
CANADA / JUDGMENT

M.S. v. S.Y.

2015 BCSC 966

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Supreme Court of British Columbia

DECIDED

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2015 BCSC 966 M.S. v. S.Y.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

M.S. v. S.Y.,

2015 BCSC 966

Date: 20150608

Docket: D099961

Registry: Vancouver

Between:

M.S.

Claimant

And

S.Y.

Respondent

Before: The Honourable Mr. Justice Steeves

Reasons for Judgment

Counsel for the Claimant:

L.A. Murphy

C.M. Chamberlain

Counsel for the Respondent:

F.M. Beveridge

Place and Dates of Hearing:

Vancouver, B.C.

March 10-11, 2015

Written submissions:

April 30, May 8, May 15, 2015

Place and Date of Judgment:

Vancouver, B.C.

June 8, 2015

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A. INTRODUCTION

- [1] In this family case, the parties have been divorced for some time.
- [2] The respondent now applies to vacate a 2012 order of this court ("2012 Order") or, in the alternative, vary it. He says he was not aware of the order or the claimant's application to obtain it. In contrast, the claimant seeks to have the 2012 Order confirmed with only some minor changes. She says the order was obtained after valid substitutional service on the respondent because he could not be found.
- [3] The 2012 Order included setting the guideline incomes of the parties, setting payment of child support by the respondent, calculation of arrears and other matters.
- [4] The 2012 Order expressly left open a review of the issues included in it. The respondent now seeks that review, including the application to vacate the order. The primary issues relate to the incomes of the parties, extraordinary expenses and arrears. The respondent's current arrears are in excess of \$200,000 (as calculated by the Federal Maintenance Enforcement Program ("FMEP")) but he disputes that figure because it is based on the 2012 Order he was not aware of. The respondent accepts that income of \$72,000 should be imputed to him but disagrees with the income of \$150,000 imputed to him in the 2012 Order.

- [5] There are also issues as to whether a 2005 agreement between the parties has been repudiated by the respondent, whether two adult children aged 19 and 21 remain children of the marriage and whether there should be a fine against the respondent for non-disclosure of his financial information. In addition, the claimant has been paying the extraordinary expenses for the education and care of the adult children and she says the respondent must make a proportionate contribution.
- [6] There is a second application by the claimant in which she seeks to admit an expert report about the income that can be imputed to the respondent. The respondent opposes the admissibility of the report.
- [7] The parties are agreed that this application is properly considered under the Divorce Act, RSC 1985, c 3. By agreement of the parties it proceeded by way of affidavit evidence. I have anonymized the names of the parties and the children to protect the privacy of the children.

B. BACKGROUND

- [8] The parties were married on September 12, 1992 and divorced pursuant to an order of this court dated January 13, 1998. There are two children from the marriage, D.Y. currently aged 19 (born May 30, 1995) and T.Y. aged 21 years old (born September 21, 1993).
- [9] According to a Form 8 filed by the claimant on December 18, 2014 her child support income is \$77,077. The respondent filed a Form 8 on November 14, 2014 in which he records child support income of \$75,455. Notwithstanding this the respondent submits that income of \$72,000 should be imputed to him. According to the claimant income of \$150,000 should be imputed to the respondent, as was done in the 2012 Order. The incomes of the parties, in particular the income of the respondent, are discussed in more detail below.
- [10] There were two previous separation agreements between the parties, dated December 11, 1996 and January 26, 2005. The claimant deposes that the second agreement was an attempt by her to obtain some security of support following the accumulation of arrears by the respondent because of his breach of the previous December 1996 agreement. She gave up some arrears to obtain that security.
- [11] The January 26, 2005 agreement dealt with child support issues (among other things) and I will refer to it as the "Child Support Agreement". It was intended as a full and final settlement of the issue of arrears owed by the respondent as well as child "maintenance". Arrears were "set" at \$30,000 and a payment plan was agreed. Child support of \$650 per month was to be paid by the respondent to the claimant "until the children are no longer children of the marriage."
- [12] The claimant says that the respondent repudiated the Child Support Agreement when he did not pay the support and expenses described in it. The respondent now says that any obligation he has arises from this agreement (assuming he is successful in having the 2012 Order vacated).

- [13] There have also been two previous orders of this court.
- [14] The first court order is dated January 13, 1998. It set out a number of matters consented to by the parties including giving the claimant "sole custody and guardianship" of the children (with reasonable access for the respondent) and spousal support (until June 2000). It set the respondent's income at \$69,500 and income for the claimant at \$3,217, with staged amounts for child support. Family assets were addressed. The parties' divorce was also granted in this order.
- [15] The second court order is the 2012 Order, dated November 20, 2012, and it varied the first agreement in a number of areas. This order is highly contested and it is the one the respondent seeks to vacate. The claimant registered this order with the FMEP.
- [16] A number of issues arise under the 2012 Order. Firstly, it was made on the basis of an application by the claimant and in the absence of the respondent. The respondent says he was not aware of the application and not aware of the order until May 2013 when the FMEP froze his bank accounts. He says the entire order should be vacated because he was unaware of it. On the other hand, the claimant says that the respondent made himself unavailable, she attempted to serve him and she ultimately obtained an order for substitutional service. She says the 2012 Order should be confirmed with some minor changes.
- [17] The 2012 Order declared that the respondent had repudiated the 2005 Child Support Agreement between the parties. It also set out the incomes of the parties at \$66,700 for the claimant and \$150,000 was imputed to the respondent. On the basis of these incomes child support payments to be paid by the respondent were ordered as were payments for extraordinary expenses. In addition, arrears for child support in the amount of \$62,015.85 were ordered to be paid by the respondent as well as \$31,736.54 for the respondent's share of retroactive extraordinary expenses. Some of these were not, in the end, incurred. Finally, the respondent was ordered to pay the amount of \$3,000 to the claimant as a fine under s. 92(1) of the Family Relations Act, RSBC 1996, c 128 ("FRA").
- [18] The respondent is significantly in arrears in payment of child support and extraordinary expenses. According to information from the FMEP, the amount owing by the respondent as of March 6, 2015 was \$206,655.79. Again, the respondent disputes this amount because it is based on income of \$150,000 imputed to him under the 2012 Order and that order should be vacated or varied. The claimant says the 2012 Order should not be vacated. She acknowledges that \$38,079.92 should be credited to the respondent's arrears as a result of the difference between costs anticipated in the 2012 Order for education of the children and the actual costs.
- [19] According to the respondent he has paid support and he was up to date at the end of 2011. He has produced different calculations (all outside the 2012 Order) that result in arrears of \$17,461, \$8,771 or \$2,387 owed by him. He also says that expenses incurred by the claimant for the children were unjustified and not agreed by him.

- [20] The respondent says the two children are no longer children of the marriage for support purposes because they are 19 years old or older. They are enrolled in post-secondary education courses but the respondent says the courses are too expensive, he never agreed to them and the children are not, in any event, serious about those programs. He also says the children decided to cut off contact with him some time ago. The children have provided affidavits countering these assertions.
- [21] The claimant has incurred substantial debt in order to support T.Y. and D.Y. This was primarily a mortgage of \$500,000 on her home with a balance of \$289,972 as of August 22, 2012. She also withdrew money from her RRSPs to fund expenses for the children. The RRSP withdrawals total \$30,382, comprising \$5,444 in 2010, \$6,312 in 2011 and \$18,625 in 2012.
- [22] There is a second application in which the claimant seeks to admit an expert report about the income that can be imputed to the respondent.

C. ANALYSIS

- [23] The 2012 Order includes the following clause:
5. The Respondent shall have the right on providing the Claimant fourteen (14) days written notice to appear in this Court to apply to amend the terms of this Order.
- [24] The current application by the respondent is based on this clause. It is dated November 14, 2014 although, on his own evidence, he became aware of the 2012 Order in May 2013.
- [25] As I read s. 5 of the 2012 Order all matters in that order are open for review and possible change. The respondent seeks to vacate the order or, in the alternative, amend it substantially. It was not addressed in argument but I note that s. 5 refers to "amend" and it does not specifically say the order can be vacated in its entirety. Nonetheless I will proceed by reading s. 5 to have that broad meaning.
- [26] The following issues arise in this application:
- (a) Should the 2012 Order be vacated?
 - (b) Was the 2005 Agreement repudiated by the respondent?
 - (c) Are D.Y. and T.Y. children of the marriage? If so, what are the extraordinary expenses for each of them while they are in school?
 - (d) What are the incomes of the parties?
 - (e) Should the expert report of the claimant be admitted on the issue of the income of the respondent?
 - (f) What is the period of arrears for the respondent's obligations to pay child support and extraordinary expenses? Should any arrears be cancelled or reduced?
 - (g) Should a fine be imposed on the respondent for failure to disclose financial information?

[27] I will consider each of these issues in turn.

(a) Should the 2012 Order be vacated?

[28] The basis of the respondent's application to vacate the 2012 Order is that he was not given notice of the application that the order was based on. He says he learned about it when the FMEP froze his bank accounts in May 2013.

[29] The claimant's application that resulted in the 2012 Order was filed September 27, 2012. The following is a summary of her efforts to contact the respondent before and after the filing of that application, as set out in her affidavit filed October 9, 2012:

(i) On May 3, 2011 the claimant sent an email to the respondent asking to discuss "next steps to support T.Y. in her school aspirations following her graduation from high school." The claimant provided two phone numbers she could be reached at. On the same day, the respondent responded "NO".

(ii) The claimant replied the next day, May 4, 2011, setting out in detail the situation with the children including the costs of postsecondary education for T.Y. at a school in the United States. She also explained the arrears owed by the respondent. The respondent replied the same day, "go away".

(iii) The claimant retained counsel who wrote to the respondent on May 18, 2012. The letter described arrears in child support and extraordinary expenses and noted the lack of response from the respondent. A current Form 8 was requested. The respondent was also advised that a judicial case conference was being sought and, if he did not respond to dates proposed for the conference, a date would be set down unilaterally. The letter was sent by email to the same address used by the claimant and by regular mail to the address of the respondent's mother at a specific address in Vancouver. The letter by mail was returned with "no such resident" marked on the envelope.

(iv) A second letter from counsel for the claimant was sent to the respondent at the same address on July 10, 2012. It repeated some of the material from the previous letter, it requested a response to the previous letter and it requested the respondent's current address for service and delivery of correspondence. It also said, "If you do not intend on responding to our correspondence an out-of-court settlement will be virtually impossible and [the claimant] will be forced to pursue a court ordered resolution to the outstanding matters between you." The previous suggestion of a judicial settlement conference was referred to but "given your unwillingness to correspond with us or [the claimant] we may be required to change course and take steps to bring a court application." This letter was returned with "no such resident" marked on the envelope.

(v) Title searches were conducted by the claimant and her counsel using the respondent's name but they did not reveal any property owned by him. A corporate search revealed that he was the sole proprietor of a company but it did not own property in British Columbia.

(vi) The claimant tried to contact the respondent through some mutual contacts and through social media websites. She could not do so. A Google search indicated a residence in the United States and employment with another company. However these were old references and not current.

(vii) The respondent did not live at the address he provided for service in the original divorce application under a different file number.

(viii) There was correspondence between the respondent and a previous counsel for the claimant in June and September 2009 which was reviewed. The respondent referred to moving from New York to Vancouver and his efforts to obtain an apartment in Vancouver. Despite a request to provide an updated address the respondent did not do so. Nor did he provide his current financial information.

(ix) The claimant attempted to contact the respondent using phone numbers she had from 2009 but he was not at these numbers. She was not able to determine where he was employed.

(x) A title search of the mother's address showed that she remained the registered owner of the property. There is also a cheque dated December 1, 2008, from the respondent to the claimant, which used the same address. A search of a domain name owned by the respondent indicated that it was his current address. It was also used for his correspondence with the Canada Revenue Agency for income tax purposes.

(xi) A process server made several attempts to contact the respondent to serve court documents but was unsuccessful. These are described in an affidavit of attempted service filed October 9, 2012.

(xii) On September 28, 2012 counsel for the claimant wrote to the respondent at the mother's address, enclosing a notice of application with supporting documents. There was no reply.

(xiii) There is no evidence from the respondent's mother.

[30] On the basis of the above information an order of substituted service was obtained on October 11, 2012. This was left in the mailbox at the mother's address on October 12, 2012, pursuant to the order for substitutional service.

[31] From the above it is clear that there was a strong basis for substitutional service on the respondent. He knew from the May 3 and 4, 2012 emails from the claimant what the claimant's concerns were but he dismissed them out of hand. I conclude that he cannot now say that he was somehow unaware of those concerns. I find that a subsequent letter to the same address from counsel for the claimant was received by the respondent but simply ignored by him. He says that the claimant did not do enough to find him but the truth of the matter is that he did not want to be found. He had legal obligations towards his children and "go away" is not responsive to those obligations. Something had to be done by the claimant and that is the purpose of substitutional service.

- [32] The consequence of a well-founded order for substitutional service is that the claimant was not required to do more than she did to contact the respondent. It was entirely open to him to become engaged in May 2011 and to participate in the claimant's application in November 2012. He chose not to as reflected in his replies on May 3 and 4, 2011. That is a complete answer to the respondent's assertion that he never knew about the application or the 2012 Order that followed.
- [33] I only add that the respondent's explanations for not being available are not compelling. He says his current legal counsel at the time was on record but there is evidence that another lawyer was on record at the material time. That person withdrew and provided the address of the respondent's mother to contact him. Another problem for the respondent is that his current counsel may not have been retained until after November 2012. He also says that he had moved to Alberta at this time but it is not explained why he did not provide an address to the claimant or even the children.
- [34] Similarly, his explanation that he discontinued his email addresses because they were hacked does not explain why he did not provide a new address or any contact information. Nor does it explain his using email to dismiss out of hand the claimant's initial inquiries in May 2011. The respondent's evidence that he did not anticipate any court application is not responsive to the May 2011 emails, his obligations as a parent or to the arrears that he knew he owed. It is simply not credible that the respondent did not know that the claimant was concerned about the respondent's failure to pay child support and expenses. She told him in May 2011 there was a problem, she told him she was planning a court application and her counsel said the same thing in an immediate follow-up letter to the same address.
- [35] In summary, I conclude that the respondent, despite having legal obligations to his children, thought he could remove himself entirely from those obligations by disappearing. He apparently had some personal problems but those did not mean his relationships with his children were at an end. He had an obligation to say something about his whereabouts and his situation. However, it was not until May 2013 when the FMEP froze the respondent's bank accounts that he re-appeared (his current application was filed sometime after that). On this basis there is good reason to conclude that if it was not for the enforcement by the FMEP of the respondent's obligations to his children, he would not have re-appeared at all. He was successful in disappearing for a time but he cannot now say he should have somehow been found or that the claimant should have somehow done more than she did to find him.
- [36] The result is that the respondent cannot now be successful in his application to vacate the 2012 Order in its entirety because he says he did not know about the claimant's application in 2012. His application to vacate the 2012 Order is denied.
- (b) Was the 2005 Agreement repudiated by the respondent?

- [37] It may be recalled that the 2012 Order declared that the respondent had repudiated the Child Support Agreement from January 2005. He now challenges that finding and, indeed, he says that if he has any support obligations they are under the Child Support Agreement, not the 2012 Order.
- [38] A previous decision has discussed repudiation in family matters as follows (*Smith v. Lau*, 2004 BCCA 443),
- [41] The legal test for repudiation of a contract arising out of a fundamental breach was considered in this Court in *Ballantyne v. Grone* (1989), 22 R.F.L. (3d) 217 at 219-20, where Hinkson J.A. for the Court adopted the summary of the law stated by Cameron J. (as he then was) in *Borg-Warner Accept. Can. Ltd. v. Wyonzek*, [1981] 4 W.W.R. 193, 122 D.L.R. (3d) 737 (Sask. Q.B.) at pp. 744-45:

Whatever its limitations or the subtle shades of its essence the doctrine with all its imperfections is embedded in Canadian law and at least for the purposes at hand may be sufficiently if not exhaustively nor perfectly stated thus: a fundamental breach is one going to the very root of the contract; where one party fails to perform the very purpose for which the contract is designed so as to deprive the other of the whole or substantially the whole of the benefit which the parties intended should be conferred and obtained, such breach goes to the very root of the contract, and the party not in default is absolved from performing his end of the contract.

[Underlining added by Court of Appeal]

- [42] In *The Law of Contract in Canada*, 3d ed. (Toronto: Carswell, 1994), G.H.L. Fridman describes the application of the legal test (at p. 570):

...The basic test comes down to the simple, if not obvious one of deciding what is the real purpose of the contract, the true benefit intended to be obtained by the injured party, the extent to which the misperformance by the defendant goes beyond falling short of what was desired by the victim of the breach and involves the complete denial to him of any benefit from the performance that was provided.

- [39] The respondent relies on the decision in *Smith* for his submission that he did not repudiate the Child Support Agreement. He says that the claimant was not deprived of any benefit from the agreement because she received the arrears that were agreed up to the end of 2011 and, in fact, she received in excess of the agreement in the first few years.
- [40] Unfortunately, this is a selective account of the relevant history. The respondent paid the amounts owing in 2005, he overpaid a slight amount in 2006 and 2007 and he was slightly under the amount owing in 2008. The record from the FMEP shows arrears of \$16,305 at the end of 2010 and then an overpayment of \$592 at the end of 2011. However, in 2011 one payment (\$18,692) amounted to 75% of the annual amount for that year and it apparently was intended to eliminate the arrears of \$16,305 at the end of 2010. This was undoubtedly well-received by the claimant but it does not represent a consistent and reliable commitment of child support on the part of the respondent.

- [41] In fact, arrears at the time of the 2012 Order were \$5,316. Then they were \$123,104 by the end of 2012, following the application of the 2012 Order. Arrears at the end of 2013 were \$161,346, they were \$201,424 at the end of 2014 and they were \$206,655 on March 6, 2015.
- [42] I also note that the respondent paid only \$13,593 in 2014, \$14,481 in 2013 and \$1,559 in 2012. In all of these years he paid less than the amount of about \$24,000 required by the Child Support Agreement to be paid annually. That is, he has not paid the amounts required by the Child Support Agreement, the agreement he says he should be paying support under.
- [43] The respondent explains this by saying he was having financial difficulties in the years he had arrears, prior to the 2012 Order. He apparently communicated this to the claimant who, according to the respondent, insisted on the amounts in the Child Support Agreement. This was a reasonable position on her part because she agreed to the Child Support Agreement in an attempt to find a solution to the respondent's non-compliance with the previous agreement of December 1996 and she was not prepared to make further changes to accommodate the respondent's breach of the Child Support Agreement. It is true, as submitted by the respondent, that the claimant did not complain about the Child Support Agreement at this time but that is because she was trying to get the respondent to comply with it. When it was clear he was not going to comply with it in any meaningful way, and he withdrew from any connection with the claimant and the world generally, she made a valid application that resulted in the 2012 Order.
- [44] I can only conclude that the claimant was entitled to maintain her rights under the Child Support Agreement. In the absence of any agreement by her to change the agreement the respondent's remedy was to apply to court on the basis of what he says was his reduced income. He did not do so until the current application to vacate the 2012 Order and restore the Child Support Agreement. More to the point on the issue of repudiation, he refused to pay his support obligations under the Child Support Agreement in any significant way.
- [45] Apart from the refusal to pay the specific amounts required by the Child Support Agreement, the respondent's erratic compliance with it raises the issue of what a previous decision has described as "purse control" by the payor spouse over the payee spouse. This control has the effect of denying the payee spouse the certainty and security of regular and predictable payments. Further, "[t]he removal of these benefits by the payor spouse can constitute a breach that goes to the root of the contract, is not compensable in damages, and amounts to a repudiation of the agreement" (*Owen v. Owen*, 2011 BCSC 1284 at para. 25).
- [46] In summary, it is incorrect for the respondent to say the claimant was not deprived of any benefit from the Child Support Agreement. At the time of the 2012 Order there was more than \$5,000 in arrears. Further, the respondent's casual compliance with the agreement deprived the claimant of its substantial purpose to help her support the two children. Put another way, the respondent's purse control of the relationship between the parties by his perfunctory compliance with the agreement denied the claimant the certainty and security she was entitled to under the agreement. The purpose of the Child Support Agreement was

to provide the claimant with the security of child support for the children and the respondent's failure to pay support deprived her of substantially the whole of the benefit intended by the agreement.

[47] I conclude that the respondent repudiated the January 2005 Child Support Agreement.

(c) Are D.Y. and T.Y. children of the marriage?

[48] As above, T.Y. is currently 21 years old and D.Y. is 19 years old. Both have graduated from high school and they are both continuing their education, although in different ways and at different levels.

[49] According to the respondent, both T.Y. and D.Y. are no longer children of the marriage and he has no obligation to provide support for them or pay for any of the expenses for their post-secondary education. On the other hand, the claimant says they continue to be children of the marriage and the respondent must contribute to their support and expenses. By way of something of an alternate position the respondent says that many of the expenses of the children, especially for T.Y., are extravagant and he never agreed to them. Issues of child support and extraordinary expenses, in the past and going forward, depend on the resolution of this issue.

[50] Section 2(1) of the Divorce Act defines a "child of the marriage" to be a child of two spouses or former spouses who, at the material time,

- (a) is under the age of majority and who has not withdrawn from their charge, or
- (b) is the age of majority or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessities of life;

[51] As a starting point, I note that pursuing post-secondary education is considered a valid reason for continued support, although mere attendance is not sufficient to maintain dependence (*Nordeen v. Nordeen*, 2013 BCCA 178 at para. 15).

[52] In a recent decision of this court Mr. Justice Parrett summarized the law applicable to this issue (*Publicover v. Publicover*, 2013 BCSC 1179):

[25] In *Beninger v. Beninger*, 2010 BCSC 1509, Fenlon J. reviewed the law in this area in the context of a child seeking a second university degree. Her reasons are directly relevant to the present application and the proper approach to its resolution.

[26] Fenlon J., in paras. 9 to 15 of her decision, summarized the law and the proper approach in this way:

[9] There is no automatic rule that a child is no longer a child of the marriage once a first university degree is completed. As noted by Madam Justice Levine in *Neufeld v. Neufeld*, 2005 BCCA 7, W.P.N. v. B.J.N. [2005] B.C.J. No. 12, at para. 30:

[30] The jurisprudence supports the view that there is a wide range of factors to be considered in the determination of whether a child is a "child of the marriage" and that individual factors will be of varying importance in different cases. All of the relevant factors must be considered. There is no arbitrary cut-off point based on the number of degrees or the eligibility of the student for financial assistance.

[Italics in original, underlining added in Publicover]

[10] A spouse may be ordered to pay for the support of a child of the marriage under s. 15.1(1) of the Divorce Act. The definition of a child of the marriage includes a child who:

2(1)(b) is the age of majority or over and under [her parents'] charge but unable, by reason of illness, disability or other cause, to withdraw from [her parents'] charge or to obtain the necessities of life;

[11] While the pursuit of education qualifies as "other cause" for continuing dependence of a child over the age of majority, it is not on its own sufficient. As the Court of Appeal noted in Neufeld at para.18:

In determining whether a child pursuing an education is unable to withdraw from her parents' charge or obtain the necessities of life a court must consider the surrounding circumstances.

[Underlining added in Publicover]

[12] The relevant factors to be considered in determining whether a child pursuing an education cannot withdraw from her parents' charge includes those listed by Master Joyce (as he then was) in *Farden v. Farden*, [1993] B.C.J. No. 1315 (S.C.):

- (1) whether the child is in fact enrolled in a course of studies and whether it is a full-time or part-time course of studies;
- (2) whether or not the child has applied for or is eligible for student loans or other financial assistance;
- (3) the career plans of the child, i.e. whether the child has some reasonable and appropriate plan or is simply going to college because there is nothing better to do;
- (4) the ability of the child to contribute to his own support through part-time employment;
- (5) the age of the child;
- (6) the child's past academic performance, whether the child is demonstrating success in the chosen course of studies;
- (7) what plans the parents made for the education of their children, particularly where those plans were made during cohabitation;

- (8) at least in the case of a mature child who has reached the age of majority, whether or not the child has unilaterally terminated a relationship from the parent from whom support is sought.
- [13] This list of factors is not exhaustive, and does not constitute a minimum set of criteria which must all be satisfied. As stated in Neufeld at para. 22: "They are relevant factors to be considered, along with others that are relevant in the circumstances. The determination is fact-specific."
- [14] In Neufeld, the court identified an additional factor: the ability of a parent to continue to support his child beyond a first degree:
- [27] The father cited in support of his argument *Maurice v. Maurice*, [1993] B.C.J. No. 1461 (S.C.) (QL), where the Court found that daughters aged 26 and 21, pursuing "achievable, realistic and legitimate" educational goals in second degrees were no longer entitled to child support. The judge in that case considered the age, educational levels and abilities of the children, and also the "age of the respondent, his income and the state of his health".
- [28] In this case, the evidence is that the father has sufficient income to support J.'s achievable, realistic and legitimate educational goals, and there is no evidence that anything about his age or health would limit his ability to assist her. Nothing in the separation agreement precluded post-graduate education.

[*Italic emphasis in original*]

- [15] It is apparent from these factors that whether a child who is 19 years or older remains a "child of the marriage" cannot be determined simply by asking (as the language of s. 2(1) of the Divorce Act suggests), whether the child can support herself while attending school. The test is much broader; it requires the court to determine whether an "adult" child should be entitled to continued support from her parents given her particular academic, financial, and family circumstances.
- [53] I will consider the factors set out in *Farden* for each of the children. I note that not all of the listed factors have to be met before an adult child can be entitled to ongoing support (*De Beck v. De Beck*, 2012 BCCA 465 at para. 41).
- (i) Is T.Y. a child of the marriage?
- [54] The respondent submits that T.Y. ceased being a child of the marriage from age 19. In the alternative, if she remains a child of the marriage, she stopped being so when she worked from May 2013 until the end of August 2014 instead of attending school.
- [55] The claimant says that T.Y. remains a child of a marriage because she is in school and she is unable to withdraw from her parents' charge or obtain the necessities of life while she is attending school.
- [56] The factors in *Farden* applied to T.Y. are as follows:

a. Enrollment

- [57] Starting in September 2011, when she was 18 years old, T.Y. started a four year program at the Pratt Institute in New York, USA, in photography. She seeks to be a photographer or a director of photography at a magazine.
- [58] The program at Pratt Institute was attractive because it offered an internship in the third year. She completed two years of full-time studies at Pratt Institute from 2011 to 2013. She wanted to study a third year and was hoping to get a scholarship for that purpose. She was not successful obtaining a scholarship and her mother, the claimant, could not support her at Pratt Institute any longer without the financial participation of the respondent. T.Y. then returned to Vancouver, she worked for a period of time from May 2013 to September 2014 and then she re-commenced her studies in photography at Emily Carr University.
- [59] The respondent points to the period between May 2013 and September 2014 when T.Y. worked and was not in school. However, the explanation for this is that by the time she realized she could not afford to attend a third year at Pratt Institute it was too late to attend another school. She resided with the claimant and worked at a clothing store to save money to continue at school in September 2014. These funds enabled T.Y. to complete her first year at Emily Carr University without incurring any debt and reducing the costs to the claimant, who was supporting T.Y. without the assistance of the respondent.
- [60] In my view this was a necessary and short interruption in T.Y.'s studies and not one that somehow made her no longer a child of the marriage, having been one before then and then again afterwards (*Clarke v. Taylor*, 2014 BCSC 49 at para. 28). It was also a transition period for T.Y. to earn money to attend Emily Carr University. This change also accords with the respondent's current view that T.Y. should not be at Pratt Institute and she should be at a local school.

b. Student loans

- [61] T.Y. received \$13,380 for the 2011-2012 school year and \$10,880 for the 2012-2013 year from government loans. By working and her mother paying her living expenses she has apparently not needed to take out a student loan since then.

c. Career plans

- [62] As above, T.Y. seeks to be a photographer or a director of photography at a magazine. She already had some setbacks in this career path when she had to stop going to Pratt Institute but she has found a way to continue it in Vancouver. There is a consistent career path here and no evidence she is attending school simply because she has nothing better to do.

d. Employment contribution

- [63] As above, T.Y. worked and saved money in between her time at Pratt Institute and Emily Carr University. She continues to work part-time. As a result of this she has been able to pay her tuition for the current school year as well as her books. She relies on her mother for a place to live and for living expenses. She could not work in the United States while attending Pratt Institute because of her immigration status.
- [64] The respondent alleges that T.Y. does not live with her mother on a full-time basis. Instead she lives with her boyfriend and this means she is no longer a child of the marriage. The support for the respondent's view is 43 pages of social media correspondence he has presented in an affidavit. It shows T.Y. socializing (including drinking and smoking marihuana) and playing with dogs. There are also comments like "[n]othing more upsetting than leaving for work in the morning while it is still dark outside" and references to a "hockey blogger boyfriend." There are photos of a Christmas tree. According to the respondent, "any emotional dependence T.Y. may have appears to be [on her boyfriend] and not her mother."
- [65] I accept that this statement is the reaction of a father to his daughter being independent, but it is not the case that the photographs show dependence on the boyfriend other than what one might expect in a relationship between two young people. There is certainly no basis for concluding that it has supplanted the relationship between mother and daughter. T.Y. denies that she is living with her boyfriend and there is no basis in the information provided by the respondent for a contrary conclusion.
- [66] Similarly, the respondent says that the images on social media show that T.Y. does not spend 1.5 hours per day traveling to work. T.Y. has deposed otherwise and there is, again, no basis for a contrary view. Finally, the respondent takes exception to an apparent purchase by her of a bicycle for her boyfriend. I do not agree that this somehow means T.Y. is not a full-time student and not living with her mother.
- e. Age
- [67] T.Y. is currently 21 years old. For her first year at Pratt Institute she was 18 years old.
- f. Demonstrated success
- [68] Contrary to the respondent's assertion that "there is little evidence about the level of T.Y.'s success", while she was at Pratt Institute, T.Y. was on the Dean's List and the President's list. She is doing well at Emily Carr.
- [69] I take it to be the case that, as the respondent says, she has not received any scholarships but that is not the standard for determining if someone remains a child of the marriage past age 19. T.Y. missed a scholarship at Pratt Institute by a narrow margin.
- g. Parents' plans

- [70] According to the respondent, the post-secondary studies of T.Y. were planned without his permission and without his knowledge. In one of his affidavits (filed November 14, 2014) he has deposed, "I did not at any time offer to pay a portion of T.Y.'s tuition nor did I encourage her to attend Pratt Institute. There was no way I could afford to pay for such an expensive program. Further, there was limited contact with T.Y. at the time."
- [71] This view does not accord with the evidence as reflected in social media and email exchanges between T.Y. and the respondent. For example, there are the following (all quotes reproduced as written):
- (a) In June 2010 T.Y. was discussing with the respondent going to school in the United States. On June 19, 2010, the respondent said to T.Y. (referring to another person "Adrian"), "Adrian says these schools are really good: Westcoast, Cal Arts, UCLA."
 - (b) The discussion continued into December 2010. On December 5, 2010 they were discussing getting together for supper and talking about American schools. The respondent said, "bring your portfolio and camera. I want to see what you showed pratt and parsons ..good job T.Y. xo." In the next message he said, "PS Both Pratt and Parsons would rock in a MAJOR MAJOR way. OMG Parsons!! so good."
 - (c) In exchanges on December 10 and 11, 2010 the respondent apologized to T.Y. about involving her in his disputes with the claimant but he said the claimant was not being fair about sharing expenses. He also said, "nickname for T.Y.] how much \$ do you need. are a MUST. anywhere that is really good. i'll help of course" [emphasis added].
 - (d) On May 18, 2011 T.Y. sent to the respondent a finance book from Pratt Institute by email and he replied he would look at it.
 - (e) In an email dated June 1, 2011 the respondent told T.Y. that he would not co-sign a loan for her with the claimant. He then said:

How much money do you have saved anyway. maybe we can talk about doing some sort of matching thing so at least you have some chunk of the loan payment available for a down payment. Don't worry this will work out if you want it to. Don't give up. [Emphasis added].

- (f) Just before leaving for Pratt, on August 18, 2011, the respondent said to T.Y. on Facebook, "T.Y. go get 'em in ny. love you lots. send me your address + I'll send \$. miss you" [emphasis added].

- (g) On November 15, 2011 the respondent wrote on Facebook to T.Y. as follows:

Hey T.Y. I just got your letter!! I was so excited I rushed home to read it by myself. It was so sweet. Thank you so much for thinking of me and sending a letter. It really means a lot to me. Have fun with your studies. If you are going to europe go to Florence. Duh. also parsons year 2 sure why not. love you lots. dad. I'll write you again later a real letter with money but I just wanted to pop this off real quick. xo" [emphasis added].

- [72] From these exchanges I conclude that the respondent encouraged T.Y. to attend Pratt Institute and even took pride in her attendance at a prestigious school. Significantly, he never said to T.Y. that Pratt Institute was too expensive and she should go to school in Vancouver even though he had many opportunities to do so. He was also supportive of her taking her second year at another school, Parsons, also in the United States. As for the financing of the education at Pratt Institute, it is also clear that the respondent represented to T.Y. that he would "of course" help her. On two occasions he said he would send money to her.
- [73] In sum, there was a plan, in which the respondent was an active participant, to send T.Y. to Pratt Institute for her education in photography. In his affidavit material filed in his application the respondent now says that he only intended to help T.Y. with her spending money. However, that late interpretation is not consistent with the statements he made at the time and described above.
- [74] I conclude that T.Y. had a reasonable expectation that her father was excited about her attending a prestigious school of photography and that he would help to finance her attendance.
- h. T.Y.'s relationship with her father
- [75] Unfortunately, there is a dispute between the respondent and his daughters about who terminated the relationship between them. According to the respondent his daughters terminated the relationship, they "unilaterally cut off contact", and he had no relationship with his daughters at the time of the 2012 Order or after. They say it was not terminated and they would like to maintain it.
- [76] The following evidence supports the views of T.Y. (and D.Y.).
- [77] The respondent deposes that he "never received a birthday card, Christmas card or even an invitation to any event the Children were attending after 2008 when I returned to Vancouver." However, T.Y. deposes that she does not send cards to anyone, instead she uses social media, she sent Christmas and birthday greetings by that medium and she would make him cards herself for holidays. In evidence are Facebook screen shots from T.Y. to the respondent wishing him happy birthdays in 2010 and 2011 and a happy father's day in 2011.
- [78] The respondent has deposed that "not a single member of my family has ever had access to either of the children." However, the evidence includes a number of cards sent by the respondent's mother to T.Y. Most of these are undated but there is one that says the grandmother will write to T.Y. in New York. In her affidavit T.Y. confirmed corresponding with her grandmother from New York. There is a Facebook message from the respondent to T.Y. on March 11, 2012 where he said, "You should call [the respondent's mother] she's dying to see you guys. [telephone number deleted]."

[79] Beginning in March 2012 T.Y. was having difficulty contacting the respondent. In an email dated March 19, 2012 she said the following to him:

Hey, why are you in Alberta? What's going on? I was going to text you, but the number you gave me was a hotel. When will you be back? I don't really hear from you and frankly it concerns me. I would write you letters, but of course I have no clue in the world what your address is. If you even have one. I just want to know what's happening, I guess.

[Reproduced as written]

[80] To this the respondent replied:

let's just say I came here with one girl and now i'm with another but the first girl reaaaaally did not like that changeover one tiny bit. nope. so she told the cops a bunch of huge lies (like really really big lies) and i got pulled over at gunpoint by the gang task force. then I went to jail for a bunch of nights. it seemed like months in that shithole. and now i'm legally stuck here until at least april. i have a 10 o'clock curfew and i can't leave alberta let alone fort mcmurray. total drag.

[Reproduced as written]

[81] An exchange between March 11 to June 3, 2012 included the following from T.Y., replying to a message from the respondent that he was in Alberta:

hey! where'v you been, under a rock? out of the country? in the country? wherever, just wanted to let you know that my phone hasn't been working for a few weeks, so incase you've tried to contact me i haven't gotten anything

[Reproduced as written]

[82] There were similar exchanges in September, October and November 2012. During these the respondent offered advice about taking photographs (using historical paintings as subjects, for example). He said that T.Y. was "so cool", her photographs were "amazing" and he "loved" that they were "unconventional".

[83] In November 2012 the exchanges continued with the respondent offering advice about what courses to take, among other things. T.Y. explained the courses she was taking. The respondent said the following on November 14, 2012:

PS sociology is the most relevant from a here and now perspective. Also the best for employment. You will learn philosophy as you get older. Ie there really are no answers to any fucking thing. And anthropology can be covered off by reading Joseph Campbell's amazing book "the power of myth"

[Reproduced as written]

[84] The message of November 14, 2012 was the last message that T.Y. received from the respondent.

[85] The court hearing that resulted in the 2012 Order was on November 20, 2012.

[86] T.Y. wrote an email to him on December 8, 2012:

im wondering if this is still your email

blink twice if yes

i messaged you a few weeks ago but I didn't even notice that it didnt actually send to you. mr no-facebook. I decided on anthropology. what is your heritage?

[Reproduced as written]

[87] There was no reply from the respondent to this email. It was sent to the same address as previous emails and the respondent did not say that address was no longer active or provide a different address. T.Y. attempted to telephone the respondent but there was no answer and she was not sure she had the correct number. She has not changed her email address or Facebook account and she uses the same cell phone number.

[88] The above information is part of an affidavit provided by T.Y. The parties have exchanged voluminous affidavits but the respondent has not provided any contrary information except for his bare statement that his daughters unilaterally cut him off.

[89] It is certainly clear that there was an abrupt end to what was an open dialogue between a father and his daughter. He was encouraging in his messages to her about photography, he offered advice about what would be the best courses to take and he was quite open about his difficulties in Alberta. Then the respondent simply stopped communicating. T.Y. attempted through emails, Facebook and telephone to contact him. He has made no attempt to contact her.

[90] I can only conclude that the end of the communications between T.Y. and the respondent was a unilateral decision made by the respondent.

i. Conclusion and child support for T.Y.

[91] There is no evidence that T.Y. withdrew from the charge of her parents prior to her 19th birthday on September 21, 2012. She was clearly a child of the marriage up to that time. Part of this time she was enrolled at Pratt Institute in her photography studies.

[92] After her 19th birthday T.Y. continued her course of study at Pratt Institute that would have lead to a degree in photography. The respondent knew about this education choice, he encouraged it and he was enthusiastic about T.Y. attending a prestigious school. He also offered to help pay for it. No one can know the chances of employment in that field but it is clear she has done well in school.

- [93] T.Y. had a setback when she did not get a scholarship and she had to change from Pratt Institute to Emily Carr University because her mother could no longer pay the cost at Pratt Institute by herself. T.Y. has contributed herself to her education through working (including during the 2013-2014 period she was not in school) and a student loan. She is unable to be a full-time student without living with the claimant who pays her living expenses. Despite her efforts to keep in touch with him, the respondent has unilaterally cut-off contact with her.
- [94] In these circumstances I conclude that T.Y. was a child of the marriage up to age 19 and since reaching that age she did not leave the charge of her parents and continued to be a child of the marriage. This will continue until the completion of her degree at the end of the 2015-2016 school year and the respondent is required to pay his share of child support to the claimant until that time (as calculated with the incomes of the parties as discussed below).
- [95] The respondent is also required to pay his share of retroactive child support for T.Y., based on his income as discussed below. The FMEP amount for child support arrears will be adjusted accordingly.
- j. Expenses for T.Y.
- [96] As above, T.Y. was born on September 21, 1993 and she turned 19 years old on September 21, 2012. There is no evidence that T.Y. withdrew from the charge of her parents before she reached age 19 and during the 2011- 2012 school year she was under the age of 19 (from September 2011 to September 21, 2012).
- [97] There were expenses for T.Y. that were paid by the claimant before T.Y. reached age 19 and these are itemized in the claimant's first affidavit, filed September 27, 2012, as part of her November 2012 application that resulted in the 2012 Order. The respondent has not paid his share of these expenses.
- [98] Since returning to Vancouver (and registering at Emily Carr University in September 2014), T.Y. has lived with her mother who has paid her basic living expenses. I have found above that she did not leave the charge of her parents after reaching age 19 and she will continue to be a child of the marriage until the completion of the 2015-2016 school year, the expected date of completion of her degree.
- [99] T.Y. has paid her expenses at Emily Carr University herself so far, using the money she earned during the period she was out of school, May 2013 to September 2014. She deposes that she may not be able to pay her expenses in the future as she is in school more and working less than before.
- [100] The respondent was supportive and encouraging of T.Y.'s career and school choices. On the basis of his offers of financial assistance it was reasonable for her (and the claimant) to rely on financial support from him. I conclude he is responsible for his proportionate share of the tuition and expenses for T.Y.'s education, including time spent at Pratt Institute.
- [101] The following are the past extraordinary expenses for T.Y.:

(a) Dance classes (per 2012 Order):

\$508.10

(b) Driving lessons (2009):

\$1,099.00

(c) Tutoring (for both T.Y. and D.Y.):

\$4,249.00

(d) Expenses for Pratt Institute (2011-2012):

(i) Visa/medical fees

\$435.00

(ii) Tuition/residence/meals/health plan

(less student loan and grant)

\$22,652.00

(iii) Camera repair

\$869.12

(iv) Airfare

\$3,141.81

(v) Trains

\$383.79

(vi) Hotels

\$1,471.26

(vii) Expenses for dormitory room

\$698.14

(e) Expenses for Pratt Institute (2012-2013):

(i) Tuition/residence/meals/health plan

\$28,088.89

(ii) Flights

\$3,448.91

(f) Expenses for Emily Carr University (2014-2015):

(i) Tuition/Fees

\$3401.17

(ii) Supplies

\$391.85

(iii) Books

\$150.00

(iv) Health/dental

\$122.50

Total:

\$71,110.54

[102] Unfortunately, the respondent has not paid any of the extraordinary costs included in the 2012 Order. Some of those expenses have been reduced as a result of changes since the 2012 Order and a submission on behalf of the claimant, dated April 30, 2015, includes an accurate list.

[103] On a going forward basis, and in order to complete her degree, T.Y. will require the following future expenses:

(a) Educational expenses (2015-2016):

\$7,500.00

(b) Educational expenses:

\$3,750.00

Total:

\$11,250.00

[104] The parties will share the above arrears and future expenses proportionate to their incomes as discussed below until the end of the 2015-2016 school year. The arrears to date as calculated by the FMEP will be amended to reflect the respondent's share of the above past expenses. His share of the past expenses is ultimately payable to the claimant.

[105] T.Y. currently works part-time for 20 hours per week, earning about \$1,000 per month, and she deposes this will continue. The security of this income is subject to change for things like illness or injury, dismissal or demands of school work. She is expected to pay some of her educational expenses from her employment earnings, including transportation expenses. She will determine her own social life and \$400 of her earned income per month will be deemed for this purpose (without need for an explanation and regardless of her earnings). The overall expectation is that T.Y.'s parents will pay most of her education

expenses, including transportation.

(ii) D.Y.

[106] D.Y. is the younger of the two children and she turned 19 years old on May 30, 2014. She was four months old when her parents separated.

[107] The application of the Farden factors to D.Y.'s situation is as follows.

a. Enrollment

[108] D.Y. graduated from high school in spring 2013. Beginning in fall 2013 D.Y. took courses in human kinetics at Langara College but she withdrew and worked from November 2013 to June 2014. The respondent characterizes this as "dropping out" but a young student is entitled to change her education plans. Nor does this change reflect the absence of a career plan, as submitted by the respondent. In any event, D.Y. was under age 19 at this time.

[109] D.Y. has now settled on working towards a degree as a registered dietician nutritionist and she returned to Langara College in fall 2014 for that purpose. She took two courses in the fall semester that are pre-requisites for her program and she expects to take "a larger courseload" in spring 2015. She was wait listed for three courses but was not successful being accepted in them. She estimates that it will take her five more years to complete her degree with expenses of about \$1,740 per semester (tuition, books, fees, transportation and health/dental plan).

b. Student loans

[110] D.Y. has paid for her own tuition and books while living with her mother, the claimant.

[111] The respondent interprets D.Y.'s situation to be one where she expects her parents to pay for her education. A more accurate view is that, so far, she is able to pay for most of her education working part-time while taking only two courses. As well, it is the claimant, not the respondent, who has been helping D.Y. attend school thus far. Our Court of Appeal has rejected the notion that an adult child has to seek student loans or exhaust other sources of financial assistance before she could be found "unable to withdraw from the charge" of her parents (De Beck at para. 41).

c. Career plans

[112] As above, D.Y.'s plan is to become a registered dietician nutritionist. This involves specific course work and she has completed two of the required courses. She expects to increase her course load and complete her degree in five years, in December 2018. She deposes that her research suggests that nutritionists are well paid.

[113] It is true that D.Y. is not currently enrolled in a dietitian nutritionist program. But at her young age she can only take courses that will prepare her to get into a program. She is not going to school because there is nothing better to do. She has a career plan although she struggles to attend school and also work.

d. Employment contribution

[114] D.Y. works part-time for about 16 hours a week, earning about \$700 per month. She is not comfortable working more hours and also doing her school work. She can pay her tuition and books while studying part-time and with the claimant paying her living expenses. Thus far, to her credit, she is debt-free.

[115] The respondent questions the legitimacy of D.Y. being off work in 2014 because of nasal surgery. However, apart from his suspicion, he has no evidence that contradicts that of D.Y. and medical records in evidence.

e. Age

[116] At the hearing of this application D.Y. was 19 years old with her 20th birthday in May 2015.

f. Demonstrated success

[117] D.Y. deposes that her marks were not available when she swore her affidavit on December 17, 2014 but she says that she "did well". The respondent says that D.Y. has not "demonstrated any superior educational abilities" but that is not the test for whether one is a child of the marriage.

g. Parents' plans

[118] Given her age, the education plans for D.Y. were made after the parties divorced in February 1998.

h. D.Y.'s relationship with her father

[119] To some extent the discussion above about T.Y.'s relationship with her father applies to D.Y. as well. I have found above that the respondent unilaterally cut off contact with T.Y. in November 2012.

[120] D.Y. deposes that he did the same thing with her. She says that she has tried to contact the respondent multiple times since November 2012, by phone, email and Facebook. She has the same phone number, email address and Facebook profile as before. There has been no reply. She has reached out to the respondent's mother and his sister but there has been no response from them. Prior to the fall of 2012 D.Y. used to receive birthday and Christmas cards from them.

[121] According to the respondent, D.Y. has only been interested in seeing him in order to obtain money, he has not been invited to her events such as graduation and the last time he saw D.Y. was in 2010. There is some basis in fact for the latter point since there is no evidence of any communications between D.Y. and her father after 2010. As well, the evidence indicates that the respondent's relationship with D.Y. has not been as open, extensive and supportive as it has been with T.Y.

[122] The respondent relies on emails he sent to T.Y. asking for contact information for D.Y. For example, on May 31, 2011, he said to T.Y., "I asked you for D.Y.'s cel phone # but you haven't even given that to me" [reproduced as written]. The context for this call was the respondent complaining to T.Y. that he was "not an ATM" and T.Y. was not "the first person to ever get a student loan."

[123] In another email on June 20, 2011 the respondent said to T.Y.:

sorry about all this shit i will explain it later,

it's been very FUCKED

basically thai prison for 60 days

i love you dearly and always and PLEASE

give me D.Y.'s email and phone

i have felt SO BAD about not getting a hold of her

i left her a message on her birthday on your home phone

but maybe it got erased

things on my end are so screwed up

put everything will be okay in the end

chalk it up to art

[Reproduced as written]

[124] However, as above, there were attempts by D.Y. after the fall of 2012 to make some contact with him and it is clear that he unilaterally withdrew from contacting both his daughters after November 2012. He was the parent and he had some responsibility to maintain communications with them.

i. Conclusion and child support for D.Y.

[125] There is no evidence that D.Y. withdrew from the charge of her parents prior to her 19th birthday on May 30, 2014.

- [126] While she was still under 19 years of age, D.Y. attempted to contact the respondent, her father, in 2012 but she was rebuffed by him. There was a period of time before then when there was no or limited contact between them. The respondent relies on his entreaties to T.Y. to give him the phone number for D.Y. as demonstrating his attempts to contact D.Y. However, her email address and other contact information have not changed and the respondent has not explained why he did not contact his daughter. His family has also cut off contact with D.Y.
- [127] In the past year, after she turned 19 years old, D.Y. has been studying part-time with the goal of being a dietician nutritionist. She has also worked part-time while in school. This has enabled her to be debt free. She is a different person than T.Y., with a different relationship with her father, but she is entitled to the same education opportunity as her sister, at least in terms of the time it will take. That is, the fact she is younger than T.Y. should not mean that she should be given less opportunity.
- [128] I conclude that D.Y. was a child of the marriage up to age 19 (in May 2014) and she did not leave the charge of her parents after that date. This will continue until December 31, 2018 and the respondent is required to pay his share of child support to the claimant until that time (calculated with the incomes of the parties as discussed below) as well as D.Y.'s education expenses.
- [129] The respondent is also required to pay his share of retroactive child support for D.Y., based on his income as discussed below. The FMEP amount for child support arrears will be adjusted accordingly.
- j. Expenses for D.Y.
- [130] As with T.Y., the respondent is in arrears with respect to his obligations to pay extraordinary expenses for D.Y.'s education. She turned 19 on May 30, 2014. I have found above that she was a child of the marriage up to that date and she continues to be one until she completes her education on December 31, 2018.
- [131] The past extraordinary expenses for D.Y. are as follows (taken from the 2012 Order as amended with current costs):
- (a) Orthodontics 2009-2011 (per 2012 Order):
- \$6,200.00
- (b) Driving lessons:
- \$1,180.89
- (c) Expenses for Langara College:
- (i) Tuition (September-December 2013)
- \$1,848.25

(ii) Tuition (September-December 2014)

\$423.32

(iii) Books

\$280.35

Total:

\$9,932.81

[132] On a going forward basis, D.Y. will incur the following expenses to complete her current studies:

(a) Expenses (September 2015-May 2016):

\$3,500.00

(b) Expenses (September 2016-May 2017):

\$3,500.00

(c) Expenses (September 2017-May 2018):

\$3,500.00

(d) Expenses (September - December 2018):

\$1,750.00

Total:

\$12,250.00

[133] The parties will share the above arrears and future expenses proportionate to their incomes as discussed below until December 31, 2018. The arrears to date as calculated by the FMEP will be amended to reflect the respondent's share of the above past expenses. His share of the past expenses is ultimately payable to the claimant.

[134] D.Y. currently works part-time for about 16 hours per week, earning about \$700 per month. She is required to pay some of her education expenses on the basis of working 10-16 hours a week. The security of this income is subject to change for things like illness or injury, dismissal or demands of school work. She is expected to pay some of her educational expenses from her employment earnings, including transportation expenses. She will determine her own social life and \$400 of her earned income per month will be deemed for this purpose (without need for an explanation and regardless of her earnings). The overall expectation is that D.Y.'s parents will pay most of her education expenses, including transportation.

(d) Incomes of the parties

[135] The issue here is what the incomes of the parties should be for the purpose of determining child support and extraordinary expenses, for arrears and on a going forward basis.

[136] The evidence of the income of the claimant from 2009 to 2014 is in the following table. I have added a column to indicate the amounts of RRSP withdrawn by her to pay for the children's expenses and a column to record her income without those withdrawals.

Employment Income

RRSP Withdrawal

Income w/o RRSP

2009

\$62,830 (a)

\$0

\$62,830

2010

\$63,255 (a)

\$5,444

\$57,811

2011

\$76,635 (a)

\$6,312

\$70,323

2012

\$93,000 (a)

\$18,625 (b)

\$74,375

2013

\$76,452 (a)

\$0 (c)

\$76,452

2014

\$77,077 (d)

\$0

\$77,077

(a) From notices of assessment.

(b) This is the amount the claimant has deposited in her affidavit filed September 27, 2012 that she withdrew from her RRSP in 2012 to fund expenses for the children. However, her tax return summary uses a figure of \$19,800.

(c) The information on the claimant's tax return summary for 2013 includes RRSP income of \$1,475. There is no evidence that this was used for the expenses or support of the children.

(d) Child support income taken from the claimant's form 8, filed December 18, 2014.

[137] As can be seen, the claimant's income has increased since 2009 and this reflects her success in employment, including the increasing levels of responsibility she has been given. An average of the years 2009 to 2014 is \$69,811. That would be one way to assess her income but it does not reflect her current earnings at a higher level.

[138] Her earnings can be roughly categorized into two periods, the three years between 2012 and 2014 and then the 2009-2011 period. For the years 2009, 2010 and 2011, the average income of the claimant is about \$64,000. I find that figure is an appropriate income for the calculation of child support and extraordinary expenses to December 31, 2011.

[139] Looking at the income of the claimant for 2012, 2013 and 2014, I conclude that an average is approximately \$75,000. That is an appropriate income for the purposes of child support and extraordinary expenses on an ongoing basis. This will be effective January 1, 2012.

[140] In this assessment I have used the claimant's income from 2012 without the RRSP income she used for the children's expenses in the absence of support from the respondent. This is because the claimant should not have to reduce her retirement investments, pay more tax, pay more expenses for the children and then receive less child support because the respondent has refused to comply with the 2012 Order.

[141] Turning to the respondent, because he did not participate in the hearing that resulted in the 2012 Order, and because he had not disclosed the information required, income was imputed to him. He also had and has complicated business earnings from American and Canadian companies. In her 2012 application the claimant sought earnings of \$175,000 to be imputed to the respondent but the 2012 Order imputed earnings of \$150,000.

[142] The evidence in the current application is that the respondent's income from 2009 to the present is as follows:

2009

\$49,038 (a)

2010

\$0 (b)

2011

\$11,521 (a)

2012

\$0 (a)

2013

\$3,455 (b)

2014

\$75,455 (c)

(a) Taken from notices of assessment.

(b) From 2010 and 2013 tax returns. Gross business income in 2010 was \$685,171.

(c) Child support income, including employment income of \$72,000, taken from the respondent's Form 8, filed November 14, 2014.

[143] The Federal Child Support Guidelines, SOR/97-175 (the "Guidelines"), set out the authority and framework for imputing income for child support:

Imputing income

19. (1) The court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following:

- (a) the spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the spouse;
- (b) the spouse is exempt from paying federal or provincial income tax;
- (c) the spouse lives in a country that has effective rates of income tax that are significantly lower than those in Canada;
- (d) it appears that income has been diverted which would affect the level of child support to be determined under these Guidelines;
- (e) the spouse's property is not reasonably utilized to generate income;

- (f) the spouse has failed to provide income information when under a legal obligation to do so;
- (g) the spouse unreasonably deducts expenses from income;
- (h) the spouse derives a significant portion of income from dividends, capital gains or other sources that are taxed at a lower rate than employment or business income or that are exempt from tax; and
- (i) the spouse is a beneficiary under a trust and is or will be in receipt of income or other benefits from the trust.

[144] The respondent accepts that some income should be imputed to him because he was underemployed while attempting some business ventures, essentially the application of s. 19(1)(a) of the Guidelines. In this regard I note the following comments with respect to imputing income (*Nielsen v. Nielsen*, 2007 BCSC 306 at para. 28; *aff'd* 2007 BCCA 604):

[28] A court in considering whether to impute income pursuant to paragraph 19(1)(a) of the Guidelines may take into account a wide variety of factors. Factors such as a parent's lifestyle, monthly living expenses, assets and investments, and the range of income earned during the marriage may be considered (*Motyka v. Motyka* (2001), 83 B.C.L.R. (3d) 339, 2001 BCCA 18 at 6, 16). The age, education, experience, skills and health of the parent should be considered, along with matters such as the availability of work and a parent's other obligations (*Watts v. Willie* (2004), 8 R.F.L. (6th) 456, 2004 BCCA 600 at 16). A parent's experience, business acumen and business contacts may also be considered in imputing income (*Braich v. Braich*, [1997] B.C.J. No. 1764 at 68 (S.C.) (QL)).

[145] The respondent says that imputing income to him of \$72,000 would be appropriate. The claimant maintains that income of \$150,000 should be imputed to him (as it was in the 2012 Order) and she points to gross business income of \$685,171 in 2010 as support for her position. The respondent says that his net income of that year was zero because of the nature of the products he was selling. Be that as it may, the respondent's business experience, business acumen and business contacts are relevant considerations for the imputation of income.

[146] There is also an issue here under s. 19(1)(f) of the Guidelines because the respondent has not provided income information he is required to provide. This information relates to his previous work in senior positions in business and it is directly relevant to assessing his income for the purposes of child support and extraordinary expenses.

[147] The respondent has simply refused to provide any information about his earnings in these positions, despite being asked for the information since before the 2012 Order. He says he did not know about the early requests because he did not know about the 2012 Order until May 2013 when the FMEP froze his bank account. As above, the respondent has an obligation to make himself informed about the legal requirement to support his children. He cannot simply disappear and then say he is not responsible for decisions that were made in his absence.

- [148] In any event, the respondent has not explained why the information at issue was not disclosed in or soon after May 2013, assuming he is correct that was the first time he learned of the 2012 Order. During the hearing of this matter in March 2014, it was submitted on behalf of the respondent that the information was not forthcoming for various reasons, none of them compelling.
- [149] As above, the respondent accepts that income of \$72,000 should be imputed to him. I find that an amount of \$90,000 is a more appropriate amount to reflect his underemployment, his business experience and his violation of s. 19(1)(f) of the Guidelines. This will apply to the period of arrears as discussed below and on a going forward basis. The FMEP will recalculate the arrears on the basis of these earnings.
- [150] Also, on a going forward basis, on or before June 15 of each year (commencing in 2015 but by July 15 in that year), each party will provide the other party with a copy of their Canada Revenue Agency Notices of Assessment and tax returns for the previous tax year. At the same time, each party will disclose any and all sources of funds received in the previous year from all sources including but not limited to shares in corporations and employment income. And each party will disclose all appointments, ownership and employment positions held in the previous year. This requirement will cease on May 1, 2019, following the end of support and expenses for D.Y. and in order to verify the parties' financial obligations in the previous year.
- (e) Expert report
- [151] As is apparent, I have not used the claimant's expert report with respect to the issue of the respondent's income in the above discussion of that issue.
- [152] I gather from both counsel that there is an issue as to whether the notice periods in the Supreme Court Civil Rules apply to an expert report in the circumstances of this case because it is a summary application and not a trial. In a previous decision Mr. Justice Walker described the approach to be taken when considering the admission of expert evidence in a summary matter as a flexible one that balances the interests of truth seeking, fairness and prejudice (*Cantlie v. Canadian Heating Products Inc.*, 2014 BCSC 2029 at para. 11).
- [153] The report provided by the claimant is from John Lawless of Lawless Vocational Consulting Inc. and it is dated February 2, 2015. Mr. Lawless has provided previous expert evidence and has a number of qualifications in the field of vocational rehabilitation. There is no dispute as to the qualifications of Mr. Lawless as an expert in this area. He was not cross-examined.
- [154] Mr. Lawless' report is a "labour market review" based on the resume of the respondent, his "website profile" and an "IPO Marketing publication" by the respondent. It provides opinions about average annual earnings for categories using occupational descriptions from the National Occupational Classification (2006). The occupations used are

"Professional Occupations in Business Services to Management (Advertising & Promotion Consultants)", "Sales, Marketing & Advertising Managers", and "Senior Managers - Financial, Communications Carriers & Other Business Services". Incomes in these occupations were determined using Statistics Canada information and are \$89,914, \$102,393 and \$200,350, respectively.

[155] I conclude that the report is admissible as an expert report. I also accept that the work of the respondent may be included in the occupations listed but they are stated very broadly, as are the incomes. Nor was the respondent interviewed or assessed. He works in the broad categories identified by Mr. Lawless but he also has done some specific work such as development of IPOs and I do not think that work can be properly assessed within the categories used in the report.

[156] For these reasons I give the report of Mr. Lawless limited weight because of its general nature.

(f) Arrears

[157] The 2012 Order declared that the respondent had arrears of \$62,015 for child support and arrears of \$31,736 for extraordinary expenses for the period of June 1, 2009 to November 30, 2012.

[158] The current history of the respondent's arrears is as follows:

Year

Paid By Respondent

Extraordinary

Expenses

FMEP Balance December 31

2010

\$0

n/a

\$16,305

2011

\$24,792

n/a

(\$-592)

2012 (a)

\$1,559

\$18,814

(\$123,104)

2013

\$14,481

\$23,608

(\$161,346)

2014

\$13,593

\$23,608

(\$201,424)

2015 (b)

\$2,105

0

(\$206,655)

(a) The 2012 Order was dated November 20, 2012 and the arrears as of November 1, 2012 were \$5,069. On December 1, 2012 the arrears were \$103,941.

(b) As of March 6, 2015.

[159] As above, following a review under s. 5 of the 2012 Order, I have amended the 2012 Order with respect to guideline income and extraordinary expenses. As I directed above, the amount of arrears will have to be re-calculated by the FMEP.

[160] The respondent seeks the cancellation of all arrears or, in the alternative, a significant reduction. The Supreme Court of Canada has set out the factors to consider when deciding when retroactive payments are appropriate (D.B.S. v. S.R.G., 2006 SCC 37).

[161] The first factor in D.B.S. is whether, in this case, the claimant had a reasonable excuse for not seeking earlier enforcement of child support. In this regard, the claimant had an agreement with the respondent in December 1996 with respect to child support but the respondent did not comply with it. The Child Support Agreement in January 2005 was her attempt to get another agreement that the respondent would comply with (and it included her giving up arrears in child support from the 1996 agreement). That is, she tried in 2005 to enforce the respondent's support obligations.

- [162] Unfortunately, he did not comply with the 2005 agreement either. He says the claimant did not complain about his non-compliance but it is clear that the claimant was seeking help in supporting the children rather than picking a fight with the respondent.
- [163] Since 2009 the claimant has been seeking information that would enable her to understand the respondent's income but that is still not forthcoming. She attempted to contact him through a variety of means to get him to disclose his financial information but the respondent put himself in a position where he could not be reached, after telling the claimant to "go away". The claimant then applied to court and obtained the 2012 Order in the absence of the respondent, an absence entirely in the control of the respondent. This is discussed above in detail.
- [164] I conclude that the claimant has acted in a timely way to obtain enforcement of her rights. This has included giving up some arrears in 2005 with the idea of getting some security of payment in the future but that was not successful. It is also necessary to point out that any delay since the 2012 Order has been the result of the inaction of the respondent. On his own evidence, he did not know about the 2012 Order until May 2013 when the FMEP froze his bank accounts but he did not make the subject application until November 2014, about 18 months later.
- [165] The next factor in D.B.S. is any blameworthy conduct by the respondent. The obvious point here is his non-compliance with his support obligations including the 2012 Order. The respondent relies on his submission that he was not aware of the 2012 Order or the application that gave rise to it. However, as discussed above, the claimant complied in all respects with the legal requirements of attempting to notify the respondent of her application. Ultimately this resulted in a valid order for substitutional service. And, in any event, the respondent knew from the May 2011 emails from the claimant that she had concerns and she was going to do something about them. His dismissive "go away" response demonstrated in clear terms that he understood what the claimant was saying. Further, as above, the respondent was in arrears at the time of the 2012 Order.
- [166] The past conduct of the respondent with respect to his obligation to pay child support is also discussed above, including his non-compliance with two agreements prior to the 2012 Order. The agreements were clear and the respondent simply refused to comply with them. It is true that the claimant insisted on the terms of the agreements but she was entitled to do that, especially given the history of non-payment. The respondent's remedy at that point was to apply to court but, instead he let arrears accumulate. It is simply not credible for the respondent to say he had a reasonably held belief that, at least until 2011, the claimant believed he was meeting his obligations to pay support. In addition, the arrears since at least May 2013 have been entirely the result of the delay of the respondent in bringing the current application to court.

- [167] Overall, despite agreements and a court order, the respondent has treated his child support obligations and the mounting arrears since 2011 as unimportant and something he can control by ignoring them. In my view this is significant blameworthy conduct.
- [168] The third factor in D.B.S. is the circumstances of the children. It is true that both are currently more than 19 years of age but that has been for two years in the case of T.Y. and about one year for D.Y. A significant part of the arrears has accumulated while T.Y. and D.Y. were under 19 years of age.
- [169] I have also found above that, contrary to the assertions of the respondent now, he was enthusiastic and encouraging of T.Y. attending at the Pratt Institute in the United States when she was accepted and at the beginning of her studies. He now is very much against the idea and he claims it was all done against his wishes. I have concluded above that was not the case. The result for T.Y. is that she was required to stop going to Pratt Institute and enroll at Emily Carr University. The other result is that the claimant has had to pay for the cost of attendance at Pratt Institute including taking on debt and using her RRSP investments. The respondent has been similarly unresponsive to his obligations to support D.Y.
- [170] The final factor in D.B.S. is whether a retroactive award would cause hardship on the respondent. He answers this in the affirmative and points to the direction in D.B.S. that any retroactive payment should minimize hardship. However, the Court also said that it is not always possible to avoid hardship and it is much less of a concern where it is the product of the blameworthy conduct of the payer parent, the respondent here (para. 116).
- [171] The respondent claims he is impecunious. He is currently not working but he anticipates he will be working. He has a car (a Porsche) but he cannot drive it because the FMEP has suspended his driver's license. He is living with his girlfriend and he says that she is paying his expenses. On the other hand the respondent accepts that income of \$72,000 should be imputed to him and his Form 8 is consistent with this figure. As well, he has not disclosed the required information that would permit a full understanding of his financial situation. He has declared significant debt.
- [172] In sum, I conclude that a retroactive payment by the respondent is required in the circumstances of this case. The claimant has done everything she could to obtain payment from the respondent in a timely matter. The respondent's conduct as it relates to the accumulation of arrears is significantly blameworthy and there has been a significant impact on the education of the two children. Finally, while there would be hardship on the respondent, this must be balanced with his conduct that is responsible for the arrears owing.
- [173] In my view the respondent cannot deliberately remove himself from his legal obligations to his children and then seek to avoid the consequences of that removal. Parents have an obligation to support their children in a way that is commensurate with their income and this obligation exists independent of any statute or court order (D.B.S. at para. 54). The

claimant was entitled to enforce the respondent's legal obligation to pay child support even in his absence. Put simply, she had no obligation to wait until he re-appeared in May 2013, after the 2012 Order.

[174] It follows that I do not agree with the respondent that there is no basis for a retroactive payment of child support and expenses in this case.

[175] I turn next to whether the retroactive amount should be waived or reduced. Section 96 of the FRA states that arrears can be cancelled or reduced if it would be "grossly unfair" not to cancel or reduce them. I am to consider the respondent's efforts to comply with the 2012 Order requiring support; the reasons why he cannot pay the arrears owing; and any other relevant circumstances.

[176] In light of the history of this matter the parties are agreed that it should be considered under the Divorce Act and on this basis s. 96 of the FRA is not directly applicable. However, I note that the "grossly unfair" principle has been found appropriate for consideration of variation applications under the Divorce Act (*Hodgson v. Hodgson*, 2014 BCSC 1372 at para. 20).

[177] I consider the following review of the case law by Madam Justice Ross in *Hodgson* as useful to consider in deciding whether to reduce or cancel arrears of child support in this case:

[22] In *Green v. Green*, 2002 BCSC 576 at para. 19, Mr. Justice Crawford summarized the decision of Madam Justice Martinson in *Earle* [*Earle v. Earle*, 1999 BCSC 283] with respect to the principles governing applications to reduce or cancel arrears of child support:

1. The onus is on the applicant seeking to reduce or cancel arrears to show a change in circumstances.
2. Arrears will only be cancelled if the applicant is unable to pay now and unable to pay in the future.
3. The applicant must provide full financial disclosure under oath that the change in financial circumstances is significant and long-lasting; the change is not the result of choice, and efforts were made to earn money but were unsuccessful.
4. The applicant's responsibility for a second family does not relieve of obligations to support the first family.
5. Delay and enforcement is generally not a factor in arrears of child maintenance.
6. The rule against hoarding does not apply to child maintenance.
7. Arrears will not be cancelled because someone else had provided financial assistance to the children.
8. Arrears will not be cancelled because the children no longer need the money.

9. An agreement between spouses to pay support cannot be relied on because support is the right of the child.
10. An applicant's lack of access to the children is not a factor.
11. Money spent directly on the children is not a factor; and
12. The lack of legal advice is not a reason in itself.

[178] Here, the onus is on the respondent to show a change in circumstances. He says this is demonstrated by the 2012 Order itself but that is plainly not a change in his circumstances in the sense of, for example, a change in his income. His point here is essentially the one discussed above, that he did not know about the 2012 Order and it should not apply to him. As pointed out in Earle, delay in enforcement is generally not a factor in arrears.

[179] And it is not seriously in dispute that the respondent has not provided full financial disclosure about his income generally. Further, in light of his proposal that his income should be imputed at \$72,000 I have some difficulty in concluding that he will have difficulty paying in the future. The evidence is that the respondent has access to income in excess of what he previously said was available to him.

[180] The fact that the claimant has supported the children with living expenses and extraordinary expenses is not a factor that assists the respondent and nor does it assist him that some of the money may no longer be needed. As above the respondent says that the claimant agreed or acquiesced in his not paying support but support is the right of the child and cannot be contracted away. I have found above that the respondent was responsible for the unilateral end of the relationship he had with his children. However, even if that is not correct, lack of access is not a factor to consider for consideration of arrears and nor is money the respondent gave directly to the children.

[181] Taken overall, I conclude that this is not an appropriate case for cancelling the arrears owing by the respondent.

[182] How, then, should the arrears be calculated and, specifically, what is an appropriate retroactivity date?

[183] In D.B.S. the Supreme Court of Canada discussed in some detail the date of retroactivity. It set out four possible dates: the date when the application was made; the date when formal notice was given to, in this case, the respondent; the date when effective notice was given to the respondent; and the date when the amount of child support should have increased. In the end the court settled on the date of effective notice as being the most appropriate (paras. 118-125) and it was defined to mean "any indication by the recipient parent that child support should be paid, or if it already is, that the current amount of child support needs to be re-negotiated" (para. 121).

[184] It is also useful to consider the following summary in D.B.S:

- [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.
- [185] In the subject case, the 2012 Order used a retroactive date of June 1, 2009 on the basis that the respondent had effective notice in May 2009 of the issues in the order. In the respondent's current application he says that the retroactive date should be in 2012, presumably early 2012. The basis for this position is that he says he was up to date in his payments at the end of 2011 (he had actually overpaid a modest amount).
- [186] However, it seems to me that, logically, a payor parent can be up to date with payments but also have effective notice from the payee parent that the current amount needs to be re-negotiated or the subject of a new Order. For this reason I conclude that the respondent's position does not accord with the Supreme Court of Canada's analysis in D.B.S. Nor do I agree that somehow the claimant's acceptance of the payments made by the respondent, or that she was relying on the FMEP for enforcement, mean a date in 2012 should be used.
- [187] The fact of the 2012 Order must also be considered here. As above I do not agree that the respondent knew nothing about what ultimately became part of that order. He had effective notice in May 2011 that the claimant was intending to enforce the respondent's obligations to pay support and share in expenses. Further, he chose to remove himself from any contact with the claimant and his legal obligations to his children. To permit him to avoid those obligations some years later would be to essentially condone his actions. And, even accepting the respondent's date of his knowledge of the 2012 Order, he did nothing from May 2013 until his current application on November 14, 2014 about his arrears. During that period they increased from \$124,748 to \$175,377. I do not read D.B.S. or other authorities to say that refusal to follow a court order justifies removing the retroactive effect of that order. That would be an anomalous result.
- [188] While the matter is not without difficulty I conclude that the date of retroactivity in this case should be based on two considerations. First, as the Supreme Court of Canada has pointed out, a period of three years is a rough maximum for arrears. Second, looking at the matter from the respondent's own evidence, he knew about the 2012 Order in May 2013 but he waited until November 2014 before making the subject application. As above, his delay is not satisfactorily explained and, in my view, the arrears in this period of time arose solely out his actions. I conclude that a period of arrears of four years prior to the November 2014 application is appropriate in this case. It recognizes the three year maximum in D.B.S. and

it recognizes the degree of blameworthiness of the respondent. It also recognizes the delay by the respondent in making this application.

[189] The result is that the arrears in this case will be calculated from November 14, 2010 to the present.

(g) Fine for non-disclosure?

[190] Section 6 of the 2012 Order states that the respondent "shall pay the sum of \$3,000 pursuant to s. 92(1) of the Family Relations Act to the Claimant, payable forthwith." Section 92(1) is as follows:

Failing to comply with rules respecting disclosure of information

92 (1) If a person fails to comply with rules respecting disclosure information in proceedings under this Act that are made under the authority of the Court Rules Act, the court may order an amount not exceeding \$5 000 for the benefit of the spouse, parent or child on whose behalf the request was made.

(2) The award under subsection (1) is additional to and not in place of any other remedy.

[191] The equivalent section of the Family Law Act, SBC 2011, c 25 is s. 213(2).

[192] No payment has been made by the respondent to the claimant under s. 6 of the 2012 Order.

[193] The reason for the fine in the 2012 Order was because the respondent has refused since 2009 to provide financial disclosure despite requests from the claimant and her counsel. For example, as discussed above, he simply refuses to provide information about his prior earnings in senior employment positions and his reasons for doing so are not compelling.

[194] I can find no reason to vacate or vary s. 6 of the 2012 Order and I make the same order. The respondent is required to pay forthwith to the claimant the sum of \$3,000.

D. SUMMARY

[195] Pursuant to the Divorce Act and s. 5 of the 2012 Order, the 2012 Order is confirmed or varied as follows:

(a) Children

(i) There are two children: T.Y., aged 21, and born September 21, 1993; and D.Y., aged 19, and born May 30, 1995.

(ii) T.Y. will remain in the charge of her parents and a child of the marriage until the end of the 2015-2016 school year. Child support and extraordinary expense obligations of the parties are payable until the end of that time.

(iii) D.Y. will remain in the charge of her parents until December 31, 2018. Child support and extraordinary expense obligations of the parties are payable until that date.

(iv) The proportionate child support and extraordinary expenses of the parties will be, for the past and going forward, determined using the following incomes:

- a. For the claimant: \$65,000 for the period 2009-2011 and \$75,000 from January 1, 2011 to the present.
 - b. For the respondent: \$90,000 from 2009 to the present.
- (v) On or before June 15 of each year (commencing in 2015 but by July 15 in that year), each party will provide the other party with a copy of their Canada Revenue Agency Notices of Assessment and tax returns for the previous tax year. At the same time, each party will disclose any and all sources of funds received in the previous year from all sources including but not limited to shares in corporations and employment income. And each party will disclose all appointments, ownership and employment positions held in the previous year. This requirement will end on May 1, 2019.

(vi) Past and future extraordinary expenses are set out above in paragraphs 102-105 for T.Y. and paragraphs 131-134 for D.Y.

(b) Arrears

(i) The respondent's application to cancel all arrears for child support and extraordinary expenses is dismissed.

(ii) The respondent's application to reduce the amount of arrears is allowed, in part, and to the extent that the guideline incomes of the parties may result in a lesser amount of arrears than in the 2012 Order.

(iii) The period of time that the respondent has been in arrears is from November 14, 2010 to the present.

(iv) Arrears will be recalculated by the FMEP based on the new guideline incomes of the parties and the length of time of the arrears. They are due and payable upon recalculation or on terms agreed by the parties.

(c) Other orders

(i) The respondent's application to vacate the 2012 Order is dismissed.

(ii) The respondent repudiated the 2005 Agreement.

(iii) The respondent is required to pay to the claimant the sum of \$3,000 for non-disclosure of his financial information.

(iv) Paragraph 5 of the 2012 Order is deleted.

(v) The claimant's application of February 24, 2015 to submit the expert report of John Lawless, dated February 2, 2015, is allowed.

(vi) The claimant has been substantially successful and she is entitled to her ordinary costs from the respondent.

[196] I remain seized with respect to any dispute over the implementation of this judgment.

"Steeves, J."

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