

CANADA / JUDGMENT

L.F. v. R.B.

2024 BCSC 2306

COURT

Supreme Court of British Columbia

DECIDED

18 December 2024

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2024 BCSC 2306 L.F. v. R.B.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

L.F. v. R.B.,

2024 BCSC 2306

Date: 20241218

Docket: E51268

Registry: New Westminster

Between:

L.F.

Claimant

And

R.B.

Respondent

Corrected Judgment: The text of the judgment was corrected at paragraph 12 on January 8, 2025.

Before: The Honourable Madam Justice Sukstorf

Reasons for Judgment

The Claimant appearing in Person:

L.F.

Counsel for Respondent:

R. Choudhry

Place and Dates of Hearing:

Port Coquitlam, B.C.

October 3, 2024

November 29, 2024

Place and Date of Judgment:

New Westminster, B.C.

December 18, 2024

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Background

- [1] This case concerns two separate notice of applications, both of which relate to prospective and retroactive child support of the two children of the marriage. They both arise from a decision pronounced by Justice Jenkins on March 15, 2021 and settled on August 8, 2023 ("Jenkins Order").
- [2] The respondent father, R.B. seeks an adjustment to the child support that he owes with respect to the Children, who are beyond the age of majority based on his "actual income" now that he has retired. He argues that his retirement was foreseen and was before Justice Jenkins and he further argues that the Jenkins Order specifically states at para 11 that he "will continue to pay table child support to the claimant for J.B., adjusted to account for the actual incomes of the Respondent."
- [3] With respect to J.B., the mother seeks a variance to the Jenkins Order and asks the court to impute R.B.'s pre-retirement income of \$149,545 and order him to pay the amount of \$1,351.25 commencing on May 1, 2021 and continuing on the first of each and every month thereafter until April 30, 2025. She also seeks that the Order to be varied to provide that the respondent be required to pay child support for J.B. for as long as she is a child of the marriage beyond her undergraduate program.
- [4] With respect to K.B., the mother also seeks a variance requiring the respondent to pay additional child support in addition to what he previously paid to her through British Columbia Family Maintenance Agency ("BCFMA") for the period of September 1, 2020, until April 30, 2021 as well as September 2021 until April 30, 2022.

R.B.'s Decision to Retire

- [5] To their credit, the parties have successfully navigated the complexities of a marriage breakdown while remaining thoughtful, committed, and caring parents to their two daughters. They have demonstrated foresight by extensively saving for their daughters' education, creating Registered Education Savings Plans ("RESP"), and planning for the associated costs of university. Both parties have been united in supporting their daughters' commitment to higher education. While they have previously appeared before the court to address child support issues, the current application arises solely as a result of R.B.'s decision to retire.
- [6] R.B. became eligible to retire from his position as a high school principal in June 2018 without incurring any penalties. However, his retirement was delayed due to changes introduced by the pension plan in or around 2017, as well as his financial circumstances at the time.

- [7] In an affidavit filed in the proceedings before Justice Jenkins, R.B. stated that he planned to retire on January 31, 2021. He acknowledged that during the first two to three years of his retirement, he would need to draw on his savings until he became eligible to receive his share of L.F.'s pension upon her turning 55 in August 2024. R.B. estimates that his portion of L.F.'s pension will provide him with approximately an additional \$1,000 per month.
- [8] A review of the transcript of the hearing confirms that R.B.'s planned retirement and its financial implications were fully disclosed in evidence and were addressed during submissions. During the earlier proceedings, L.F. explicitly noted her objection to R.B.'s decision to retire. Following the hearing, L.F. was given the opportunity to file a reply affidavit or make further submissions to the court. However, I was not provided with a copy of any submissions from L.F.
- [9] L.F. challenges R.B.'s decision to retire on several grounds, primarily asserting her disagreement with the timing of his retirement, arguing that he could have continued earning a higher salary. However, the evidence establishes that R.B.'s decision to retire was grounded in his eligibility to receive a full pension after a long and dedicated career in education. While R.B. acknowledged that he would need to rely on his savings during the initial years of his retirement until becoming eligible to receive his portion of L.F.'s pension, there is no evidence to suggest that his decision to retire was motivated by an intent to avoid his child support obligations.
- [10] At the time of R.B.'s retirement, both children were well over the age of majority. Importantly, as will be discussed below, the obligation of parents to pay child support for adult children is not as absolute as it is for minor children. This distinction reflects the evolving financial responsibilities of adult children and the corresponding shift in the role of parental support.

Facts

- [11] The parties were in an 18-year marriage. They married on March 14, 1998 and separated on April 12, 2014. The marriage was dissolved on October 15, 2016. The claimant, L.F. is currently 55 years old and the respondent is 63 years old.
- [12] They have two children, K.B., [date redacted]; and J.B., born [date redacted]. Their children are now 25 and 24 years old.
- [13] The claimant is an elementary school principal, although she has not worked and has been on medical leave since March 2022.
- [14] The respondent, R.B., retired as a high school principal on January 31, 2021, at the age of 59, after 34.5 years of service. His pre-retirement income was \$149,545. His income for the subsequent years is as follows:

2021: \$75,250

2022: \$72,895

2023: \$77,691.

- [15] The evidence establishes that R.B.'s income will have just recently increased due to his eligibility to collect his portion of L.F.'s pension. This entitlement, previously unavailable, has become accessible now that L.F. has reached the age of 55, which was a condition before R.B. could commence receiving the pension benefits. L.F. turned 55 years of age in August of 2024.
- [16] K.B. completed her Bachelor of Business Management from UBC Okanagan, along with a Diploma in Urban Land Economics from UBC Vancouver, in April 2022. As K.B. has now completed her post-secondary education, she no longer meets the definition of a "child of the marriage" under the Divorce Act, R.S.C., 1985, c. 3 (2nd Supp.) [Divorce Act].
- [17] J.B., now 24 years old, continues to attend university and is pursuing a Bachelor of Science in Biology at Simon Fraser University ("SFU"). Although J.B. began her studies in 2018, her academic progress was delayed due to medical challenges stemming from multiple concussions. Her injuries necessitated a reduced course load, which L.F. attests that SFU confirmed qualifies as full-time enrollment considering her medical conditions. J.B. resides primarily with L.F.
- [18] In January 2023, J.B. secured an eight-month co-op position in an entomology lab at Agriculture and Agri-Food Canada's Agassiz Research and Development Station. During this period, J.B. lived temporarily in Agassiz but commuted home on weekends and holidays. Following the conclusion of the co-op position, J.B. has continued to work part-time at the Agassiz Research and Development Station while maintaining her university studies.

History of Proceedings

- [19] On September 14, 2016, at a Judicial Case Conference, the parties agreed to a consent order before Bernard J. (the "Bernard Order").
- [20] In clauses 11 and 12 of the Bernard Order, the parties agreed to review child support and s. 7 expenses annually to ensure the amount of support accorded with the requirements of the Federal Child Support Guidelines, SOR/97-175 [Guidelines] with the first review to be completed by June 30, 2017.
- [21] In the earlier decision involving the same parties, L.F. v. R.B., 2021 BCSC 464 [Jenkins Decision], the Court reviewed the parties' child support obligations both retroactively from September 2017 and prospectively. The review was prompted by a material change in circumstances, including the children's enrollment in post-secondary education and, in J.B.'s case, ongoing health issues. The Court relied on the principles set out in s. 17(4) of the Divorce Act to justify varying the existing support order.

- [22] As part of this review, the Court determined the incomes of L.F. and R.B. for the years 2016 to 2019. These income assessments formed the basis for recalculating and adjusting the child support payments for the relevant periods.
- [23] With respect to K.B., the Court concluded that she remained a "child of the marriage" under the Divorce Act during the relevant years, despite being over the age of majority, because she was enrolled as a full-time university student.
- [24] The Court reduced R.B.'s child support obligation for the months K.B. resided at university, acknowledging her ability to contribute to her expenses through savings and part-time work. However, regular table child support was reinstated for the summer months when K.B. resided with her mother. The Court also found that certain expenses claimed by L.F., such as vehicle costs, did not qualify as extraordinary expenses under s. 7 of the Guidelines and were properly categorized as general living expenses.
- [25] Similarly, the Court deemed J.B. a "child of the marriage" due to her ongoing university education and her inability to work, which was caused by persistent concussion symptoms.
- [26] In paragraph 11 of the Jenkins Order, the Court directed that table child support for J.B. be adjusted annually to reflect R.B.'s actual income.

Positions of the Parties

- [27] Pursuant to the required annual review of his income, R.B. seeks a reduction in the amount of child support he is paying to L.F. for J.B. While he does not dispute his obligation to provide support for J.B., he asserts that the Jenkins Order established that his child support obligations would be calculated annually based on his actual income. R.B. further submits that Justice Jenkins was aware of the material fact that he would be retiring at the end of January 2021. R.B., now 63 years old, emphasizes that this retirement was fully disclosed and anticipated during the earlier proceedings.
- [28] R.B. also argues that a reduction in his support obligations is justified given J.B.'s age, her capacity to contribute to her own expenses through work or scholarships, and his reduced income following retirement after a lengthy teaching career.
- [29] R.B. informed the Court that, pursuant to the Jenkins Order, he attempted to have his income adjusted for the purpose of BCFMA payments. However, L.F.'s refusal to sign the required forms necessitated that he file this application to have his child support obligations adjusted in accordance with his reduced income.

- [30] L.F., in turn, seeks a variation of paragraph 11 of the Jenkins Order to require R.B. to pay child support for J.B. based on his pre-retirement income of \$149,545 rather than his actual income. She requests that this adjustment commence retroactively from May 1, 2021, and continue monthly until April 30, 2025. Additionally, L.F. seeks an order requiring that child support continue to be calculated based on R.B.'s pre-retirement income beyond J.B.'s anticipated graduation in May 2025, should J.B. pursue postgraduate studies.
- [31] L.F. contends that R.B.'s pre-retirement income should be imputed for child support purposes, arguing that he should not have retired while he still had a child attending university.
- [32] L.F. also requests retroactive child support for K.B. for the periods from September 2020 to April 2021 and from September 2021 to April 2022, during which K.B. attended university in Penticton and resided with her maternal grandparents rather than at the previously planned residence. However, L.F. has provided no receipts or evidence demonstrating any change in K.B.'s expenses resulting from this living arrangement.

Issues

- [33] Based on the two applications before the Court, the issues requiring determination are summarized as follows:
- a) Is L.F. entitled to retroactive child support for the last two years of K.B.'s university studies in Penticton?
 - b) Should R.B.'s child support obligations for J.B. be reduced to reflect his actual income following retirement?
 - c) Has there been a material change in circumstances that would justify imputing R.B.'s pre-retirement income for child support purposes?
 - d) What are the actual incomes of the parties?
 - e) How much child support is payable?
 - i. Should the adjustment to child support apply retroactively?
 - ii. If retroactive adjustments are warranted, how should the overpayment be addressed?
 - f) Should R.B. be awarded costs associated with the application and adjournment?

Legal Authority

Test for Variation

- [34] Firstly, L.F. seeks a variation to the Jenkins Order with respect to child support.
- [35] Section 17(4) of the Divorce Act lists the requirements on an application to vary a child support order. Section 14 of the Guidelines provides:

14. For the purposes of subsection 17(4) of the [Divorce] Act, any one of the following constitutes a change of circumstances that gives rise to the making of a variation order in respect of a child support order:
- (a) in the case where the amount of child support includes a determination made in accordance with the applicable table, any change in circumstances that would result in a different child support order or any provision thereof;
 - (b) in the case where the amount of child support does not include a determination made in accordance with a table, any change in the condition, means, needs or other circumstances of either spouse or of any child who is entitled to support.
- [36] As may be seen from s. 17(4) of the Divorce Act, there must be a change of circumstances since the previous order, in the case at bar, the final order of Justice Bernard. The change in circumstances must be a material and long-lasting: *Bockhold v. Bockhold*, 2006 BCCA 472 at para. 34.
- [37] A material change must be both material and a change that was not subjectively known to the parties at the time of the original order. It is important to focus on what the parties knew or contemplated at the time of the Jenkins' Order.

Imputation of Income

- [38] Despite the Jenkins Order directing that child support be determined based on R.B.'s actual income, L.F. asks this Court to impute R.B.'s pre-retirement income for the purpose of calculating child support.
- [39] Imputation of income is addressed in s. 19(1) of the Guidelines, which sets out a non-exhaustive list of circumstances where a court may impute income. The relevant section is 19(1)(a) which provides:
- 19 (1) The court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following:
- (a) the spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the spouse;
- [40] The principles relating to imputation of income were reviewed by Justice Griffin, in *Zilic v. Zilic*, 2021 BCCA 107.
- [41] In short, the imputation of income is a discretionary decision guided by the principle of reasonableness, considering the parties' actual capacity to earn income considering their specific circumstances. The burden of proof lies on the party seeking to have income imputed, requiring them to establish an evidentiary basis for such a finding.

[42] Courts assess reasonableness by considering factors such as the individual's age, education, physical and mental health, work history, and the availability of work, which also encompasses childcare responsibilities.

Analysis of Issues

Is L.F. entitled to retroactive child support for the last two years of K.B.'s university studies in Penticton?

[43] In response to R.B.'s application to update his child support obligations, L.F. asserts, for the first time in late August 2024, a claim for additional child support for K.B. during her final two years of university.

[44] L.F.'s claim stems from K.B.'s decision to reside with her maternal grandparents while attending university in Penticton. L.F. contends that, notwithstanding the Jenkins Order, R.B. should pay additional child support for this period.

[45] However, L.F. has provided no receipts or evidence to substantiate any increase in K.B.'s costs resulting from this change in living arrangements.

[46] After a thorough assessment of the means, needs, and circumstances of the parties, as well as K.B.'s ability to support herself, the Court in the Jenkins Decision the provided clear guidance on how child support was to be adjusted. At para. 74, the decision states:

[73] In considering the means, needs, and circumstances of the parties and the ability of K.B. to contribute herself, I make the following assessments of child support owing for K.B.'s second year of university to the completion of her degree:

- a) For K.B.'s second year of university (Sept 2018 - Apr 2019), K.B. had saved enough to pay \$500 per month toward her expenses. As stated, her reasonable expenses are \$1,200 per month while she is at school. Therefore, for K.B.'s second year at school, I would set the respondent's contribution to the care of K.B. at one-half the difference of her expenses and her income, which is \$350 per month.
- b) For K.B.'s third year of university (Sept 2019 - April 2020), K.B. had enough saved to pay \$1,000 per month toward her expenses. The claimant submits that for K.B.'s university exchange in spring 2020, the parties should treat her exchange expenses as s. 7 expenses to be shared equally. She estimates the costs of the trip to be \$14,100, and notes that \$7,000 of that will come from the RESP. I would note that \$5,000 of that is her estimate for "meals" over five months. Considering K.B.'s savings and the exceptional nature of a university exchange, I would not order the parties to pay more than their regular support for K.B. during that time. She has made a decision to go travelling, and she has the savings and resources to do so. However, in recognition of her increased expenses and that she earned more in the summer of 2019 to help offset her travel costs, I would leave the contribution from the respondent for the support of K.B. at \$350 per month.

- c) For K.B.'s next year or two in her undergraduate education, there is no reason to assume that she would not have the same success in saving up over the summer to support herself for the following year. I would continue the contribution from the respondent for the support of K.B. at \$350 per month while she attends her program.
- [74] For the summers of 2018, 2019, 2020, and possibly 2021 (provided K.B. is returning to full-time education in the fall of 2022), I would set the child support payable to the claimant at the table amount adjusted for the actual incomes of the respondent.
- [75] Should K.B. require support thereafter, it is open to the parties' agreement or further court order to set child support for K.B. following completion of her degree.
- [47] After considering the evidence and arguments presented, and the Jenkins Decision, I do not accept L.F.'s claim that R.B. should be required to pay retroactive child support for K.B.'s final two years of university while she resided with her grandparents.
- [48] This claim is inconsistent with the Jenkins Order, and there is no evidence before the Court to establish that K.B.'s decision to reside with her grandparents resulted in a significant change to her expenses that would justify a retroactive variation from the amounts contemplated under the Jenkins Order. On the contrary, it is reasonable to infer that K.B.'s costs may have decreased due to access to shared meals and reduced rent while living with her grandparents.
- [49] In the absence of evidence demonstrating a material change in K.B.'s circumstances, I find that the child support paid was consistent with that required under the Jenkins' Order.
- Should R.B.'s child support obligations for J.B. be reduced to reflect his actual income following retirement?
- [50] R.B. acknowledges his ongoing obligation to pay child support for J.B. until she completes her undergraduate degree. However, he asserts that the Jenkins Order confirms that child support should be calculated based on his actual income following his retirement, rather than his pre-retirement earnings.
- [51] Conversely, L.F. argues that R.B.'s retirement was a voluntary decision and contends that his pre-retirement income should be imputed for the purpose of determining his child support obligations.
- [52] The Jenkins Decision, at para. 40, underscores that "it is clear that the parties intended for the child support obligations to be adjusted to coincide with the respondent's income." Justice Jenkins further stated at para. 82:

[82] In accordance with the authorities regarding s. 3(a) of the Guidelines, J.B.'s situation is very alike to that of a child under the age of majority. She is wholly reliant on her parents for support, and has high needs during her time of recovery from her injuries, including multiple doctors' appointments. The respondent will continue to pay Table child support to the claimant for J.B., adjusted to account for the actual incomes of the respondent set out above.

[Emphasis added.]

[53] Addressing the threshold issue raised by R.B. regarding an adjustment to his child support obligations, this case is distinguished by the explicit provision in the Jenkins Order requiring annual reviews of child support based on R.B.'s actual income. As a result, R.B. is not obligated to demonstrate a material change in circumstances before the quantum of child support may be adjusted to reflect fluctuations in his income.

[54] Justice Jenkins was fully aware that R.B.'s income was likely to fluctuate following his retirement and, on a year-to-year basis, particularly when R.B. became eligible to receive his portion of L.F.'s pension. The evidence before the Court at the time indicated that R.B. was scheduled to retire effective January 31, 2021. With this evidence before him, Justice Jenkins deliberately included a provision in the Jenkins Order requiring annual adjustments to account for changes in R.B.'s income.

[55] While provisions like those in the Jenkins Order are designed to minimize the need for court applications for limited purposes such as income adjustments, either party retains the right to seek the Court's assistance if the quantum of child support cannot otherwise be resolved (*Reis v. Bucholtz*, 2012 BCSC 50). This is precisely the situation that arose in the present case.

[56] The evidence establishes that R.B.'s retirement, which was known to both parties, resulted in a reduction in his income. This reduction, in turn, required a downward adjustment to the child support he was obligated to pay, in accordance with the terms of the Jenkins Order.

[57] R.B. provided evidence of his attempts to obtain L.F.'s cooperation in varying his income with the BCFMA pursuant to the Jenkins Order. Although L.F. offered explanations for her unavailability, the practical result was that L.F. purposefully avoided addressing the issue and refused to make it a priority requiring R.B. to bring the matter before the Court to have his income adjusted.

Has there been a material change in circumstances that would justify imputing R.B.'s pre-retirement income for child support purposes?

- [58] Despite the Jenkins Order and the requirement to review the child support payable each year based on R.B.'s actual income, it is L.F.'s position that R.B. should continue paying child support at the income and table amount based on R.B.'s pre-retirement income because it was his decision to retire. She provided many reasons for why he should not have retired, and as a result, seeks an adjustment to the child support owing for J.B. based on his pre-retirement income.
- [59] R.B. contends that his retirement plans were disclosed in multiple affidavits filed in the proceedings before Justice Jenkins, and L.F. was given an opportunity to respond.
- [60] In her notice of application, L.F. acknowledges that she was aware of R.B.'s plans to retire prior to the hearing on July 31, 2020. Given her own experience and the fact that she was already collecting her portion of R.B.'s pension, and her knowledge that R.B. would be entitled to collect his portion of her pension, L.F. was fully aware of the financial implications of his retirement decision. Furthermore, she was invited to file a response affidavit and make submissions on the matter.
- [61] While R.B. does not object to paying the full amount of child support based on his actual retirement income, even if a material change in circumstances existed that permitted the Court to conduct a fresh assessment, determining whether such an adjustment is appropriate requires a more holistic evaluation of the circumstances surrounding J.B.
- [62] Once a child reaches the age of majority, the Court is required to apply a greater degree of scrutiny to the child's needs than would be necessary for a child under the age of majority. This shift in approach reflects the importance of fostering accountability in young adults, encouraging them to take financial responsibility, and requiring them to contribute to meeting their own needs where feasible.
- [63] Jurisprudence requires the Court to strike a balance between society's interest in supporting young adults to maximize their educational opportunities and the principle that adults should be held accountable for demonstrating financial responsibility. This balance also recognizes the need to afford parents some discretion in determining the extent of their financial obligations to their adult children.
- [64] For many parents, there may be legitimate and commendable non-financial reasons for wishing to limit financial assistance to an adult child. Provided the explanation offered by the parent is reasonable, the Court should exercise a degree of deference to their perspective. This approach respects the autonomy of parents while ensuring that the best interests of the child are not overlooked.

- [65] J.B., now 24 years old, has taken longer than anticipated to complete her undergraduate degree due to complications from multiple concussions. While both parties acknowledge these challenges, there is no evidence to suggest that J.B.'s medical condition has worsened or that she remains dependent on her parents' support. On the contrary, her ability to live independently for an eight-month co-op placement demonstrates her growing independence and capacity to manage her life without direct parental support.
- [66] J.B. also has access to significant financial resources, including her RESP, income from her co-op position and part-time job, and a substantial \$35,000 gift from her paternal grandmother. These resources, combined with her demonstrated ability to contribute meaningfully to her own expenses, underscore her increasing financial self-sufficiency.
- [67] The issue before me arises in this context: should the Court impute the pre-retirement income of a 63-year-old father, who retired after a lengthy career, to the benefit of his 24-year-old daughter, who has demonstrated no substantial financial need beyond the generous support already provided by her parents and grandparents?
- [68] Although at the earlier 2020 hearing, the parties agreed that J.B. should be treated as a minor child, she is now four years older and demonstrating independence. Section 3(2) of the Guidelines permits the Court to deviate from the Child Support Tables when a child of the marriage is over the age of 19, if applying the tables would be inappropriate. This determination is made by considering "the condition, means, needs and other circumstances of the child and the financial ability of each spouse to contribute to the support of the child."
- [69] For children over the age of 19, the Court may order no child support in appropriate circumstances or may require payment of the full table amount. For example, deviation may occur if the child is attending university, and their needs are met through contributions such as education assistance or if the child resides at home while studying. While the table amount serves as the presumptive baseline for child support, this presumption is rebuttable depending on the specific circumstances of the case.
- [70] In reaching his Decision and Order, Jenkins J. conducted a thorough review of the balancing exercise required to determine whether child support is payable for an adult child and, if so, the appropriate amount. He carefully considered the Court's discretion in such matters deciding to amend child support for K.B. based on this and acknowledged the father's willingness to pay full child support for J.B., calculated based on his actual income.
- [71] A review of the case law demonstrates that courts have discretion in addressing child support for adult children, tailoring their decisions to the child's ability to contribute to their own expenses. In K.B.'s case, the Court considered her capacity to work and support herself while living away at university. After assessing her income and expenses, the Court determined that both parents should contribute \$350.00 each toward her schooling during the academic months, with R.B. paying full child support during the summer when K.B. resided at home with L.F.

- [72] For J.B., the Court initially adopted a different approach due to her younger age, residence at home, and the challenges posed by her concussions. Child support was adjusted to reflect R.B.'s actual income, gradually reducing his contribution from \$1,352.25 for the first few years to approximately \$743.00 per month until her anticipated graduation. Now, like K.B., J.B. is progressing toward independence, contributing to her own expenses through her co-op placement, part-time job, scholarships, and effective use of her RESP for university costs.
- [73] In summary, even with R.B.'s reduced income, he will effectively pay more child support annually for J.B. than he did for K.B. during her final two years at university.
- [74] Further, I would add that R.B.'s decision to retire is distinguishable from many of the cases cited by L.F. in her submissions. In most of those cases, the payor was either self-employed and underreporting income or had ongoing obligations for minor children or indeterminate spousal support. By contrast, R.B. retired after a lengthy and stable career, supported by the financial security of a reliable pension. Both J.B. and K.B. are over the age of majority, and while J.B. remains in university, the obligations for supporting adult children are not as absolute as those for minor children. R.B.'s financial stability, stemming from his pension, has allowed him to continue meeting his child support obligations to J.B., albeit at an adjusted level that reflects his reduced post-retirement income.
- [75] Given the lack of evidence establishing a material change in circumstances and the absence of compelling justification to deviate from R.B.'s actual income as specified in the Jenkins Order, L.F. has not met the threshold required to vary the Jenkins Order to request the court impute R.B.'s pre-retirement income for child support calculations. The Court must respect the balance struck in the Jenkins Order, which reflects the principles of fairness and the shared financial responsibility of both parents.

What Are The Actual Incomes Of The Parties

- [76] Based on the evidence presented from the parties Notices of Assessment, the following is a summary of the parties' most recent incomes:

Year

L.F.'s Income

Respondent's income

2023

\$244,036

\$ 77,689

2022

\$212,150

\$ 72,892

2021

\$156,246

\$ 75,348

2020

Not Provided

\$149,543

2019

\$147,153

\$139,403

2018

\$134,445

\$132,346

How much Child Support is payable?

[77] Based on an application of R.B.'s actual income, as contemplated in the Jenkins Order, and considering the relevant time periods, the Guideline amounts payable are as follows:

Time Period in Question

Income Considered

Guideline Amount

1 June 2024 to May 2025

Based on R.B.'s 2023 income of \$77,689

\$743

1 June 2023 to May 2024

Based on R.B.'s 2022 income of \$72,892

\$695

1 June 2022 to May 2023

Based on R.B.'s 2021 income of \$75,348

\$ 719

1 June 2021 to May 2022

Based on R.B.'s 2020 income of \$149,543

Prior Amount in Jenkins Order

[78] As clarified in court, the amount of child support owed is to be calculated annually based on the Notice of Assessment received in May of each year, following the completion of income tax filings. For the period from June 1, 2021, to May 31, 2022, child support is to be based on R.B.'s 2020 income, which was \$149,543. Accordingly, the amount of child support owed by R.B. during that time remains unchanged.

[79] Effective June 1, 2022, following K.B.'s graduation and her cessation as a "child of the marriage" for the purposes of child support, R.B.'s obligation was limited to supporting J.B. alone. Concurrently, R.B.'s retirement in 2021 and the associated reduction in his income must be factored into the calculation of child support owing from June 1, 2022, onward. The reduced income reflects a material change in R.B.'s financial circumstances, which impacts his child support obligations.

[80] Based on the DivorceMate and Guidelines' calculations, the following amounts are owed for the period beginning June 1, 2022:

- a) 12 months at \$719 per month = \$8,628
- b) 12 months at \$695 per month = \$8,340
- c) 6 months at \$743 per month = \$4,458

This results in a total amount owing of \$21,426.

[81] For the period since June 1, 2022, R.B. has consistently paid \$1,325.25 per month in child support, making 30 uninterrupted payments. This totals \$39,757.50, which represents an overpayment of \$18,331.50, based on the Guideline amounts determined for the same period.

Should the adjustment to child support apply retroactively??

[82] While I note that the retroactive award sought by R.B. does not arise from a change in circumstances but rather from a frustrated annual review process, the secondary effects of granting such an award are analogous. Accordingly, the court must exercise principled discretion in considering whether to make such an order.

[83] In *MacDonald v. MacDonald*, 2005 BCCA 23, the Court of Appeal underscored that the decision to retroactively vary a support order, whether upward or downward, necessitates the exercise of principled discretion. As Lambert J.A. observed at para. 35:

The power to award retroactive child support is governed by a principled discretion. Some of the factors representing the principles governing the discretion are set out in *S.(L.) v. P.(E.)*, in the passage I have quoted. But unless a judge applies the wrong principles or fails to consider the correct principles, it is not open to this Court to substitute its decision on retroactivity for the trial judge's discretion. The entitlement to a retroactive award of child support is not absolute. If all or a part of it is properly seen as "a wealth transfer or spousal maintenance disguised as child support", as Mr. Justice Sigurdson decided part of a fully retroactive award would be, then it would be contrary to the principles that govern the exercise of the discretion to make that award.

[84] In *G.M.W. v. D.P.W.*, 2014 BCCA 282, the Court of Appeal underscored that trial judges must apply the principles outlined in *D.B.S. v. S.R.G.*, 2006 SCC 37. Although *D.B.S.* primarily addresses retroactive increases in child support, its principles equally apply to cases involving reductions in support where payments have already been made.

[85] In *D.B.S.*, the Supreme Court of Canada provided essential guidance to ensure fairness and consistency in decisions, while prioritizing the best interests of the children. These principles include:

- a) The need to consider unreasonable delay;
- b) The assessment of any blameworthy conduct by the payor;
- c) The paramount importance of the children's circumstances; and
- d) Consideration of the hardship caused by a retroactive order within the broader family context.

[86] In applying these principles, the Court must carefully evaluate the specific facts of this case to ensure that any order aligns with the principles of fairness and prioritizes the best interests of J.B. This evaluation will determine whether the requested retroactive relief is justified or should be declined.

[87] Unreasonable Delay: If a payor delays unreasonably in bringing their application, this weighs against granting retroactive relief. The Supreme Court of Canada emphasized that delay could have significant implications, as it often prevents the recipient parent from preparing financially for any reduction in support. This is particularly critical when the children have already relied on the support during the period in question.

[88] R.B. retired in January 2021. Under the reporting cycle, any entitlement to a reduction in child support would not have arisen until June 1, 2022. The evidence indicates that Justice Jenkins' decision was pronounced on March 15, 2021, but the resulting order was not entered until August 8, 2023.

[89] Following the issuance of the Jenkins Order, R.B. took initial steps to comply with its terms by contacting the BCFMA and offering to provide his income tax documents to facilitate an adjustment to the child support payments. He was informed by the BCFMA that L.F. needed to complete a consent form before any adjustment could be processed. Consequently, R.B.

emailed L.F. on August 23, 2023, requesting her review of the child support, completion of the required form, and submission to the BCFMA. R.B. also followed up with a text message to inform L.F. of the email; however, she did not respond.

- [90] A month later, R.B. reached out again to inquire whether L.F. was available or interested in meeting to discuss the child support adjustment. This inquiry also went unanswered. On October 5, 2023, R.B. sent another email asking L.F. if she would meet to review the matter. Once again, she did not reply. Left with no alternative, R.B. re-engaged his former counsel, who, on October 16, 2023, wrote to L.F. requesting her engagement to address the child support adjustment.
- [91] On October 25, 2023, L.F. responded via email to R.B.'s counsel, but her response did not address the child support adjustment. Four days later, on October 29, 2023, R.B.'s counsel emailed L.F. requesting her income tax returns and Notice of Assessment for 2022, as required under the terms of the Final Order. L.F. eventually provided her income tax documents around December 18, 2023, more than a year after the initial efforts to resolve the matter.
- [92] On April 19, 2024, R.B. texted L.F., providing her with his 2023 T1 Summary, which she acknowledged receiving. However, L.F. continued to refuse to engage in discussions regarding the adjustment of child support, nor did she provide any explanation for her refusal. On April 24, 2024, R.B.'s counsel emailed L.F. proposing dates for a hearing--June 4, 7, or 10, 2024--and asked her to confirm her availability by April 29, 2024. L.F. replied that she was on extended medical leave and would respond once her leave with WorkSafe had concluded.
- [93] On April 29, 2024, R.B.'s counsel advised L.F. by email that the hearing would proceed on June 4, 2024, in New Westminster. L.F. was unable to attend that hearing. Subsequently, on July 24, 2024, R.B. filed a notice of application, culminating in the present matter now before the court.
- [94] I find that L.F. was aware as early as July 2020 of R.B.'s intention to retire in January 2021. The Jenkins Decision, pronounced in March 2021 following R.B.'s retirement, explicitly stated that child support for J.B. would be adjusted annually based on R.B.'s actual income. I further note that R.B. acted diligently and promptly to update his income as soon as the Jenkins Order was entered. Any delay in the adjustment process is attributable to L.F.'s lack of responsiveness.
- [95] While the court acknowledges and is sympathetic to the medical challenges and family support issues faced by L.F., it would be inequitable to prejudice R.B. because of these circumstances.

- [96] Blameworthy Conduct on the Part of the Payor: Blameworthy conduct, in this context, is defined as "anything that privileges the payor parent's own interests over the children's right to appropriate support." Such actions undermine fairness and the prioritization of the child's best interests. Courts must carefully assess whether the payor's behavior demonstrates a disregard for their financial obligations or whether it reasonably reflects changing circumstances.
- [97] In this case, L.F. has raised historical concerns regarding R.B.'s willingness and level of cooperation in paying child support. However, those issues, if they existed, were resolved by the Jenkins Order, and R.B. has since complied with all child support obligations as outlined therein. Furthermore, R.B. has not sought to reduce his financial obligations to J.B. despite her increasing independence, including her full-time employment for one academic year during which she was not attending school.
- [98] The evidence instead suggests that R.B. has acted reasonably and in good faith, continuing to support J.B. while considering his retirement income. His conduct does not reflect an attempt to prioritize his own interests over J.B.'s support. On this basis, there is no evidence of blameworthy conduct on the part of R.B.
- [99] Circumstances of the children are a paramount consideration. The circumstances of the child are a paramount consideration in determining child support obligations. It is well-established that the right to child support belongs to the child, not the parent, and any retroactive or continuing support order must ensure the child receives the financial benefit to which they are entitled. However, the law does not require parents to provide unconditional support into adulthood; rather, it recognizes the evolving independence and responsibilities of adult children.
- [100] J.B., now in her eighth year of university, continues to qualify as a "child of the marriage" under the Divorce Act. However, her situation reflects growing financial independence. During this period, J.B. worked full-time for one academic year and was not attending school. She has also benefited from scholarships, a RESP, and a \$35,000 gift from her paternal grandmother, which remains unutilized. J.B. has further demonstrated an ability to contribute to her own expenses through co-op placements and part-time employment.
- [101] At the same time, J.B.'s tuition and other education-related expenses have been well-managed through prudent planning by both parents, leaving no outstanding financial obligations in this regard. R.B., while retired, continues to receive sufficient income to provide support for J.B. as appropriate, particularly given her access to other financial resources.
- [102] In balancing these considerations, the court must account for J.B.'s increasing independence and partial financial self-sufficiency while ensuring any retroactive or continuing support order reflects a fair determination of R.B.'s financial obligations.

- [103] Hardship caused by a retroactive order. Hardship is not confined to the payor parent; the court must also assess the potential prejudice to the recipient parent and the children. Where the recipient has reasonably relied on the support received, any retroactive adjustment should be approached with caution to avoid undue harm.
- [104] The evidence establishes that L.F. has maintained a consistently high income, exceeding \$200,000 annually over the past two years. While L.F. has noted that a portion of this income increase stems from disability benefits received during recent years, she has also been receiving a portion of R.B.'s pension for at least the past eight years.
- [105] There is no indication of any financial hardship experienced by either L.F. or J.B. Furthermore, J.B. has access to additional financial resources, including scholarships, a RESP, and a \$35,000 gift from her paternal grandmother. These factors collectively mitigate any suggestion of financial strain on L.F. or J.B. that might necessitate adjustments to the existing support arrangements.
- [106] In summary, the evidence demonstrates that R.B. acted promptly to address his obligations under the Jenkins Order and maintained consistent compliance with the terms of that order. There is no evidence of blameworthy conduct on R.B.'s part, nor any indication of financial hardship on the part of L.F. or J.B., given their substantial financial resources, prudent planning, and J.B.'s increasing independence. Balancing these considerations, the court concludes that any retroactive relief must fairly reflect the realities of the parties' circumstances while avoiding undue prejudice to either side.

If retroactive adjustments are warranted, how should the overpayment be addressed?

- [107] R.B. seeks a declaration that the overpayment, totaling \$18,331.50 plus interest, be repaid by L.F. within 14 days of this decision. L.F., in response, submits that the matter must be addressed through a set-off by the BCFMA. While utilizing the BCFMA for a set-off may be practical in some cases, the pending graduation of J.B. in five months limits the available timeline for such an arrangement. With ongoing support payments of \$743 per month totaling \$3,715 until J.B.'s scheduled graduation, a significant balance of the overpayment would remain. This balance would still require recovery by the BCFMA to refund the excess support payments.
- [108] In *Moazzen-Ahmadi v. Ahmadi-Far*, 2019 BCSC 1772, aff'd on this issue at *Moazzen-Ahmadi v. Ahmadi-Far*, 2021 BCCA 126, Justice Blok conducted a detailed analysis of the issue of repayment of overpaid child support. The decision confirmed that courts possess the jurisdiction under s. 17 of the Divorce Act to address overpayments, reinforcing the principle that the authority to vary support retroactively includes the power to rectify imbalances where overpayments have occurred.

[109] Based on the foregoing reasons, I conclude that L.F. can be ordered to repay the overpaid child support directly to R.B. The repayment amount shall include an adjustment for interest, calculated in accordance with the applicable provisions of the Court Order Interest Act, R.S.B.C. 1979, c. 79. The total sum, inclusive of interest, is to be certified and repaid promptly.

Costs

[110] The respondent, R.B., seeks an order for costs against L.F., asserting that her application was frivolous, brought four years after the hearing and three years after the Jenkins Decision was delivered.

[111] Given R.B.'s success on his application before this Court, he is entitled to his costs of the application pursuant to the Supreme Court Family Rules, Appendix B. Costs are to be assessed as a matter of ordinary difficulty and payable forthwith upon certification by the Registrar.

[112] Pursuant to the Order of Justice Brongers, it was directed that the costs "thrown away" from the adjournment during the Chambers appearance on August 20, 2024, be determined by the Justice hearing this application. The respondent seeks \$1,200, inclusive of disbursements, for the half-day proceeding. However, considering the health issues raised by L.F. as the reason for her inability to proceed at that time, and in light of the substantial retroactive repayment I am ordering, I exercise discretion to give L.F. the benefit of the doubt and decline to award costs against her for the adjournment.

Disposition

[113] For these reasons, I order:

- a) L.F.'s application for a retroactive variation in child support for K.B., as well as her request for an imputation of R.B.'s pre-retirement income for J.B., is dismissed;
- b) R.B.'s obligation to pay child support to L.F. for J.B. shall be retroactively adjusted as follows:
 - i. From June 1, 2022, to May 31, 2023, based on R.B.'s 2021 Guideline income of \$75,348, child support is set at \$719 per month for 12 months, totaling \$8,628;
 - ii. From June 1, 2023, to May 31, 2024, based on R.B.'s 2022 Guideline income of \$72,892, child support is set at \$695 per month for 12 months, totaling \$8,340;
 - iii. From June 1, 2024, to December 31, 2024, based on R.B.'s 2023 Guideline income of \$77,691, child support is set at \$743 per month for 6 months, totaling \$4,458.
- c) From January 1, 2025, R.B. shall continue paying \$743 per month to L.F. for J.B., with this amount subject to annual adjustment based on R.B.'s actual income. Payments shall continue until J.B. ceases to be a "child of the marriage" under the Divorce Act or as otherwise agreed by the parties;

- d) As a result of the above retroactive adjustments, the total overpayment by R.B. to L.F. is determined to be \$18,331.50. L.F. shall repay this amount to R.B., along with interest calculated in accordance with the Court Order Interest Act, R.S.B.C. 1979, c. 79. If the parties are unable to agree on the amount payable, the matter will be referred to the registrar for determination, who shall certify the result. The total amount, inclusive of interest, shall be repaid within 21 days of this Order.
- e) R.B., having been successful on his application before this Court, is entitled to his costs of the application pursuant to the Supreme Court Family Rules, Appendix B. Costs shall be assessed as a matter of ordinary difficulty and shall be payable forthwith upon certification by the Registrar.

"Sukstorf J."

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