equally; the MOS did not deal with the parties' remaining assets which included their RRSPs, investment accounts, and the respondent's interests in RBC.

- [8] Although the MOS provided for shared parenting of the children, they did not adjust well to the separation and their father's new partner. By 2013 the shared parenting regime had given way to an unpredictable parenting schedule, with the appellant having primary responsibility for all three children until 2017.
- [9] In the ten years after their marriage ended, the parties made numerous chambers applications relating to the children, but it was not until the trial in November and December 2021 that the parties asked the court to address the remaining matters in dispute between them.
- [10] The judge delivered reasons on April 14, 2022 ("RFJ1"). Thereafter, the appellant sought to reopen the trial to argue issues relating to spousal and child support, and both parties sought a ruling on costs. Those matters were dealt with in a four-day hearing in September 2022, with judgment delivered on November 10, 2022 ("RFJ2"). The appellant mistakenly filed separate appeals for each part of the trial, but the two appeals were consolidated for hearing.

On appeal

- [11] The appellant contends the judge erred in:

1. Determining that only the duration of spousal support, but not the amount, should be increased to take into account unanticipated events post-separation;
2. Failing to adjust the award of child support for 2011 and 2012; and
3. Ordering the parties to bear their own costs.

- [12] The first two grounds of appeal concern support orders which are fact-based, discretionary decisions reviewed on a deferential standard. This Court will not interfere unless the reasons disclose an error in principle, a significant misapprehension of the evidence, or the decision is clearly wrong: *Cook v. Cook*, 2021 BCCA 194 at para. 31. The third ground of appeal challenges the judge's decision to deny the appellant's application for special or ordinary costs. This too is a highly discretionary order reviewable on a deferential standard: *Pyper v. Schuetze*, 2023 BCCA 334 at para. 61.

- [13] I turn now to the first ground of appeal.

1. Spousal Support

- [14] The appellant contends the judge made errors in principle in applying the framework established by the Supreme Court of Canada in *Miglin v. Miglin*, 2003 SCC 24. The *Miglin* analysis addresses applications for an initial order for spousal support under s. 15.2 of the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), when a final spousal support agreement is already in place. In *Nicholl v. Nicholl*, 2020 BCCA 173, this Court summarized the *Miglin* framework as follows:

[40] In summary, a court undertaking a Miglin analysis should:

Stage One

1. Inspect the circumstances at the time the agreement was entered into to determine if there is evidence of "oppression, pressure, or other vulnerabilities". If such negative circumstances existed, the "agreement will merit little weight".
2. If there are no such negative circumstances, determine whether the agreement considered the Divorce Act factors and complied with its objectives. If the agreement does not comply with those objectives, the intervention of a court is only warranted where the agreement operates in a way that reflects a "significant departure from the general objectives" of the Divorce Act.

Stage Two

If the court has not intervened at stage one, the court must still analyze the agreement at the time of the application for spousal support to consider whether it represents the parties' original intentions and whether it continues to comply with the Divorce Act. The claimant needs to demonstrate that new circumstances, not reasonably anticipated at the time of the agreement, warrant the court's intervention. The change in circumstances needs to be significant but need not be "radically unforeseen". However, the focus is not on whether a change occurred, but whether the agreement continues to represent the parties' intentions and continues to be in substantial compliance with the objectives.

[15] In Nicholl, this Court observed that it is necessary at both stages of the Miglin test for the court to consider whether the separation agreement operates in a way that reflects substantial compliance with the objectives of the Divorce Act: at para. 30. Those objectives are set out at ss. 15.2(6):

- (6) An order made under subsection (1) [] that provides for the support of a spouse should
 - (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
 - (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
 - (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
 - (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

- [16] There is an evident tension between the objectives of the Divorce Act as set out above, and the policy goal of encouraging spouses to enter into agreements that reflect their own goals and concerns: Nicholl at para. 35. Valid spousal support agreements are entitled to deference: Zimmerman v. Shannon, 2006 BCCA 499.
- [17] The Miglin framework differs from the test to be applied on an application to vary a pre-existing order for spousal support (under s. 17 of the Divorce Act). On an application to vary, the court considers only whether there has been a material change in circumstances since the pre-existing order was made: L.M.P. v. L.S., 2011 SCC 64. Under the Miglin analysis, by contrast, the applicant must show that there has been a significant change in the parties' circumstances that could not reasonably have been anticipated at the time of negotiation of their agreement, such that the terms of the agreement no longer reflect the parties' intentions at the time they entered into it: Miglin at paras. 87-88.
- [18] With that review of the applicable principles, I turn now to the errors the appellant says the judge made in conducting the Miglin analysis. Those errors can be conveniently restated as follows:
- (a) At stage one, using the parties' 2010 incomes rather than their incomes in 2011, the year the MOS was entered into;
 - (b) At stage two, finding that the parties anticipated the respondent's significant increase in income post-separation; and
 - (c) Failing to engage in a de novo inquiry once unanticipated events were established, thereby failing to give full effect to the appellant's strong compensatory claim.
- (a) Use of the parties' 2010 income at stage one of the Miglin analysis
- [19] As noted above, the appellant asked the judge to reopen the trial to reconsider her assessment of the adequacy of the \$4,000 per month spousal support agreed to in the MOS. One basis for the reopening was the judge's misapprehension of the appellant's 2010 income, which she understood to be \$48,700. On the reopening, the judge acknowledged that \$47,500 of that figure was actually the respondent's income (which the parties had taxed in the appellant's hands in an unsuccessful attempt to split income), and that the appellant's 2010 income was in fact only \$1,200. She recognized that this finding affected her original assessment of whether the MOS met the objectives of the Divorce Act for the purposes of stage one of the Miglin analysis: RFJ2 at para. 51.
- [20] Using the corrected income figure, the judge determined that the Spousal Support Advisory Guidelines ("SSAG") resulted in the following range: low of \$3,045 per month, mid of \$5,501, and a high of \$6,046. Notably, her earlier analysis assumed \$4,000 was a mid-range figure. But she found nonetheless that the sum of \$4,000 per month met the objectives of the Divorce Act, saying:

[53] According to the DivorceMate calculations, the family's net disposable income ("NDI") for 2010 would be equalized if spousal support were paid at the low end of the SSAG in the amount of \$3,045. This would result in each party's monthly NDI being approximately \$7,823. This is of particular significance since the [appellant] testified that the parties wished to roughly equalize their NDI by way of the support provisions in the MOS. The spousal support payments to the [appellant] under the MOS, at \$4,000 a month, are roughly \$1,000 a month more than the low amount under the SSAG.

[21] The judge rejected the appellant's submission that the objectives of the Divorce Act could be met only if the support reflected at least the mid-range of the SSAG. She referred to the Spousal Support Advisory Guidelines: Revised Users Guide (April 2016) in which the authors criticized the tendency in the case law to default to the mid-range amount, especially in shared parenting cases, saying:

In shared custody cases, by contrast, the default outcome in bi-nuclear cases (no new partners, no new children) should be the spousal support which generates a 50/50 split of net disposable income (NDI), explained in more detail above under "The With Child Support Formula".

I see no error in the judge's conclusion that, even using the corrected income figure for the appellant, the MOS spousal support met the objectives of the Divorce Act.

[22] On appeal, the appellant raises a new argument. She contends the judge was required to assess the adequacy of the MOS when it was entered into by using the respondent's 2011 income of \$299,454, rather than his 2010 income of \$269,555. The appellant says the parties only used the 2010 figure because, when they entered into the MOS in June 2011, they did not yet know what the respondent's 2011 income would be. She says that, since the judge determined the actual 2011 income, she was required to use that figure to measure the adequacy of the spousal support agreed to in the MOS. She states that the definition of 'income' under the SSAG is that found in the Guidelines. She points to the following part of that definition, in s. 2(3) of the Guidelines:

2

(3) Where, for the purposes of these Guidelines, any amount is determined on the basis of specified information, the most current information must be used.

[Emphasis added.]

The appellant says that when the 2011 income figure is used, the low end of the range to achieve a 50-50 NDI is \$5,052, which demonstrates the inadequacy of the MOS spousal support.

[23] The simple answer to this argument is that the respondent's 2010 income was the most current information available at the time the MOS was entered into. Indeed the appellant acknowledges that the 2011 income was unknown and would not have been available until some time in 2012. It follows that I would not accede to this ground of appeal.

(b) Finding that the respondent's substantial increase in income was reasonably anticipated

[24] The second stage of the Miglin framework is concerned with events that occur after the agreement is entered into. Even if an agreement met the objectives of the Divorce Act at the time it was entered into, at stage two of the analysis, unforeseen circumstances can lead a court to make a different award of spousal support: *Reid v. Reid*, 2017 BCCA 73 at para. 58. The court must assess the extent to which enforcement of the agreement still reflects the original intentions of the parties and the extent to which it is still in substantial compliance with the objectives of the Divorce Act: *Miglin* at para. 87.

[25] In the present case, the appellant submits that the parties did not contemplate the magnitude of the increase in the respondent's annual income after their separation. There is no doubt that the respondent's income increased dramatically over the decade between the end of the parties' marriage and trial. The judge determined the respondent's income to be as follows:

Year

Income

2010

\$269,555

2011

\$299,454

2012

\$356,089

2013

\$434,613

2014

\$570,251

2015

\$542,312

2016

\$643,005

2017

\$673,103

2018

\$669,559

2019

\$682,860

2020

\$855,348

[26] In contrast, the appellant's income (less spousal support and the universal child care benefit she received) was found to be as follows:

Year

Income

2013

Nominal

2014

\$47,247

2015

\$8,830

2016

\$61,496

2017

\$23,978

2018

\$61,495

2019

\$54,614

2020

\$68,000

- [27] The judge began her analysis by recognizing that the appellant had the burden of demonstrating that events that were not reasonably anticipated at the time of the agreement warrant the court's intervention. She observed that the court will only intervene if current circumstances "represent a significant departure from the range of reasonable outcomes anticipated by the parties, in a manner that puts them at odds with the objectives of the [Divorce Act]": RFJ1 at para. 215.
- [28] The judge found that the respondent's increases in income were contemplated by the parties, saying:
- [218] I agree with the [respondent] that his income increase does not constitute an unexpected event or unforeseen circumstance. While the [respondent] enjoyed a significant increase in his income post-separation, this increase is consistent with the trajectory of success that he was already on at the time of separation. The [appellant] did not testify that the [respondent]'s post-2011 increase in income was unexpected at the time of the MOS. In order to prove that current circumstances represent a significant departure from the range of reasonable outcomes anticipated by the parties, the [appellant] would have to provide some evidence that the [respondent]'s income increase was unanticipated: *Sandy v. Sandy*, 2018 BCCA 182 at paras. 65-66.
- [219] The income disparity that developed between the parties post-separation was significant, but not unanticipated. Because of that, it is not appropriate to revisit the monthly quantum of support payable to the [appellant] on the basis that the MOS no longer reflects the intentions of the parties or the objects of the Divorce Act. With respect to quantum of support, the MOS was fairly negotiated, in a context in which both parties were aware that the [respondent] was on an upward trajectory in his career. It was substantially compliant with the objectives of the Divorce Act at the time it was entered into. I am not satisfied that the quantum of monthly support under the MOS should be retroactively adjusted in the manner sought by the [appellant].
- [Emphasis added.]
- [29] The appellant acknowledges that she did not give direct evidence as to what was within her contemplation about the respondent's income when the MOS was signed. But she says her lack of contemplation of such significant increases can be inferred from evidence that the respondent's income had fluctuated in the three years before the signing of the MOS and her testimony that the parties did not know what impact the shared parenting arrangement would have on the respondent's income. The appellant says there was no evidence that the parties actually discussed or intended to address the prospect of the respondent's income increasing significantly. She relies on other cases in which dramatic increases led to a reassessment of spousal support including: *Jennens v. Jennens*, 2020 BCCA 59.

[30] In my view this ground of appeal turns on the standard of review. The judge's conclusion that the income disparity between the parties was anticipated is a finding of fact. Other cases turn on their own facts and are of limited assistance. Here, there was evidence in the record to support the judge's finding that the appellant was aware that the respondent's income was on an upward trajectory.

[31] The appellant testified that, as the respondent grew his client base, their life became more and more comfortable. The respondent received commissions and payouts every third month which the appellant described as "really big cheques" that grew over the years. In her closing submissions the appellant described the respondent's income trajectory this way:

The [respondent's] business as an Investment Advisor thrived and he quickly accomplished milestones where he achieved the status of Vice President, was awarded P-Points starting in 2005, he experienced increasing growth of his annual revenue output and assets under management which placed him at or near the top of one third of all IA's nationally and continues to be in the top echelon of his peers. This entitled him to participate in valuable compensation rewards programs offered by RBC DS in 2005 and thereafter. With this success, his income continued to rise year after year

[32] The parties were at the mid-point of their careers when they separated. Nothing in the record suggested that the appellant, at the time the MOS was entered into, did not appreciate or anticipate the potential for the respondent's earnings as a financial advisor to grow dramatically as his career progressed.

[33] In summary on this ground of appeal, the appellant has not established a palpable and overriding error of fact or an error in principle that would warrant this Court interfering with the judge's finding that the parties reasonably anticipated the respondent's income to increase significantly post-separation.

(c) Extending duration of spousal support but not quantum

[34] Although the judge did not find that the respondent's increase in income warranted a retroactive adjustment to the quantum of support, she was persuaded that the duration of spousal support should be extended, saying:

[221] It is clear from the structure of the MOS that the parties understood on separation that they would engage in something close to equal parenting time which would give the [appellant] the opportunity to re-enter the workforce in a meaningful way. However, the parenting time schedule contemplated by the MOS was dissolved by 2013 and the [appellant] continued to have primary parenting time for all three children until 2017. She continued to have the majority of parenting time for J until she moved to Toronto in July 2019. The shared parenting time anticipated by the MOS did not materialize.

[222] Further, almost from the time of separation and continuing through to the time of trial, the three boys have struggled psychologically and emotionally with the breakdown of their parents' marriage. As a result of these struggles, parenting arrangements were fluid and

sometimes chaotic based on the level of conflict a particular child had with a particular parent at a given point in time. The police were sometimes involved, as were numerous counsellors and medical professionals. I do not cast responsibility on one parent or the other for this state of affairs. It is apparent that the children did not adjust well to the introduction of the [respondent]'s new partner into their lives, and they struggled with the starkly different parenting styles of both parents. Based on the evidence before me, which included Dr. Elterman's s. 211 report, I am satisfied that the mental health and well-being of all three children was extremely fragile during the years following separation. The primary parent, who for most of the relevant period was the [appellant], bore the burden of her children's suffering and this impacted her ability to re-enter the work force.

- [223] Finally, as I have already found, the [appellant] was rendered unable to work for the better part of 2015 as a result of the two surgeries and radiation treatment she underwent for colorectal cancer that year.
- [35] The judge concluded that all three factors, namely the preponderance of parenting time taken on by the appellant, the struggles of the children, and the appellant's cancer were unexpected and delayed her ability to re-establish herself in the workforce and attain economic self-sufficiency: RFJ1 at para. 224. She found this state of affairs to be contrary to the parties' original intentions as expressed in the MOS: to roughly equalize the net family income on separation in the context of a shared parenting arrangement, in order to give the appellant a reasonable opportunity to become economically self-sufficient: RFJ1 at para. 226.
- [36] The judge therefore ordered that the appellant should receive an additional three years of spousal support, extending the duration from 9 to 12 years so that it terminated in August 2023.
- [37] The appellant says the judge erred by restricting the adjustment to an extension of support at \$4,000 per month. She submits that the judge was required to approach the question of support as a "trial de novo", unfettered by the MOS. In that context, she says the judge should have given effect to the appellant's strong compensatory claim and awarded 15 years of support based on the respondent's actual income, from 2011 through 2026.
- [38] There is no dispute that the appellant has a strong compensatory claim for support. She worked full-time for the first nine years of the parties' 15-year marriage, but left her successful career at that point to care for the children full-time and to support the respondent's career in so doing. That departure put her at a distinct disadvantage because the advent of social media during her six years out of the workforce shifted the public relations landscape, making it difficult for her to resume her career. Nonetheless, she was a relatively youthful 41, articulate and intelligent, with a successful career behind her. Under the SSAG she was entitled to support in the range of 7.5 to 15 years, but not indefinite support. In these circumstances, in my view the judge's imposition of an order extending the appellant's right to spousal support for an additional three years was appropriate.

Having found at stage one of the Miglin analysis that the MOS met the objectives of the of the Divorce Act, the judge at stage two was required to bring the spousal support back into alignment with the intentions expressed by the parties in their original agreement. This is precisely what she did.

[39] In short, I cannot accept the appellant's submission that the judge should have started from a blank slate, ignoring the terms of the parties' agreement so as to provide for a fluctuating level of support from year to year. As the Supreme Court of Canada said in Miglin:

[90] The court's focus should be on the agreement's continued correspondence to the parties' original intentions as to their relative positions and the overall objectives of the Act, not on whether a change occurred per se. That is to say, we do not consider "change" of any particular nature to be a threshold requirement which, once established, entitles the court to jettison the agreement entirely. Rather, the court should be persuaded that both the intervention and the degree of intervention are warranted. That is, at this stage, even if unbending enforcement of the agreement is inappropriate, that agreement may still indicate to a trial judge the parties' understanding of their relationship and their intentions. Even an agreement that is not determinative as a result of the parties' circumstances at the time of the application warrants compulsory consideration under s. 15.2(4).

[Emphasis added.]

Accordingly, I would not accede to the first ground of appeal.

2. Child Support

[40] The second issue raised by the appellant on the reopening was increased child support for 2011 and 2012. The appellant submitted to the judge that she had made a mistake in stating in her judgment that neither party took issue with child support payments in those years, when in fact the appellant had put those years in issue.

[41] The judge began by considering whether the appellant had at trial pursued an increase to child support for 2011 and 2012. She noted that the appellant was self-represented at trial (although she had counsel on the reopening) and that "it was not always clear what relief she was seeking and what the basis for that relief was": RFJ2 at para. 22. For example, the appellant said she was seeking a review and retroactive award of child support, when in reality she was relying on the mechanism in section 3.c of the MOS for adjusting support, which amounted to a claim for arrears. Section 3.c provides:

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- c. As of June 1, 2013, child support shall be reviewed annually and adjusted in accordance to the sums, formulas and principles delineated in the Federal Child Support Guidelines and having regard to the actual income of each parent;

- [42] The judge acknowledged that the appellant in argument referred to a review of child support for 2011 and 2012 but found that, since the appellant "expressly sought a review pursuant to the MOS" which only gave a right of review after June 1, 2013, the appellant could not have been seeking a review of child support before that date: RFJ2 at para. 29.
- [43] The judge also found that the MOS fixed the amount of child support for 2011 and 2012: RFJ2 at para. 33. She therefore concluded that, if the appellant was seeking to change child support payable in those years, she was not seeking arrears but was rather seeking a retroactive variation of child support, a subject which the appellant had not canvassed at all on the reopening. This led the judge to conclude that, even if the appellant had made a claim for increased child support in 2011 and 2012 at trial, it was not in the interests of justice to re-open the issue--without any submissions on retroactive support, a reconsideration was unlikely to affect the result at trial: RFJ2 at paras. 36-37.
- [44] On appeal, the appellant contends the judge erred in her analysis because she considered only section 3.c of the MOS and did not take into account section 3.b, which provides for adjustment of child support before 2013:

3. Child Support

- b. Child support shall remain at \$4000 through June 2013, UNLESS there is an increase or decrease in either [F.J.'s] or [A.D.J.'s] income equal to or greater than \$20,000 /per annum as reflected in their annual Income Tax Returns;

[Emphasis added.]

- [45] I agree with the appellant that the judge overlooked the mechanism in the MOS for adjustment of child support at section 3.b. That term provided for an adjustment to child support if the respondent's income were to increase by \$20,000 or more before June 2013. Although it does not specify that the child support is to be adjusted in accordance with the Guidelines, in my view that is implicit in the MOS.
- [46] It is common ground that the prerequisite for an adjustment prior to June 2013 was met. The judge found that the respondent's income increased from \$269,555 in 2010 to \$299,454 in 2011, and again to \$356,089 in 2012.
- [47] In fairness to the judge, it is not clear whether the appellant expressly identified section 3.b. as the provision relied on in relation to a "review" of support for 2011 and 2012. However, it is evident from the appellant's closing submissions that she relied on that term:

In contemplation of our marriage ending and our establishing separate homes, we entered into the June 30, 2011 Minutes of Settlement (the "MOS") addressing child support with an annual review clause of child support after 2013 but with percentage income variations that would trigger an earlier review.

[Emphasis added.]

[48] Therefore, I would conclude, with respect, that the judge erred in determining that child support for 2011 and 2012 was not put in issue by the appellant at trial. I would accordingly accede to this ground of appeal and increase the arrears of child support by \$28,803 to reflect adjustments to support payable in those years.

3. Costs

[49] In her trial reasons the judge recognized that both parties wished to schedule a further hearing to address the issue of costs. She expressed a preliminary view on costs, saying:

[230] To assist the parties in possibly resolving the matter of costs without the further involvement of this Court, I will offer some remarks. The [appellant] has been substantially successful in this trial. In the normal course, she would be entitled to her ordinary costs in accordance with the tariff.

[231] Evidence was led about actions the [appellant] has taken in this litigation that are concerning. The most egregious is that she forged a signature on a document and appended it to an affidavit. The [respondent], on the other hand, displayed a troublingly casual approach to his financial disclosure obligations, swearing multiple Form F8 financial statements that omitted significant information. There may be other evidence each party intends to lead about the poor conduct of the other in the litigation.

[232] Without prejudging costs, which may be the subject to further evidence and submissions before me, I can advise the parties that this is a case where the likely outcome is that both parties will be required to bear their own costs. On the limited costs-related evidence that was tendered at trial, I was able to discern that both parties at different times engaged in unfair tactics and have misused the process of the courts in order to advance their ongoing dispute with one another. Awarding one party special costs against the other would suggest that one party is more blameworthy in the conduct of this ten-year dispute. Based on what I was able to observe during the 18-day trial, the blame is shared.

[Emphasis added].

[50] Post-trial, the parties were unable to resolve the question of costs and each pursued an award of special costs against the other. However, the respondent abandoned his application at the reopening hearing and submitted instead that the parties should be ordered to bear their own costs. The judge ultimately made that order. The appellant contends on appeal that the judge erred in so deciding.

[51] The judge began her analysis on the costs application with the general principle that the appellant, as the substantially successful party at trial, would ordinarily be entitled to costs "absent other considerations". The judge found, however, that three circumstances justified depriving the appellant of her costs in the present case.

- [52] First, the appellant admitted to forging a signature on a letter she attached as an exhibit to one of her affidavits. She submitted there was nothing reprehensible about that conduct because the signed letter existed--she simply had not been able to find the signed version when she prepared her affidavit. Indeed, appellant's counsel at the reopening hearing stated that the letter had "since been found". The judge dismissed that submission, however, noting that it was unsupported by evidence. In addition, the judge accepted the sworn evidence of the putative author of the letter, Mr. Nou, denying that he had ever signed such a letter. The judge went on to say:
- [87] However, even if Mr. Nou did sign a version of the letter, the conclusion the Court must draw from the [appellant]'s behaviour is the same. By forging his signature and knowingly appending a letter containing a forged signature to her affidavit, the [appellant] intentionally deceived the Court.
- [88] Like Ballance J. in Cardwell, I am of the view that, when a party is intentionally deceitful with the court, it is not material whether the matter about which they were deceitful was large or small in the context of the issues that the court had to determine in the proceeding. Rather, when a party intentionally deceives the court, they engage in conduct that "is disdainful of the judicial process and is aimed at undermining it." This is no small matter.
- [53] Second, the appellant breached an order not to discuss the litigation with the children. The judge referred to a number of examples which established that the appellant contravened that order.
- [54] Third, the appellant engaged in incendiary and inappropriate communications with opposing counsel in which she called into question their professionalism and made misconduct allegations against them.
- [55] On appeal, the appellant challenges the second and third findings of misconduct on her part. She contends the findings should be set aside because the judge relied on the respondent's affidavit materials even though they were filed late, which prevented her from preparing a full response to his allegations. The appellant also says the judge erred by addressing costs using affidavit evidence, submitting that in-person evidence was necessary to adequately address the disputed facts.
- [56] In my view, it was open to the judge to accept late-filed affidavit material, and to limit the parties to affidavit evidence without cross-examination in keeping with her responsibility to manage the proceedings efficiently. The parties had already consumed a great deal of court time and incurred what the judge described as a "crippling financial toll": RFJ1 at para. 1. The respondent had initially contemplated his application for special costs against the appellant taking almost as long as the original trial.
- [57] The appellant points to one of the examples of her contact with the children in contravention of the order not to involve them in the litigation, contending that example actually reflects a contravention by the respondent. I note however that at the hearing, the

appellant did not deny that she had repeatedly discussed litigation matters with the children. The appellant's written submissions were found by the judge to demonstrate "a troubling lack of concern for the very serious reasons behind these kind of conduct orders, and the consequences of them not being followed". She referred to the following passage from those submissions:

Orders of this nature are of course easy to grant but very difficult to invigilate in the crucible of daily life. That is particularly so with teenagers who become inquisitive about the disputes that exist between their parents.

- [58] The appellant attributed the tone of her communications with the respondent's lawyers to the failure of the respondent and his lawyers to disclose financial information in compliance with their legal obligations. She describes her correspondence as "carefully" written and "professional". The judge did not agree. I can see no error in her characterization of the appellant's communication with opposing counsel as "incendiary and inappropriate". Nor do I see error in the judge's conclusion that the appellant's repeated setting down of applications without consultation was part of an intentional litigation strategy.
- [59] I turn now to the appellant's argument that the judge failed to give effect to the egregious behaviour of the respondent who for years failed to disclose his retirement savings plan with RBC, called the deferred share unit program ("DSU"). She contends that the judge erred in refusing to award special costs against the respondent given the magnitude of the respondent's reprehensible conduct in this regard.
- [60] In my view, this ground of appeal can be addressed summarily. The judge was alive to the magnitude of the respondent's breach of the rules and fully considered and addressed that conduct: RFJ2 at paras. 104-116. She found his failure to disclose the DSU to be "a dereliction of his responsibilities to the [appellant] and to the Court". She regarded his conduct as egregious enough to have warranted depriving him of his costs had he been substantially successful in the litigation. Ultimately, however, the judge concluded that the respondent's decision not to disclose the DSU statements "was not deliberately deceitful" because he erroneously believed the DSU was not relevant since it had been acquired post-separation.
- [61] Costs orders are highly discretionary. The judge had the benefit of observing the parties' conduct over the course of a lengthy trial. She adopted the words of Justice Stromberg-Stein in *Bhopal v. Bhopal*, 1997 CanLII 4223 (B.C.S.C.) at para. 10, finding that "[b]oth parties acted in a manner that considerably protracted, complicated, and confused the trial and the balance achieved in the ultimate judgment would be upset by an award of costs to one party".
- [62] In summary on this ground of appeal, there is in my view no basis upon which this Court could interfere with the judge's conclusion that "the fairest allocation of costs in the circumstances, given the behaviour of both parties, is for each party to bear their own costs."

Disposition

[63] I would allow the appeal only to the extent of increasing the arrears of child support payable by the respondent to the appellant by \$28,803. As success has been divided, the parties should bear their own costs of the appeal.

"The Honourable Madam Justice Fenlon"

I AGREE:

"The Honourable Mr. Justice Hunter"

I AGREE:

"The Honourable Mr. Justice Voith"

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