

CANADA / JUDGMENT

K.M. v. N.M.

2024 BCSC 1650

COURT

Supreme Court of British Columbia

DECIDED

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2024 BCSC 1650 K.M. v. N.M.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

K.M. v. N.M.,

2024 BCSC 1650

Date: 20240905

Docket: E32667

Registry: New Westminster

Between:

K.M.

Claimant

And

N.M.

Respondent

Before: The Honourable Justice E. McDonald

Reasons for Judgment

Counsel for the Claimant:

J. Ling

Counsel for the Respondent:

T. Yu

Place and Date of Trial/Hearing:

New Westminster

April 3-4, 2024

Vancouver, B.C.

May 17, 2024

Place and Date of Judgment:

Vancouver, B.C.

September 5, 2024

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Introduction

- [1] Many years after reaching a final settlement of their family law issues, the parties bring cross-applications respecting child support and s. 7 expenses. A complicating factor is that the parties reconciled numerous times over the years but they disagree on the frequency and duration of those reconciliations.
- [2] The respondent seeks an order for retroactive child support and s. 7 expenses. The claimant seeks declarations that the children are no longer children of the marriage and orders reducing or cancelling support arrears and interest.

Background

- [3] These formerly married parties separated in 2007 and they have two children together:
 - a) C1, born August XX, 1999; and
 - b) C2, born February XX, 2005.
- [4] On April 29, 2009, the parties filed in this court: (1) a joint writ of summons family law proceeding seeking an order for divorce only; and (2) a settlement agreement (the "Agreement"). On August 9, 2009, a divorce order was made.
- [5] The Agreement provides that C1 and C2 will ordinarily reside with the respondent and the claimant will have reasonable and generous access to the children. Commencing January 15, 2009, the Agreement required the claimant to pay child support of \$922 per month in accordance with his Guideline income of \$61,000. The Agreement provides that the obligation to pay child support ends when a child marries, becomes self-supporting or becomes 19 years old unless the child remains a child of the marriage within the meaning of the Divorce Act, R.S.C 1985, c. 3 (2nd Supp.) [Divorce Act].
- [6] The Agreement provided that the parties would each provide copies of their annual tax return information and other relevant information by May 15th each year to facilitate determination of the adjustment, if any, required to child support. The parties were also to notify the other immediately of any material change of circumstances "that may affect child support obligations".
- [7] The Agreement provided as follows regarding varying child support:
 - 36. [Claimant] and [Respondent] will review the Child Support annually by May 31st of each year to adjust Child Support to take into account changes in:
 - a. the parties' respective Guideline Incomes,
 - b. the amount required to be paid under the Federal Child Support Guidelines.

37. If the parties do not review the Child Support as provided in this Agreement or review the Child Support and do not vary it in writing, both parties are deemed to consider that the Child Support continues to satisfy the requirements of the Federal Child Support Guidelines.
38. Any adjustment to Child Support under this clause will not apply retroactively but will be in effect from the date of review.
- [8] No review of child support as contemplated by s. 26 of the Agreement has ever occurred. For some periods after separation, the respondent agrees there was no child support payable because the parties had reconciled. At some points, the claimant paid child support of less than \$922 per month, for example, when the parenting arrangements changed, or when he alleges the parties agreed to a lower amount.
- [9] In 2018, 2020 and 2021, after the final reconciliation period, the respondent alleges she made multiple requests for the claimant's financial information to review child support. She further submits that the claimant failed to supply the information requested.
- [10] On May 26, 2023, the respondent filed her application concerning retroactive child support and s. 7 expenses. On February 20, 2024, she filed an "amended" application pursuant to s. 15.1 of the Divorce Act and s. 146-150 and s. 152 of the Family Law Act, S.B.C. 2011, c. 25 [FLA], again seeking orders that the respondent be required to pay retroactive child support for 2017 to 2023 and retroactive s. 7 expenses for 2017 to 2022.
- [11] On November 20, 2023, the claimant filed his application seeking cancellation or reduction of child support arrears and interest. On December 21, 2023, he filed an "amended" application and on March 13, 2024, he filed a "second amended" application pursuant to ss. 148, 150 and 174 of the FLA, s. 2 of the Divorce Act and s. 1 of the Age of Majority Act, R.S.B.C. 1996, c. 7. He sought various orders and declarations in respect of child support including orders cancelling or reducing arrears of child support, including seeking interest relief, and orders requiring the respondent to pay him child support.
- [12] Rule 8-1(1) of the Supreme Court Family Rules, B.C. Reg. 169/2009 [Rules] provides for the amendment of "pleadings". "Pleadings" is defined in Rule 1-1(1) as, "a notice of family claim, a response to family claim, a counterclaim and a response to counterclaim". There is no authority in the Rules for filing an amended notice of application. In addition to the absence of a rule authorizing the amendments, an additional problem is that both parties' amendments confusingly and/or inaccurately identify the so-called "amendments".
- [13] An issue common to both applications is the timing of when notice was given of the relief sought. While the parties' amendments are problematic for the reasons I have explained, I am of the view that in the particular circumstances before me, the proper approach is to treat the date of formal notice for the relief sought, whether set out in an original or "amended" application, as no later than the date when the party filed and served their original notice application. In other words, nothing respecting the timing of notice turns on the lapse in time between the timing of an original or an "amended" application.

Guideline Income

- [14] The preamble to the Agreement determined that the claimant and respondent's 2007 gross annual income was \$61,000 and \$50,000, respectively. For purposes of calculating child support, \$61,000 was used as the claimant's Guideline income.
- [15] Based on the information available as of the hearing of the present applications, the parties' reported total income since 2017 is as follows:

Year

Respondent

Claimant

Proportion to Income

2017

\$79,809

\$97,443

45/55

2018

\$84,533

\$110,915

43/57

2019

\$88,767

\$45,698

66/34

2020

\$84,579

\$108,190

44/56

2021

\$100,822

\$113,643

47/53

2022

To be determined

[TBD]

\$141,444

TBD

When did the parties reconcile?

[16] The parties agree that in the years following separation, they reconciled numerous times. However, the claimant alleges the reconciliations were longer and more frequent than the reconciliations acknowledged by the respondent.

[17] The claimant specifically alleges that no child support is payable because the parties were reconciled for the following periods:

- a) For two years and seven months from August 2010 to May 2013;
- b) For 19 months from September 2013 to February 2015; and
- c) For 21 months from May 2015 to February 2017.

[18] The respondent's evidence is that no child support is payable because the parties were reconciled for the following periods:

- a) For eight months from August 2010 to March 2011;
- b) For five months from December 2011 to April 2012;
- c) For nine months from October 2013 to June 2014; and
- d) For 10 months from September 2015 to June 2016.

[19] The Family Maintenance Enforcement Program ("FMEP") record of arrears confirms there are periods when no child support was payable because the parties were reconciled. The FMEP record is consistent with the respondent's submissions concerning the periods when the parties had reconciled. Put another way, the FMEP record does not indicate that child support is payable during any of the times when the respondent acknowledges the parties were reconciled.

[20] I will now consider whether the parties reconciled during the additional periods alleged by the claimant.

- [21] The claimant has produced documents to support his submissions about the additional periods of reconciliation he alleges. For example, the claimant points to an Insurance Corporation of British Columbia ("ICBC") document showing his effective address from April 2011 to February 2022. The claimant's evidence is that over the years, he was very careful to keep ICBC up-to-date regarding his current address and for this reason, the ICBC document is reliable evidence to show where he was residing.
- [22] However, the claimant further states that for a period between 2013 to 2015, he did not keep ICBC informed of his current address. In this period, the claimant says he assisted his tenant by purposely not updating ICBC on his current address, thereby obtaining a better rate for the utility charges for the tenant at the rental premises. In my view, this militates against the claimant's assertion that the ICBC record is reliable to show where he was living at various times.
- [23] The claimant's evidence respecting the timing of the reconciliations also includes the residential addresses listed on his tax documents, credit card and bank statements. The claimant submits that these records confirm he was living at the same address as the respondent during the additional periods.
- [24] In my view, the documents produced by the claimant are largely consistent with the periods when the respondent acknowledges the reconciliations, but they do not support significantly longer periods of reconciliation. For example, there is a dispute about whether the final period of reconciliation extended beyond June 2016 until February 2017, as alleged by the claimant. The claimant attaches a credit card statement listing Lorraine Avenue as his address for the statement period of September 16 to October 17, 2016. This suggests he lived at that address with the respondent for longer than she acknowledges. However, there are no statements produced for any periods beyond October 17, 2016, raising the possibility that the claimant changed the address before February 2017 precisely because the reconciliation period was over.
- [25] Again, the respondent's evidence is that the claimant moved out of Lorraine Avenue in June 2016. Many of the claimant's documents show a mailing address that aligns with the periods when the respondent acknowledges they were reconciled. There is no evidence to demonstrate the dates when the claimant requested changes to his mailing address with his financial institutions.
- [26] I find it more likely than not that the claimant's mailing address was the same as the respondent's address for additional periods because it took him time to notify all institutions of his new mailing address. I find this is the reason why the claimant continued receiving mail at Lorraine Avenue for a few months after the reconciliation period had ended.
- [27] Overall, when I consider the entirety of the evidence, I am satisfied that the preponderance of the evidence establishes that the parties were reconciled for the following periods:
- a) For eight months from August 2010 to March 2011;

- b) For five months from December 2011 to April 2012;
- c) For nine months from October 2013 to June 2014; and
- d) For 10 months from September 2015 to June 2016

(the "Reconciliation Periods")

[28] In the Reconciliation Periods, no child support is payable by the claimant. The respondent agrees with that conclusion.

[29] The Reconciliation Periods are not included in the FMEP records as periods during which child support was payable by the claimant. Therefore, any request by the claimant to reduce or vary child support arrears due to the parties being reconciled is unfounded since no support was payable and such a request is denied.

Are there children of the marriage?

Is C1 a child of the marriage?

[30] Section 146 of the FLA defines a "child" to include a person under 19 years of age or older and unable, due to illness, disability or another reason, to obtain the necessities of life or withdraw from the charge of the person's parents.

[31] The claimant submits that C1 was no longer a child as of December 2022, because that is when C1 completed all of the courses necessary for her degree. The parties do not dispute that C1 did not officially graduate and receive her degree until June 2023. The respondent agrees that as of June 2023, C1 was no longer a child. Therefore, the dispute concerns whether, prior to June of 2023, C1 remained a child.

[32] C1 provided an affidavit made April 1, 2024. In that affidavit, she states that from the time of her high school graduation in 2017, she lived full-time with the respondent. She also states that she moved into the basement suite belonging to the claimant from November 1, 2018 to May 2019 and that she paid the claimant rent. C1 states that she moved back in with the respondent in June 2019 until the end of December 2021.

[33] Some of the dispute concerning whether C1 remains a child arises from evidence that C1 moved out to live with her boyfriend. The respondent submits that C1 moved out of her house to live with her boyfriend in or about December 2021. There is a residential tenancy agreement confirming that C1 and her boyfriend jointly rented a residence together after that time.

[34] C1 says that she and her boyfriend decided to live together as of December 2021. However, before that time, she primarily lived with the respondent.

[35] The claimant further submits that C1 moved out of the house to live with her boyfriend earlier than December 2021. He relies on a few text messages between himself and C1 from January of 2021 about the claimant's friend having an apartment to rent out. In those text

messages, the claimant and C1 discuss the apartment and whether C1 and her boyfriend are interested in renting it. Ultimately C1 declines to pursue the apartment suggested by the claimant. C1 states in her affidavit that when she sent the claimant these text messages, she was just being respectful to her former boyfriend by using the subject pronoun, "we", to describe their living situation.

- [36] C1 says that sometimes she would stay at her boyfriend's place after working late shifts or on weekends, but primarily she lived with the respondent until December 2021. C1 also states that the claimant has incorrect financial information about her since she did not start working three jobs to live independently and cover her own expenses until after she graduated in June 2023.
- [37] In my view, it is not unusual or unreasonable for adult "child" to have relationships that might involve spending some time away from their usual housing arrangement. I accept C1's evidence that even though she would occasionally stay at her boyfriend's house, she continued to live primarily with the respondent until December 2021.
- [38] Based on the whole of the evidence, I find that C1 was a child from June 2017 until January 2022. I recognize that from November 2018 to May 2019, C1 lived at the claimant's house and she paid a monthly rent of \$450 per month. I accept the respondent's evidence that she contributed \$200 per month towards C1's rental costs. Even though C1 was residing in the claimant's rental suite, I find that C1 remained a child because she still was attending post-secondary school and, while she had part-time employment, she could not withdraw from her parents' care.
- [39] The respondent submits that in 2022, she paid for C1's tuition and she helped to cover her expenses. The claimant disputes that the respondent paid for C1's tuition in 2022, because he says that expense was covered by the RESP. The practice was that C1 would make a RESP withdrawal and reimburse the respondent for tuition paid up-front.
- [40] The evidence is that there was about \$22,000 in the RESP account. The claimant says that by the end of 2021, those funds had been drawn down. However, C1 told the claimant she had obtained a student loan to cover her remaining educational expenses.
- [41] The respondent agrees that C1 obtained a student loan toward the end of her university studies. However, the respondent states that she managed to pay for the tuition in 2022 herself and therefore, C1 was able to return all of the student loan funds. This demonstrates that in 2022, C1 was able to meaningfully contribute to her own expenses through student loan funds.
- [42] Beyond the tuition payments she made for C1 in 2022, the respondent provides no evidence to show the amounts she paid after December 2021, to cover C1's expenses. There is no budget information related to C1's expenses in 2022. After C1 and her boyfriend broke up, C1 continued living in her own apartment.

- [43] I am aware that C1 did not actually graduate until June 2023. However, there is no evidence to show, for example, that C1 could not qualify for her job prior to graduating.
- [44] I am not satisfied that the respondent has established that C1 remained a child after December 1, 2021. I find that after December 2021, C1 managed to withdraw from her parents' charge, live independently, and provide for the necessities of life, likely due to working and combining resources with her live-in boyfriend. I also find that C1 had the ability to contribute to her own expenses after December 2021 due to employment and receipt of a student loan.
- [45] As mentioned, the claimant asserts that C1 ceased to be a child prior to December 2021; however, I do not accept that assertion. While C1 might have stayed with her boyfriend sometimes, she was not living away from home on an indefinite basis and she could not withdraw from the care of her parents.
- [46] In conclusion, I find that C1 ceased to be a child as of January 1, 2022. Prior to that, C1 was a child.

Is C2 a child of the marriage?

- [47] The claimant submits that C2 ceased to be a child as of June 2023, which is when he graduated from high school. As C2 did not turn 19 years old until February 2024, he was presumptively a child before then.
- [48] Since graduating from high school, C2 has obtained part-time employment at an electrical company. C2 wishes to become an electrician and this employment is part of his plan to train for that trade.
- [49] C2 has registered for the electrical apprenticeship program at a college commencing October 2024. The program includes a mixture of classroom study and on-the-job apprenticeship. The respondent anticipates that C2 will graduate from the program in the spring of 2026. In my view, C2's part-time employment is part of his educational training plan.
- [50] Based on the evidence, I find that C2 has at all times remained a child due to his being under the age of 19 years and after attaining that age, by registering for a study and apprenticeship program to obtain a trade qualification. I also find that due to these circumstances, C2 is unable to withdraw from the charge of his parents and obtain the necessities of life. C2 has not, to date, ceased to be a child within the meaning of s. 146 of the FLA.

Past Child Support Claim

- [51] The respondent seeks retroactive child support for 2017, 2018, 2019, 2020, 2021, 2022 and 2023. The respondent submits that she is entitled to retroactive child support because the claimant's income increased and, with a few minor exceptions, the children lived with her for at least 80% of the time. The respondent also submits that the claimant failed to pay her the child support provided for in the Agreement.
- [52] The claimant submits that retroactive child support should be denied because the parties reconciled and there were no children of the marriage for the periods at issue. I have already dealt with those issues.
- [53] The claimant further submits that the respondent's application should be denied because the court lacks jurisdiction to grant the relief sought, the respondent delayed in seeking retroactive child support and, the parties' actually had shared parenting time.

Jurisdiction Issue

- [54] The claimant, relying on *Michel v. Greydon*, 2020 SCC 24 at para. 11, submits there is no jurisdiction to grant the respondent's request for retroactive child support because, at the time of the respondent's application, there were no children of the marriage. In that case, the court instructs that to decide an application, the statutory scheme must be examined and respected. After examining the scheme, the conclusion is that s. 152 of the FLA authorizes a court to retroactively vary a child support order whether or not the beneficiary is a child at the time of the application.
- [55] The respondent submits that her application is authorized by ss. 146-150 and 152 of the FLA, and specifically, s. 148(3). The respondent seeks to set aside or replace with an order, those parts of the Agreement respecting child support on the grounds that the court should "make a different order in consideration of the matters set out in s. 150": s. 148(3).
- [56] On the jurisdiction issue, the parties referred me to *Wood v. Wood*, 2021 BCSC 1664, *Hinz v. Davey*, 2022 BCCA 232, *L.L.M. v. D.R.M.*, 2022 BCSC 143 [L.L.M.] and *Deng v. Zhang*, 2022 BCCA 271 [Deng]. However, none of these cases determines the precise situation presently before the court, i.e. where a party applies to vary child support terms of an agreement pursuant to s. 148(3) of the FLA and the responding party challenges whether, at the time of the application, the would-be beneficiary was a child of the marriage.
- [57] In *L.L.M.*, the parties had signed a separation agreement providing, among other things, that no child support was payable for their two children. Later, the parties consented to an interim without prejudice order that the payor would pay child support respecting child "J". However, there was never a previous application, nor an order, providing for child support respecting child "N". In other words, there was an original application for child support respecting child "N" before the court, which makes the reasoning helpful in deciding the present case.

- [58] In L.L.M., before deciding that the court lacks jurisdiction to grant an order for retroactive child support respecting child "N", Justice Lyster states:
- [66] Michel does not overrule the holding in Dring that the Court has no jurisdiction to entertain an original application for child support under the FLA where the would-be beneficiary is no longer a child.

In Deng, at para. 87, Justice Abrioux specifically agrees with Justice Lyster's analysis on this point.

- [59] In Deng, the Court of Appeal considers an appeal from a trial judge's order granting retroactive child support. In that case, the parties had signed a separation agreement in 2004 that required Mr. Zhang to pay Ms. Deng monthly spousal support. In 2018, Mr. Zhang filed a notice of family claim seeking an order for divorce and division of family property, while Ms. Deng filed a counterclaim seeking retrospective and prospective child support at a time when the child was 19 years old and attending university.
- [60] During the trial in Deng, there was an issue about whether the support required by the agreement included child support and the judge found that it did not. The judge awarded Ms. Deng retroactive child support based on her counterclaim. The Court of Appeal concludes that the judge erred by making an order for retroactive child support without having first determined if the child was a child of the marriage at the time the counterclaim was filed.
- [61] Deng did not involve an application under s. 148(3) of the FLA. Rather, it concerns a counterclaim for retroactive child support filed some 14 years after a separation agreement providing only for spousal support. In deciding the appeal, Justice Abrioux concludes, at paras. 77 and 82, that the judge had jurisdiction to consider the retroactive child support claim, but only after first determining that the statutory conditions were met by the child being a "child" under s. 146 of the FLA: paras. 77 and 82. Only after the judge had decided that the adult child remained a child of the marriage, would the judge then be required to proceed to consider whether retroactive child support was appropriate.
- [62] When I consider the statutory scheme and the reasoning in L.L.M. and Deng, I am satisfied that the respondent's present application is properly characterized as an original application for child support. That is not disputed by the respondent. However, the respondent submits that the jurisdictional challenge is without merit because she brings her application to replace child support provisions in the Agreement with an order pursuant to s. 148(3) of the FLA.
- [63] As the Court of Appeal notes in Deng, at paras. 77 and 82, it would be an error to proceed without first determining whether the statutory conditions are met. In other words, I must first determine whether C1 and C2 are children pursuant to s. 146 of the FLA when the respondent's application was filed. I have already found that C2 was a child, but C1 was not.

- [64] Keeping in mind the reminder in *Deng*, at para. 86, that the court lacks jurisdiction to make a statutory retroactive award unless at the date of the application the would-be beneficiary was still a "child" pursuant to the FLA, I conclude that the court lacks jurisdiction to grant an original application for child support respecting C1, when she was no longer a child when the application was filed. The court does, however, have jurisdiction to grant an original application for child support respecting C2.
- [65] As I noted earlier, the respondent also seeks to rely on s. 152 of the FLA. However, *Wood and Hinz* are clear that since there is only an Agreement and no prior order for child support, s. 152 of the FLA does not apply.
- [66] Therefore, after reaching my conclusions about jurisdiction, I need only address the respondent's request for retroactive child support and s. 7 expenses related to C2, who was a child when the application was filed.
- [67] In *G.J.L. v. M.J.L.*, 2017 BCSC 688, at para. 122, Justice Schultes sets out the steps to determine an application to change a child support agreement under s. 148(3) of the FLA:
- [122] As a result, when considering whether to change a child support agreement, it is necessary to consider all of the matters in s. 150. The first step is to proceed under s-s (1) and determine what an application of the Guidelines would produce. That is what the court will initially consider in deciding whether it "would make a different order" than what is provided in the agreement. However, it is also open to the party seeking to uphold the agreement to refer the court to s-s (2) and ask it to find that reasonable arrangements have been made for the support of the children. If it makes that finding then it is not a situation in which it would "make a different order" and set aside the agreement or replace it with an order.
- [68] The first step under s. 150 of the FLA is to determine the child support an application of the Guidelines would produce. Earlier in these reasons, I set out the Guideline income of the claimant for 2017 to 2022. That income was substantially higher than the \$61,000 annual income stated in the Agreement. Therefore, an application of the Guidelines in an order pursuant to s. 150 would produce a different, likely higher, child support amount respecting C2.
- [69] Pursuant to s. 150(4) of the FLA, the court may also consider ordering a different amount if satisfied about certain matters, including that applying the Guideline amount would be inequitable after considering the Agreement. In the present case, the claimant does not seek to uphold the Agreement respecting child support. In fact, even though he asks to adjourn that part of his application, the claimant seeks to set aside the child support terms of the Agreement. In other words, the claimant - like the respondent - requests that the child support required by the Agreement be replaced, albeit for different reasons.

Parenting Time

- [70] The claimant also submits that since 2017, he has had equal parenting time with C2, which should be considered in the assessment of past or prospective child support. The Agreement provides that the claimant will have generous access, but it does not state the parties have shared parenting. The respondent denies that the parties have had equal parenting time with C2 since 2017.
- [71] From October 2023 to mid-January 2024, the respondent acknowledges that C2 lived full-time with the claimant. However, the respondent's evidence is that since then, C2 has lived full-time at her home.
- [72] The claimant submits that he and C2 have spent lots of time together since 2017. For example, he says they work on vehicles because the claimant is a mechanic and C2 likes working on his car.
- [73] The respondent maintained a calendar to track of the days when C2 stayed with the claimant. According to her calendar, C2 never spent more than 40% of the time at the claimant's house from 2018 to 2023. The claimant denies the respondent's calendar is accurate. In his evidence, he regularly spent time with C2, for example, working on the car that the claimant purchased for him.
- [74] In my view, when I consider the evidence on this issue as a whole, including emails between the parties, I do not find that the claimant has demonstrated that the respondent's calendar is unreliable. The claimant has not shown that he had parenting time with C2 on dates contrary to the record in the calendar. I accept the calendar kept by the respondent is, on balance, accurate and persuasive evidence of the parties' parenting time with C2. I find that, except for four months in late 2023 and early 2024, C2 lived primarily with the respondent and there was no shared parenting arrangement pursuant to the Guidelines.
- [75] The claimant seeks child support from the respondent respecting C2 for the four-month period from October 2023 to January 2024. The claimant's evidence is that C2 moved into his basement suite and he paid monthly rent to the claimant of \$500. The claimant submits that he is entitled to child support in this period, less the \$500 per month that C2 paid him as rent.
- [76] As C2 was residing primarily with the claimant from October 2023 to January 2024, and he was a child of the marriage in this period, the claimant is entitled to child support, less the \$500 he received as rent from C2. Therefore, the respondent shall pay the claimant child support respecting C2 for this four-month period based on her Guideline income.

Notice Respecting Retroactive Child Support

- [77] The respondent submits that she provided effective notice of her intention to seek retroactive child support in 2018. Specifically, the respondent states that on March 5, 2018, April 11, 2018 and June 12, 2018, she requested the claimant's financial information for the annual review of support starting with 2017. The claimant's evidence, in para. 12 of his affidavit made November 15, 2023, is that the respondent accepted his \$500 per month child support payments but when she got angry with him, she would demand more.
- [78] The claimant states in paragraph 12 of his November 15, 2023 affidavit that, "Between March 2018 to June 2018, she was pushing me to pay her more money. On June 13, 2018, I offered to pay \$1,000 a month, but she did not respond to my email. Even in our Whatsapp messages, she did not raise this issue about additional payments."
- [79] In the claimant's email June 13, 2018, which responds to the respondent's April 11 and June 12 emails asking him to pay arrears of child support and s. 7 expenses, he offers to pay \$1,000 per month stating, "Last time I explained to you on [baseball] field my situation and you accepted \$800 monthly toward child support now you want more".
- [80] In 2021, the respondent retained counsel and in October 2021, the respondent and her counsel repeatedly requested the claimant's financial information. The respondent submits that the claimant engaged in blameworthy conduct by failing to provide his financial information when it was requested.
- [81] The claimant points to prolonged periods of inactivity by the respondent respecting retroactive child support to say that his interest in certainty regarding child support was not displaced until she filed her formal application in May 2023. However, when I take all of the circumstances into account, including the claimant's failure to provide accurate and complete financial information, and the tenor of the communications between the parties, I find those circumstances provide a reasonable excuse for the respondent's delay.
- [82] I reject the claimant's argument that his interest in certainty regarding child support returned because the respondent failed to incessantly request his financial information in 2018 and afterwards. I find the claimant deliberately failed to provide his financial information even though he was obliged to provide that information under the Agreement and in response to the requests. There is no dispute that the claimant only supplied some of his financial information in April 2022, when he provided his notices of assessment for 2019, 2020 and 2021.
- [83] As the court notes in *Colucci v. Colucci*, 2021 SCC 24 at para. 114, if the recipient meets the threshold of establishing a past material change in circumstances, namely an increase in income, the payor's failure to disclose financial information is a relevant factor when considering whether to retroactively increase support. A failure to disclose financial information can constitute blameworthy conduct that justifies departing from the presumptive date of retroactivity and instead using the date when the income increased. In

light of the evidence, I am satisfied the claimant's conduct was blameworthy and that it justifies a departure from the presumptive date of retroactivity.

- [84] In my view, the respondent gave the claimant effective notice on March 5, 2018. However, the respondent is not actually seeking retroactive child support for any year prior to 2017.

Alleged Agreement to Reduce Child Support

- [85] The claimant submits that he and the respondent agreed that he would pay \$500 per month for child support as of January 2017. He bears the onus to establish that such an agreement was reached.
- [86] The respondent denies that she agreed to reduce the child support payable. She points to her emails to the claimant sent on March 5 and April 11, 2018, stating that the child support payable is \$922 per month. In these emails, the respondent asks the claimant to pay the full amount owing. Her requests for his financial information after 2018, further support that no agreement to reduce child support had been reached.
- [87] When I consider the evidence as a whole, I do not find that the claimant has established that the parties had ever agreed to reduce child support from \$922 to \$500 per month. However, this finding is not about the periods when the respondent acknowledges that child support was only payable for one child of the marriage.

Conclusions Regarding Past Child Support Claim

- [88] Respecting the parties' request for retroactive child support, I summarize the conclusions I have reached as follows:
- a) The court lacks jurisdiction to consider the respondent's application for retroactive child support in respect of C1; however, there is jurisdiction to consider the application in respect of C2. For clarity, this means there is no retroactive child support claim that the court may consider respecting C1.
 - b) The table child support payable by the claimant respecting C2 would be different than stated in the Agreement due to the claimant's annual Guideline income exceeding \$61,000 per year since 2017.
 - c) For C2, the respondent had the majority of parenting time in the relevant periods, except for four-months from October 2023 to January 2024.
 - d) For each of 2017, 2018, 2019, 2020, 2021, 2022 and 2023, the claimant is required to pay the respondent retroactive table child support respecting C2 based on his Guideline income.
 - e) For the period from October 2023 to January 2024, the respondent is required to pay the claimant table child support respecting C2, subject to the claimant's agreement that the support should be reduced by \$500 per month on account of the rent paid to him by C2.

- [89] The retroactive table child support payable by the parties is to be calculated by the parties pursuant to the findings in these reasons for judgment. If the parties cannot agree on the child support calculations including, the amounts paid, to be paid, to be set-off or to be refunded, as a result of these reasons, they have leave to contact SC Scheduling to seek a further appearance before me to make additional submissions respecting their respective calculations.

Past Section 7 Expenses Claim

- [90] The Agreement provides that the parties will share special and extraordinary expenses in proportion to their incomes and it provides for an annual accounting of the expenses. The Agreement specifies special or extraordinary expenses to include, for example, educational costs, including private school fees and extraordinary extra-curricular activities. There is no requirement to agree on or give notice, before incurring a s. 7 expense.
- [91] The respondent submits that despite asking for the claimant's contribution to the children's s. 7 expenses, he has not paid his proportionate share. For example, on March 5, 2018, the respondent requested payment for 2017 expenses. On December 4 and 7, 2018, and on January 13, 2021, the respondent emailed the claimant again asking for payment of the claimant's share of s. 7 expenses.

Expenses for C1

- [92] For C1, the s. 7 expenses the respondent submits that she paid a total of \$11,826 for tuition and orthodontic expenses. Out of this total amount, the respondent submits that she paid \$6,958 for tuition that was not covered by the RESP.
- [93] The claimant submits that he contributed solely to the RESP and all of C1's educational costs were paid from the RESP. He denies that he owes the respondent any amounts for tuition costs for C1. Out of the total s. 7 expenses claimed by the respondent of \$35,050, the respondent submits that the claimant's proportionate share up to 2021, is \$15,186.
- [94] The respondent says the RESP was opened with "family funds". I find that the claimant made all of the RESP contributions. Beyond the respondent's bald assertion that family funds were used to open the account, there is no corroboration for that. As well, this allegation is contrary to Agreement which states that the parties will maintain separate bank accounts after separation. The respondent relies on J.C.W. v. J.K.R.W., 2024 BCSC 139 to support her allegations regarding the RESP. However, that case is distinguishable because it did not involve a RESP opened by one parent after signing a separation agreement. I find there is no amount owing by the claimant in respect of s. 7 expenses for C1 because he paid for the education using the RESP and he more than contributed his proportionate share. The claimant does not request a credit for any overcontribution for C1's educational costs.

[95] The claimant says he is not responsible for s. 7 expenses claimed by the respondent related to C1's orthodontic treatment. He submits that C1 received reimbursement from the insurer for orthodontic treatment. He denies that he was required to pay any amounts to the respondent for C1's orthodontic treatment. However, there is insufficient evidence to establish the amounts that were reimbursed to C1. The claimant shall pay his proportionate share of the orthodontic expenses of \$4,868 to the claimant. However, I note that the claimant agrees that if the respondent can provide her with receipts proving the reimbursements were for orthodontic costs, the claimant should get credit for any amounts refunded directly to C1.

Expenses for C2

- [96] The respondent submits that the claimant failed to pay her any amount in advance of the annual accounting towards s. 7 expenses for C2. She submits that the claimant owes her his proportionate share of s. 7 expenses for C2 for 2017 to 2022, is as follows: \$8,792 (2017); \$5,567 (2018); \$2,462 (2019), \$5,177 (2020); \$815 (2021), \$420 (2022). The total s. 7 expenses for C2 that the respondent submits she has paid for 2017 to 2022 is \$23,224.
- [97] The claimant submits that the private school fees for C2 are not s. 7 expenses because C2 did not want to go to that school. However, the respondent provided evidence that the claimant told her that school fees were a reasonable expense. C2 had attended this private school since kindergarten although he later left the school.
- [98] The claimant also submits that many of the expenses claimed for C2's baseball expenses are not extraordinary and hence not s. 7 expenses that he is required to contribute to. I find that the baseball expenses are extraordinary expenses because C2 was an elite player who played on a Junior World Championship team.
- [99] I further find that the claimant knew about the baseball expenses and he agreed in emails with the respondent that the expenses were reasonable. He just said that he could not afford to pay. His counsel alleges that the claimant paid for some of the baseball expenses directly. Therefore, I do not accept that the claimant was unaware that there were s. 7 expenses for baseball related to C2.
- [100] I find that the private school expenses and baseball expenses for C2 are all appropriate s. 7 expenses for which the claimant is responsible to pay his proportionate share based on the parties' Guideline income. The extracurricular math tutoring and math lesson expenses for C2 are not special expenses under s. 7.

[101] If the parties are unable to agree as to the amount of the past s. 7 expenses owing pursuant to the findings in these reasons for judgment, the parties are directed to seek an appointment and pre-hearing conference before the registrar for the purpose of having the registrar conduct an assessment of s. 7 expenses and to provide a certificate to the respondent with the result of the s. 7 expenses and the proportionate share payable by each party based on the parties' respective Guideline incomes.

Should child support arrears and interest be cancelled or reduced?

[102] In July 2023, the Director of the FMEP wrote to the claimant asking him to pay ongoing child support of \$577 per month and child support arrears of \$59,196 from the period January 2009 to July 2023 (the "Arrears"). As of October 2023, the claimant began to pay child support of \$577 each month when prior to that, he had been paying \$500 per month. In a separate application that is not before me, the claimant seeks to dispute the Arrears and a notice of attachment in respect of the Arrears.

[103] The claimant seeks to retroactively review and potentially reduce child support going back as far as 2009. The claimant specifically seeks the following relief in his March 13, 2024 application:

- a) A declaration that parties were reconciled, and no child support is payable, for the following periods:
 - i. August 2010 to May 2013;
 - ii. September 2013 to February 2015; and
 - iii. May 2015 to February 2017;
- b) An order pursuant to s. 174 of the FLA that the child support arrears owing by the claimant from January 15, 2009 to July 1, 2023, be cancelled or reduced, and if the arrears be reduced, the interest does not accrue on the reduced arrears if the arrears are cancelled, the interest be cancelled to.
- c) The monthly child support of \$500 payable by the claimant for the period from June 2022 to September 2023, be set at \$107 for the benefit of C2. Any excess support paid by the claimant to the respondent shall be refunded to the claimant by the respondent.
- d) Commencing on October 2023 until January 2024, the respondent shall pay the claimant monthly child support based on her Guideline income, less \$500 per month, for the benefit of C2.
- e) A declaration that as of February 15, 2024, C2 is no longer a child of the marriage and that child support is suspended until he is a child of the marriage.

[104] The claimant requests that his alternative relief to set aside parts of the Agreement, be adjourned generally. I grant the request to adjourn generally that aspect of the application.

- [105] I have already determined the periods of reconciliation. There is no child support payable during the reconciliation periods. Again, the FMEP record confirms that no support is sought from the claimant for the reconciliation periods, so no gross unfairness exists respecting the reconciliation periods.
- [106] In *MacCarthy v. MacCarthy*, 2015 BCCA 496 at para. 54, the Court of Appeal states that the factors to be considered in granting an order to cancel arrears are: (1) whether there is a material change in circumstances, and (2) whether it would be grossly unfair not to cancel or reduce arrears. In general, arrears will only be cancelled if the payor shows that they are unable to pay "now and in the future": *Ibid.*
- [107] The respondent also submits, and I agree, that when C1 moved out of the respondent's house and into the basement suite of the claimant's house from November 2018 to May 2019, the child support payable by the claimant was reduced by one child. That is confirmed in the FEMP record where the child support payable for this period is reduced from \$922 to \$577 per month. Since there is no child support showing as payable for two children respecting periods when C2 was living at the claimant's house, I find no basis to grant the relief sought by the claimant.
- [108] The FMEP record also reflects that after December 2021, which is when C2 moved out of the respondent's house and into an apartment with her boyfriend, the child support payable by the claimant was reduced by one child. That is consistent with my finding that C1 ceased to be a child of the marriage as of January 2022 and C2 remains a child of the marriage. In light of the FMEP record, which does not assert child support is payable for two children as of January 2022, I find no basis to grant the relief sought by the claimant.
- [109] As I have already found, for the reasons explained, that C2 continues to be the child of the marriage. I do not find that there is any change of circumstance or gross unfairness associated with child support arrears related to C2, except for the four-month period from October 2023 to January 2024, which I dealt with earlier in these reasons. During that four-month period, the claimant is not obligated to pay child support and in fact, he is the recipient parent during that period as set out earlier.
- [110] In respect of the claimant's general submission that the court should cancel or reduce arrears and interest, for child support arrears that he owes from January 15, 2009 onwards, the claimant has not established a material change in circumstances or that it would be grossly unfair not to cancel or reduce arrears and interest. My reasons for so concluding include that:
- a) I reject the claimant's submission that there was an agreement to reduce or eliminate child support, other than for periods when the parties were reconciled or when C2 lived in the claimant's basement suite.
 - b) The claimant's Guideline income, as I have previously determined, was well in excess of the amount stated in the Agreement.

- c) The claimant has accumulated considerable real estate assets and he has failed to show that he is unable to pay the arrears now or in the future.

[111] The claimant's application to cancel or reduce arrears and associated interest is dismissed.

Costs

[112] In my view, overall, the respondent has achieved substantial success on her application while the claimant has not.

[113] As such, unless there are circumstances in respect of the costs that I am unaware of, the respondent is entitled to the costs of the applications in accordance with Appendix B of the Rules.

"E. McDonald J."

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