

CANADA / JUDGMENT

K.C.W.G. v. K.M.C.

2024 BCSC 1966

COURT

Supreme Court of British Columbia

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2024 BCSC 1966 K.C.W.G. v. K.M.C.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

K.C.W.G. v. K.M.C.,

2024 BCSC 1966

Date: 20241025

Docket: E181940

Registry: Victoria

Between:

K.C.W.G.

Claimant

And:

K.M.C.

Respondent

Before: The Honourable Justice K. Wolfe

Reasons for Judgment

Counsel for the Claimant:

G. Fogarty-Greenshaw

Counsel for the Respondent:

K. Gale

Place and Date of Hearing:

Victoria, B.C.

October 8-9, 2024

Place and Date of Judgment:

Victoria, B.C.

October 25, 2024

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Introduction and scope of reasons

- [1] The claimant father (the "Father") and the respondent mother (the "Mother") filed competing notices of application seeking to vary existing orders about parental responsibilities and parenting time in respect of their eight-year-old child (the "Child"). Among other things, the parties disagree on where the Child should attend school and

which extra-curricular activities he should participate in. The Mother also seeks to vary a May 13, 2022 final order (the "Funt Order") respecting child support, both retroactive to June 1, 2022 and prospectively, based on the parties' actual incomes rather than those previously imputed to them. In addition, the Mother seeks related adjustments to s. 7 expenses and the imposition of a fine against the Father. The Father agrees child support must be reviewed, but says the Mother remains under-employed and any change to child support should be more limited (in duration and amount) than the Mother seeks.

- [2] In their respective notices of application, each party sought exclusive decision-making authority over schooling and extra-curricular activities for the Child. In the alternative, the Father sought the appointment of a parenting coordinator to assist the parties with decisions about schooling and extra-curricular activities. The evidence filed in support suggested the Child had communicated different wishes to each parent. As a result, in response to the Father's application, the Mother pivoted to request that the issues respecting schooling and extra-curricular activities be adjourned generally to permit the parties to obtain a "views of the child" report under s. 211 of the Family Law Act, S.B.C. 2011, c. 25 [FLA]. The Father opposed both the adjournment of the parenting issues and the appointment of a s. 211 report writer, but abandoned his request for exclusive decision-making authority in favour of solely seeking a parenting coordinator.
- [3] Given the shifts in the parties' positions, I asked counsel to address the adjournment request first. After hearing submissions, I delivered brief oral reasons on the afternoon of the first day. I ordered the parties to jointly retain a s. 211 report writer to prepare a report on the Child's views regarding schooling and extra-curricular activities, and provided directions about certain factors to be considered by the report writer. I also ordered the parties to share the costs of the report equally. I adjourned the balance of the parties' applications respecting parental responsibilities and the Child's schooling pending receipt of the s. 211 report.
- [4] As I indicated to the parties during the hearing, after receipt and review of the s. 211 report, it remains open to the parties to agree on where the Child should attend school and which extra-curricular activities he should participate in. In the absence of such agreement, the parties are at liberty to return to court respecting those issues. During the hearing, I briefly canvassed if the parties wished me to remain seized of the matters that were adjourned, but the discussion did not conclude. Recognizing that new or amended application materials may be required for any further hearing, and there may be urgency to future applications, I decline to seize myself. Instead, if they so choose, either party may submit a request to appear before me for my consideration.
- [5] In their respective applications, the parties sought additional orders regarding disclosure of information about health and dental claims for the Child, as well as minor adjustments to existing parenting orders respecting video-calls with the Child and the summer holiday parenting schedule. During the hearing, the parties raised additional concerns about parental attendance at field trips and the Child's school during the other party's parenting

time. With the assistance of counsel over the course of the two days of hearings, the parties reached agreement on each of those matters, allowing orders to be made by consent. I am grateful to both counsel for their work in reaching those agreements and commend the parties for cooperating on those issues.

- [6] The outcome of those efforts and the results of my oral ruling were captured in a formal order which I signed on the bench on October 9, 2024. I will not address those issues further, other than to note that term 8 of my October 9, 2024 order varies and wholly replaces both term 17(a) of the Funt Order and term 15 of the subsequent September 29, 2023 order of Justice Jones (the "Jones Order") in respect of parenting time during summer vacation.
- [7] Accordingly, the remainder of these reasons focus on the Mother's application to vary child support and the sharing of s.7 expenses retroactively and prospectively and for an order that the Father pay a fine for breaching the Jones Order. To protect the privacy and well-being of the Child, I have initialized the names of the parties in the style of cause and anonymized certain identifying details in this judgment.

Background

- [8] The parties began living together in a marriage-like relationship around April 2016 and separated in January 2018. The Child is their only child together; he was born in June 2016. Both parties have re-partnered since separation. The Mother has a second child with her new partner, and is expecting a third child.

The existing orders

- [9] The parties attended a four-day trial before Justice Funt in May 2022. Neither party was represented by counsel. On May 13, 2022, Justice Funt delivered oral reasons for judgment. The Funt Order, dated May 13, 2022 and filed May 20, 2022, addresses guardianship and parental responsibilities, parenting time (both regular and for holidays and special occasions), child support (including reviews thereof), communication and costs. All other claims arising from the parties' relationship were dismissed.
- [10] The reasons for judgment underlying the Funt Order were not published and no transcript has been ordered. However, for purposes of the present application, it is agreed that Justice Funt imputed income to the Mother consistent with the earning capacity of a junior environmental scientist; the Mother had graduated from Royal Roads University in late 2021 with a Bachelor of Science in Environmental Science. Beginning in January 2022, while seeking employment in the field of environmental science, the Mother worked part-time as a hairdresser and stylist. It appears Justice Funt imputed income to the Father based on his 2019 and 2020 earnings with the Canadian Forces.
- [11] With respect to child support and s. 7 expenses, the Funt Order can be summarized as follows:

- a) the Father is deemed to have an annual income under the Federal Child Support Guidelines, SOR/97-175 [Guidelines] of no less than \$75,000 and the Mother is deemed to have an annual Guidelines income of no less than \$60,000;
 - b) beginning June 30, 2022 and until June 1, 2024, the Father will pay the Mother \$150 per month (based on a week-on, week-off shared parenting schedule and the parties' incomes);
 - c) beginning June 30, 2022 and until June 1, 2024, the parties will share s. 7 expenses equally; and
 - d) starting June 2024, the parties will conduct an annual review and will adjust child support and the sharing of s. 7 expenses based on changes in the parties' respective Guidelines incomes, with any changes to take effect July 1st of the review year (the Funt Order also requires an exchange of financial information to facilitate the annual review).
- [12] The parties returned to Court in late September and early October 2023 on the Father's application to address further parenting issues, including certain modifications to the Funt Order. The Mother was represented by her current counsel; the Father was self-represented. After several non-consecutive days of hearings, on October 3, 2023, Justice Jones pronounced the Jones Order (which is dated September 29, 2023).
- [13] The Jones Order does not address the table amounts for child support under the Guidelines, but does address s. 7 expenses. Term 11 of the Jones Order specifies which expenses qualify as s. 7 expenses, and term 12 establishes a process and timeline for reimbursement of such expenses. Relevant to the Mother's request that the Father pay a fine, the Jones Order lists specific extra-curricular activities for the Child, establishes a process for reviewing them, and sets a requirement for prior written consent before enrolling the Child in an activity during the other party's parenting time. All terms of the Jones Order were made by consent. The reasons underlying the Jones Order were not published and no transcript has been ordered.

Events since the Funt Order

- [14] Under the Funt Order, the parties share week-on, week-off parenting of the Child. There is no dispute that from June 30, 2022 to May 2024, the Father paid the Mother \$150 per month in child support, as required by the Funt Order, for a total of \$3,600 in child support. In May 2024, the parties exchanged financial information to facilitate the review of child support under the Funt Order. The Father paid \$150 in child support for June 2024. As there was no request to adjust child support before July 2024, the Father paid a further \$150 for child support in July 2024. However, as the terms of the Funt Order did not specify an amount of child support beyond June 1, 2024, the British Columbia Family Maintenance Agency ("BCFMA") advised they are unable to collect further child support payments. This may explain why BCFMA labelled the Father's July 2024 child support payment as a payment for "soccer".

- [15] The Mother says that around the time the Funt Order was made, or shortly after, she discovered she was pregnant with her second child. Her second child was born prematurely in late October 2022, requiring time in hospital. The Mother took maternity leave until September 2023.
- [16] The Mother says she has attempted to secure work in her field, but has been unsuccessful in doing so. She says there are not many positions in her field in Victoria, and the Funt Order prohibits her from leaving Victoria. The Mother deposes she has applied for many different positions and has interviewed for multiple positions (including second interviews in several cases), but she has been unable secure a position. She is presently unemployed and receiving employment insurance. The Mother says that because of her second child and the inability to secure a position in her field, her actual income over the past two years has been significantly lower than the \$60,000 imputed to her under the Funt Order.
- [17] In addition, shortly before this hearing, the Mother disclosed she is pregnant with her third child. She expects she will again take time off with her new baby, so does not foresee a return to the workforce in the near future, or the ability to earn the kind of income imputed to her under the Funt Order any time soon, if ever. She notes she has never earned that much.
- [18] With the exception of several minor disagreements, the parties have generally paid s. 7 expenses for the Child equally, reimbursing each other under the process established by the Jones Order before the Mother enrolled with the BCFMA in April 2024. One disagreement relating to an orthodontics expense has been resolved. The remaining issues stem from the Father's refusal to pay his share of the Child's soccer expenses on two occasions. However, the Mother says that if income had not been imputed to her, it is likely the Funt Order would have required the parties to share s. 7 expenses in proportion to their incomes rather than equally.
- [19] The Mother admits she did not request a review of child support or the equal sharing of s. 7 special expenses, or suggest the arrangements were inadequate, before filing her notice of application on August 2, 2024 (the Father was served August 7, 2024). The Mother says when the parties exchanged financial information in May 2024, she realized the Father was paying much less child support than he would have if Justice Funt had not imputed income to her. The parties each filed updated Form F8 Financial Statements for purposes of these applications. The Mother summarized the parties' financial information (as exchanged in May 2024) in her Affidavit #5, sworn July 31, 2024. The parties agree the amounts in following table reflect their respective line 15000 incomes for the past five years:

Year

Father's income

Mother's income

2019

\$74,928

\$15,742

2020

\$74,468

\$17,000

2021

\$85,507

\$1,079

2022

\$77,401

\$23,967

2023

\$91,558

\$12,619

[20] In terms of compliance with the Jones Order, the Mother says the Father unilaterally enrolled the Child in baseball in spring 2024 and did not tell her. The parties had attempted the review required by the Jones Order but failed to agree on extra-curricular activities either between themselves or through mediation. The Mother also alleges that without her consent, the Father temporarily imposed a "parallel parenting" regime, under which he asserted each parent could take the Child to the activities that parent wished during their parenting time, and was not required to support the Child's attendance at other activities or contribute to their costs. As a result, the Mother says the Father refused to support the Child in soccer.

[21] The Father says that in imputing income to the Mother, Justice Funt considered not just that she had recently earned her second degree, but also that she misrepresented her work history and income. The Mother disputes the latter statement. The Father allows that the Mother may not have been in a position to work immediately following the birth of her second child, but says there was time before the birth, and it has been at least a year since the second child turned one. The Father says the Mother has a history of "deliberate underemployment and unemployment" and has not provided sufficient evidence of her efforts to find a job commensurate with her skills and education. He notes that in each of the last five years, the Mother has earned well below the current approximate annual income of \$35,000 under minimum wage.

- [22] The Father admits his income was significantly higher in 2021 and 2023 than the amount imputed, but says his 2023 income includes some retroactive pay from 2022. He expects his income in 2024 to be approximately \$88,000. He also says that in addition to paying child support, he has solely paid for the Child's childcare during the school year and for summer camps. He has also opened and contributed \$334 per month to a Registered Education Savings Plan for the Child.
- [23] The Father agrees child support should be adjusted, but says under the Funt Order, neither party was obligated to make adjustments before June 2024. He emphasizes the Mother knew her own income levels prior to the exchange of financial information in May 2024, yet did not raise the adequacy of child support and the sharing of s. 7 expenses with the Father until August 7, 2024. The Father says this bears on the Mother's claim for retroactive support.
- [24] Regarding extra-curricular activities, the Father says he initiated discussions in November 2023 ahead of the January 2024 review required by the Jones Order. He suggesting swimming and baseball. He says the parties agreed the Child should attend swimming but when they could not agree on a date and location, the Mother unilaterally enrolled the Child in swim lessons at a location and on a day convenient only to her. The Father agrees mediation was not successful, but says following the failed mediation, the Mother sent him a bill for soccer despite the Child's activities not yet having been settled. The Mother says the Child's activities were to remain as set by the Jones Order until changed by agreement.
- [25] The Father provided evidence the Mother has not facilitated the Child's full attendance at karate during her parenting time. The Mother does not deny this, but says she and the Child agreed he could attend fewer karate classes during her parenting time to provide him a break. The Father says when he enrolled the Child in baseball, he was unrepresented, had tried unsuccessfully to reach agreement on extra-curricular activities (including making proposals to which he received no response), and did not want the Child to lose out on an opportunity he had expressed interest in for two years. The Father admits it may not have been the best course of action to do so, despite his intention to prioritize the Child's best interests.

Issues

- [26] The questions in issue are as follows:
- a) Should the Funt Order be varied in relation to child support and s. 7 expenses? This depends on whether the imputed incomes of the parties should be varied and if so, as of what point in time.
 - b) Did the Father breach the Jones Order in a manner that warrants a fine?

The positions of the parties

- [27] The Mother asks to vary the Funt Order respecting child support and s. 7 expenses primarily because of the birth of her second child, but also her inability to find employment in her field. She says there has been a material change in circumstances and the variation should be retroactive to June 1, 2022 when child support and sharing of s. 7 expenses began to be based on imputed incomes. She says when she received financial disclosure in May 2024, she realized the extent of the differences between the parties' actual incomes compared to the imputed amounts.
- [28] The Mother asks that the terms imputing income to each party and requiring the Father to pay \$150 per month be replaced with terms requiring child support from June 1, 2022 to May 2024 to be payable based on the parties' actual incomes from the previous tax year. Further, she asks that beginning June 2024, child support be payable based on the parties' line 15000 income from the previous tax year, with an annual review for adjustments. If her approach is adopted, the Mother calculates the Father owes her retroactive child support arrears of \$12,684 from June 1, 2022 to May 2024. She seeks an order for payment of that amount, as well as an order requiring the Father to pay her \$850 per month beginning June 1, 2024.
- [29] With respect to s. 7 expenses, the Mother asks to vary the term of the Funt Order so that the parties pay s. 7 expenses in proportion to their incomes beginning June 1, 2022. If so varied, the Mother says the Father owes her arrears of \$1,775.69 and she seeks an order to that effect. In the alternative, the Mother seeks an order that beginning June 1, 2024, the parties share s. 7 expenses in proportion to their actual income from the previous tax year (foregoing the alleged arrears).
- [30] Finally, the Mother says the Father knowingly breached the terms of the Jones Order by unilaterally enrolling the Child in baseball and refusing to commit to soccer. The Mother says this is a clear and intentional breach. The Jones Order established specific extra-curricular activities for the Child, required the parties to agree in writing to any changes and prohibited either party from enrolling the Child in any activity occurring within the other party's parenting time without prior written consent. As baseball was not among the specifically listed activities and had practices each week, it was captured by the terms of the Jones Order. The Mother says the Father ought to have applied to vary the Jones Order rather than just enrolling the Child in baseball, and absent agreement to change soccer, the Father was required to support it.
- [31] The Mother recognizes the Father's breach was not the kind of extreme example for which the Court has ordered the maximum fine of \$5,000. However, as extra-curricular activities have been such a point of contention, the Mother says the Father's deliberate decisions require sanction. In submissions, the Mother suggested a fine of \$1,000.
- [32] With respect to child support and s. 7 expenses, the Father admits the Funt Order required a review as of June 2024 and accepts that his income has increased. He effectively frames the two issues as whether to order retroactive support before the June 2024 review period and

whether to set aside the imputation of income to the Mother. On the first issue, the Father says the Mother has not explained the delay in seeking to vary support. Both the impact of the birth of her second child, and to a lesser extent, her inability to find employment in her field, were known by late 2022. The Father says the Mother did not require financial disclosure from him to know that her income differed from the imputed amounts. The Father also says making an award retroactive to June 2022 would cause hardship. The Father says any change should be made from the presumptive date of retroactivity - namely, August 7, 2024, when the Mother provided notice through her application.

- [33] On the second issue, the Father says it would be inappropriate to use the Mother's actual income, as she has not made sufficient efforts to secure work consistent with her two degrees and her experience as a hair stylist. In addition, the Father says the Mother's financial information appears incomplete. The Mother claims to earn less than \$13,000 per year, while reporting annual expenses of approximately \$80,000, yet her debts do not align with the anticipated shortfall. Although the Mother admits her parents assist her with legal expenses, and her partner subsidizes her income, the extent of that assistance remains unclear.
- [34] While the Father accepts the Mother has made personal choices to have a second and third child with her new partner, he says he should not have to bear the financial burden of choices that do not involve him or the Child for whom he is responsible. As a result, he says the imputation of income to the Mother under the Funt Order should be maintained. In the alternative, if the Court is inclined to reduce the income imputed to the Mother, the Father says it should only be reduced temporarily and not below \$40,000, and should be increased again to \$60,000 a year after her third child is born.
- [35] Finally, the Father says the Mother's request that he pay a fine for breaching the Jones Order ignores her own misconduct in unilaterally enrolling the Child in swimming. He says his actions regarding baseball were not intended to breach the Jones Order and did not impose on the Mother's parenting time. The Father says, viewed objectively, his conduct does not amount to a breach or warrant a sanction, but if the Court determines otherwise, any fine or penalty should be nominal.

Analysis

Issue 1: Should the Funt Order be varied in relation to child support and s. 7 expenses?

Legal principles

- [36] The Funt Order was made under the FLA, which presumes that child support is payable according to the Guidelines, subject to the Court's discretion to order otherwise. Under s. 3(1) of the Guidelines, the amount of a child support order consists of the applicable table amounts (which are based on the number of children and the income of the payor parent) and any amount determined for s. 7 expenses. In shared parenting situations, where both

parents are "payors", the analysis under s. 9 of the Guidelines involves more than a straight set-off of each parent's table amount, but a Court will often exercise its discretion to require that support be paid based on the set-off amount: *L.C.C. v. C.B.C.*, 2020 BCSC 627 at paras. 13-14.

[37] Section 152 of the FLA addresses variation of child support orders:

Changing, suspending or terminating orders respecting child support

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

- (2) Before making an order under subsection (1), the court must be satisfied that at least one of the following exists, and take it into consideration:
 - (a) a change in circumstances, as provided for in the child support guidelines, has occurred since the order respecting child support was made;
 - (b) evidence of a substantial nature that was not available during the previous hearing has become available;
 - (c) evidence of a lack of financial disclosure by a party was discovered after the last order was made.

[38] The Mother's application engages s. 152(2)(a) of the FLA.

[39] The concept of a material change in circumstances, which also applies in the spousal support context, has been described as a change that is "substantial, unforeseen, and continuing": *Linn v. Alguire*, 2024 BCSC 914, at para. 34, citing *S.M.R.C. v. S.H.C.*, 2014 BCSC 2197 at para. 11. At para. 20 of *Willick v. Willick*, 1994 CanLII 28 (SCC), [1994] 3 S.C.R. 670, the Supreme Court of Canada described a material change as:

a change, such that, if known at the time, would likely have resulted in different terms. The corollary to this is that if the matter which is relied on as constituting a change was known at the relevant time it cannot be relied on as the basis for variation.

See also *Young v. Young*, 2019 BCSC 1953 at para. 42.

[40] Under s. 14 of the Guidelines, among other things, a change in income that would result in a party paying a different amount under the applicable table will constitute a change in circumstances. The changes in circumstance set out in the Guidelines have been expressly incorporated into s. 152(2)(a) of the FLA. To be a material change in circumstances, a change in income must be significant, must have some degree of continuity and must be real and not one of choice: *Colucci* at para. 61.

- [41] The party seeking a variation bears the onus to prove a material change in circumstances: Linn at para. 35, citing Willick at para. 31; see also K.P.B. v. A.S.R., 2016 BCCA 382 at para. 20, citing L.M.P. v. L.S., 2011 SCC 64 at paras. 31-33.
- [42] Once a party establishes a past material change in circumstances, that triggers a presumption in favour of retroactively increasing (or decreasing) support from a certain date: Colucci v. Colucci, 2021 SCC 24, at paras. 6, 71-73, 113-114. The presumptive date of retroactivity is the date the party provided effective notice to the payor by broaching the topic of support, but it will generally not extend back more than three years prior to formal notice, unless the payor engaged in blameworthy conduct: D.B.S. v. S.R.G., 2006 SCC 37, at paras. 121-123; Colucci at paras. 113-114.
- [43] The Court retains discretion to depart from the presumptive date of retroactivity where the result would otherwise be unfair. The exercise of that discretion is guided by the four D.B.S. factors: a) a reasonable excuse for why support was not sought earlier; b) the conduct of the payor parent; c) the circumstances of the child; and d) the potential hardship occasioned by a retroactive award: Colucci at paras. 71, 96, 113-114; D.B.S. at paras. 94-116. None of the D.B.S. factors are decisive; the Court maintains significant discretion to determine retroactive support, which is neither "rare" nor "exceptional": Berlando v. Berlando, 2024 BCSC 11, at para. 43, citing D.B.S. at para. 99.
- [44] In some cases, particularly when the payor parent engages in blameworthy conduct, the date when the increased support ought to have been paid may be a more appropriate date of retroactivity: D.B.S. at paras. 118-124; Colucci at para. 43. Where effective notice is not given, child support should generally be varied back to the date of formal notice: Colucci at paras. 95, 114.
- [45] In determining the parties' incomes for support purposes, s. 19(1)(a) of the Guidelines provides that the Court may impute income it considers appropriate when a parent is intentionally under-employed or unemployed, unless the under-employment or unemployment is required by the needs of a child or by the reasonable educational or health needs of the parent. To impute income to a parent, the Court only needs to determine the income the parent is capable of earning, not that the parent is intentionally unemployed or evading their support obligations: K.P.B. at para. 20, citing Beissner v. Matheusik, 2015 BCCA 308, at para. 44. Imputing income to a payor parent is an inherently discretionary process, not a mathematical exercise: Pousette v. Janssen, 2023 BCCA 176, at para. 48.

Discussion

Material change in circumstances

- [46] As noted, the Mother relies primarily on the birth of her second child as establishing a material change in circumstances. She says if the Court had been aware of her pregnancy, it is unlikely the Court would have imputed the same level of income to her or required the parties to share s. 7 expenses equally. To a lesser extent, the Mother also relies on her inability to secure a position in her professional field, saying if the difficulties she has encountered had been known, the Court would not have imputed the income it did.
- [47] The Mother relies on *K.D. v. N.D.*, 2011 BCCA 513, in support of her position that the birth of a child in a new relationship can constitute a material change in circumstances. The Court of Appeal upheld the chambers judge's conclusion that in the circumstances of that case, "the respondent's pregnancy, particularly the associated medical problems that precluded taking steps toward employment, represented a material change in her circumstances" (*K.D.* at para. 39; emphasis added).
- [48] The Father does not accept that the birth of a child in a second relationship necessarily constitutes a material change in circumstances. He relies on *McCaffrey v. Paleolog*, 2011 BCCA 378, in that regard. At para. 34 of *McCaffrey*, the Court of Appeal noted that whether a birth constitutes a change in circumstances depends on the evidence. The Court of Appeal ultimately held the mother's evidence did not establish a material change in circumstances, either from the birth generally or because her children's needs required her to remain unemployed (thus making her exempt from the imputation of income). The Father also notes that in *McCaffrey*, the mother sought a time-limited suspension of her obligations to pay child support. Here, the Mother appears to seek indefinite relief from the obligation to earn income commensurate with her skills, without any end date or return to work plan.
- [49] The Father concedes, however, that in the two years since the Funt Order, his income has changed. His income for 2021 was more than \$10,000 higher than the imputed amount; this does not appear to have been in evidence before Justice Funt. While his 2022 income only exceeded the imputed amount by approximately \$2,400, the Father's 2023 income was again more than \$10,000 over the imputed amount (even accepting that it includes some retroactive pay from 2022). Further, the Father anticipates his income will continue to exceed the imputed amount. Coupled with the mandatory review ordered by Justice Funt for June 2024, the Father agrees that an adjustment to child support and the sharing of s. 7 expenses is warranted. Counsel's submissions suggested the Father may have increased his support payments after August 2024 in recognition of this reality. As a result, the real points of dispute appear to be the date from which any variation should be made effective and whether the income imputed to the Mother should be maintained.
- [50] As the parties agree there is a need to revisit support obligations, albeit for different reasons, I am satisfied there is at least some basis on which to vary the Funt Order. While the evidence before me is not detailed, I accept (and the Father does not appear to strenuously deny) that the birth of the Mother's second child, who was premature, had a substantial

impact on her ability to seek employment and earn income for at least a period of time. I also accept that impact was not foreseen at the time of the Funt Order and lasted at least until she finished her maternity leave in September 2023. Since the Father's income increased during the same timeframe and is expected to remain higher than the imputed amount, I am satisfied there are at least two factors that could constitute a material change in circumstances. Had either factor been known at the time of the Funt Order, it is likely the terms that impute income and establish support obligations would have been different.

Date of retroactivity

- [51] With respect to the date for the variation, the Mother concedes she did not broach the topic of adjusting support before she served her notice of application. Her counsel admitted she did not even "hint" the existing support order was inadequate, but also suggested there would have been little point given the parties' history of conflict. I do not agree. The fact that the other party might rebuff a suggestion to revisit child support does not save a parent from the consequences of failing to raise the issue. In the absence of an effective date of notice, the date of retroactivity is generally the date of formal notice. In this case, that would be August 7, 2024.
- [52] The Mother says the Court should depart from the date of formal notice based on the D.B.S. factors. She says she did not seek to vary support earlier for two reasons: a) she was following the court-imposed timeframe for review under the Funt Order; and b) she did not appreciate the differences in income until the parties exchanged financial information in May 2024. The Mother does not allege any blameworthy conduct by the Father. She acknowledges he paid both support and (with two exceptions) s. 7 expenses, and disclosed his financial information, all as required by the Funt Order. She does not suggest she asked for earlier disclosure or gave any indication the review process under the Funt Order was insufficient.
- [53] The Mother also concedes there is no evidence of disadvantage to the Child, but says there is equally no evidence the Father will suffer hardship if required to pay increased support going back two years. The Child has a right to support commensurate with his parents' incomes. The Mother submits it is appropriate to order retroactive support back to June 1, 2022, to rectify all support obligations that were paid based on imputed incomes that were inaccurate for both parties.
- [54] The Father says the Court should not depart from August 7, 2024. He says the Mother has not provided a reasonable explanation for the delay. Her application is not based on a change in his income, but rather on the birth of her second child impacting her own economic situation. Further, the Father says under a shared parenting regime, the Mother is also a "payor". Her application thus amounts to a request to reduce her own support obligations (triggering an increase in his obligations), because she did not earn the income imputed to her. In this regard, the Father says the Mother has been aware since at least October 2022 (when her child was born, if not before) that her income would be lower. Her awareness did

not depend on receipt of his financial information, so that is not a reasonable explanation. As well, since the Mother did not raise the issue earlier, the Father says he was unable to assess and attempt to respond to the situation as it unfolded.

- [55] The Father agrees neither party is guilty of blameworthy conduct. Failure to disclose financial information is often considered blameworthy conduct, and both the case law (Colucci) and the FLA indicate a positive obligation to provide information. However, the Funt Order expressly set June 2024 as the first review, and June 1, 2024 as the deadline by which financial information was to be exchanged. While the parties were not precluded from providing information earlier, I agree it was reasonable for both parties to believe compliance with the Funt Order was sufficient. In addition, the Father says the fact that he has gone beyond his financial obligations under the Funt Order militates against an earlier date of variation.
- [56] The Father agrees there is no evidence the Child has been disadvantaged by the Funt Order. By all accounts, it has met his needs. Lastly, the Father says he would suffer hardship if support were varied back to June 1, 2022. His Form F8 demonstrates that the annual expenses for which he is solely responsible already exceed his annual income. As there are no excess funds available, the Father says imposing a retroactive award back to June 1, 2022 would reduce the funds available to his household and could reduce the quality of the Child's life when with him. He says there is no evidence the Mother will suffer hardship if the date of formal notice is used.
- [57] In my view, the D.B.S. factors do not support extending the date of retroactivity back to June 1, 2022 for either child support or s. 7 expenses. There is a disconnect between the Mother's explanation for the delay in seeking a variation and the basis on which her application was brought. The Mother's ability to ask was not dependent on receiving the Father's financial information. On the contrary, the Mother was the one uniquely in possession of the information on which she grounds her claim for variation - i.e. the impact of her second child's birth, and to a lesser extent, her stated difficulties in finding employment in her field. While I appreciate the potential confusion from the Funt Order having set the first review after two years rather than one, I am not satisfied with the Mother's explanation overall.
- [58] There is no evidence the Child has experienced hardship or is currently in need as a result of the support payments not having been higher. Nor is there any evidence of blameworthy conduct. Instead, the Father's evidence demonstrates a willingness to provide financial support for the benefit of the Child beyond what the Funt Order requires. I find this militates against a significantly earlier date. Lastly, the Father has provided some evidence that extending the variation date back to 2022 would negatively impact his ability to manage his financial affairs.
- [59] That said, I am not satisfied August 7, 2024 is the appropriate date. The Funt Order contemplated that child support and the sharing of s. 7 expenses would remain constant until July 1, 2024. The parties' conduct suggests they accepted this. As well, the Funt Order

required the parties to exchange financial information by June 1st, but gave each party a further 90 days after that exchange of information to request a change to support or s. 7 expenses. If the parties had followed the review process under the Funt Order, and exchanged their information near the June 1st deadline, either party could have requested a change in support until just before the end of August. Regardless of when such a request was made, the Funt Order expressly stated that the adjustment to the child support and sharing of s. 7 expenses would "take effect on July 1st of the review year" (Funt Order, term 24).

- [60] Accordingly, on August 7, 2024, if the Mother had made a request under the Funt Order to vary support rather than serving her notice of application, any adjustment would have taken effect July 1, 2024. Given both parties' reliance on the review process set out in the Funt Order, and the Child's interest in a fair standard of support being paid, in my view, it is more appropriate to preserve the adjustment date under the Funt Order rather than to set a new one. Accordingly, I find the child support and sharing of s. 7 expenses should be adjusted effective July 1, 2024.

Quantum of variation

- [61] The next step is to consider the parties' incomes to determine both the quantum of support to be paid and how expenses are to be shared. As noted, the Funt Order imputed income to the Father of \$75,000 and \$60,000 to the Mother. The former appears based on the Father's earnings from the Canadian Forces for 2019 and 2020; the latter was based on the earning capacity of a junior environmental scientist, for which there was presumably some evidence at trial.
- [62] The Funt Order required the parties to exchange financial information ahead of June 1, 2024 to allow support to be adjusted. As is common practice, support for the upcoming year was to be based on the previous year's tax information, subject to the term imputing a minimum level of income. Both parties provided their financial information as required.
- [63] The Mother asks the Court to cancel the imputation of income to both parties so their Guidelines incomes are based on their previous year's tax information. The Father opposes that relief.
- [64] Starting with the Father, since 2021, his actual income has surpassed the level of imputed income; this is expected to continue. In the circumstances, as the Funt Order imputes income to the Father of "no less than \$75,000", that term has no practical impact on the Father's Guidelines income and should be cancelled. I make that order. Based on the evidence, I also find the Father's Guidelines income for 2024 is \$91,558.
- [65] Turning to the Mother, question is whether to cancel her imputed income altogether, as she asks, or, as the Father requests, whether to preserve it, either at the same level or a temporarily reduced one. As noted, the Mother says she has been unable to secure remunerative employment at the level of income imputed to her. Further, given her current pregnancy, the Mother does not expect to earn that level of income for "several more years

to come"; she has been absent from the work force since 2022 and says she will be unable to re-enter it "in the near future".

- [66] The Father notes that, after four days of trial, Justice Funt found it appropriate to impute income of \$60,000 to the Mother. The Father concedes the Mother has not earned that level of income since the Funt Order was made, and appreciates she was on maternity leave from October 2022 to September 2023. Still, the Father says the Mother has a duty to support the Child, regardless of her new family obligations, and at least since September 2023, she has not taken reasonable steps to earn income commensurate with her skills and qualifications.
- [67] The evidence indicates the Mother has been and continues to receive employment insurance, but that evidence is limited to the aggregate numbers listed in both the Mother's updated Form F8 and her tax returns and notices of assessment; there are no details. The Father's application response also highlighted the Mother's failure to provide any documentation of her job searches. A month after the Father's responding materials were filed, the Mother filed a further affidavit deposing she has been "unable to obtain records of [her] job applications". The Father submits this is not believable. If, as she says, the Mother applied online through platforms like indeed.com, linkedin.com and government websites, the Father says there should at least be emails confirming receipt of her applications. There should also be communications regarding the interviews the Mother says she has had. In the absence of any corroborating evidence, the Father invites the Court to draw an adverse inference about the Mother's efforts to find work.
- [68] Further, the Father says that unlike in both *K.D.* and *McCaffrey*, the Mother is not seeking a temporary reprieve from her support obligations. She has not provided any plan for childcare or a return to the workforce. Instead, she says she will not be able to work for the foreseeable future, which amounts to an indefinite exemption from her support obligations. For those reasons, the Father says the Mother should continue to be imputed an income of \$60,000. Alternatively, the Father says that for a temporary period (until a year after the birth of her third child), the Mother should be imputed an income of not less than \$40,000.
- [69] As set out above, s. 19(1)(a) of the Guidelines permits the Court to impute income the Court considers appropriate where a spouse is "intentionally under-employed or unemployed", in the sense that they are not earning what they are capable of earning; *Barker v. Barker*, 2005 BCCA 177; *Beissner* at para. 44. In *McCaffrey* (at para. 46) and again in *Beissner* (at para. 44), the British Columbia Court of Appeal confirmed the guiding principles when deciding whether to impute income (adopted from *Donovan v. Donovan*, 2000 MBCA 80, at para. 21). The principles relevant to the present case can be summarized as follows:
- a) A parent has a duty to seek employment to support their child where they are healthy and there is no reason they cannot work, even if the parent cannot obtain interesting or highly paid work, or requires re-training.

- b) The test is what is reasonable for the parent to earn, in light of factors such as their age, education, experience, skills, work availability, freedom to relocate and other obligations.
- c) A court may impute income where a parent is persistently unemployed or under-employed.
- d) A parent can generally not avoid child support obligations by a self-induced reduction of income.

[70] After a comprehensive trial, the Court previously imputed income of \$60,000 to the Mother based, at least in part, on her two degrees and her other skills and qualifications. Those factors have not changed. However, the Mother deposes that work in her field is not readily available in Victoria. While she did not provide corroborating evidence, the Father does not contradict that assertion, and the Funt Order does prevent the Mother from relocating outside Victoria. As a result, I accept there is at least some evidence that less work is available in her field in Victoria than previously anticipated. This represents something of a change.

[71] Still, the Mother has an ongoing positive obligation to seek employment to support the Child, even if she is unable to work in the field she wishes. The Mother did not to return to the workforce in any capacity when her maternity leave ended in September 2023, more than a year prior to this hearing. While I accept she is expecting her third child, there is no evidence that the Mother is unable to work in some capacity before that child is born, or that the particular needs of her second child require her to stay home. In McCaffrey, the Court of Appeal confirmed at para. 49 that a desire to stay home with children is not a sufficient basis on which to exempt a parent from the imputation of income. Further, McCaffrey confirms that even where there is evidence that a child's needs require a parent to remain at home, any period of relief from child support obligations must be reasonable (McCaffrey at para. 58). I do not find an open-ended request for relief from support obligations, with no plan to return to work, to be reasonable.

[72] Nor is this a situation like in K.D. where there was evidence that medical problems arising from the pregnancy prevented the parent from seeking employment. Even with that evidence, in K.D., the income imputed to the parent was only temporarily suspended for nine months.

[73] The Mother is a well-educated individual who also has additional employable skills and experience as a hairdresser and stylist. She has an obligation to earn income to support the Child commensurate with her earning capacity: D.B.S. at para. 54. Her choice to have additional children with her current partner does not relieve her of that obligation: Earle v. Earle, 1999 CanLII 6914 (BC SC) at para. 32.

[74] I accept the Mother was a student until late 2021. However, since graduating with her second degree, and particularly after September 2023, she has not earned anywhere close to minimum wage, let alone an income reasonable for someone with her education, qualifications and skills. In addition, given the number of jobs she says she applied for over

six months, and the number of interviews she says she attended, it is concerning she was unable to provide any documentation. The Courts have refused to accept vague statements in affidavits about job searches when they lack sufficient detail: see, for example, K.P.B. at paras. 10, 21-25. In the circumstances, I find it remains appropriate to impute income to the Mother.

- [75] I agree with the Father that, based on the Mother's education, qualifications and skills, it is appropriate to impute to her an annual income greater than the minimum wage annual income of \$35,000. However, since there is less work available in the Mother's preferred field than anticipated, particularly since she cannot relocate, it is not appropriate to maintain an imputed income of \$60,000. Given that, and in the absence of any information about the expected due date for the Mother's third child, I decline to order a temporary reduction, followed by a restoration to \$60,000. In my view, it is reasonable to conclude the Mother has an earning capacity of at least \$10,000 more than the annual income under minimum wage. On that basis, I impute an income of not less \$45,000 to the Mother for purposes of calculating child support. For clarity, this level of income will continue to be imputed each year unless the Mother earns more (in which case, her actual income will be used) or she successfully applies to vary the imputed amount.
- [76] The parties did not provide the Court with evidence sufficient to permit a full analysis of all the factors under s. 9 of the Guidelines. However, the history of this file does not make it an appropriate case in which to adjourn the child support issues any further. Instead, I exercise my discretion to require child support to be paid by both parties beginning July 1, 2024, based on their respective Guidelines incomes as determined in these reasons, and the resulting set-off amount.
- [77] I have assumed the equal sharing of s. 7 expenses under the Funt Order was based on the fact that the parties' imputed incomes were not that far apart and they exercise shared parenting. Since I have varied the imputation of incomes, it is also appropriate to vary how s. 7 expenses are shared. I order that, beginning July 1, 2024, the parties share s. 7 expenses in proportion to their respective Guidelines incomes.

Issue 2: Should the Court impose a fine?

Legal principles

- [78] Several sections of the FLA permit the Court to impose fines or make other orders to address non-compliance with court orders. For example, s. 228 outlines available remedies when a party fails to comply with a conduct order made under Division 5 of the FLA. The remedies include a fine not exceeding \$5,000. Section 230 of the FLA addresses enforcement generally. Orders under s. 230 may only be made if no other provision applies for enforcing an order (s. 230(1)). As under s. 228, s. 230(2)(b)(iii) also permits the Court to make an order requiring a party to pay a fine not exceeding \$5,000. The Court may also make an order requiring a party to pay an amount not exceeding \$5,000 to or for the benefit of another party, or a

spouse or child impacted by the breach (FLA s. 230(2)(b)(ii)).

- [79] To establish a breach of a court order, the applicant must show: (1) the order was clear and unequivocal about what should or should not be done; (2) the party alleged to have breached the order had actual notice of the order; and (3) the breach was intentional: *T.A.O. v. D.J.M.*, 2021 BCSC 1724, at para. 48.
- [80] A breach must be established on a balance of probabilities: *T.A.O.* at para. 49. Whether there has been a breach is an objective determination for the Court, but a party's subjective intentions can inform the remedy: *C.A.L. v. D.E.L.*, 2018 BCSC 772, at para. 44. The Court may impose a fine or other sanction in situations where the Court considers it necessary to signal that there are consequences to non-compliance: *C.A.L.* at para. 48.

Discussion

- [81] The Mother asks the Court to impose a fine against the Father under s. 230 of the FLA for breaching the extra-curricular activities terms of the Jones Order. At the hearing, the Father submitted the application ought properly to have been brought under s. 228 of the FLA, on the basis that the relevant terms of the Jones Order are conduct orders, rather than parenting orders. I do not agree. Many decisions treat orders relating to extra-curricular activities as parenting orders: see, for example, *M.G.T. v. L.S.R.*, 2024 BCSC 411 at para. 43; and *Apperley v. Apperley*, 2023 BCSC 1621 at para. 56. In any event, the test and available relief are the same. As the Mother's arguments rely on multiple terms of the Jones Order, I am satisfied it is appropriate to proceed under s. 230 of the FLA.
- [82] The Mother says the Father breached the Jones Order both by unilaterally enrolling the Child in baseball (term 10) and by refusing to support the Child's participation in soccer, including financially (terms 7 and 11). The Mother disputes she breached term 10 of the Jones Order when she enrolled the Child in swimming without the Father's consent to the specific location and days. She interprets term 7 of the Jones Order as requiring the parties to keep the Child enrolled in (and to pay for) the specific listed activities unless and until they agree otherwise in writing. As swimming is a listed activity, the Mother says the Father's consent was not required. The Mother concedes the Father's alleged breach is not the kind of egregious and repeated breach found in the cases she referred to (*T.A.O.* and *D.G.T. v. V.J.I.*, 2023 BCSC 1061), but maintains some form of sanction is warranted. The Father disagrees there were breaches and if so, that sanctions are necessary.
- [83] There is no dispute both parties had actual notice of the Jones Order. There is equally no dispute the Father enrolled the Child in baseball in spring 2024 without the Mother's consent (she opposed baseball at that time due to concerns about overloading the Child). For his part, because the Jones Order established an annual review of the Child's activities each January, the Father says he interpreted that as providing the parties a "clean slate" as of January 1, 2024, when extra-curricular activities were to be reviewed and agreed between the parties. At the relevant time, the Father was self-represented. Based on his

understanding, he suggests his actions do not constitute an "intentional" breach.

- [84] As I adjourned the substance of the applications respecting decision-making and extra-curricular activities, I will not conduct an exhaustive interpretation of the Jones Order at this point. Following receipt of the s. 211 report, one or more of the parties may seek further variations of the existing orders regarding extra-curricular activities. However, I do need to briefly examine terms 7 and 10 of the Jones Order to consider the breach issue. In my view, there is a practical tension between them.
- [85] On its face, term 7 lists activities in which the Child is to participate "unless otherwise agreed to in writing". I accept this may be read to mean the parties must continue with these activities unless they agree to something different in writing. On that reading, the Father's deliberate refusal to continue with and contribute to the Child's soccer is more likely than not a breach. However, children's extra-curricular activities are not static; the evidence confirms activities often require re-registration for the next session and, as a result, class days, times and even locations can change. While term 7 of the Jones Order specifies the type of activity the Child is to be enrolled in, it does not (nor practically could it) specify the logistical details.
- [86] Term 10 of the Jones Order states neither party will enroll the Child in any activity that falls within the other party's parenting time without advanced written consent from the other party. As the parties have a week-on, week-off parenting schedule, any recurring activity will impact both parties' parenting time and prior written consent is thus required to enrol the Child. The Father's deliberate enrolment of the Child in baseball would therefore be a breach. However, I find term 10 can also fairly be read as requiring the parties to agree on the logistical details of enrolment for an activity listed in term 7 - such as which day the Child will attend swimming at which location. Accordingly, by not obtaining the Father's consent before enrolling the Child in a particular swimming lesson at a particular location, the Mother's actions would also be a breach.
- [87] The Father suggested the Mother was likely trying to do the same thing with swimming as he was with baseball, namely, ensure the Child did not miss out on an opportunity. As noted, a subjective intent (for example, to address the Child's needs and interests) goes to remedy, not whether there is a breach. The Father also says the Mother did not facilitate the Child's full attendance at karate during her parenting time. While the Mother explained why she and the Child agreed he could attend fewer classes when with her, she does not suggest she discussed that modification with the Father. He does not seek a fine against the Mother for these actions, but says the fact that both parties took steps without the other's consent, but with the Child's interests at heart, weighs against imposing a sanction on him alone.
- [88] In considering the evidence and submissions before me, and based on my objective interpretation of the Jones Order, I find it more likely than not that both parties breached the terms of the Jones Order as each intentionally enrolled the Child in an activity without the other's consent. In my view, these breaches are minor and flow directly from the parties'

differing interpretations of the Jones Order. I accept the intent of each party was to provide the Child with opportunities, and I acknowledge the Father's admission that his decision to enrol the Child in baseball was not the best course of action. In the circumstances, I decline to impose a fine or other penalty on the Father for unilaterally enrolling the Child in baseball.

- [89] However, I exercise my discretion to order that the Father pay the Mother his portion of the costs of the Child's soccer that he previously refused to pay in October 2023 and March 2024. The Father initiated negotiations about extra-curricular activities in November 2023 in preparation for the review under the Jones Order; the parties were unable to reach agreement even after mediation. The evidence confirms the Father's refusal to pay in March 2024 was connected to the ongoing dispute, but there is no evidence about why the Father refused to pay in October 2023. In any event, I find the Father's deliberate refusal to contribute to soccer (which is a listed activity) on those two occasions was a breach of the Jones Order. While also a minor breach, faced with a court order requiring the costs of the specifically listed activities to be shared equally, it was not appropriate for the Father to refuse to pay his share. Accordingly, under s. 230(2)(b)(ii) of the FLA, I order the Father to pay the Mother \$184.53.[1] Settling this cost will also ensure the Father's \$150 payment in July 2024 can be properly credited (at least between the parties) to child support rather than to "soccer".

Conclusion and summary of orders

- [90] In conclusion, I allow portions of the Mother's application to vary the Funt Order in respect of child support, imputation of income and s. 7 expenses and make the following specific orders:
- a) Terms 22, 23, 24 and 28 of the Funt Order are varied and replaced with the following:
 - i. For purposes of calculating child support under the Guidelines:
 - (1) the Father is found to be a resident of British Columbia and is found to have an annual Guidelines income of \$91,558 for 2024; and
 - (2) the Mother is found to be a resident of British Columbia and is deemed to have an imputed annual Guidelines income of no less than \$45,000.
 - ii. Based on each party's Guidelines income, beginning July 1, 2024 and continuing on the first day of each month thereafter, the Father will pay the Mother monthly support of \$874 for the Child, and the Mother will pay the Father monthly support of \$423 for the Child. To satisfy each party's obligations to pay child support, the Father will pay to the Mother the net sum of \$451 per month. These payments will continue for as long as the Child is eligible for support under the FLA or until further agreement of the parties or order of the Court.

iii. Beginning July 1, 2024, the parties will share the cost of s. 7 expenses for the Child in proportion to their respective Guidelines incomes. For clarity, beginning July 1, 2024, the Father will pay 67% and the Mother will pay 33%. The parties will continue to share s. 7 expenses for as long as the Child is eligible for support under the FLA or until further agreement of the parties or order of the Court.

iv. Beginning in June 2025, and in each subsequent year, the parties will exchange financial information on or before June 1st and, based on any changes in the parties' respective Guidelines incomes, the parties will adjust the child support and proportionate sharing of s. 7 expenses accordingly, with such changes to take effect on July 1st of each year (the "Annual Review").

[91] For clarity, terms 25-27 of the Funt Order remain unchanged. The above terms of order are designed to work with them. I leave it to counsel to calculate any amounts owing from July to the date of this order, or any necessary adjustments, based on child support and / or s. 7 expenses already paid over that period.

[92] I dismiss the Mother's application for a retroactive variation of child support and sharing of s. 7 expenses before July 1, 2024 for the reasons set out above.

[93] I also dismiss the Mother's application for an order imposing a fine against the Father for breaching the Jones Order by unilaterally enrolling the Child in baseball. However, I order the Father to pay the Mother \$184.53 for breaching the Jones Order by refusing to pay his share of the Child's soccer expenses in October 2023 and March 2024.

[94] With respect to costs, the Mother has been partially successful in her application to vary child support and s. 7 expenses, but I have not granted relief on the specific terms she sought. Instead, I have granted orders largely consistent with the review of child support already contemplated under the Funt Order and which the Father agreed was necessary. The primary exception is that I have varied the imputation of incomes so that the Father's income is based on his actual Guidelines income, and the Mother is imputed a Guidelines income of no less than \$45,000. In the circumstances, I do not consider the Mother to have been substantially successful, and I order each party to bear their own costs.

"K. Wolfe J."

[1] This amount is calculated as follows: \$144.06 (October soccer invoice) + \$225 (Feb/March soccer invoice) ÷ 2 = \$184.53.

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