

CANADA / JUDGMENT

L.L.W. v. D.P.D.

2023 BCSC 2086

COURT

Supreme Court of British Columbia

DECIDED

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2023 BCSC 2086 L.L.W. v. D.P.D.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

L.L.W. v. D.P.D.,

2023 BCSC 2086

Date: 20231128

Docket: E107065

Registry: Kelowna

Between:

L.L.W.

Claimant

And

D.P.D.

Respondent

Before: The Honourable Justice Hardwick

Reasons for Judgment

Counsel for the Claimant:

D.O. Barnes

Appearing in Person:

D.P.D.

Place and Date of Trial/Hearing:

Kelowna, B.C.

November 6, 2023

Place and Date of Judgment:

Kelowna, B.C.

November 28, 2023

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Introduction

- [1] These reasons for judgment address the relief sought in the amended notice of application filed by the claimant on August 11, 2023 (the "Application"). The Application was amended pursuant to court order made on July 31, 2023. The original underlying notice of application was filed more than three years ago on June 23, 2019. The original application was set for hearing but was not adjudicated upon its merits. Its timing and discussions between the parties at the time of said hearing are very relevant for reasons that will be apparent.
- [2] The primary issue in the Application is child support, namely:
- a) arrears of child support/retroactive child support;

- b) prospective child support; and
 - c) section 7 special and extraordinary expenses.
- [3] There are certain other corollary property issues which I will address at the conclusion of my reasons for judgment.

Factual Overview

- [4] The claimant and the respondent have one child together, K., born in March 2007. K. is currently 16.5 years of age.
- [5] The claimant and the respondent did not marry and so all legal issues between them are governed by the Family Law Act, S.B.C. 2011 c. 25 [FLA].
- [6] On May 5, 2016, a final order (the "May 2016 Order") was entered with this Court on the basis of it being an undefended family law case without an oral hearing under R. 10-10 of the Supreme Court Family Rules [Family Rules].
- [7] Importantly, the May 2016 Order was made on consent of both parties. The claimant was represented by counsel (who continues to be her counsel at the Application) and the respondent was self-represented. The respondent continues to be self-represented.
- [8] I will note that, somewhat unusually, the May 2016 Order does not set out Guideline incomes for either party, even though K. was clearly a "child" as defined by the FLA and reasonable support arrangements are required by the legislation. This is not a recommended practice for obvious reasons, even where an order is being made by consent of both parties.
- [9] I will summarize, in my own phrasing, the key provisions of the May 2016 Order:
- a) The parties are both guardians of K., under s. 39 of the FLA;
 - b) The claimant shall have primary residence and primary care of K. and shall be permitted to relocate to from Westbank, British Columbia to Kamloops, British Columbia;
 - c) Until such time as the respondent relocates to the Kamloops area, the claimant shall have sole day-to-day parenting responsibilities, but major parenting responsibilities continued to be shared;
 - d) Until such time as the respondent relocates to Kamloops area, the respondent will have frequent and generous parenting time as agreed between the parties based upon his work schedule, with the parties sharing responsibilities for transporting K. between the different communities based upon different scenarios;
 - e) After the sale of the family home (which was located in Westbank, British Columbia) and in the event that the respondent relocated to the Kamloops region, the parties would transition to a substantially equal parenting time schedule; [Emphasis added.]

- f) There would be no basic child support payable at the time, but the parties would equally share all of K.'s health-related expenses and other special and extraordinary expenses;
- g) The respondent had sole occupancy of the family home pending sale and was to be responsible for the expenses related to the home and keep it in clean and good repair;
- h) Upon the sale of the family home and payment of certain secured and specified unsecured debt, the net sale proceeds shall be divided into two separate educational accounts for K. and the respondent's daughter from a prior relationship, T. As it relates to K.'s educational account, it would be jointly managed by the parties. These amounts were unknown at the time of the May 2016 Order but, with the benefit of the statement of adjustments from the sale of the family home, the sum of \$2,027 was ultimately deposited to each of T.'s and K.'s educational accounts;
- i) The respondent would withdraw his response to family claim and discontinue his counterclaim to allow the matter to proceed on an uncontested basis;
- j) All other relief contained in the claimant's notice of civil claim was dismissed.

Initial Procedural Matters

- [10] The last two provisions of the May 2016 Order referred to above gave me some procedural concern as to whether the Application was properly brought before the court. If there is no existent action, the court does not have jurisdiction to grant relief. New proceedings are required.
- [11] However, the provision in the May 2016 Order that no child support was payable for K. could never have been a "true" final order as child support is the right of the child and is variable in the event of a material change in circumstances. The remainder of the relief sought in the Application amounts to enforcement of certain provisions of the May 2016 Order and a new action is not required to enforce an entered court order. I am thus satisfied that the Court has the necessary jurisdiction to consider the application on its merits.
- [12] I am further satisfied that this matter is capable of determination on the basis of affidavit evidence. There are conflicts in the evidence, I recognize, which make it not ideally suited for same. However, the amount of money in issue, while significant to the parties, does not, in my view, warrant more fulsome litigation processes as I am satisfied I can find the necessary facts to proceed.
- [13] Further, this matter has been lingering for some time (the underlying application, as noted, having been filed in 2019 and not heard until late 2023). This also favours just, speedy and inexpensive determination in accordance with the general principles set forth in the Family Rules and the guidance of the Supreme Court of Canada in *Hryniak v. Mauldin*, 2014 SCC 7 which provides as follows:

- [1] Ensuring access to justice is the greatest challenge to the rule of law in Canada today. Trials have become increasingly expensive and protracted. Most Canadians cannot afford to sue when they are wronged or defend themselves when they are sued, and cannot afford to go to trial. Without an effective and accessible means of enforcing rights, the rule of law is threatened. Without public adjudication of civil cases, the development of the common law is stunted.
- [2] Increasingly, there is recognition that a culture shift is required in order to create an environment promoting timely and affordable access to the civil justice system. This shift entails simplifying pretrial procedures and moving the emphasis away from the conventional trial in favour of proportional procedures tailored to the needs of the particular case. The balance between procedure and access struck by our justice system must come to reflect modern reality and recognize that new models of adjudication can be fair and just.
- ...
- [5] To that end, I conclude that summary judgment rules must be interpreted broadly, favouring proportionality and fair access to the affordable, time, and just adjudication of claims.

Relocation

- [14] Of some significance, and as summarized above, the May 2016 Order contemplated the claimant and K. relocating to Kamloops with the consent of the respondent. This occurred.
- [15] In 2020, the claimant and K. moved to the District of Lake Country where they continue to reside. The respondent never relocated to Kamloops. The respondent instead relocated to the lower mainland region of the province of British Columbia after the sale of the family home where he has established a new family unit. Shared parenting has thus not been a practicable option since the May 2016 Order given K.'s age and school obligations.

Oral Agreement and Arrears

- [16] The parties were in court on July 29, 2019 pursuant to the claimant's filing of the initial version of the Application as referred to above. Although not made entirely clear in the affidavit evidence, I gather the matter was unable to proceed due to lack of judicial time or unlikely to proceed based upon an adjournment request by the respondent.
- [17] The parties did, however, engage in fruitful discussions in the courthouse hallway regarding the issue of child support for K.
- [18] Specifically, I accept that the courthouse hallway discussions resulted in an oral agreement between the parties that the respondent would commence paying \$500 per month in child support for K. effective August 2019 and the Application (in its then form) was adjourned generally.

- [19] Unfortunately, this oral agreement was not spoken to on the record or reduced, in due course, to a written agreement. I still find it constitutes an agreement as contemplated under s. 148 of the FLA, which does not require, in subsection 1(a), that an agreement respecting child support be in writing. The requirement for an agreement to be in writing is limited to subsection (2), where the agreement is sought to be filed with the court and enforceable as if it was an order.
- [20] The respondent did not pay support for August 2019, for reasons not explained. However, the respondent paid \$500 per month in support for K. to the claimant for eight months between September 2019 and April 2020. This, I conclude, exhibits conduct consistent with the oral agreement reached in the courthouse hallway on July 29, 2019. The respondent is entitled to \$4,000 in credit for this support paid.
- [21] The respondent ceased paying child support after his April 2020 payment on the basis that he was off work due to the COVID-19 pandemic. Although I accept this was true for a short period of time, the respondent did not even pay a reduced amount of support voluntarily. He simply ceased paying support for K. entirely and left the claimant with all financial responsibility for K. in turbulent financial times. The respondent did so despite starting to collect CERB payments. The exact date of when he commenced receiving those benefits is not clear on the affidavit evidence, but I am prepared to take judicial notice that it was likely in or about April or May 2020 as the CERB program was initiated by the federal government in March 2020. Further, the respondent has long since been back working on a full-time basis, but did not resume his monthly child support payments to the claimant for K.
- [22] To address K.'s financial needs at the outset of the COVID-19 pandemic, the parties orally agreed the claimant could remove the sum of \$7,800 (\$10,000 net of penalties and mandatory deductions) from K.'s educational fund. This left approximately \$10,000 in the account for K.'s future post-secondary costs. Although not precisely articulated, I accept this was done on the premise that the respondent would receive credit for his \$3,900 portion of the funds towards his child support obligation. Again, the fact that the parties failed to reduce their agreements to writing provides for some ambiguity, but there was conduct of both parties consistent with this agreement, certain text messages exchanged consistent with the agreement and the respondent does not allege that the funds were withdrawn improperly or unilaterally without his consent.
- [23] To the contrary, the respondent actually demanded that the claimant personally pay him the sum of \$500 by e-transfer as a condition of signing the RESP withdrawal form for K., which she did. The respondent was thus clearly aware of the claimant's desperate need to access these funds. This conduct, combined with the respondent's prior conduct in unilaterally ceasing all child support for K., does not paint the respondent in a favourable light.

- [24] On the basis of the evidence, and subject to my below calculations for support paid, I am satisfied that the respondent is obligated, at minimum, to pay child support to the claimant for K. in the amount of \$500 per month commencing August 1, 2019 continuing until August 1, 2023 (the order granting the amendment of the Application seeking a variation of said support having been made July 31, 2023).
- [25] I am satisfied that this conclusion is consistent with the principles set forth by the Supreme Court of Canada in *Colucci v. Colucci*, 2021 SCC 24, even though the respondent has not actually brought forward a proper application to cancel some or all of his arrears of support. Given the lack of such an application, I am going to simply rely on my review of the principles set forth in *Colucci in M.D.W. v. T.T.W.*, 2022 BCSC 770.
- [26] As set out in the reasons for judgment, *M.D.W.* was a Divorce Act case. Given there is no cross-application by the respondent before me, my commentary on the application of *Colucci* to the FLA are moot. However, the overarching principles are, I find, very instructive in confirming that the respondent cannot take the benefit of having taken self-help remedies and simply ceasing payment of the support, which I accept he agreed to pay commencing August 1, 2019. If there was a material change of circumstances in the respondent's income situation, the obligation was on him to take the necessary steps to bring the matter before the court or negotiate an agreement with the claimant.
- [27] As set out in *M.D.W.* at paras. 62 to 71, the core principles of *Colucci* are, in my view, summarized as follows:
- [62] In this regard, the primary governing authority to apply is the recent Supreme Court of Canada decision in *Colucci v. Colucci*, 2021 SCC 24. Had I concluded that this matter was governed by the Family Law Act, the possible application of *Colucci* would have required further consideration. Specifically, as noted by the British Columbia Court of Appeal in *P.J.M. v. R.M.S.*, 2021 BCCA 260 at paragraph 43:
- [43] Assuming without deciding that the *Colucci* framework applies to an application under the Family Law Act, [the respondent] was *prima facie* entitled to the benefit of the presumption. I say "*prima facie*" because the judge did not consider *Colucci* and a substantive analysis of that case in the context of the Family Law Act is for another day, when a lower court has considered the issue and its consideration is subject to appellate review. Nothing said here should be taken as determinative in the application or interpretation of *Colucci*.
- [63] Returning to *Colucci*, the Supreme Court of Canada in this case considered the law regarding retroactive support orders and the rescission of arrears. It is now the governing authority on applications of this nature, at least those governed by the Divorce Act.

[64] At paragraph 30 of Colucci, the Supreme Court of Canada noted that there are three main categories with respect to claims for retroactive relief under s. 17 of the Divorce Act. The second of those two categories apply here to T.T.W., namely the payor is seeking a retroactive decrease in support because of a past change in circumstances, and the payor seeks to rescind or suspend arrears because of a current or future inability to pay.

[65] At paragraph 46 of Colucci, the Supreme Court of Canada referred to its earlier seminal decision in a trilogy of cases considering retroactive support generally: namely, D.B.S. v. S.R.G., 2006 SCC 37. The Court specifically referred to paragraph 37 of D.B.S. where it noted that there are:

. . . three interests which must be balanced to achieve a fair result in retroactive variation cases: first and foremost, the child's interest in receiving the appropriate amount of support to which they are entitled; second, the interest of the parties and the child in certainty and predictability; and third, the need for flexibility to ensure a just result in light of fluctuations in payor income

[66] At paragraph 57 of Colucci, the Supreme Court of Canada also specifically considered the framework for dealing with retroactive increases and stated that:

Any framework developed to accommodate retroactive variations of child support in response to decreased payor income must deal fairly with a wide range of factual situations, from payors who diligently paid the proper amount until they lost their employment or otherwise fell on hard times, to those who have made little effort to meet their responsibilities and are absent, intentionally underemployed or persistently delinquent.

[67] At paragraph 61 in Colucci, the Court held that to meet the threshold for a retroactive variation of support based on a material change in circumstances, a decrease in income must be significant. It must have a degree of continuity and it must be real and not one of choice.

[68] At paragraph 62 of Colucci, the Supreme Court of Canada further stated that:

The payor must have disclosed sufficient reliable evidence for the court to determine when and how far their income fell, and to ascertain whether the change was significant, long lasting, and not one of choice. A decision to retroactively decrease support can only be made based on "reliable, accurate and complete information"

[69] Skipping forward to the issue of arrears, the Supreme Court of Canada in Colucci at paragraph 134 stated that a claim for rescission of arrears is a form of "hardship" application in which there has been no past change in circumstances justifying a retroactive decrease in the support obligation. In other words, rescission of support calls for a different analysis than the aforementioned retroactive variation, which does not involve such a retroactive or backward-looking lens.

[70] The Supreme Court of Canada continued, in part, at paragraphs 135 to 137 of Colucci as follows:

135 under this third category of cases, the payor's ongoing financial capacity is the only relevant factor. The payor must therefore provide sufficient reliable evidence to enable the court to assess their current and prospective financial circumstances, including their employment prospects and any assets, pensions, inheritances or other potential sources of future capacity to pay.

136 Courts have taken a highly restrictive approach to the availability of rescission or suspension of child support based solely on current and ongoing inability to pay

137 This strict approach to rescission and suspension of arrears based on current inability to pay is justified. The interests of the recipient and child in certainty and predictability are paramount, as the payor has failed to comply with a court order or agreement without any "excuse for non-payment of support when it came due"

[71] Finally, at paragraph 138, the Supreme Court of Canada held that:

138 Accordingly, in this third category of cases, the payor must overcome a presumption against rescinding any part of the arrears. The presumption will only be rebutted where the payor parent establishes on a balance of probabilities that -- even with a flexible payment plan -- they cannot and will not ever be able to pay the arrears

[28] Having regard to my above findings of fact, the respondent is, at minimum, obligated to pay arrears basic child support for K. as follows:

2019

5 months x \$500

\$2,500

2020

12 months x \$500

\$6,000

2021

12 months x \$500

\$6,000

2022

12 months x \$500

\$6,000

2023

7 months x \$500

\$3,500

Subtotal:

\$24,000

Less - Credit for payments made

\$4,000

Less - Credit for $\frac{1}{2}$ of RESP withdrawal

\$3,900

Subtotal:

\$16,100

Plus - reimbursement for payment for RESP withdrawal authorization

\$500

Total:

\$16,600

[29] This \$16,600 represents the respondent's minimum financial obligation to the claimant for child support for K. It does not take into consideration whether additional retroactive support should be awarded, having regard to the relevant legal principles.

Guideline Income Determination

[30] For the purposes of considering both the claim for retroactive child support and prospective child support, I must determine the respondent's Guideline income pursuant to the Federal Child Support Guidelines (SOR/97-175).

[31] Despite very clear requests from the claimant's counsel, the respondent has made piecemeal financial disclosure. The claimant raises understandable questions as to whether, given the limited disclosure, there is income from other sources including employment insurance benefits. Notwithstanding these concerns, the claimant wanted to proceed with a hearing of the Application on its merits and did not seek an adjournment to pursue better financial disclosure.

[32] Thus, from what I am able to glean from the exhibits to the respondent's affidavit, I conclude the respondent's Guideline income was as follows:

2022

\$90,231

(This is based on the various T4 statements provided and not confirmed by a tax return or notice of assessment.)

2021

\$129,126

2020

\$121,336

Average:

\$113,564

- [33] As calculated above, using a patterning of income approach under s. 17 of the Guidelines, the average of these three taxation years is \$113,564. When the respondent's CERB is excluded on the basis of the respondent's evidence that he repaid the benefits received, the average is \$110,891.
- [34] On a prospective basis, the respondent's most recent paystub confirms he is receiving an hourly rate of \$44.87 per hour and an overtime rate of \$67.30. The respondent also receives a fairly significant tax-free travel allowance, which he does not explain in his affidavit. He is further contributing to an employee RRSP and an "extra RRSP" (neither of which is a proper deduction from his Guideline income), and is paying union dues (which is a proper deduction from his Guideline income). As best as I can decipher from his paystub, the respondent earned approximately \$1,400 for the week of September 9 to September 15, 2023.
- [35] This is not also inconsistent with the respondent's own evidence wherein he states, at paragraph 8 of his affidavit sworn September 25, 2023, that "I have no problem supporting my daughter moving forward if reasonable, my industry of work fluctuates to be anywhere near 80k to 110k".
- [36] Based upon the financial disclosure I do have and the respondent's affidavit evidence, I conclude that the respondent's Guideline income for support commencing August 1, 2023 is \$110,000 per annum pending further court order or written agreement.
- [37] I reach this conclusion based on both s. 18 of the Guidelines, as referred to above, and s. 19 of the Guidelines which permits the court to impute income where appropriate having regard to the factors enumerated therein. On this latter point, even the respondent's own less than satisfactory disclosure does not support the proposition that he is only capable of earning \$80,000 per annum. Rather, I find that the respondent is intentionally underemployed if he earns less than \$110,000 per annum and that income is appropriately imputed to him for the purposes of supporting K.
- [38] The claimant's Guideline income is only relevant for the purposes of s. 7 expenses. However, I have the benefit of a more comprehensive compilation of T-1 Tax returns, taxation summaries and notices of assessment from the claimant. On the basis of this documentation I am satisfied that the claimant's Guideline income was as follows:

2022

\$29,669

2021

\$8,411 (the year the claimant was primarily in receipt of social assistance)

2020

\$29,435

2019

\$16,640

2018

\$33,595

2017

\$57,763

2016

\$61,988

[39] Having regard to the fluctuation in the claimant's income due to the loss of her more remunerative employment and her period of reliance on social assistance, I am satisfied that a patterning of income approach would not accord with a proper application of s. 18 of the Guidelines.

[40] Rather, I conclude that the claimant's Guideline income is appropriately determined, pursuant to s. 15 of the Guidelines, at \$30,000 per annum. This is consistent with her Form 8 financial statement filed June 22, 2023 and, I note, also generally consistent with her 2022, 2020 and 2018 tax returns.

Retroactive Support

[41] The law on retroactive child support is very well settled by the Supreme Court of Canada where there is an agreement or court order in place. The success of an application for a retroactive change in support depends on the occurrence of a material change in circumstances from when the original amount was set: *D.B.S. v. S.R.G.*, 2006 SCC 37 and more recently, *Michel v. Graydon*, 2020 SCC 24.

[42] I am not going to review the law on retroactive support in extensive detail for the purposes of the reasons for judgment in this case. The issue here is the application of said law to the particular facts and does not invoke any novel application of these well-established principles.

- [43] I will simply refer to the instructive summary of the key principles outlined by the majority at para. 10 of Michel:
- [10] In D.B.S., this Court endorsed certain important principles governing orders for child support (including retroactive child support) that merit restating here:
- Child support is the right of the child, which right cannot be bargained away by the parents, and survives the breakdown of the relationship of the child's parents (para. 38);
 - Child support should, as much as possible, provide children with the same standard of living they enjoyed when their parents were together (para. 38);
 - The child support owed will vary based upon the income of the payor parent, and is not confined to furnishing the "necessities of life" (paras. 38-45);
 - Retroactive awards are not truly "retroactive", since they merely hold payors to the legal obligation they always had to pay support commensurate with their income (para. 2);
 - Retroactive awards are not confined to "exceptional circumstances" or "rare cases" (para. 5); and
 - In determining whether to make a retroactive award, the payor parent's interest in certainty in his/her obligations must be balanced with the need for "fairness and . . . flexibility". A court should consider whether the recipient parent's delay in seeking retroactive support was reasonable in the circumstances, the conduct of the payor parent, the circumstances of the child, and the hardship the retroactive award might entail (para. 133).
- [44] I will further confirm that the test for retroactive child support set forth in D.B.S. requires the court to consider and balance the following four factors:
- a) the conduct of the payor party;
 - b) the recipient's delay in seeking the retroactive award;
 - c) the circumstances of the recipient; and
 - d) the potential hardship to the payor.
- [45] Applying those principles, I ultimately conclude that any claim for retroactive child support from 2016 to July 2019 must be dismissed for the reasons set forth below.
- [46] The claimant agreed to the terms of the May 2016 Order that stipulated that no child support was payable by the respondent for K. It was contemplated therein that the respondent might also relocate to Kamloops after the sale of the family home, but that was far from a certainty. It was a possibility based upon a hypothetical but uncertain future factual scenario.

- [47] The application to vary the child support for K. under the May 2016 Order was filed by the claimant in June 2019. The parties attended court (more accurately, as I have described, at least attended in the hallway outside of court) in July 2019 and agreed upon a prospective child support plan for K. Had the claimant sought to pursue child support for the period from the sale of the family home in 2016 to 2019, the issue should have been addressed in their oral agreement outside the courtroom at that time. Even if simply to the extent of agreeing on a prospective amount and adjourning the issue of retroactive support to a later date pending disclosure and/or court availability.
- [48] Rather, I am satisfied that the claimant, as the party who has consistently had legal counsel, intentionally did not pursue the claim for retroactive support at that time in 2019 and that this was not due to blameworthy conduct of the respondent. Nor is there evidence, in considering the third factor of the D.B.S. analysis, that K.'s financial needs were not being met during this time. Again, I am having to piece together facts from a less than ideal record but I find that the claimant had reasonably well-paying employment in Kamloops until 2018. The claimant was also engaged in a new relationship in Kamloops during this time that afforded her and K. a degree of financial security which left her unmotivated to pursue a variation of the child support arrangements provided for in the May 2016 Order even though it was readily apparent to her that the possible relocation of the respondent to Kamloops was not happening.
- [49] The situation manifestly changes as of July 2019.
- [50] The respondent agreed, as I have accepted, to pay \$500 per month in support for K. I have no financial disclosure from 2018 or 2019 from the respondent and due to the oral nature of the agreement I, again, do not have the benefit of there being a determined or agreed upon Guideline income. This amount was not, I find upon the available evidence before me, strictly based upon a precise application of the Guidelines.
- [51] Using reverse calculations, and applying the Guidelines table amounts as they existed at that time, support of \$500 per month was based upon the respondent having a Guideline income of approximately \$53,000 per year. There is no evidence before me to support that this was an accurate assessment of his Guideline income but also unfortunately no evidence which objectively confirms this was not his Guideline income.
- [52] Rather, I am left to accept that this was an amount the parties accepted, in the circumstances, as fair and reasonable amount of support for K. having regard for the fact that she was primarily resident with the claimant in Kamloops. In this regard, I again recognize that child support is the right of the child, as set forth above, but also recognize that the FLA and the Guidelines permit parties to make compromises of strict legal rights where same might be appropriate.
- [53] I am thus satisfied that the claimant and respondent considered the respondent's agreement to pay \$500 per month in child support reasonable when compared to the May 2016 order which provided for \$0 in child support as a means to avoid a contested application, with the

attendant legal costs, to seek child support that precisely accorded with the respondent's Guideline income. The claimant's decision to accept \$500 per month in support for K. was generous in the respondent's favour and he ought to have been more than satisfied with the compromise achieved.

- [54] Apart from his failure to pay support for the month of August 2019, which is not explained, the respondent honoured this oral agreement for eight months. This is, as set out above, consistent with there being consensus ad idem to vary the child support from that set forth in the May 2016 Order from \$0 to \$500 per month.
- [55] The respondent's blameworthy conduct, I conclude, commenced when he unilaterally ceased paying the \$500 in child support for K. after April 2020. The respondent did not consult the claimant or seek to vary his support obligation temporarily due to COVID-related employment issues. Instead, the respondent took self-help measures which placed the claimant, as the primary caregiver of K. and responsible for the payment of her very basic day-to-day expenses such as ensuring she had shelter, food, clothes, and transportation to school, in an extremely precarious financial position.
- [56] The respondent did so notwithstanding the benefit of not having paid child support from the May 2016 Order until the July 2019 oral agreement which I again stress required him to pay support at what I have concluded was based on an income very likely less than his actual Guideline income at the material time.
- [57] The respondent further did so with knowledge of certain mental health struggles K. faced during these years for which the claimant was primarily, if not exclusively, responsible for managing.
- [58] The respondent has also been blameworthy in being less than diligent in his financial production. This continues to present date despite the very specific demands from claimant's counsel for simple "first tier" financial disclosure as noted above.
- [59] Notwithstanding my conclusions regarding the blameworthy conduct of the respondent, I am limited by the fact that the Application does not seek retroactive support in excess of \$500 per month for the period of September 2019 to and including June 2023. Specifically, paragraph 3(b) of the Application seeks the following relief:
3. . . .
 - b. Child support to be set at the sum of \$500.00 per month based upon the [parties'] agreement for the time period of September 2019 through June 2023, with credit to the Respondent for payments made;

- [60] I am further not satisfied, upon a review of the law, that the basket clause prayer for relief of "any other relief the Court may deem just" allows me to order retroactive child support during the period between September 2019 and June 2023 beyond that claimed in the Application. That would unfairly prejudice the respondent who is entitled to know the case he is required to meet, as defined in the pleadings, when coming to court.
- [61] I thus must conclude that any claim for retroactive support during the period between September 2019 and June 2013 is dismissed and the claimant is entitled solely to the arrears of child support in the amount of \$16,600 as calculated above.

Section 7 Expenses

- [62] Paragraph 3(d) of the Application seeks an order that the respondent "pay his proportionate share of the child's Section 7 special and extraordinary expenses, retroactively and prospectively".
- [63] I accept that the claimant did incur health-related expenses for K. which would qualify as special and extraordinary expenses. The evidence in support of this claim on a retroactive basis is woefully deficient, however. All that I have in the affidavit record is certain text messages between the parties in which expenses are discussed. Similarly, it is possible that there were some claims for other special and extraordinary expenses for extracurricular activities, but again the evidentiary basis is deficient.
- [64] I thus must also reluctantly dismiss the retroactive s. 7 special and extraordinary claims in their entirety without even engaging in a substantive D.B.S. analysis as I simply do not have the necessary evidence to establish what expenses were alleged to be incurred on what dates and what amounts were paid by either party towards the same.
- [65] Should I be in error in this regard, my conclusions regarding the respondent's blameworthy conduct remain applicable and I am also satisfied, on the basis of the aforesaid text messages, that the respondent was aware of certain expenses for K. and that the claimant was not improvidently or imprudently incurring expenses for K. with the expectation that the respondent would simply indemnify her. Rather, the text messages, I conclude, establish that the claimant was incurring expenses for the benefit of K. and sought the financial assistance of the respondent, as K.'s father and the higher income earning parent, to contribute to these expenses as required.

Prospective Child Support

- [66] Based upon my conclusion that the respondent's current Guideline income is \$110,000, the respondent shall be required, commencing effective August 1, 2023 and continuing on the 1st of each month thereafter unless varied by written agreement or court order, to pay the claimant the sum of \$1,031 for the support of K.

[67] The arrears of child support from August 1, 2023 through to and including November 1, 2023 must be paid in full by February 15, 2024. These arrears amount to \$4,124.

Payment of Historical Arrears

[68] The respondent owes \$16,600 in historical arrears as calculated above. It is in K.'s best interests to have the benefit of those funds in the claimant's household while she continues to be a "child" as defined in the FLA.

[69] I cannot ignore, however, the reality that the respondent has a new family unit which also require his financial support. His decision to take on these financial obligations does not diminish K.'s right to support under the "first family first" approach but that is not an absolute principle and cannot be outrightly ignored for enforcement purposes.

[70] Rather, I have concluded that the respondent shall pay, in addition to his prospective support obligations set forth herein, the sum of \$691.65 for a period of 24 months commencing March 1, 2024 and continuing on the 1st of each month thereafter in satisfaction of his arrears of support.

[71] I have intentionally delayed these monthly payments on account of historical arrears to account for my order requiring the prospective child to be brought current by no later than February 15, 2024.

Prospective Section 7 Special and Extraordinary Expenses

[72] On a prospective basis commencing August 1, 2023, having regard to my determination that the respondent has a Guideline income of \$100,000 and the claimant has a Guideline income of \$30,000 per annum, I conclude that s. 7 special and extraordinary expenses for K. shall be proportionately shared such that the claimant is responsible for 78% and the respondent is responsible for 22%.

[73] In light of the lack of particularity of the ongoing expenses for K. set forth in the evidentiary record I conclude that special and extraordinary expenses are as follows:

- a) unreimbursed medical and dental expenses; and
- b) such further and other expenses that the parties may agree upon in writing or which the court may further deem to be special and extraordinary expenses, with consent not to be unreasonably withheld.

Fine for Financial Disclosure and Ongoing Disclosure

[74] As is apparent from these reasons for judgment, I am not satisfied that the respondent has been diligent in providing his financial disclosure.

[75] The May 2016 Order does not, however, set out any specific terms regarding the exchange of financial disclosure.

- [76] The claimant also does not expressly seek a fine under the FLA for incomplete and delayed disclosure in the Application.
- [77] Had such relief been sought, I am satisfied that an order would have been appropriate under s. 213(a)(ii) of the FLA which allows the court to make orders where person "fails to comply" with "a requirement to disclose information in accordance with the [Family Rules]".
- [78] In the circumstances, I was simply left with drawing inferences as to the respondent's prospective Guideline income for the purposes of the Application.
- [79] However, to secure the respondent's financial disclosure on an ongoing basis and to allow the claimant, if necessary, to avail herself of relief under ss. 212 or 213 of the FLA in the future, I am making the following orders:
- a) By May 15 of each year, commencing June 1, 2024 and until such time as K. ceases to be a child as defined by the FLA, the respondent shall provide to the claimant a copy of his complete T-1 personal income tax return, with attachments; and
 - b) By June 15 of each year, commencing June 1, 2024 and until such time as K. ceases to be a child as defined by the FLA, the respondent shall provide to the claimant a copy of his notice of assessment and, if applicable, any notices of reassessment from the Canada Revenue Agency.
- [80] I make the above orders on the basis that financial disclosure from payor parents is mandated under both the Family Rules and under s. 21 of the Guidelines and that neither of above orders contradicts any prior written agreement or court order on these issues. Further, and in the alternative, I consider this procedural type of order to fall within my jurisdiction to grant "any other relief the court may deem just" as claimed in paragraph 6 of the Application.

Parenting

- [81] K. is 16.5 years of age.
- [82] When the May 2016 Order was pronounced, K. had just turned 9.
- [83] It is trite law that court orders are not mere recommendations and are to be abided by unless varied by agreement or further court order. Neither occurred here.
- [84] There is some, albeit very limited, evidence before me that there have been challenges with the respondent exercising his parenting time with K. since the May 2016 Order. I conclude that both parties must shoulder some blame for these issues and that K. has been caught in the middle. The respondent though did not bring the parenting issues back before the court for enforcement or variation at any point since the May 2016 Order if he genuinely believed that the claimant was wrongfully denying him parenting time with K.

- [85] The result being that the parenting schedule contemplated in the May 2016 Order is obsolete and this Court is not in a position to make an order that K., in light of her age, abide by a specific parenting plan. Such an order, particularly given that the respondent resides with his current family unit in the lower mainland and works away from home for extended periods and K. has resided primarily with the claimant since separation and does so currently in the District of Lake Country would be futile. Rather, it would simply place the claimant in jeopardy of facing allegations of wrongful denial of parenting time or even contempt of a court order.
- [86] In reaching this conclusion, there is nothing in the evidence which conclusively establishes that the respondent is not a good father, although the claimant's evidence does suggest that he has made poor decisions in not even continuing a relationship through text messaging, social media or other electronic means with K. My conclusion is rather based on the practical reality that K. is a mature minor child with parents who reside in different regions of the province. Any parenting schedule must, pursuant to s. 73 of the FLA, respect K.'s views as part of the best interests analysis, but continue to be facilitated by the parties.
- [87] The claimant should thus encourage K. to have a positive relationship with the respondent and visit him at a time that is convenient to her and accords with his work schedule. The respondent should similarly make reconnecting with K. and spending time with K. a priority. I accept that with three young children with his new spouse and a new baby arriving soon this may make this seem somewhat challenging. However, K. will still only be a "child" as defined by the FLA for a relatively limited period of time. This, accordingly, is the prime opportunity for the parties, as best as possible, to foster the relationship between K. and the respondent, her stepmother and her younger half-siblings.

Family Home Expenses

- [88] The family home was sold in July 2016. That is more than seven years ago.
- [89] The evidence that the respondent failed to comply with paragraph 13 of the May 2016 Order that required him to keep it "clean, in good repair and ready to be shown at all times" while being listed is scant. A substantial portion of the costs are for landscaping charges and I have no baseline to know the state of the family home when the claimant vacated it in November of 2015. I thus dismiss the portion of paragraph 4(a) of the Application pertaining to landscaping costs.
- [90] The respondent also alleges that the respondent was derelict in paying property taxes for the family home. However, there is no evidence to support what portion of the property taxes is attributable to the period under which the respondent had exclusive occupancy and exclusive responsibility for the expenses of the family home under the May 2016 Order. To the contrary, based upon the sale price of the family home being \$193,449 I conclude that at least some portion of the \$1,584 in outstanding taxes which were paid upon the sale accrued during the period between the May 2016 Order and the sale of the family home. Further, although the claimant vacated the family home in November 2015, the May 2016 Order does

not address responsibility for expenses between the claimant vacating the family home and the May 2016 Order. I thus also dismiss this portion of paragraph 4(a) of the Application.

- [91] I am, however, satisfied on the basis of the documents from the conveyancing lawyer responsible for overseeing the sale of the family home that the respondent let the "pad rent" for the family home fall into arrears of some \$370. Those arrears had to be paid in order to allow the sale to proceed. There was a further non-sufficient funds ("NSF") charge of \$75 payable to the property management company due to the respondent's failure to pay the pad rent with sufficient funds. These arrears and the NSF fee were paid jointly out of the net sale proceeds but were the sole obligation of the respondent pursuant to the May 2016 Order.
- [92] I will note I have some concern about the issue of laches given the claimant's less than diligent efforts to pursue this issue prior to 2019 when the Application was first filed and July 31, 2023 when a court order was obtained for leave to amend the Application. However, the cost of pursuing this as a stand-alone issue would have been wholly disproportionate to the amount in issue and I am thus prepared to allow the relief sought notwithstanding the delay as it is not technically limitation barred since the obligation arises pursuant to paragraph 13 of the May 2016 Order.
- [93] Paragraph 4(a) of the Application is thus allowed but the amount owing to the claimant by the respondent is limited to \$445, which represents the outstanding pad rent and the corresponding NSF fee.

Consolidation Loan

- [94] Pursuant to paragraph 20 of the May 2016 Order, the respondent was "assigned and is solely responsible for his consolidation loan with TD Bank with an approximate balance of \$9,946.00" and "shall remove Claimant's name from his consolidation loan as soon as possible".
- [95] Much like the failure to include Guideline incomes in the May 2016 Order, this provision is problematic. It is problematic because it imposed a positive obligation upon the respondent for something that was not actually within his control. If there had been funds in trust from the family home from which the respondent was obligated to pay to this consolidation loan and he failed to do so, that would be a sanctionable breach of the order. However, as is apparent from my above summary, the limited net sale proceeds from the family home were directed to educational accounts for K. and T. They were not available, by mutual agreement, for use by either party.

- [96] The respondent ultimately did not obtain the release of the respondent from the consolidation loan. The respondent instead made a consumer proposal under the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, which proposal was accepted. The consolidation loan was included within that consumer proposal and the respondent has paid (and continues to pay) a proportionate share of that loan in accordance with the terms of the accepted consumer proposal.
- [97] The relief sought by the claimant would seek to give her priority over other debtors in the consumer proposal who ultimately accepted a payment plan for amounts less than the face value of the debts they were owed (which debts I accept were not limited to the consolidation loan).
- [98] The claimant also provides no authority whatsoever which would support her claim that contribution by the respondent to what she asserts is her ongoing liability for the consolidation loan debt, notwithstanding the respondent's accepted consumer proposal, should be deemed "additional child support" so that it may be enforced by the Family Maintenance Enforcement Program.
- [99] I thus also dismiss the relief sought by the claimant at paragraph 4(b) of the Application.

Costs

- [100] Costs are awarded at the discretion of the Court pursuant to R. 16-1 of the Family Rules.
- [101] The general rule is that costs are awarded to the party that is substantially successful unless the court exercises its discretion to otherwise order.
- [102] The claimant has not been successful on all the issues addressed in the Application. However, some of those issues turn on the failure of the claimant to tender the necessary evidence to establish her claims upon the balance of probabilities as opposed to their being compelling evidence tendered by the respondent to defeat those claims on their merits. The claimant's pursuit of the relief, substantially all of which was sought on behalf of K., was complicated by the respondent's failure to provide fulsome document disclosure.
- [103] I am thus satisfied, in all the circumstances, that the claimant was the substantially successful party in respect of the Application.
- [104] I shall thus order that the claimant is entitled to her costs of the Application as ordinary costs under the tariff set forth in the Family Rules.

"Hardwick J."

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