

CANADA / JUDGMENT

Marshall v. Wallat

2021 BCSC 337

COURT

Supreme Court of British Columbia

DECIDED

1 March 2021

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2021 BCSC 337 Marshall v. Wallat

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Marshall v. Wallat,

2021 BCSC 337

Date: 20210301

Docket: E201886

Registry: Vancouver

Between:

Christopher Robert Marshall

Petitioner

And

Karin Elisabeth Wallat

Respondent

Before: The Honourable Madam Justice Forth

Reasons for Judgment

Counsel for the Petitioner via telephone:

K.H. Russ

Respondent Karin Elisabeth Wallat:

No appearance

Place and Date of Hearing:

Vancouver, B.C.

February 1, 2021

Place and Date of Judgment:

Vancouver, B.C.

March 1, 2021

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Introduction

- [1] The parties were married in 2000 and had a child born September 2001. The parties separated in 2002 and the respondent, Karin Elisabeth Wallat, commenced a family law proceeding out of the Alberta Court of Queen's Bench. Christopher Robert Marshall, the defendant in that action, was ordered to pay child support in the amount of \$616 per month.
- [2] Mr. Marshall, petitioner, now applies to this Court, pursuant to s. 18 of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) (the "Act"), for a provisional order to either reduce or cancel the child support arrears and that Ms. Wallat pay child support of \$583 monthly to Mr. Marshall for the period that the child resided with Mr. Marshall. Mr. Marshall further sought that Ms. Wallat reimburse him for his overpayment of child support. This aspect of the petition was not pursued before me.
- [3] Ms. Wallat was served with the petition, the notice of hearing setting the petition for hearing on February 1, 2021, in the BC Supreme Court, and the affidavit #1 of Mr. Marshall in Red Deer, Alberta on December 4, 2020. Ms. Wallat has not responded.

Jurisdiction

- [4] Section 5(1) of the Act gives the Superior Court of any province or territory the jurisdiction to vary an order made under the Act, regardless of where the order was made provided:

- (a) either former spouse is ordinarily resident in the province or territory at the commencement of the proceeding; or
 - (b) both former spouses accept the jurisdiction of the court.
- [5] Mr. Marshall was ordinarily resident in British Columbia at the time the petition was filed. His tax returns show his province of residence as British Columbia since 2002. I am satisfied this requirement has been met.
- [6] Section 18(2) of the Act provides that:
- (2) Notwithstanding paragraph 5(1)(a) and subsection 17(1), where an application is made to a court in a province for a variation order in respect of a support order and
 - (a) the respondent in the application is ordinarily resident in another province and has not accepted the jurisdiction of the court, or both former spouses have not consented to the application of section 17.1 in respect of the matter, and
 - (b) in the circumstances of the case, the court is satisfied that the issues can be adequately determined by proceeding under this section and section 19,

the court shall make a variation order with or without notice to and in the absence of the respondent, but such order is provisional only and has no legal effect until it is confirmed in a proceeding under section 19 and, where so confirmed, it has legal effect in accordance with the terms of the order confirming it.

- [7] In the event that a provisional order is made, s. 18(3) of the Act directs that the order and supporting documents be sent to the Attorney General for this province to be communicated to the Attorney General of the province where the respondent is ordinarily resident. The Attorney General for that province transmits the documents to a court in that province and a confirmation hearing is set, at which the respondent can challenge the provisional order (s. 19).
- [8] Although the June 2005 order does not specifically reference that it was made pursuant to the Act, I note that an order on April 20, 2004, by the Alberta Queen's Bench granted a desk divorce and that remaining relief was severed and reserved for trial. I am satisfied that Mr. Marshall is entitled to bring this application before me.
- [9] Mr. Marshall is not able to proceed under the Interjurisdictional Support Orders Act, S.B.C. 2002, c. 29. Being a provincial statute, it has no relevance to an application under the Act to vary a support order made under the Act. In these circumstances, the procedure in s. 18 of the Act must be followed.

- [10] Ms. Wallat did not appear before me or file any responding materials. I will proceed with the petition based solely on the materials Mr. Marshall filed and in absence of Ms. Wallat, as per s. 18 of the Act. Ms. Wallat will be entitled to address any provisional order that I may make in front of the Alberta Court of Queen's Bench, as that Court will need to confirm any such order pursuant to s. 19 of the Act.

Background Facts

- [11] Mr. Marshall is currently 60 years old. He has worked in the used car business since 1986.
- [12] I have very little information about Ms. Wallat except that she resides in Red Deer, Alberta. I have no information on what she did for a job or her current employment, if any.
- [13] The child is an adult. He turned 19 years old in September 2020. He is currently staying at his mother's home in Red Deer. For the period from July 1, 2019, until September 2020 he was residing with Mr. Marshall in British Columbia.
- [14] On April 20, 2004, the parties appeared before Justice C.S. Kenny of the Court of Queen's Bench in Chambers and various orders were made, including for child support. The order provided that Mr. Marshall's income be imputed at \$50,000 per annum. He was to pay Ms. Wallat child support in the amount of \$430. Ms. Wallat's Guidelines income was \$63,840 per annum. The Court ordered that Mr. Marshall pay \$186 a month for his proportionate share of the daycare costs, for a total of \$616.00 per month. Payments were to commence on May 1, 2004.
- [15] The matter proceeded to trial before Justice J.C. Coutu of the Court of Queen's Bench in March 2005. On June 10, 2005, various orders were made. Child support remained the same with Mr. Marshall required to pay child support in the amount of \$616 monthly to Ms. Wallat (the "2005 Order"). The 2005 Order was filed on April 11, 2008.
- [16] Of particular significance in the 2005 Order are the following provisions:

Child Support

24. The Defendant shall have a Guideline income imputed to him retroactively to June 1, 2002 in the sum of \$50,000 annually. The Plaintiff's income for 2002 is imputed to be \$63,840.00 per annum. The Plaintiff's income for 2003 and 2004 is found to be \$63,840.00 per annum for each of those years. The Plaintiff testified that she expects to receive a raise to \$68,000 and the Plaintiff's guideline income shall be set at that amount when the Plaintiff receives that raise.
25. Commencing on July 1, 2005, and continuing on the 1st day of each and every month thereafter, the Defendant shall pay ongoing child support in the sum of \$616.00 per month, and said sum being calculated as follows:
1. Base Child Support per month in \$430.00

accordance with the Defendant's Guideline

Income for \$50,000 per annum;

2. Defendant's monthly proportionate share (44%) \$186.00

of daycare expenses for the child;

3. TOTAL \$ 616.00

27. The Defendant shall pay retroactive base child support of \$430.00 per month from June 1, 2002 to June 1, 2005, and his proportionate share (44%) of day care costs incurred by the Plaintiff at such times when the Plaintiff was working and the child was in care.

28. The sum of \$14,784.00 (24 months x \$616.00) due by the Defendant to the Plaintiff shall be withheld by the Plaintiff from the amount due by the Plaintiff to the Defendant for the distribution of property and as security for future support (24 months) due by the Defendant to the Plaintiff. There shall accordingly be no payments made by the Defendant with respect to ongoing child support for the twenty-four (24) month period commencing July 1, 2005 and terminating on June 1, 2007. The amount paid by the Defendant for July 2005 child support in the sum of \$616.00, having already been credited to the Defendant in the retroactive child support amount calculated in paragraph 34 hereof, shall be released to the Plaintiff by the Maintenance Enforcement Program.

29. Commencing July 1, 2007 the Defendant shall continue to make child support payments for the child in the sum of \$616.00 per month on the 1st day of July 2007 and continuing on the 1st day of each and every month thereafter until the child is no longer a child of the marriage or pending further Court Order.

30. The parties shall exchange the following information by May 30th of each year commencing May 30, 2006:

- a. Copies of their respective personal Tax Returns for the prior year;
- b. The Defendant shall provide a copy of his business expenses and income which is reflected in his net taxable income on his Tax Return;
- c. he Plaintiff shall provide copies of receipts related to child care expenses;

31. If there are any upward adjustments in the twenty-four (24) month period commencing July 1, 2005 and terminating June 1, 2007, to the Plaintiff's income or to the Defendant's imputed income, or to the child care expenses, there shall be an adjustment made to the made to the child support each year.

[17] Mr. Marshall claims that out of the \$60,000 in family property he received from the divorce judgment, the amount of \$30,000 went to pay his wife's legal fees and \$30,000 for future child maintenance. The 2005 Order gave Mr. Marshall the 30% increase in the value of the family property or \$58,000. Paragraph 34 states:

34. The Plaintiff shall be entitled to deduct the following amounts from the sum due by the Plaintiff to the Defendant with respect to the distribution of matrimonial property:

a. Retroactive base child support

\$

(9,975.64)

b. Costs owed by the Defendant with respect to prior costs award;

\$

(500.00)

c. The sum with respect to the cost of

Dr. Pearce's Report;

\$

(2,475.00)

d. Future child support payments for a twenty-four (24) month period commencing July 1, 2005 and terminating on June 1, 2007

\$

(14,784.00)

\$

(27,736.64)

TOTAL DUE BY THE PLAINTIFF TO THE DEFENDANT PURSUANT TO PARAGRAPH 32 LESS DUE BY THE DEFENDANT TO THE PLAINTIFF

\$

58,500.00

\$ (27,734.64)

BALANCE REMAINING

\$ 30,765.36

=====

- [18] The issue of costs was left to the parties to agree on or return before the trial judge to argue. Mr. Marshall says he had 69 court appearances in Alberta involving access to his son and he was placed in jail for 30 days for contempt of court over what he says was a misunderstanding about weekend access. It would appear that Ms. Wallat could easily have accumulated \$30,000 in legal fees.
- [19] Mr. Marshall takes issue with his income being imputed at \$50,000 in 2005 when he claims he was only earning \$30,000 a year. As far as I can tell, he did not file an appeal to the 2005 Order.
- [20] I note in Mr. Marshall's affidavit made on September 11, 2020, he states at para. 13 that:
Between 2000-2006 I worked as an autobroker and made \$30,000.00 per month.
- [21] His tax returns for the years 2002 to 2006 do not support such an income. I am assuming the reference to "per month" is meant to be "per year".
- [22] In 2007, Mr. Marshall went bankrupt. He says he did not have an income that year. His line 150 income was \$1.
- [23] In 2008, he worked as a car salesman and his line 150 income was \$27,500.
- [24] In 2009, he worked as a car salesman and his line 150 income was \$42,000.
- [25] In 2010, he worked as a car salesman/owner and his line 150 income was \$38,500. In April 2010, he went into business with Robert Cortens and operated a business selling used cars.
- [26] In 2011, he worked as a car salesman/owner and his line 150 income was \$42,000.
- [27] In 2012, he worked as a car salesman/owner and his line 150 income was \$43,032.
- [28] In 2013, he worked as a car salesman. His gross business income was \$67,428 and his line 150 income was \$29,758.
- [29] In 2014, he did not work and his income was zero. He says he was homeless and living in a motorhome.
- [30] In 2015, he did not work and his income was zero in his tax return. He says he was living in his motorhome in Vancouver. He brought a civil suit against Mr. Cortens, who had invested in his car lot. The matter proceeded to trial before Justice Watchuk who pronounced reasons, indexed at 2016 BCSC 915. This Court awarded damages to Mr. Marshall for breach of the agreement in the amount of 50% of the profit of the business for three years following the end of September 2012. The amount of the profit was referred to the Registrar of the Court. Mr. Marshall advised that he could not afford to set up a registrar hearing and that, in any event, Mr. Cortens went bankrupt.

- [31] In April 2015, he claims the Family Maintenance Enforcement Program ("FMEP") took away his right to renew his driver's licence, his passport, and "shut down his bank account". FMEP took these actions as Mr. Marshall had not paid child support. He was unsuccessful in trying to get his driver's license reinstated in BC Provincial Court on two occasions in 2015 and 2016.
- [32] In 2016, he began working as a general labourer. He says he was earning approximately \$1,000 a month. That is not supported by his declared employment income of \$847.66, other income of \$538.30, and social assistance payments, for a line 150 income of \$8,559.60 on his 2016 tax return.
- [33] In 2017, he had employment income of \$1,332.76 and social assistance for a line 150 income of \$8,867.76. He says that his motorhome was stolen that year, he was homeless, and began "couch surfing".
- [34] In 2018, he did not work and received social assistance for a line 150 income of \$8,355.00. He was caught driving while prohibited and was sentenced to 30 days in jail. His driver's licence was suspended for two years.
- [35] In 2019, he moved into a friend's apartment in return for helping out at his friend's car lot. The car lot closed in July. He says he then worked for temporary agencies and made approximately \$1,000 per month and \$720 a month from social assistance. His rent was \$1,500 a month. As of June 2020 he was overdue on his rent and owed approximately \$15,000.
- [36] On January 13, 2020, he was sentenced to 110 days in jail for driving while prohibited for the second time. His licence was suspended for one year.
- [37] While in prison, he applied for a Persons With Disability ("PWD") pension with the Ministry of Social Development and Social Innovation.
- [38] In April 2020, he worked at his friend's car lot in exchange for free rent and \$880 per month. He was let go from that job and is currently not working.
- [39] At some point in 2020, he began receiving the PWD pension. While his son was living with him he received \$1,900 a month. After his son turned 19 he began receiving \$1,450. The ministry pays \$595 for rent. He is currently living in a social housing apartment with his current partner and her nine-year-old daughter.
- [40] On January 11, 2021, Mr. Marshall filed for bankruptcy. He has not yet been able to renew his driver's licence as he owes fines to ICBC.
- [41] As part of the PWD application, Mr. Marshall completed an application on January 21, 2020, while he was incarcerated at the Fraser Regional Correctional Institute. He states that a psychiatrist and psychologist at the Institute diagnosed him with bipolar disorder and placed him on medication.

- [42] Part of the PWD designation application form requires a physician registered and licensed to practice medicine in British Columbia or a Nurse Practitioner registered to practice in British Columbia to fill out the "Section 2 - Medical Report". The applicant is required to demonstrate how their medical conditions and impairments affect their ability to perform Daily Living Activities. These are defined in the Employment and Assistance for Persons with Disabilities Regulation, B.C. Reg. 265/2002, pursuant to the Employment and Assistance for Persons with Disabilities Act, S.B.C. 2002, c. 41. It states that this application is "not intended to assess employability or vocational abilities".
- [43] The physician who completed the medical report on February 25, 2020, is Dr. Witold Widajewicz, forensic psychiatrist at the Forensic Psychiatric Hospital in Port Coquitlam. He diagnosed Mr. Marshall with schizoaffective disorder, with a date of onset in 1999, and bipolar disorder with what appears to say "manic/psychotic".
- [44] The doctor notes that the medical conditions have resulted in Mr. Marshall having "poor judgment, elevated mood leads to chronic unemployment & criminal charges. Severe led to homelessness & loss of social supports."
- [45] The doctor reports that Mr. Marshall has been prescribed medication being Divalproex (Epival) and he will require it on a life long duration. The doctor opines that the impairment will be life long. He notes that Mr. Marshall has difficulties in communication with "pressured speech, flight of ideas, grandiosity". He has psychotic symptoms including delusions and emotional disturbances of mania.
- [46] The doctor notes that Mr. Marshall has continuous restrictions on his ability for personal care and management of finances as well as periodic difficulties with management of medications, daily shopping, mobility outside of home, and social functioning. He notes that Mr. Marshall's social functioning is impacted most of the time. The degree of restriction is "moderate to severe".
- [47] Mr. Marshall acknowledges that as a result of his bipolar and mania, which went undiagnosed for a number of years, he made some poor decisions concerning business deals and dealing with the court system concerning his son. He states that he regrets his conduct in not complying with the 2005 Order and not making an application sooner.
- [48] He submits that the change in financial circumstances is significant and long lasting, based on his bipolar and "mania mental health issues". He asserts the reason he is on social assistance is because of reasons related to his mental health issues.
- [49] He says that he currently is not able to pay off the arrears in child support although he might be able to afford \$100 a month in the future to reduce the arrears.
- [50] According to a FMEP Account Statement, the amount of arrears owing to Ms. Wallat, as of April 27, 2017, is \$22,311.05. I assume that further arrears have been accumulated since that date.

[51] Mr. Marshall calculates the amount of overpayment of child support from 2009 to 2019 as \$61,105.52. In the petition, he claimed the overpayment amounts to \$84,502.16. During the hearing he agreed that the appropriate figure was \$61,105.52. This calculation is based on the annual child support of \$7,392, compared with child support based on his line 150 income.

Legal Principles

[52] The statutory scheme to cancel arrears for child support is found in s. 17 of the Act, which provides:

17(1) A court of competent jurisdiction may make an order varying, rescinding or suspending, prospectively or retroactively,

- (a) a support order or any provision thereof on application by either or both former spouses; or
- (b) a custody order or any provision thereof on application by either or both spouses or by any other person.

[53] Section 17 (4) sets out the factors to be considered for a child support order and provides:

- (4) Before the court makes a variation order in respect of a child support order, the court shall satisfy itself that a change of circumstances as provided for in the applicable guidelines has occurred since the making of the child support order or the last variation order made in respect of that order.

[54] In making a variation order respecting child support, I must do so in accordance with the applicable guidelines: s. 17(6.1) of the Act.

[55]

The Federal Child Support Guidelines, S.O.R./97-175 [Guidelines] provide, in relevant part:

Circumstances for variation

14 For the purposes of subsection 17(4) of the Act, any one of the following constitutes a change of circumstances that gives rise to the making of a variation order in respect of a child support order:

- (a) in the case where the amount of child support includes a determination made in accordance with the applicable table, any change in circumstances that would result in a different child support order or any provision thereof;
- (b) in the case where the amount of child support does not include a determination made in accordance with a table, any change in the condition, means, needs or other circumstances of either spouse or of any child who is entitled to support;

[56] The Family Law Act, S.B.C. 2011, c. 25, contains a similar test for reducing or cancelling arrears and interest under s. 174:

Reducing or cancelling arrears

174 (1) On application, a court may reduce or cancel arrears owing under an agreement or order respecting child support or spousal support if satisfied that it would be grossly unfair not to reduce or cancel the arrears.

- (2) For the purposes of this section, the court may consider
- (a) the efforts of the person responsible for paying support to comply with the agreement or order respecting support,
 - (b) the reasons why the person responsible for paying support cannot pay the arrears owing, and
 - (c) any circumstances that the court considers relevant.
- (3) If a court reduces arrears under this section, the court may order that interest does not accrue on the reduced arrears if satisfied that it would be grossly unfair not to make such an order.

[57] A helpful analysis of the law concerning cancellation or reduction of child support arrears is by Justice Martinson, then a member of this Court, in *Earle v. Earle*, 1999 BCSC 283, where she observed that:

[23] The courts are generally reluctant to reduce or to cancel arrears. Under the Family Relations Act arrears will not be reduced or cancelled unless it is grossly unfair not to do so. This principle is similar to the one applied to the Divorce Act, which requires a material and long lasting change.

[58] In paras. 24 to 43 in *Earle*, Martinson J. addressed a number of common positions taken by applicants to reduce or cancel child support arrears and discussed what would be required to meet the high standard for each argument or why the argument was unacceptable. Concerning an inability to pay because financial circumstances had changed, she said in paras. 27-28:

b. "I could not pay when I was supposed to because my financial circumstances changed"

[27] People making this argument have a heavy onus. It is not good enough just to say that they could not pay because they earned less. They can only get a reduction or a cancellation of arrears if they present detailed and full financial disclosure, under oath (usually in the form of an affidavit) that:

- i. the change was significant and long lasting and
- ii. the change was real and not one of choice and
- iii. every effort was made to earn money (or more money) during the time in question, and those efforts were not successful.

[28] The requirement that the information be under oath is an important one. A decision to cancel or reduce arrears can only be made on reliable, accurate and complete information. The Rules of the Supreme Court say that this can only be made based on sworn evidence unless a judge says otherwise. No judge will allow evidence that is not reliable and accurate.

[Emphasis in original]

[59] Justice Wilcock commented on the factors to consider in *MacCarthy v. MacCarthy*, 2015 BCCA 496 at para. 54:

[54] The factors to be considered in granting an order cancelling arrears are set out in *Burgie v. Argent*, 2013 BCCA 247, at paras. 15 and 23, namely, (a) whether there is a material change in circumstances, and (b) whether it would be "grossly unfair" not to cancel or reduce the arrears. In general, arrears will only be cancelled if the applicant shows he is unable to pay "now and in the future": *Semancik v. Saunders*, 2011 BCCA 264 at para. 25. The test for cancelling arrears of child support is more stringent than that for refusing to make a retroactive child support order. It is a "higher threshold".

Discussion

Should the Child Support Arrears be Cancelled or Reduced?

[60] Two criteria exist for determining whether a cancellation or reduction of child support arrears is appropriate: there must be a material change in circumstances and it would be grossly unfair not to reduce or cancel the arrears.

[61] Mr. Marshall argues, and I accept, that there has been a material change in circumstances since the original order for child support was made. In June 2005, Mr. Marshall had a job and was working. I am not convinced that there was a material change in circumstances for the years 2008 to 2013. During this period, he was working as a car salesman or as an owner of a car lot. His income varied from a low of \$27,500 to a high of \$43,032. There may well have been valid arguments that further income should be imputed or that he was underemployed during this period of time.

[62] In 2014, there was a material change in circumstances. He was no longer working, was homeless, and living in a motorhome. He made some limited income after 2014 but well below the threshold of \$12,000 set in the Guidelines where no child support is paid: Schedule 1, Subsection 2(1) of Guidelines.

[63] I further accept that Mr. Marshall's mental health diagnoses constitutes a further material change. Based on the evidence, Mr. Marshall was likely suffering from the impacts of his undiagnosed schizoaffective disorder for many years. The forensic psychiatrist is of the view that the mental health diagnoses are lifelong afflictions for which he will need to take medication.

- [64] I accept that the loss of his employment and his mental health diagnoses are material and long lasting. He has met the first component of the variation test.
- [65] Under the heading of grossly unfair, Mr. Marshall relies on what he asserts is the unfairness of the "overpayment" of child support in the amount of \$61,105.52. In my view there are two flaws with this calculation. The first flaw is the assumption that the 2005 Order required the payment of \$7,392 annually. I note this number is based on $\$616 \times 12 = \$7,392$. However, a component of the \$616 owed monthly was the daycare expense. It appears the daycare expense was not claimed after September 2, 2013. By that date the child would have been almost 12 years old. It appears child support from September 2, 2013, was \$430. This equates to a yearly amount of \$5,160. Based on my review, the amount of overpayment, if the payments had been made, would be more in the range of \$34,500.
- [66] In addition, Mr. Marshall has not paid all of the child support, hence the reason for the arrears. If he had paid all of the child support payments, and the Court accepted that the support amounts should be reduced to reflect his line 150 income, then he may have an argument that he overpaid. Taking into account the arrears as of April 2017, the amount of "overpayment" is more in the range of \$12,000.
- [67] According to the FEMP account statement, the amount received from 2008 to 2017 totalled \$39,683.99. The amount still due in 2017 arrears was \$22,311.05.
- [68] There remains the question of what arrears are owed since April 2017. Assuming Mr. Marshall made no child support payments, the arrears that would have accumulated at \$430 a month from May 2017 to June 2019 (26 months) adds up to \$11,180.
- [69] I have a great deal of difficulty in accepting the number that Mr. Marshall says he overpaid in child support. Fortunately, I do not have to resolve this issue, since Mr. Marshall is not seeking reimbursement from Ms. Wallat for overpayment at this time.
- [70] I accept that Mr. Marshall has delayed in returning to court to seek a reduction of the child support payments. He should have made the application back in 2014 when he was unemployed and homeless. I note there was a mechanism in the 2005 Order for the parties to exchange financial information and adjust the amount of child support owed. I accept that his undiagnosed mental health condition is a reasonable explanation for not following this process.
- [71] I am prepared to find that it would be grossly unfair not to make the order cancelling all child support arrears. Mr. Marshall is struggling with severe mental health issues, he has been in prison on at least three occasions, and he does not yet have his driver's licence returned to him. He has gone through one bankruptcy and has recently filed for a second bankruptcy. He is not in a position to pay the arrears now. He is currently 60 years old, and the prospect of him securing and maintaining a job and paying off the arrears is highly unlikely. The medical evidence before me supports that his mental health challenges are not temporary, but life long.

[72] Mr. Marshall has met the onus on him to show the arrears of child support should be cancelled. I order their cancellation on a provisional basis.

Should an Order for Retroactive Child Support Be Made?

[73] I do not have sufficient evidence before me to make an order that retroactive child support be paid to Mr. Marshall. It does appear that for some period of time the child was living with his father in BC and not with the mother in Alberta.

[74] I note for a period of time while Mr. Marshall was in prison he claims his son was living with him. It is not clear on the evidence before me how long Mr. Marshall was in prison but he was imprisoned at the time he completed the PWD application on February 21, 2020.

[75] There is an issue with respect to whether Mr. Marshall is entitled to child support payments while he is in prison and not providing care for his child. I would require further information on how the child was being cared for while Mr. Marshall was in prison in order to determine the time when the child support should be paid.

[76] The second issue is the quantum of any child support claim. Mr. Marshall suggests that I set the child support at the sum of \$583.00 based on Ms. Wallat's Guideline income of \$68,000 per annum.

[77] The \$68,000 figure is referenced in the 2005 Order as Ms. Wallat expected to receive a raise to that amount back in 2005.

[78] I have no information on what Ms. Wallat earned in 2019 or what job, if any, she had. I note that s. 2(3) of the Guidelines requires that in determining the amount payable the most current information should be used. I accept that in some circumstances where a payor has refused or neglected to produce current income information it may well be appropriate to use historical information: A.R.J. v. Z.S.H. 2021 BCSC 274 at para. 82. However, in this case I have no evidence that any request was made to the respondent to produce income information.

[79] I am not satisfied that the threshold in s. 18(2)(b) of the Act has been met that I have evidence that allows me to adequately determine the claim for child support by Mr. Marshall without any evidence on Ms. Wallat's income. I am not convinced that using her 2005 income to base a child support award for 2019 is appropriate.

[80] In the result, I decline to order any retroactive child support from July 1, 2019 to September 14, 2020. It may well be that some child support is due and owing to Mr. Marshall but I do not have adequate evidence before me to make that determination.

"Forth J."

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