

CANADA / JUDGMENT

M.L.G. v. K.G.G.

2021 BCSC 682

COURT

Supreme Court of British Columbia

DECIDED

14 April 2021

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

M.L.G. v. K.G.G.,

2021 BCSC 682

Date: 20210414

Docket: E128427

Registry: Kelowna

Between:

M.L.G.

Claimant

And

K.G.G.

Respondent

Before: The Honourable Mr. Justice G.P. Weatherill

Reasons for Judgment

Counsel for the Claimant:

M. Koochin

Counsel for the Respondent:

D.R. Bloor

Place and Date of Trial/Hearing:

Kelowna, B.C.

March 11, 2021

Place and Date of Judgment:

Kelowna, B.C.

April 14, 2021

Introduction

- [1] After nine years of marriage, the parties separated on July 8, 2008. Just over two months later, with the assistance of experienced family-law lawyers, they entered into a comprehensive separation agreement dated September 17, 2008 ("Separation Agreement") resolving all issues between them, including 50/50 shared parenting and child support for their then six and five-year-old children ("Children"). Using the Federal Child Support Guidelines ("Guidelines") and setting off their respective incomes in accordance with the Guidelines, they agreed that the respondent would pay the claimant \$2,000 per month ongoing child support.
- [2] No court orders were made and the Separation Agreement contained no provision for the parties to exchange tax returns and/or disclose their respective incomes annually and adjust child support accordingly.
- [3] The oldest child, L.M. (born December 9, 2001), commenced living full-time with the respondent in late December 2015 and the youngest child, N.J. (born August 15, 2003), followed in December 2019. In June 2020, the respondent ceased paying child support to the claimant as a consequence and advised the claimant that she should be paying him child support.
- [4] The claimant sought legal advice and now applies to vary the Separation Agreement as it relates to child support on the basis that, unbeknownst to her, the respondent's income increased significantly over the years since the Separation Agreement and that he failed to adjust his child support payments accordingly. She says that based on the table amounts in the Guidelines he owes her retroactive child support of \$142,730.

Background

- [5] The parties, both currently 50 years of age, were married on May 1, 1999, separated nine years later, and were divorced on August 12, 2009. Prior to their separation, they lived a modest but comfortable lifestyle.
- [6] During their marriage, the parties purchased a daycare business that they operated through a corporation known as The Lilyput Centre for Kids Ltd. operating as "TLC for Kids" ("TLC"). As part of the division of family assets, the respondent transferred his 50% interest in TLC to the claimant, who has been running it ever since.

- [7] The respondent has always been a professional engineer employed with Urban Systems Ltd.
- [8] Both parties understood that the Separation Agreement resolved all current and future issues between them. Both parties expected that their incomes would vary in the years to follow. But neither appreciated or were told by their respective counsel that child support should be reviewed on an annual basis once their respective incomes for the previous year was known. Neither party disclosed his or her respective incomes to the other over the twelve years that followed.
- [9] Indeed, the parties' respective incomes varied over the years. In particular, the respondent earned much more than the amount attributed to him in the Separation Agreement.
- [10] Joint parenting of the Children continued as agreed and the respondent dutifully paid child support of \$2,000 per month to the claimant as agreed. L.M. turned 19 on December 9, 2020, and N.J. turned 17 on August 15, 2020. The respondent has supported all of L.M.'s financial needs since January 2016 and N.J.'s financial needs since December 2019.
- [11] It is apparent that the Children have nearly completely severed all ties with the claimant. They now rarely reply to her text messages and almost never take her phone calls.
- [12] Despite the Children living with the respondent full-time, the respondent continued to pay the claimant \$2,000 per month child support until July 2020 when he informed the claimant that those payments would not only cease, but that he wanted her to pay him child support instead.
- [13] The claimant sought legal advice on the point. It was only then that she was advised that the parties should have been exchanging financial information on an annual basis since 2008, so that child support could be adjusted and properly paid in accordance with the Guidelines. The claimant's counsel requested and obtained the respondent's income tax information from 2008, which disclosed that he had earned substantially more income than the amount upon which the \$2,000 child support was originally based. The claimant calculates that the respondent owes her \$142,730, representing the difference between what the respondent says he should have paid and what he did pay. She bases this amount on the 50/50 parenting time scheme and the setoff calculation of the parties' incomes as required by the Guidelines.
- [14] The claimant acknowledges her obligation to pay the respondent child support for N.J. now that he resides full-time with him. She calculates the amount at \$1,282 per month based on her 2019 income. She says she will begin doing so once this matter is resolved.

The Separation Agreement

- [15] In setting child support at \$2,000 per month, the Separation Agreement provided, and the parties agreed, that the claimant's income would be set at \$40,000 per year and the respondent's income would be set at \$162,000 per year "plus discretionary bonuses based on performance and profitability of his employer". When the Separation Agreement was signed, the respondent's income for 2008 was not yet known and the parties agreed to

estimate it. The same was true of the claimant's income. The parties agree that, using the income setoff approach provided for in the Guidelines, \$2,000 in monthly child support equates to the respondent's 2008 income being in the \$200,000 per annum range.

- [16] The Separation Agreement was silent on any requirement for annual exchange of the parties' financial statements and tax returns and did not mention that child support should be reviewed and/or adjusted annually. Both parties say their respective lawyers did not advise them on the point.

The Claimant's Circumstances

- [17] The claimant is engaged to be married. Her fiancé is currently on long-term disability and not receiving his usual pay. The claimant is intending on listing TLC for sale because she is tired of the business. She hopes to sell it for \$150,000. The claimant owns a home in Peachland that she values at \$441,000 with a \$283,500 mortgage registered against it. She has a \$5,000 TFSA and an RRSP of \$18,000 and a small municipal pension.

The Respondent's Circumstances

- [18] The respondent is a 2.78% partner with Urban Systems Ltd. All his income is paid as employment income; this has always been the case. His F8 Financial Statement filed September 21, 2020, places his net worth at approximately \$1.45 million
- [19] The respondent lives in a home in Kelowna he purchased in June 2010, which he values at \$882,000. It has a mortgage registered against it in the approximate amount of \$443,000. He values his partnership interest in Urban Systems at \$372,000 and he has an RRSP and LIRA totaling approximately \$517,000. His only liquid asset is a TFSA valued at \$105,000.

Claimant's Position

- [20] In support of her application, the claimant submitted a table showing her version of the parties' respective incomes since 2008 (annexed to these reasons as Table 1) and a table setting out her calculation of child support owing (annexed to these Reasons as Table 2). Table 2's calculations take into account when she says the Children started living with the respondent full-time.
- [21] The claimant points to the respondent's 2008 income of \$344,000 and says that right from the outset, the respondent knew or ought to have known that the child support he was paying was woefully low. Although she concedes he may not have known his 2008 income when the Separation Agreement was signed, she says he certainly would have known it when he got his 2008 T4 from Urban Systems.

- [22] She says that if the respondent's income over the years was only modestly higher than \$200,000, she would not have brought this application. She says it was only after his income was disclosed to her in the fall of 2020 that she realized his income was substantially higher than she thought. Accordingly, she asserts that he should have been paying substantially more than \$2,000 per month in child support.
- [23] Citing *Michel v. Graydon*, 2020 SCC 24 [Michel], she contends that the law places a positive obligation on the respondent to disclose his income each year, pay child support in accordance with the Guidelines, and his failure to do so is blameworthy conduct that warrants retroactive child support back to January 2009.
- [24] She contends that this is a straightforward case of the respondent clearly underpaying child support from the outset, and the law obliges him to correct this deficiency by paying her a lump sum. She simply wants to be paid what she should have been paid since September 2008.
- [25] She asserts there is no British Columbian case where a payor earned income similar to the respondent and the Guidelines were not followed. Paying less than the Guideline amount she says is a very high bar to overcome and the law is very much in her favour. Further, she says that the retroactive child support she seeks is not inordinate given the respondent's resources.
- [26] She says that the income she earned since separation as set out in Table 1 is fully accounted for, complete, and correct. She denies either splitting income or having a joint back account with her fiancé or anyone else.
- [27] Respecting the Children's post-secondary education, she says that there is no requirement for her to fund it and she cannot afford to do so. Besides, she says, the Children each have RESPs set up, although she does not specify the amounts.

Respondent's Position

- [28] The respondent asserts that the child support he paid to the claimant pursuant to the Separation Agreement was appropriate having regard to the conditions, means, needs, and other circumstances of the Children. Relying on ss. 4 and 9 of the Guidelines, he says there has been no underpayment of support.
- [29] He contends that applying the test set out in *D.B.S v. S.R.G.*, 2006 SCC 37 [D.B.S.], retroactive child support is not warranted in this case. Alternatively, he says that the three-year limitation period set out in D.B.S. should apply such that retroactive child support would not be payable prior to July 2017 ("Three-Year Retroactive Period"). Further, any such retroactive child support order should be paid into trust to the benefit of the Children for their future post-secondary educational needs and not to the claimant.

- [30] He says that at the time the parties negotiated the Separation Agreement, they were in their late 30's and were both aware that their respective incomes would likely increase over the years with their growing careers. He says that, while they were cohabiting, the claimant knew that his income was on an upward trend and for her to suggest she did not expect his post-separation earnings to have similarly increased is disingenuous.
- [31] Further, he asserts that despite their respective incomes set out in the Separation Agreement, each knew that the other's was higher. He says the claimant's income that year would have been at least \$75,000, not the \$40,000 indicated. Knowing this, he says they were both prepared to accept the numbers indicated and move forward with their lives.
- [32] The respondent also challenges the claimant's calculations of retroactive child support on the basis that Table 1 underreports her income from TLC. He places her actual income for the purposes of child support calculations in the range of \$50,000 - \$160,000, depending on the year. He submits his calculations of child support in a table of his own (annexed to these reasons as Table 3).
- [33] The respondent says he has lived up to the spirit and intent of the Separation Agreement from 2008 through June 2020, despite the fact that the Children were living with him full-time past December 2015, in the case of L.M., and December 2019, in the case of N.J. He points out that he has paid 100% of their financial needs since.
- [34] He says he did not understand that a review of child support could have been initiated. Similar to the claimant, he understood that they had each committed to the financial obligations in the Separation Agreement. Following separation, he did not disclose his income over the years to the claimant because he did not think it was either necessary or required.
- [35] The respondent also points out that over the years, the claimant never expressed any issues related to hardship or inadequate child support. He cites various examples of the parties' respective lifestyles, before and after separation, including where they live, the location and size of their homes, travel, vacations, transportation, sports, extracurricular activities, and the like. He says the parties' circumstances, while not identical, are and have always been similar since separation.
- [36] He responds to the claimant's suggestion that he is financially better off than her by pointing out that she is a university educated professional operating a successful day-care business "on the side" and who has had over 10 years since separation to improve her economic situation.
- [37] The respondent has reviewed TLC's financial statements and has combined what he says is his net income for child support purposes for each year with the claimant's line 150 income. As set out in Table 3, he says to TLC's pre-tax income must be added a minimum of \$10,000 to account for personal expenses run through the business and a tax-gross up of \$4,000.

- [38] He argues that if he had to come up with the amount of retroactive child support being claimed, it would be a significant financial burden for him. His only liquid asset is a TFSA, which he has earmarked for the Children's post-secondary education expenses. Accordingly, if retroactive child support was ordered, he would have to borrow money from a bank and/or refinance his mortgage.
- [39] He contends that a proper consideration of the "conditions, means, needs and other circumstances" of the parties and the Children pursuant to s. 9 of the Guidelines demonstrates that requiring him to pay the table amounts would be inappropriate. He points out that there is no evidence that the Children suffered any disparity between family homes. The Children lived a comfortable lifestyle in both parties' homes post separation and the table amounts far exceed the Children's reasonable needs. Given the Children's needs and the family's lifestyle, both before and after separation, any presumption in favour of the Guidelines is rebutted in this case.
- [40] He asserts that in reality, what the claimant seeks amounts to an inappropriate transfer of wealth in the guise of child support: *Francis v. Baker*, [1999] 3 S.C.R. 250 at para. 41 [Francis]. He argues that the objective of child support is maintenance of children, not household equalization or spousal support: *R. v. R.* (2002), 58 O.R. (3d) 656 at para. 39 (C.A.) [*R. v. R.*].
- [41] He points out that the claimant has no intention of using any award of retroactive child support for the benefit of the Children, or to assist with their post-secondary education expenses. She says she has RESP funds available for them but does not say how much they are and does not list them in her financial statement.
- [42] Given the Children's ages, the fact that they now reside with the respondent full-time and will soon be attending post-secondary school, he argues that a retroactive child support payment to the claimant would only benefit the claimant, not the Children, and would be contrary to the intent of child support payments.
- [43] Lastly, he says that to the extent he must pay retroactive child support, it should be held in trust for their educational expenses.

Issues

- [44] The issues for determination are:
- What is the claimant's Guideline income for 2009 to 2019?
 - What is the respondent's Guideline income for 2009 to 2019?
 - When did L.M. cease to be a child of the marriage?
 - What amount, if any, does the respondent owe the claimant in arrears of child support?
 - What child support is payable by the claimant to the respondent?

The Federal Child Support Guidelines

[45] At this point, a review of the relevant sections of the Guidelines is in order.

[46] Section 3(1) of the Guidelines states:

3(1) Unless otherwise provided under these Guidelines, the amount of a child support order for children under the age of majority is

- (a) the amount set out in the applicable table, according to the number of children under the age of majority to whom the order relates and the income of the spouse against whom the order is sought .

[47] Section 4 of the Guidelines provides the court with a discretion to depart from the table where the payor's income exceeds \$150,000:

4 Where the income of the spouse against whom a child support order is sought is over \$150,000, the amount of a child support order is

- (a) the amount determined under section 3; or
- (b) if the court considers that amount to be inappropriate,
 - (i) in respect of the first \$150,000 of the spouse's income, the amount set out in the applicable table ;
 - (ii) in respect of the balance of the spouse's income, the amount that the court considers appropriate, having regard to the condition, means, needs and other circumstances of the children who are entitled to support and the financial ability of each spouse to contribute to the support of the children. . . .

[48] Section 9 of the Guidelines provides that, in the case of a shared parenting arrangement (such as is the case here), the amount of child support must be determined by taking into account:

- 9 (a) the amounts set out in the applicable tables for each of the spouses;
- (b) the increased costs of shared custody arrangements; and
 - (c) the conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought.

[49] Section 16 of the Guidelines provides that a spouse's annual income is generally determined by Line 150 of his or her tax return. In the case of a shareholder, director or officer of a corporation, however, s. 18 of the Guidelines provides that if the court is of the opinion that the Line 150 amount does not fairly reflect all the money available to the spouse for the payment of child support, that court may consider a three-year running average and include in that spouse's income: "(a) all or part of the pre-tax income of the corporation. . . ."

[50] Section 18(2) goes on to provide:

18(2) In determining the pre-tax income of a corporation for the purposes of subsection (1), all amounts paid by the corporation as salaries, wages or management fees, or other payments or benefits, to or on behalf of persons with whom the corporation does not deal at arm's length must be added to the pre-tax income, unless the spouse establishes that the payments were reasonable in the circumstances.

[51] Section 21(1) of the Guidelines provides for the information that must be provided by a spouse claiming child support. In the case of a spouse who is self-employed, the material must include:

21(1)(d)(ii) a statement showing a breakdown of all salaries, wages, management fees or other payments or benefits paid to, or on behalf of, persons or corporations with whom the spouse does not deal at arm's length. . .

[52] This mandatory provision is to cover cases involving income-splitting or other arrangements that artificially reduce income that should be considered in the calculations of the claimant spouse's income for child support purposes. If that spouse fails to comply, the court may make an order for production of the required documents: s. 22(1)(b). The court may draw an adverse inference against a spouse who fails to produce the required documents and may impute income to that spouse in such amount as it considers appropriate: s. 23.

[53] Section 25(1) of the Guidelines provides that a spouse against whom a child support order has been made must, after making of the order and on written request of the payee spouse, provide financial disclosure.

Legal Principles re: Retroactive Child Support

[54] The two leading authorities on the issue of retroactive child support, when it should be ordered and how far back in time the order should go are D.B.S. and Michel.

[55] D.B.S. held that, although not always the case, it may be unreasonable in many situations to order retroactive child support beyond three years before an application for retroactive child support is made. Depending on the circumstances and in particular when the payor parent has engaged in blameworthy conduct such as failing to voluntarily disclose financial information and failing to voluntarily increase child support payments when his/her income has materially increased, retroactive child support can go back further. At paras. 124 and 125, the Court stated:

[124] The date when increased support should have been paid, however, will sometimes be a more appropriate date from which the retroactive order should start. This situation can most notably arise where the payor parent engages in blameworthy conduct. Once the payor parent engages in such conduct, there can be no claim that (s)he reasonably believed his/her child's support entitlement was being met. This will not only be the case where the payor parent intimidates and lies to the recipient parent, but also where (s)he withholds

information. Not disclosing a material change in circumstances -- including an increase in income that one would expect to alter the amount of child support payable -- is itself blameworthy conduct. The presence of such blameworthy conduct will move the presumptive date of retroactivity back to the time when circumstances changed materially. A payor parent cannot use his/her informational advantage to justify his/her deficient child support payments.

- [125] The proper approach can therefore be summarized in the following way: payor parents will have their interest in certainty protected only up to the point when that interest becomes unreasonable. In the majority of circumstances, that interest will be reasonable up to the point when the recipient parent broaches the subject, up to three years in the past. However, in order to avoid having the presumptive date of retroactivity set prior to the date of effective notice, the payor parent must act responsibly: (s)he must disclose the material change in circumstances to the recipient parent. Where the payor parent does not do so, and thus engages in blameworthy behaviour, I see no reason to continue to protect his/her interest in certainty beyond the date when circumstances changed materially. A payor parent should not be permitted to profit from his/her wrongdoing.
- [56] Michel clarified the principles in D.B.S. and re-emphasized that a payor of child support should be paying based on his/her income, ought to disclose material increases in income, and adjust child support accordingly. It should not fall on the recipient parent to demand income disclosure.

Discussion

- [57] The claimant seeks to vary the Separation Agreement retroactively to January 1, 2009. The first point is that the Separation Agreement is an agreement. It is not a court order. Neither party sought to have the terms of the Separation Agreement respecting child support made the subject of an order.
- [58] In D.B.S., the Supreme Court of Canada made the following points relevant to this case:
- a) independent of any statute or court order, parents have an obligation to support their children in a manner commensurate with their income (para. 54);
 - b) child "support is the right of the child" (para. 60);
 - c) ". . . parents are to be trusted with the responsibility of caring for their children, but the courts are not to be discouraged from defending the rights of children when they have the opportunity to do so" (para. 60);
 - d) ". . . When an application for retroactive support is made . . . it will be incumbent upon the court to analyse the statutory scheme in which the application was brought" (para. 54);
 - e) the differences between an agreement for payment of child support, and a court order for child support cannot be ignored (para. 75);

- f) ". . . a payor parent who adheres to a separation agreement that has not been endorsed by a court should not have the same expectation that (s)he is fulfilling her/her legal obligations as does a payor parent acting pursuant to a court order" (para. 77);
- g) although agreements between parents respecting child support obligations should be given considerable weight, "where circumstances have changed . . . and the actual support obligations of the payor parent have not been met, courts may order a retroactive award so long as the applicable statutory regime permits it" (para. 78);
- h) Where a province's "legislature accords agreements between parents a special status, courts must be attentive to it" (para. 79);
- i) "It will not always be appropriate for a retroactive [child support] award to be ordered. Retroactive awards will not always resonate with the purposes behind the child support regime; this will be so where the child would get no discernible benefit from the award. . . while a free-standing obligation to support one's children must be recognized, it will not always be appropriate for a court to enforce this obligation once the relevant time period has passed" (para. 95);
- j) When child support "obligations appear to be settled, fairness also demands that they not be gratuitously disrupted" (para. 96);
- k) "Retroactive awards may also cause hardship to a payor parent in ways that a prospective award would not" (para. 95);
- l) In order to avoid the three-year presumptive date, the payor parent must act responsibly by not engaging in blameworthy conduct, such as failing to disclose material changes in circumstances to the payee parent (para. 125); and
- m) Any retroactive award must ensure the quantum fits the circumstances, as blind adherence to the table amounts is neither required nor recommended; the court should not order a retroactive award in an amount that it considers unfair having regard to the relevant circumstances (paras. 128 and 130).

[59] Section 148 of the Family Law Act, S.B.C. 2011, c. 25 [FLA] deals with agreements respecting child support:

148 (1) An agreement respecting child support is binding only if the agreement is made

- (a) after separation, or
 - (b) when the parties are about to separate, for the purpose of being effective on separation.
- (2) A written agreement respecting child support that is filed in the court is enforceable under this Act and the Family Maintenance Enforcement Act as if it were an order of the court.

- (3) On application by a party, the court may set aside or replace with an order made under this Division all or part of an agreement respecting child support if the court would make a different order on consideration of the matters set out in section 150.

[60] Section 150 of the FLA provides:

150 (1) If a court makes an order respecting child support, the amount of child support must be determined in accordance with the child support guidelines.

- (2) Despite subsection (1), a court may order child support in an amount different from that required by the child support guidelines if
- (a) the parties ... have an agreement respecting child support, and
 - (b) the court is satisfied that reasonable arrangements have been made for the support of the child.
- (3) The court must consider the child support guidelines for the purposes of subsection (2), but must not consider arrangements made for the support of the child to be unreasonable only because the amount required under the child support guidelines differs from those arrangements.
- (4) Despite subsection (1), a court may order child support in an amount different from that required by the child support guidelines if satisfied that
- (a) an agreement or order respecting the financial duties of the parents or guardians or the division or transfer of property, other than an agreement respecting child support, benefits the child directly or indirectly, or that special provisions have otherwise been made for the benefit of the child, and
 - (b) applying the child support guidelines would be inequitable on consideration of the agreement, order or special provisions.
- (5) If a court makes an order respecting child support in an amount different from that required under the child support guidelines, it must give reasons for doing so.

[Emphasis added]

- [61] The jurisdiction to vary the Separation Agreement respecting child support, as the claimant seeks, is founded in the FLA, s. 148(3). The court has authority to set aside or replace the terms of the Separation Agreement respecting child support only if the court would have made a different order on consideration of the matters set out in s. 150. Section 150 obliges the court to consider the Guideline amounts unless the parties have an agreement respecting child support (which they do) and the court is satisfied that reasonable arrangements have been made for the Children's support. Section 150(3) provides that child support arrangements are not to be considered unreasonable only because the amount differs from the Guidelines. Section 150(4) authorizes the court to order child support in an amount that differs from the Guidelines provided that arrangements satisfactory to the court

have been made respecting division of assets directly or indirectly benefiting the Children and applying the Guidelines would be inequitable, all things considered.

- [62] At the core of this application is the claimant's demand for retroactive child support of \$142,730 from January 1, 2009 to July 1, 2020. Because the parties had a 50/50 shared parenting arrangement, the claimant's income over that timeframe must be determined.
- [63] The evidence suggests, and I infer, that since separation, the parties' living circumstances were comparable. There is no suggestion that either the claimant or the Children suffered financially or otherwise. Throughout the years, both parties were able to care for and meet the Children's needs while under their respective care.
- [64] This application has stirred up emotions on both sides. Despite the claimant not seeking to revisit Guideline s. 7 expenses for the Children, each claims to have paid well in excess of their respective obligations respecting special and extraordinary expenses for the Children over the years.
- [65] The test for child support in a shared parenting situation is governed by s. 9 of the Guidelines which is a complete and separate code. The presumptive rule in s. 3 does not apply: *Lozinski v. Lozinski*, 2017 BCCA 280 at para. 39 [Lozinski]. Instead, s. 9 is designed to emphasize the objectives of fairness, flexibility and the recognition of the actual conditions, means, needs and other circumstances of each spouse and their children: *Lozinski*, at para. 39, quoting from *Contino v. Leonelli-Contino*, 2005 SCC 63 at para. 33 [Contino]. The court is to consider the "overall situation of shared custody" with a view to ensuring "a fair level of child support" and "that the economic reality and particular circumstances of each family are properly accounted for": *Contino*, at para. 27.
- [66] The phrase "conditions, means, needs and other circumstances of each spouse" vests a broad and flexible discretion in the court to consider the resources and needs of both parents and the children in order to address the financial realities of shared parenting families with a focus on the standards of living in the two homes and the ability of each parent to maintain that standard: *Lozinski*, at paras. 42 & 43.
- [67] Section 4 of the Guidelines also allows discretion to depart from the table amounts to the extent the payor's income exceeds \$150,000, if such a departure is appropriate having regard to nine factors (referred to in the jurisprudence as the "Francis Factors" after Francis), including the conditions, means, needs and other circumstances of the children and the financial ability of the parents to support the children. Courts have held that the departure from the tables can only be made if the presumption in favour of the tables is rebutted on clear and compelling evidence and only after examining all the circumstances including the s. 4(b)(ii) factors. The actual circumstances of the children are an important consideration: *S.R.M. v. I.A.M.*, 2002 BCSC 1453 at para. 130 [S.R.M.], quoting from *Macdonald v. Macdonald*, 2002 BCCA 46 at para. 17.

- [68] The presumption in favour of applying the table amounts, therefore, can be rebutted where the payor parent establishes that before separation the family had a comfortable but not lavish or extravagant lifestyle achieved at a cost less than the table amount: S.R.M., at paras. 167-170, referring to R. v. R., at paras. 24, 44-47.
- [69] Accordingly, the case law directs that I take into account the conditions, means, needs and other circumstances of the parties and the Children. There is no presumption in this case that the table amounts automatically apply. I am to determine child support in an amount that acknowledges the overall circumstances of the parties and the Children's needs by analyzing the s. 9 factors.
- [70] I am then to consider whether, given the facts of this case, a retroactive child support award ought to be made and if so, in what amount.
- a) What is the Claimant's Guideline income for 2009 to 2019?
- [71] The evidence discloses that the claimant operates TLC through a corporation. She says she is its sole shareholder. Accordingly, s. 18 of the Guidelines applies. The purpose of s. 18, particularly in the case of a sole shareholder who has the ability to control the income of a corporation, is to allow the court to "lift the corporate veil" to ensure that all money available for the purpose of child support calculations is reflected: Hausmann v. Klukas, 2009 BCCA 32 at para. 32, quoting Kowalewich v. Kowalewich, 2001 BCCA 450 at paras. 43, 54, 58 & 59.
- [72] The claimant says that she has put forth TLC's full corporate pre-tax income, without deductions for each year since separation, both good and bad years, without write-offs or personal expenses being deducted. TLC's financial statements are in evidence, as are the claimant's tax returns. Complicating the exercise of determining the claimant's Guideline income is that TLC has a fiscal year end of June 30 and the claimant's income taxes are based on the calendar year.
- [73] For simplicity's sake, in Tables 1 and 2, the claimant has included TLC's pre-tax income as of June 30 of each year into her total income for each calendar year.
- [74] The claimant bases her income for the purposes of child support calculations on her T4 income earned from TLC as well as her corporate income. During the hearing, an issue arose as to whether line items in TLC's financial statements, such as amortization/depreciation, automotive, travel/entertainment, and management salaries, need to be taken into account in calculating her appropriate income. It became somewhat complicated and I requested further information from TLC's accountant and submissions on the point.
- [75] That information has now been disclosed in the form of affidavits from the claimant and TLC's accountant, Lisa Legace. Ms. Legace has been providing payroll services for TLC only for the last couple of years and relies on information obtained from the claimant respecting the payment of management salaries, the company's general ledger, and financial statements prior to then. She prepared a reconciliation of management salaries for the financial

statements from 2008 through 2019 and the claimant's T4s that she says confirms that all management salaries were paid to the claimant, the only slight discrepancies being attributable to TLC's CPP payments, which are not reflected in the claimant's T4s. That reconciliation is difficult to follow and, from what I can discern, does not accord with the claimant's income set out in Table 1. One glaring example of an inconsistency is that for the 2010 calendar year, the claimant says she earned -11,020 (that is, a loss of \$11,020), whereas Ms. Legace's reconciliation suggests she was paid \$64,625 by TLC. Further, many of the backup documents needed for the reconciliation were missing.

- [76] The claimant says she has included the most she could have earned through TLC. The respondent challenges this on the basis that TLC's expenses included amortization, depreciation, management salaries that do not appear to mesh with her stated annual income and personal expenses, such as travel, entertainment, and automotive. The respondent argues that the sum of \$10,000 should be added to her income each year (grossed up by 40% to \$14,000 per year) to fairly account for these expenses. The respondent also takes issue with the claimant claiming corporate losses that artificially reduce her income.
- [77] As examples of why the claimant has under-reported her income for child support purposes, the respondent suspects that a number of expenses listed in TLC's financial statements are of a personal nature and ought to be added back to her income and grossed up to account for how much gross income would be required to net that amount of after-tax income: C.J.R. v. S.P.J., 2009 BCSC 264.
- [78] While the claimant makes a blanket denial of this allegation, she offers nothing to support her conclusions regarding her income. There is no expert or other evidence offered to deal with what I consider are valid concerns of the respondent that some of the expenses deducted by TLC for tax or other purposes (which of course is valid and acceptable for the CRA) are proper expenses deductible for child support calculation purposes.
- [79] What is also unexplained is why TLC's income fluctuated so drastically over the years. As the respondent points out from his experience prior to separation, TLC operates a relatively fixed business that accommodates a fixed number of clients at a given location at pre-determined rates, with very few variables. He further notes that demand for daycare spaces at TLC was always insatiable when the parties were together.
- [80] Specifically, the respondent notes that TLC was acquired by the parties in 2004-2005 and that he functioned as its initial administrator. He states that:

The actual income derived from the business is a function of the actual earned income achieved from sales/revenue as well as the Claimant's living expenses that can be deducted as a result of being affiliated with the business. The Claimant expensed day to day living expenses against the costs associated with the running of the business .

- [81] I agree with the respondent's submission that a reasonable amount for personal expenses that were expensed through TLC should be added to the claimant's income each year. None of TLC's ledgers proving what these expenses were related to are in evidence. While TLC may properly expense these items for accounting and income tax purposes, they are not properly deductible for the purposes of calculating income for child support. The claimant has not persuaded me that these expenses are completely related to TLC's business and not to her personally.
- [82] In order to do rough justice to the parties and recognizing that without a full audit of TLC's books it is not possible to be precise, I assess the annual amount that must be added to the claimant's income each year since 2008 to account for these expenses at \$10,000.
- b) What is the Respondent's Guideline income for 2009 to 2019?
- [83] The respondent's annual income since 2008 is easy to determine. The parties agree that his annual income from 2008 can be determined from Line 150 of his tax returns. Accordingly, the respondent's income for each year is the income set out in Table 1.
- c) When did L.M. cease to be a Child of the Marriage?
- [84] As mentioned, both Children now reside with the respondent. The parties do not agree on when L.M. ceased to be a child of the marriage. The claimant says that L.M. commenced living with the respondent on January 1, 2016, but then left for England in September 2020 to live with someone she met on-line, returning to live with the respondent in January 2021. She says, therefore, that L.M. ceased being a child of the marriage in September 2020. The respondent says that L.M. moved in with him full-time in November 2015 and, despite travelling to England from September 2020 through December 2020, he continued to support her and she remains a child of the marriage. He expects her to return to school in 2022 to study veterinary sciences.
- [85] The parties' evidence leaves it uncertain when precisely L.M. commenced living with the respondent full-time and when she ceased to be a child of the marriage (as defined by either the Divorce Act, R.S.C. 1985, c. 3 or the FLA). The difference between their respective positions at either end is a matter of months. What is certain is that January 1, 2016, is the latest that L.M. moved in with the respondent full-time and I accept that date. Respecting when L.M. ceased to be a child of the marriage, given that she was living with the respondent and did not have much communication with the claimant, on balance I accept the respondent's evidence that, despite L.M. travelling to England for the months of September through December 2020, he continued to support her. He concedes that L.M. ceased to be a child of the marriage upon her return in December 2020. I conclude that she ceased being a child of the marriage effective January 1, 2021.
- [86] Respecting N.J., the evidence satisfies me that he began living with the respondent full-time effective December 1, 2019. There is no dispute that he continues to be a child of the marriage.

d) What amount, if any, does the Respondent owe the Claimant in arrears of child support?

[87] I repeat that this case involved a 50/50 shared parenting arrangement. The parties did not go to court to seek an order respecting child support and no court orders exist. They relied on the terms of the Separation Agreement, which they both followed for twelve years.

[88] To support her claim for \$142,730 in retroactive child support, the claimant relies heavily on Michel and says that her claim is more or less a "no-brainer".

[89] I disagree. Although Michel confirms the principles set out in D.B.S., it is distinguishable in a number of respects. Michel involved a separation in 1994, after which the father of the couple's young child agreed to pay \$341 per month in child support. The agreement was formalized in a consent order in March 2001. The mother did not apply for an order varying the consent order until January 2015, four years after child support was terminated by court order. Ultimately, the Supreme Court of Canada held that the mother was entitled to retroactive child support dating back to the March 2001 consent order. Retroactive child support was not ordered from the date of separation but from the date of the wrongdoing--the date of the misrepresentation leading to the consent order. At para. 36 of Michel, Justice Brown, writing for the majority, commented:

[36] Finally, Mr. Graydon contests the effective date of retroactive child support adopted in the hearing judge's award. The hearing judge awarded retroactive child support dating back to the March 29, 2001 consent order of child support (which he treated as taking effect on April 1, 2001). The hearing judge's conclusion was based on his finding that the date when Ms. Michel presented a settlement agreement to Mr. Graydon was the date of effective notice given to him. Mr. Graydon argues that merely presenting a draft settlement agreement could not serve as effective notice. His argument on this point is immaterial, however, because the date of effective notice is not relevant when a payor parent has engaged in blameworthy conduct (irrespective of the degree of blameworthiness). Again, in light of such conduct, there is no need to protect Mr. Graydon's interest in the certainty of his obligations beyond the date when circumstances changed materially (D.B.S., at para. 125). Having furnished an inaccurate picture of his income from the start of his child support payments, it does not lie in his mouth to now insist that it was inappropriate for the hearing judge to award support dating back to the March 29, 2001 consent order. Indeed, in the circumstances of this case it was clearly appropriate for the hearing judge to do so.

[Emphasis added]

[90] The distinguishing features of Michel include the following:

- a) the case did not involve a shared parenting arrangement, and the child lived exclusively with the payee mother;
- b) the mother was financially strapped and had to rely on social assistance to survive;

- c) the father not only knew about the child's hardships, but made disparaging remarks about her standard of living rather than increasing his child support payments;
- d) the consent order provided for child support was based on the father's misrepresentation that his income that year was \$39,832, when, to his knowledge, it was \$45,580;
- e) the father repeatedly misrepresented his income to the respondent in each year but one since the consent order was made until his child support obligations terminated by court order effective April 2012 when the child was 20 years old;
- f) the child was unable to attend post-secondary schooling as a result of the father woefully underpaying child support; and
- g) the case involved an application under s. 152 of the FLA, which provides an avenue for the court to retroactively change a child support order only after considering:
 - i. a change in circumstances since the order was made;
 - ii. evidence of a substantial nature that was not previously available becoming available; and
 - iii. evidence of a lack of financial disclosure after the order was made.

[91] D.B.S. instructs that the court should strive for a holistic view of each case's facts. While not determinative of whether or not a retroactive child support order should be made, D.B.S. sets out four factors for consideration:

- a) does the payee spouse have a reasonable excuse for not applying for child support earlier?
- b) is the payor parent guilty of blameworthy conduct?
- c) what are the children's circumstances?
- d) if a retroactive child support order is made, will it result in hardship to the payor parent?

[92] Respecting the issue of delay, the claimant says she did not bring this application sooner because she was not aware that she could until she sought legal advice after the Children moved in with the respondent full-time and he sought child support from her. She says that she did not know what the respondent had earned in the years since the Separation Agreement until his recent forced disclosure.

[93] The claimant's reasons ignore the evidence that the claimant would have known the respondent's earnings prior to the separation in July 2008 and ignores that the Separation Agreement noted that his income was "\$162,000 plus discretionary bonuses based on performance and profitability". Indeed, the \$2,000 net set-off child support amount the parties agreed to was based on the respondent's annual income of approximately \$200,000 and not \$162,000. I conclude that the claimant would reasonably have known that the respondent's annual income and his bonuses were tied to Urban System's performance each year. Her acceptance of the \$2,000 per month payments without raising any concerns, particularly in the context of the shared parenting regime, invited the respondent to feel

that his child support obligations had been met.

- [94] While she would not have known precisely what the respondent earned each year post Separation Agreement, I conclude that the claimant knew that he was likely earning substantially more than \$200,000 in the years that followed. Here, both parties paid insufficient attention to the child support payments that should have been made under the Guidelines. But this is because both were engaged in raising the Children on a 50/50 basis, both attended to the Children's needs as required, and both contributed to the Children's s. 7 extraordinary expenses as necessary without requiring contribution or an accounting from the other. They were both content to live their separate lives sharing parenting responsibilities of the Children on a 50/50 basis.
- [95] Further, the claimant does not deny referring to the respondent as a "millionaire" when speaking to the Children over the years nor does she deny telling the Children that she "could have taken him to the cleaners". This contradicts her suggestion that she was oblivious to their income disparity.
- [96] I conclude that the claimant's application for retroactive child support is in reality a counter-attack to the respondent informing her that he would cease paying child support and was asking her to pay him child support instead.
- [97] In my view, the claimant's delay in bringing the application is not reasonable and militates against a retroactive child support award.
- [98] Respecting whether or not the respondent was engaged in blameworthy conduct, I note again that the parties were engaged in a 50/50 shared parenting regime and were both obliged to disclose their respective earnings. Neither did. In my view, to the extent the term is applicable in this case (and I am not persuaded that it is), neither party's behavior should be considered as "blameworthy". I conclude it was an honest, but mistaken, belief on the part of both parties.
- [99] At paras. 106 to 108 of D.B.S., the Court made these comments respecting blameworthy conduct, which are apropos this case:
- [106] Courts should not hesitate to take into account a payor parent's blameworthy conduct in considering the propriety of a retroactive award. Further, I believe courts should take an expansive view of what constitutes blameworthy conduct in this context. I would characterize as blameworthy conduct anything that privileges the payor parent's own interests over his/her children's right to an appropriate amount of support. A similar approach was taken by the Ontario Court of Appeal in *Horner v. Horner* (2004), 72 O.R. (3d) 561, at para. 85, where children's broad "interests" -- rather than their 'right to an appropriate amount of support' -- were said to require precedence; however, I have used the latter wording to keep the focus specifically on parents' support obligations. Thus, a payor parent cannot hide his/her income increases from the recipient parent in the hopes of avoiding larger child support payments: see *Hess v. Hess* (1994), 2 R.F.L. (4th) 22 (Ont. Ct.

(Gen. Div.)); *Whitton v. Shippelt* (2001), 293 A.R. 317, 2001 ABCA 307; S. (L.). A payor parent cannot intimidate a recipient parent in order to dissuade him/her from bringing an application for child support: see *Dahl v. Dahl* (1995), 178 A.R. 119 (C.A.). And a payor parent cannot mislead a recipient parent into believing that his/her child support obligations are being met when (s)he knows that they are not.

- [107] No level of blameworthy behaviour by payor parents should be encouraged. Even where a payor parent does nothing active to avoid his/her obligations, (s)he might still be acting in a blameworthy manner if (s)he consciously chooses to ignore them. Put simply, a payor parent who knowingly avoids or diminishes his/her support obligation to his/her children should not be allowed to profit from such conduct: see *A. (J.) v. A. (P.)* (1997), 37 R.F.L. (4th) 197 (Ont. Ct. (Gen. Div.)), at pp. 208-9; *Chrintz*.
- [108] On the other hand, a payor parent who does not increase support payments automatically is not necessarily engaging in blameworthy behaviour. Whether a payor parent is engaging in blameworthy conduct is a subjective question. But I would not deny that objective indicators remain helpful in determining whether a payor parent is blameworthy. For instance, the existence of a reasonably held belief that (s)he is meeting his/her support obligations may be a good indicator of whether or not the payor parent is engaging in blameworthy conduct. In this context, a court could compare how much the payor parent should have been paying and how much (s)he actually did pay; generally, the closer the two amounts, the more reasonable the payor parent's belief that his/her obligations were being met. Equally, where applicable, a court should consider the previous court order or agreement that the payor parent was following. Because the order (and, usually, the agreement) is presumed valid, a payor parent should be presumed to be acting reasonably by conforming to the order. However, this presumption may be rebutted where a change in circumstances is shown to be sufficiently pronounced that the payor parent was no longer reasonable in relying on the order and not disclosing a revised ability to pay.
- [100] The respondent notes that in 2008, the world economy was in crisis and he had no idea what his future might entail or even if Urban Systems would survive. Both parties agreed to carry on with their lives independent of the other, earning their respective incomes independently with neither sharing their respective finances with the other. Neither knew that they were to exchange income information annually. In these circumstances, including the shared parenting regime where they were both payor parents, I accept that both had reasonable expectations that the child support issue was settled by the Separation Agreement and they could each go on with their lives.
- [101] In these circumstances, I do not consider the parties' failure to disclose their annual incomes to the other as blameworthy conduct. This is not a case where either party actively hid or misrepresented their respective incomes from the other. Nor is this a case where either party consciously chose to ignore the obligations owed to the Children in a blameworthy manner. I accept the evidence that the respondent reasonably believed that he was meeting his support obligations by following the terms of the Separation Agreement

which he presumed to be valid despite the annual increase in his income, and by supporting the Children in other ways including s. 7 special and extraordinary expenses. Each party respected the Separation Agreement and lived by its terms. They were not actively withholding information. They each knew that they had parental responsibilities over and above its terms while the Children were under their respective care. Each fulfilled their respective obligations to the Children's well being by paying for their various extra-curricular activities over the years without calling on the other to contribute or without complaint.

- [102] Respecting the circumstances of the Children, D.B.S. directs that I consider both their past and current circumstances. The evidence discloses that the Children did not suffer hardship or deprivation growing up and enjoyed a standard of living approximately the same as they did before the parties' separation. The Children are both living with the respondent and are enjoying a relatively high standard of living. The Children did well in school, were active, were involved in various team sports; L.M. even had her own horse (that the claimant paid \$500 per month for). Further, the Claimant purchased a vehicle for them after they were eligible to drive that neither now uses. The Claimant deposes that she "could have done a lot more with the children (e.g. travelling) and could have provided them a better lifestyle in [her] home". In my view, this is not evidence of deprivation or hardship or that the Claimant had to make sacrifices. This is not evidence that the Children were needy or were wanting. To the contrary, the evidence suggests the Children enjoyed all the advantages they would have received had the respondent been paying full-table child support as the claimant suggests.
- [103] L.M. aspires to study veterinary sciences commencing in 2022 pending her physical and mental health stabilizing. Her tuition is expected to be \$10,000 per year for a three-year program.
- [104] N.J. has been accepted to study Biomedical Engineering at several universities in Ontario and expects to matriculate in September 2021. The respondent anticipates that N.J.'s tuition, room and board will cost approximately \$25,000 per year. In total, the four-year program will cost \$100,000.
- [105] The claimant has indicated that, save for whatever each has in RESPs, she has no intention of assisting the Children with their respective post-secondary expenses. The respondent is not only prepared to fund these expenses, he has set aside his TFSA for that purpose.
- [106] Respecting the hardship that the respondent might suffer if a retroactive child support award is made, his only liquid asset is a \$105,000 TFSA that he has earmarked to fund the Children's post-secondary education, which will fully absorb those funds. If a retroactive order is made, he will either use the TFSA money (and the Children's education will suffer accordingly) or he will have to borrow the money from a bank or refinance the mortgage on his home. A retroactive child support award to the claimant, who does not propose to use any of it to fund the Children's education, would not only disrupt the respondent's

management of his financial affairs, but would do nothing to help the Children. This militates against such an order.

- [107] Returning to the Guidelines, the claimant argues that the \$150,000 threshold contained in s. 4 is all but dead in British Columbia. In other words, she argues that courts are typically ignoring s. 4(b)(ii) and ordering that the payor parent pay the table amount. She argues that to pay less than the table amount on income over \$150,000, the respondent has a formidable onus which has not been met (see *Devathasan v. Devathasan*, 2019 BCSC 661 [Devathasan]).
- [108] Section 4 of the Guidelines contemplates a consideration of the condition, means, needs and other circumstances of the child when exercising the discretion conferred on payor spouses who earn in excess of \$150,000 per year. The overarching consideration is whether, in the circumstances of each case, the child support being ordered is appropriate.
- [109] In exercising discretion under s. 4 of the Guidelines, the factors for consideration are:
- a) there is a presumption in favour of the Table amounts in all cases;
 - b) the Guideline amounts can only be increased or reduced under s. 4 if the party seeking such a deviation has rebutted the presumption that the applicable Table amount is appropriate;
 - c) There must be clear and compelling evidence for departing from the Guidelines;
 - d) Parliament expressly listed in s. 4(b)(ii) the factors relevant to determining both appropriateness and inappropriateness of the Table amounts or any deviation from them;
 - e) Courts should determine Table amounts to be inappropriate and so create more suitable awards only after examining all circumstances including the factors expressly set out in s. 4(b)(ii);
 - f) Section 4(b)(ii) emphasizes the "centrality" of the actual situation of the children. The actual circumstances of the children are at least as important as any single element of the legislative purpose underlying the section. A proper construction of s. 4 requires that the objectives of predictability, consistency and efficiency on the one hand, be balanced with those of fairness, flexibility and recognition of the actual "condition, means, needs and other circumstances of the children" on the other;
 - g) While child support payments unquestionably result in some kind of wealth transfer to the children which results in an indirect benefit to the non-paying parent, the objective of child support payments must be kept in mind. The Guidelines have not displaced the Divorce Act which has as its objective the maintenance of children rather than household equalization or spousal support;
 - h) The court must have all necessary information before it in order to determine inappropriateness under s. 4. If the evidence provided is a child expense budget, "the unique economic situation of high income earners" must be considered; and

- i) The test for reasonableness of expenses will be a demonstration by the paying parent that the budgeted expense is so high "as to exceed the generous ambit within which reasonable disagreement is possible";

(see Francis; Hathaway v. Hathaway, 2014 BCCA 301 at para. 28; Devathasan, at para. 302).

[110] It must be remembered that this case involved shared parenting of the Children. It must also be remembered that the claimant's application is grounded on s. 148(3) of the FLA. Whereas D.B.S. was grounded on s. 15.1 of the Divorce Act and s. 16 of Alberta's Parentage and Maintenance Act; Michel was grounded on s. 152 of the FLA, which provides:

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

[Emphasis added]

- [111] Because this case involves an agreement, the Court has jurisdiction to order an amount of child support that varies from the Guidelines if satisfied that reasonable arrangements were made for the Children's support (FLA, s. 150(2)).
- [112] The evidence on the condition, means, needs and other circumstances of the Children while they were living with the claimant half-time and while they were living with the respondent half-time, albeit weak, satisfies me that since the Separation Agreement was made, the arrangement the parties made for supporting the Children was reasonable. There is little basis for me to conclude that while living with the claimant, the monthly amounts payable under the Table would have made a significant difference to the Children.
- [113] As Justice Gomery stated in Devathasan, at para. 308, I am required to balance predictability, consistency and efficiency (favouring the application of the Guideline formula) against fairness, flexibility and recognition of the Children's actual condition, means, needs and other circumstances, taking into account their position as the Children of the respondent who earns well in excess of \$150,000.
- [114] This case requires me to craft an order that accomplishes the goals of child support and at the same time minimizes hardship on the respondent, especially given my finding that he is not guilty of blameworthy conduct.
- [115] I have concluded that a retroactive child support award is warranted but, in accordance with the general rule established by D.B.S., at para. 123, it should be limited to three years' prior to when the claimant notified the respondent that retroactive child support had become an issue, namely, July 2017 (as noted in paragraph 29 the Three-Year Retroactive Period). In balancing the respondent's interest in certainty and fairness to the Children, I conclude that the most appropriate order is to require, to the extent of the Three-Year Retroactive Period, that the respondent's TFSA be held by the respondent in trust for the Children to assist in funding their education. This funding will only be engaged after the RESPs held by the claimant and her family have been exhausted.

e) What child support is payable by the Claimant to the Respondent?

[116] I have already determined that L.M. began living with the respondent full-time on January 1, 2016, and ceased being a child of the marriage on December 31, 2020. Therefore, the claimant is obliged to pay the respondent child support for L.M. commencing January 1, 2016 and ending December 31, 2020, based on the Guideline income for each year as I have determined above.

[117] N.J. commenced living with the respondent full-time effective December 1, 2019. The claimant is therefore obliged to pay the respondent child support for N.J. commencing December 1, 2019, based on her income as determined above and continuing until N.J. is no longer a child of the marriage as defined in the Divorce Act (or "child" as defined in the FLA, as the case may be).

Summary

[118] At the parties' suggestion, I will leave it to them to calculate the retroactive award based on the parties' incomes for the period July 1, 2017 to date, based on the Guideline table amounts, based on L.M. residing with the respondent commencing January 1, 2016 through December 31, 2020 (when she ceased being a child of the marriage) and based on a shared parenting arrangement respecting N.J. until December 1, 2019, following which he resided full-time with the respondent.

[119] The orders are as follows:

- a) The Separation Agreement is varied to require the respondent to pay the claimant retroactive child support for N.J. only from July 1, 2017 (the Three-Year Retroactive Period) to December 1, 2019, based on setting off the claimant's income of \$91,930 in 2017, \$147,600 in 2018, and \$150,560 in 2019 and 2020, with the respondent's income for those years as set out in Table 1 and applying the table amounts ("Respondent's Retroactive Child Support"). The amount of the Respondent's Retroactive Child Support is left to the parties to determine;
- b) The Separation Agreement is also varied to require the claimant to pay retroactive child support to the respondent for L.M. from July 1, 2017 (the Three-Year Retroactive Period) to December 31, 2020, based on her Guideline income of \$91,930 in 2017, \$147,600 in 2018, and \$150,560 in 2019 and 2020 ("Claimant's Retroactive Child Support"). The amount of the Claimant's Retroactive Child Support is left to the parties to determine;
- c) The Respondent's Retroactive Child Support may be set off against the Claimant's Retroactive Child Support, and vice versa;
- d) To the extent the Respondent's Retroactive Child Support exceeds the Claimant's Retroactive Child Support, that amount shall be held by the respondent in trust for the Children and is to be used to fund the Children's respective post-secondary education expenses once their RESPs have been exhausted;

- e) L.M., born December 9, 2001, ceased to be a child of the marriage as of December 31, 2020;
- f) The claimant shall pay the respondent child support for N.J., born August 15, 2003, in the Guideline Table amount commencing December 1, 2019. Her child support payments are to be adjusted based on her prior year's income every January, until N.J. ceases to be a "child" or "child of the marriage" as defined by the FLA and the Divorce Act, respectively, or until his residency as between the parties changes.

[120] I have determined that the respondent has been the substantially successful party. He is therefore entitled to his costs.

[121] Should the parties require any further assistance to implement the orders I have made, they have liberty to apply.

"G.P. Weatherill J."

Table 1

Year

Respondent

Claimant

2008

\$344,000

\$65,840

2009

\$292,100

\$45,410

2010

\$312,000

\$(11,020)

2011

\$295,500

\$32,300

2012

\$299,000

\$43,550

2013

\$421,900

\$62,940

2014

\$264,100

\$82,570

2015

\$330,700

\$2,890

2016

\$536,960

\$60,170

2017

\$549,950

\$81,930

2018

\$521,750

\$147,600

2019

\$486,070

\$140,560

Table 2

Year

Respondent's Monthly Child Support Payable on His Income

Claimant's Monthly Child Support Payable on Her Income

Amount of Arrears

2008

\$4,425

\$994

\$5,736

(4 months)

2009

\$3,795

\$690

\$13,260

2010

\$4,037

\$0

\$24,444

2011

\$3,830

\$505

\$15,900

2012

\$3,981

\$662

\$15,828

2013

\$5,530

\$954

\$30,912

2014

\$3,582

\$1,246

\$3,552

2015

\$4,380

\$0

\$28,560

2016

\$4,187

(L.M. with father - 1 child)

\$913

(2 children continuing)

\$15,288

2017

\$4,283

\$1,237

\$12,552

2018

\$4,255

\$2,130

\$1,500

2019

\$3,977

\$2,044

\$(800)

2020

\$3,977

(x2 months - L.M. with mother - 1 child)

\$2,044

(x6 months - 2 children)

\$(24,002)

\$1,282

(x6 months - 1 child: 2 months when L.M. with mother plus September - December)

Total Net Arrears:

\$142,730

Table 3

Year

Respondent

Claimant

2008

\$343,919

\$81,758

2009

\$292,091

\$76,030

2010

\$311,869

\$76,500

2011

\$295,500

\$46,300

2012

\$298,902

\$57,550

2013

\$421,862

\$76,940

2014

\$264,083

\$96,570

2015

\$330,703

\$50,913

2016

\$536,960

\$74,170

2017

\$549,949

\$95,930

2018

\$521,748

\$161,600

2019

2020

\$486,225

Unknown

\$154,560

Unknown

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