

CANADA / JUDGMENT

Mracek v. Crees

2025 BCSC 911

COURT

Supreme Court of British Columbia

DECIDED

15 May 2025

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2025 BCSC 911 Mracek v. Crees

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Mracek v. Crees,

2025 BCSC 911

Date: 20250515

Docket: E123237

Registry: Vancouver

Between:

Kari Anne Mracek

Claimant

And

Tristan Sebastian Crees

Respondent

Corrected Judgment: The text of the judgment was corrected on the cover page on May 22, 2025

Before: The Honourable Justice Hamilton

Reasons for Judgment

Counsel for the Claimant:

S.L. Specht

Counsel for the Respondent:

M. Witzman

Place and Dates of Hearing:

Vancouver, B.C.

February 25 and 26, 2025

Place and Date of Judgment:

Vancouver, B.C.

May 15, 2025

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Overview

- [1] This is a family file with a long history, although much of the history is not relevant to the issues before me. The parties separated after a three-and-a-half-year relationship. Their child, T., is 13 years old. Justice Jenkins heard the trial in 2014 and awarded Ms. Mracek sole custody and guardianship and granted Mr. Crees supervised parenting time, which was reviewable on Mr. Crees fulfilling certain conditions, including counselling. However, Mr. Crees has not pursued time with T. since 2014.
- [2] Justice Jenkins imputed Mr. Cree's income at \$153,295 per year and Ms. Mracek's income at \$60,029 and ordered Mr. Crees pay child support of \$1,347 per month. Justice Jenkins ordered a hybrid form of spousal support consisting of a \$70,000 lump sum and periodic spousal support of \$1,000 per month without a specified end date. Justice Jenkins also made specific orders relating to s. 7 expenses and ordered Mr. Crees make the monthly premium payments for his life insurance and critical illness insurance policies for T.'s and/or Ms. Mracek's financial security.
- [3] Justice Jenkins also ordered Mr. Crees to pay Ms. Mracek costs of approximately \$100,000, 75% of which related to parenting and support issues and 25% of which related to property issues. Mr. Crees filed for bankruptcy. The parties agree that the portion of costs that related to the parenting and support survived bankruptcy and were eventually paid. The parties disagree whether the other 25% of the costs survived the bankruptcy and Ms. Mracek is pursuing Mr. Crees for the remainder in a separate action.
- [4] Each party seeks to vary child support retroactively. Mr. Crees also seeks to terminate spousal support retroactively. I will address these primary issues first before addressing the other issues raised by the parties.

Positions of Parties Regarding Support

Mr. Crees' Position

- [5] Mr. Crees filed a notice of application on July 23, 2024, seeking to retroactively reduce child support from 2015 onward. He also seeks to vary s. 7 expenses and terminate spousal support retroactively to March 2021.
- [6] Mr. Crees submits that there has been a material change in circumstances since 2015 in that his income has been lower than the income imputed to him at trial. Mr. Crees submits that child support from 2015 on should reflect his actual line 15000 income reported on his tax returns for each year, as opposed to the imputed income. Mr. Crees submits, in addition to having a lower income, that remarrying in 2015 and having another child in 2017 also constitute material changes in his circumstances since trial.

- [7] In terms of spousal support, Mr. Crees submits that he has fulfilled his obligation by paying the combination of: (1) the lump sum spousal support of \$70,000; and (2) monthly periodic spousal support of \$1,000 until March 21, 2021. He submits that as of March of 2021, he had paid the mid-range duration of spousal support according to the Spousal Support Advisory Guidelines ("SSAG's").
- [8] Regarding s. 7 expenses, Mr. Crees submits that T. ceasing to require a nanny constituted a material change in circumstances. He therefore seeks to reduce his share of the s. 7 expenses from his fixed \$1,800 per month contribution to a fixed contribution of \$500-1,000 per month, retroactive to at least March 2021. He also seeks to terminate Justice Jenkin's order that he pay for the insurance policies because the \$600 per month is unaffordable and now unnecessary. Mr. Crees submits that he is in a stable, supportive relationship which has helped his mental health to improve since trial. He further submits that he pays his support, has no arrears and as such maintaining the insurance policies no longer makes sense.

Ms. Mracek's Position Regarding Support

- [9] Ms. Mracek opposes Mr. Crees' applications. She submits that it would be unfair to use Mr. Crees' line 15000 income because \$153,295 represents Mr. Crees' capacity to earn income. Mr. Crees has not shown that there has been a material decrease in that capacity. She submits that Mr. Crees has not adequately explained why his tax returns show income less than \$153,295 from 2015 to 2022. She submits that by his own choice, he may have been underemployed. Therefore, Ms. Mracek submits that there should be no reduction in child support from 2015 through 2022.
- [10] Further, Ms. Mracek submits that from 2023 on, Mr. Crees' income has actually increased. Ms. Mracek only realized this recently because Mr. Crees did not provide his financial disclosure until after he filed his notice of application on July 23, 2024 to reduce support. Once Ms. Mracek received Mr. Crees' full income tax information for 2023 and 2024, she promptly filed her own application on October 24, 2024 to retroactively increase child support from January 2023 onward.
- [11] Ms. Mracek submits that Mr. Crees' remarrying was not unforeseeable and not a material change that would justify decreasing support. Further, she submits that Mr. Crees' remarriage has been to his financial benefit not detriment in that he now shares household expenses with his spouse. The only evidence of Mr. Crees' spouse's income is that in 2023, she appears to have earned \$106,000. Ms. Mracek submits that Mr. Crees chose to have a child with his spouse knowing he already had spousal and child support obligations to herself and T. She submits that this is not a fair reason to shirk his pre-existing support obligations.
- [12] In relation to s. 7 expenses, Ms. Mracek concedes that since the COVID-19 pandemic, T. has not had a nanny. However, she submits that other s. 7 expenses replaced the nanny costs. Ms. Mracek's evidence is that since the trial, T. has been diagnosed with autism,

coordination disorder, a sensory processing disorder, migraines and ADHD which require additional therapies and other s. 7 expenses. Ms. Mracek seeks an increase in Mr. Crees' contribution to s. 7 expenses or, in the alternative, to leave his fixed contribution at \$1,800 per month. Ms. Mracek submits that Mr. Crees should continue to pay the insurance policy payments of \$600 per month. She emphasizes that Justice Jenkins found that these policies were crucial to her and T's financial security.

- [13] In terms of spousal support, Ms. Mracek maintains that spousal support should continue. She submits that there has been no change in circumstances warranting a variation of spousal support. If anything, she submits that her situation has worsened. She is no longer working due to complications from COVID-19, including chronic fatigue syndrome as well as debilitating chronic migraines. She has been unable to work and has been receiving long term disability payments from her employer since 2021.

Child Support

Law

- [14] Both parties rely on s. 17(1) of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) [DA]. Mr. Crees seeks to reduce child support retroactively, back to January 2015. He must show a material decrease in his income as at January 2015. Ms. Mracek seeks to increase child support retroactively back to January 2023. She must show a material increase in Mr. Crees' income as at January 2023.
- [15] The principles governing retroactive child support are set out in *D.B.S. v. S.R.G.*, 2006 SCC 37, and restated in *Michel v. Graydon*, 2020 SCC 24 at para. 10, and in *Colucci v. Colucci*, 2021 SCC 24.
- [16] At para. 30 of *Colucci*, the Court outlines the three main categories of claims for retroactive relief under s. 17 of the DA. The first two categories apply to the parties' applications: (1) where the payor submits the final order overestimates his income and seeks a retroactive decrease in support because of past changes in the payor's ability to make payment when they are due; and (2) where the recipient submits that the final order underestimates the payor's income and seeks a retroactive increase in support because of past changes in the payor's ability to pay support. The third category in *Colucci* is not applicable as there are currently no arrears of child support. I will now turn to what *Colucci* says about how to analyze each of the two relevant categories starting with retroactive decreases before moving to retroactive increases.
- [17] In *Colucci*, the Court explains just because a payor establishes a past decrease in income, that does not automatically entitle the payor to a retroactive decrease in support back to the date of the decrease because the overall decision is discretionary:

- [6] As I will explain further, the court's discretion is structured by a presumption in favour of retroactively decreasing support to the date the payor gave the recipient effective notice of an intention to seek a downward adjustment of the child support obligation, up to three years before formal notice is given of an application to vary under s. 17. This presumption is triggered as soon as a past material change in circumstances is established -- it is no longer necessary to first ask whether retroactive relief is generally appropriate before moving to the question of how far back retroactive relief should extend. Discretionary factors parallel to those considered in D.B.S. may justify departing from the presumptive date in favour of a longer or shorter period of retroactivity.
- [7] Given the informational asymmetry between the parties, a payor's success in obtaining a retroactive decrease will depend largely on the payor's financial disclosure and communication. Indeed, effective notice in this context is only "effective" when there has been disclosure of the changed financial circumstances. At the stage of considering the D.B.S. factors, disclosure will once again be a key consideration in assessing whether the payor's conduct operates to shorten or lengthen the presumptive period of retroactivity.

[Emphasis added.]

- [18] The Court in Colucci then summarizes the analysis applicable when a payor applies to retroactively decrease child support at para. 113:
- (1) The payor must meet the threshold of establishing a past material change in circumstances. The onus is on the payor to show a material decrease in income that has some degree of continuity, and that is real and not one of choice.
 - (2) Once a material change in circumstances is established, a presumption arises in favour of retroactively decreasing child support to the date the payor gave the recipient effective notice, up to three years before formal notice of the application to vary. In the decrease context, effective notice requires clear communication of the change in circumstances accompanied by the disclosure of any available documentation necessary to substantiate the change and allow the recipient parent to meaningfully assess the situation.
 - (3) Where no effective notice is given by the payor parent, child support should generally be varied back to the date of formal notice, or a later date where the payor has delayed making complete disclosure in the course of the proceedings.
 - (4) The court retains discretion to depart from the presumptive date of retroactivity where the result would otherwise be unfair. The D.B.S. factors (adapted to the decrease context) guide this exercise of discretion. Those factors are: (i) whether the payor had an understandable reason for the delay in seeking a decrease; (ii) the payor's conduct; (iii) the child's circumstances; and (iv) hardship to the payor if support is not decreased (viewed in context of hardship to the child and recipient if support is decreased). The payor's efforts to pay what they can and to communicate and disclose income information on an ongoing basis will often be a key consideration under the factor of payor conduct.

- (5) Finally, once the court has determined that support should be retroactively decreased to a particular date, the decrease must be quantified. The proper amount of support for each year since the date of retroactivity must be calculated in accordance with the Guidelines.
- [19] Absent effective notice of a drop in the payor's income, "certainty and predictability for the child are to be prioritized over the payor's interest in flexibility": Colucci at para. 84. The payor is aware of their own financial situation and able to decide when to disclose that information so the payor controls the date of notice and the date of retroactivity. Once effective notice is given, the payor's interest in flexibility comes to the forefront of the analysis: "by making the date of effective notice the presumptive date of retroactivity, the framework preserves ample flexibility for the payor": Colucci at para. 85.
- [20] The Court in Colucci addresses what qualifies as "effective notice" in the decrease context. A payor must do more than broach the topic of reduction of support with the recipient because the payor has an informational advantage over the recipient. As such, the timing and extent of disclosure is a critical consideration to ascertain whether and when effective notice has been given and whether to depart from the presumptive date of retroactivity: Colucci at para. 87.
- [21] The proof that must accompany effective notice in decrease cases is described by the Court in Colucci as follows:
- [88] In decrease cases, therefore, courts have recognized that effective notice must be accompanied by "reasonable proof" that is sufficient to allow the recipient to "independently assess the situation in a meaningful way and respond appropriately" (Gray, at para. 62, citing Corcios, at para. 55; Templeton, at para. 51). This ensures that effective notice provides a realistic starting point for negotiations and allows the recipient to adjust expectations, make necessary changes to lifestyle and expenditures, and make informed decisions (Hrynkow v. Gosse, 2017 ABQB 675, at para. 13 (CanLII); Hodges v. Hodges, 2018 ABCA 197, at para. 10 (CanLII)).
- [89] In some cases, such as where the payor is incarcerated or suffers a serious health setback, clear communication may be sufficient to meet the requirements of effective notice. In other cases, the payor may not have access to full income information at the time notice is given, but should provide proof of the change in circumstances by promptly obtaining and disclosing available documents, such as those demonstrating new employment, reduction of salary or termination of employment. Even where a diligent payor believes in good faith that a decrease in income will be temporary, the most prudent course of action is nevertheless to communicate the change to the recipient and provide information which substantiates the claimed change in circumstance.
- [90] After communicating a change and providing available documents, a payor maintains "an ongoing obligation to engage in meaningful dialogue with the recipient, advise the recipient of changes in their circumstances that may impact their ability to pay support and voluntarily disclose pertinent information so that the recipient can continue to

independently assess the situation and react appropriately" (Templeton, at para. 52). Failure to do so may impact the period of retroactivity when the court applies the discretionary D.B.S. factors. Further, effective notice of an initial change in income will not amount to effective notice of subsequent changes (Corcios, at para. 55).

- [22] Even when effective notice has been given by the payor, the period of retroactivity is presumed to be no more than three years before the date of the formal notice. However, the court may depart from that presumption according to the factors in D.B.S. which may be summarized as: (1) whether there is an understandable reason for the delay in giving notice or seeking relief in court; (2) the payor's conduct; and (3) the circumstances of the children.
- [23] In Colucci at para. 114, the Supreme Court turns to the principles which apply to applications like Ms. Mracek's application to retroactively increase support under s. 17 of the DA:
- a) The recipient must meet the threshold of establishing a past material change in circumstances. While the onus is on the recipient to show a material increase in income, any failure by the payor to disclose relevant financial information allows the court to impute income, strike pleadings, draw adverse inferences, and award costs. There is no need for the recipient to make multiple court applications for disclosure before a court has these powers.
 - b) Once a material change in circumstances is established, a presumption arises in favour of retroactively increasing child support to the date the recipient gave the payor effective notice of the request for an increase, up to three years before formal notice of the application to vary. In the increase context, because of informational asymmetry, effective notice requires only that the recipient broached the subject of an increase with the payor.
 - c) Where no effective notice is given by the recipient parent, child support should generally be increased back to the date of formal notice.
 - d) The court retains discretion to depart from the presumptive date of retroactivity where the result would otherwise be unfair. The D.B.S. factors continue to guide this exercise of discretion, as described in Michel. If the payor has failed to disclose a material increase in income, that failure qualifies as blameworthy conduct and the date of retroactivity will generally be the date of the increase in income.
 - e) Once the court has determined that support should be retroactively increased to a particular date, the increase must be quantified. The proper amount of support for each year since the date of retroactivity must be calculated in accordance with the Guidelines.

Analysis

- [24] I will address Mr. Crees' application for a retroactive decrease of child support before dealing with Ms. Mracek's application for a retroactive increase.

2015 through 2022: Mr. Crees' Application to Decrease Child Support

[25] The onus is on Mr. Crees to establish a material decrease in his income from 2015 on that would warrant a retroactive reduction of his child support.

[26] Mr. Crees' line 15000 income on his tax returns for 2015 to date (rounded) is as follows:

2015: \$119,000

2016: \$125,000

2017: \$118,000

2018: \$125,000

2019: \$125,000

2020: \$130,000

2021: \$126,000

2022: \$134,000

[27] While the tax income stated on Mr. Crees' tax returns is lower than \$153,295 from 2015 through 2022, Colucci requires that Mr. Crees demonstrate that the decrease in his income be real, sustained and not by his own choice. I find that Mr. Crees has not demonstrated that the decrease in his income was not by choice. I will explain.

[28] Justice Jenkins heard the nine days of trial. At trial, Mr. Crees opposed paying child or spousal support in his Form 8 financial statement at the time, he stated his income was \$140,000 which was lower than his 2013 income (the year before trial).

[29] In his reasons, Jenkins J. noted that Mr. Crees had degrees in mechanical and electrical engineering. He noted that Mr. Crees had been employed by International Submarine Engineers from 1989 to 2010. From 2010 through until the trial, Mr. Crees was employed by Cellula Robotics ("Cellula"). His skills were sought after by employers.

[30] Mr. Jackson of Cellula, testified at trial. He testified that Cellula relied on Mr. Crees' expertise for the design and fabrication of robots used to map and record sea beds. He confirmed that Mr. Crees worked out of town several weeks of the year to map and record sea beds with the robots Mr. Crees had designed and that Mr. Crees was paid extra for the out of town work. Mr. Jackson testified that the company was successful and that he expected to increase everyone's salaries and bonuses. He confirmed that Mr. Crees was a valuable employee.

[31] Mr. Jackson testified that Mr. Crees' lucrative out of town work opportunities would continue and that he hoped that Mr. Crees would continue accepting these opportunities. Ultimately, Justice Jenkins determined Mr. Crees' income going forward to be \$153,295 which was consistent with his 2013 income. The income figure also approximated Mr. Crees' form 8 estimate of his income plus a bonus of roughly \$7500.

- [32] Mr. Crees now submits that he did not work as much out of town after the trial. He states in his affidavit that the out of town work became unavailable but he does not specifically state when this happened. Mr. Crees' counsel properly conceded that Mr. Crees' affidavit does not specify exactly when the overtime and out of town work opportunities ended but appears to suggest that this happened in 2013. If that was the case, that would have pre-dated the trial, was already argued by Mr. Crees at trial and would not count as a material change in circumstances.
- [33] The evidence before me does not satisfy me that Mr. Crees' income decreased based on the unavailability of overtime and out of town work opportunities since the trial. Mr. Crees has not provided any objective evidence from Cellula that the out of town work was no longer available to him. I am left with the impression that Mr. Crees may simply not have accepted these opportunities from 2015 to 2022.
- [34] Mr. Crees also submits that prior to the trial, he was working so much overtime that it was not sustainable. However, this argument would have been available to him at the trial and does not appear to be a material change since Jenkins J.'s order. In fact, Mr. Crees argues that his health has improved since the trial. Further, Mr. Crees has not provided evidence of the hours he worked from 2015 to 2022. I cannot tell whether Mr. Crees was working full time or less than full time from 2015 to 2022. In my view, Mr. Crees should have been working to the same capacity post trial as he was before trial. There is no medical evidence to support a reduction in Mr. Crees' capacity to work post trial.
- [35] Further, Mr. Crees has not outlined the extent of any benefits he may have received from Cellula from 2015 through 2022 that may not appear on income tax returns, such as use of a car, cellular phone or other perks. Mr. Crees claims that he no longer has access to such records. However, that is his own fault. Much like the opportunities for overtime and out of town work and the hours he worked, he had the information regarding benefits at the time and could have shared it with Ms. Mracek on an ongoing basis at the time as is encouraged by Colucci.
- [36] For these reasons, I am unable to conclude that there has been a material decrease in Mr. Crees' income from 2015 through 2022. I will now address Mr. Crees' two other suggested material changes, namely, Mr. Crees' remarrying and having another child.
- [37] Mr. Crees started living with his current spouse, Sarah, in 2015 and they have shared household expenses since. In fact, Mr. Crees maintains that Sarah has paid more than her fair share of their expenses. Sarah is on title to a townhouse purchased in 2020 where she and Mr. Crees live with their child.

- [38] While Sarah is not a party and her income is not disclosed, it appears from Mr. Crees' income tax return for 2023 that she earned income of \$106,000 in 2023. In my view, since Mr. Crees remarried, he appears to have benefited financially by having someone with whom to share household expenses. I do not find that this is a material change in circumstances of the type to warrant a decrease in his support obligations.
- [39] Similarly, there is no evidence that Mr. Crees having another child has significantly affected his ability to pay support. Further, Mr. Crees chose to remarry and have another child, knowing he had ongoing obligations to pay child support. Neither of these changes demonstrates a material decrease in Mr. Crees' means or ability to pay support.
- [40] In the event that I am wrong and Mr. Crees' decreased income from 2015 through 2022 constitutes a material decrease in his income that is real, continuing and not by his choice, I would still not grant a retroactive decrease in child support.
- [41] Colucci makes it clear that financial disclosure is extremely important in the context of a request to retroactively reduce support. Here, Mr. Crees did not provide Ms. Mracek with any financial disclosure from 2015 through until after he filed his notice of application in July 2024. Then, even when he filed his application seeking the reduction, he still only provided his 2022 tax return and 2023 and 2024 tax summaries. He did not provide his income information for 2015 through 2021 at that time, despite requesting a decrease in support for that time period. He finally provided 2015 through 2021 tax returns later in 2024.
- [42] The presumptive date for retroactivity is the date of effective notice. Colucci makes it clear that there is no effective notice given by the payor unless they have provided full financial disclosure such that the recipient can meaningfully assess the request for a reduction in support. Given the lack of financial disclosure, there was no effective notice given before formal notice in this case. 2015 through 2021 tax returns were not provided until 2024 after formal notice. Even then and continuing at this hearing, Mr. Crees did not provide the necessary disclosure to show why his income was less than the \$153,295 imputed to him by Jenkins J. That is, disclosure to demonstrate the decrease in income was not done, by his own choice.
- [43] As stated above, Colucci states that where no effective notice is given by the payor, child support should generally be varied back to the date of formal notice or a later date where the payor has delayed in making complete disclosure in the course of proceedings: Colucci at para. 113. As no disclosure was provided until 2024, that would be the earliest date in which Mr. Crees could expect a retroactive variation absent compelling D.B.S. factors. I do not find such factors in this case, given Mr. Crees' blameworthy conduct in failing to provide timely disclosure.
- [44] For the above reasons, Mr. Crees' application to retroactively vary child support is dismissed.

[45] I will now turn to Ms. Mracek's application to increase child support from 2023 to date and ongoing.

2023 and on: Ms. Mracek's Application for Retroactive Increase in Child Support

[46] Ms. Mracek must demonstrate a material increase in Mr. Crees' income since January 1, 2023. I am satisfied that she has done so.

[47] Mr. Crees' income at line 15000 of his tax return for 2023 was \$179,446. Mr. Crees seeks to impute income of \$200,000 to Mr. Crees for 2023. Mr. Crees' position is that his line 15000 income should be used.

[48] Mr. Crees' income for 2024 is somewhat complicated. Mr. Crees was laid off from Cellula in September 2023 due to organizational restructuring. He received a severance package consisting of contractual severance of \$21,504, additional severance of \$107,520 and a "retiring allowance" of \$32,500 plus \$10,859 vacation pay. The severance package was paid to Mr. Crees over a two-year period which straddled 2023 and 2024. Mr. Crees' 2023 income of \$179,000 includes income from Cellula of approximately \$147,000.

[49] When he was laid off from Cellula, Mr. Crees started his own company Banksia Robotics in November 2023 ("Banksia"). Banksia earned gross revenue of \$35,730 in its first fiscal year. I accept Mr. Crees' evidence that he started Banksia to earn self-employment income in case he could not find employment with another employer. I also accept his evidence that he did not intend to generate self-employment income in addition to full time employment income and that he ceased to generate new Banksia work once he started working for Sanctuary AI.

[50] Mr. Crees' income for 2024 is derived from several sources. In May 2024, Mr. Crees obtained employment with Sanctuary AI. He expected to earn \$200,000 per year plus benefits and bonuses. However, Mr. Crees' employment at Sanctuary AI was short-lived as he was terminated in September 2024. He was given 8 weeks of severance from Sanctuary AI. As he was earning approximately \$16,666 per month at Sanctuary AI, his total 2024 income from Sanctuary AI was approximately \$116,000.

[51] In addition, Mr. Crees was still receiving his severance package from Cellula in 2024. A pay stub produced by Mr. Crees dated July 12, 2024 shows income of \$96,771 from Cellula.

[52] In December 2024, Mr. Crees secured employment with Hydrogen in Motion, earning a base salary of \$150,000 plus benefits and stock options which vest over a four-year period.

[53] Ms. Mracek seeks to impute income of between \$250,000 to \$300,000 to Mr. Crees for 2024. Mr. Crees maintains that his 2024 income is \$197,620.

- [54] I find there was a material change in Mr. Crees' income commencing in 2023 when Mr. Crees was laid off from Cellula, received severance and started his own company. I find that Mr. Crees' Guideline income for 2023 consists of his 2023 T1 income tax statement (salary and portion of severance and vacation pay paid out by Cellula in 2023) at \$179,445 plus \$10,000 I impute to him for self-employment/Banksia income for November/December of 2023. This totals \$189,445 for his 2023.
- [55] I therefore impute Mr. Crees' Guideline income for 2023 at \$189,445. Child support should have been such that \$1,664 per month from January through December 2023 instead of \$1,347 per month as said out in Justice Jenkin's order.
- [56] For 2024, I do not have Mr. Crees' income tax form. However, I am satisfied that it is appropriate to impute income to Mr. Crees for 2024 based on the total of the following sources of income:
- a. Remaining severance income from Cellula of approximately \$97,000;
 - b. Income from Sanctuary AI of approximately \$116,000;
 - c. Imputed income from Banksia for 2024 \$14,500; and
 - d. Approximately one month's income from Hydrogen in Motion: \$12,500.
- [57] The above totals \$240,000 income for 2024. As such, Mr. Crees should have paid child support of \$2,058 per month from January 1, 2024 through December 2024.
- [58] For child support from January 1, 2025 onward, I impute income to Mr. Crees of \$153,295, which is the same as Jenkins J. imputed to him at trial. Mr. Crees' current annual salary from Hydrogen in Motion is \$150,000. I am not persuaded to include any Banksia income because Mr. Crees is already working full time and I accept that he only incorporated Banksia to work during times when he was not otherwise employed. This is consistent with both the timing of Mr. Crees setting up the company and the relatively small amount of income it has earned.
- [59] Mr. Crees was let go from Sanctuary AI but, to his credit, found alternative full time employment right away I find he acted reasonably. As Mr. Crees went from full time employment with Sanctuary AI to full time employment with Hydrogen almost immediately, I have declined to impute further income from Banksia to Mr. Crees beyond 2024.
- [60] Mr. Crees has stock options at his current employment. However, it is premature to consider those as income. Finally, I recognize that the imputed income for ongoing support of \$153,295 is slightly more than Mr. Crees' current salary of \$150,000. However, it is close and I find that Mr. Crees' capacity to earn income is not lower than what Jenkins J. found at trial. I anticipate that Mr. Crees will receive salary increases in the future and he may receive bonuses or taxable benefits. As such, Mr. Crees shall provide his T1 full income tax return and notice of assessment to Ms. Mracek annually by June 15th each year. He is also to include financial statements and tax returns for Banksia in the event it remains active. I will

make the exchange of information mutual as Ms. Mracek's income may be relevant to s. 7 expenses.

[61] Thus, to summarize, I impute income to Mr. Crees as follows:

2023: \$189,446;

2024: \$240,000;

2025 on: \$153,295

[62] Ms. Mracek has shown that there has been a material increase in Mr. Crees' income from January 1, 2023 through 2024. Ms. Mracek gave effective notice in 2024 once she received disclosure from Mr. Crees. She also brought a formal application in 2024. Colucci provides that the presumption is that a variation will go back retroactively to the date of effective notice.

[63] As mentioned above, the court retains the discretion to depart from the presumptive date of retroactivity where the result would otherwise be unfair. The D.B.S. factors continue to guide this exercise of discretion, as described in Michel. If the payor has failed to disclose a material increase in income, as in this case, that failure qualifies as blameworthy conduct and the date of retroactivity will generally be the date of the increase in income.

[64] In this case, Mr. Crees was aware that he had an ongoing obligation to pay child support for T. Per D.B.S, Michel, and Colucci, it was incumbent on Mr. Crees to disclose to Ms. Mracek that his income in 2023 and 2024 was higher than the income imputed to him by Jenkins J. He did not do so and that is blameworthy conduct. As stated above, child support is T's right. It is only fair, in my view, that T. benefit from Mr. Cree's increased income in 2023 and 2024

[65] Ms. Mracek did not delay in requesting the retroactive increase in child support. She brought her application immediately once she had Mr. Crees' disclosure. I have no doubt that T. will benefit from the retroactive award. T. has many legitimate expenses that do not qualify as s. 7 expenses. I also find that Mr. Crees will not suffer any hardship in paying a retroactive amount to bring his base child support in line with his income for 2023 and 2024. He currently has no arrears for child or spousal support owing. He is able to meet his expenses and shares expenses with his spouse.

[66] By contrast, Ms. Mracek's income is approximately \$60,800 from taxable long-term disability payments and a small WCB pension. She is not re-partnered. She does not have stock options. While she has some savings, likely from the lump spousal support ordered by Jenkins J., she has also accumulated significant debt as well in trying to give T. a fulfilling childhood and meet his special needs.

[67] Mr. Crees takes issue with Ms. Mracek taking T. on a couple lengthy trips, including a trip around the world in 2019. Ms. Mracek says that the trips are not a regular occurrence and she wanted to show T. places and art because he learns best by experiencing things. She concedes that her and T. went on a trip for several months in 2019 before she got COVID-19

and went on long term disability. She says that while the trip was long, she was very frugal. Overall, I am not concerned that Ms. Mracek spends money on T. She is entirely devoted to T and ensuring T's interests are met. I do not accept Ms. Mracek's past travel with T. as a reason to deny her claim to retroactive child support from January 2023 onward. The only concern I have regarding the trips is to the extent that Ms. Mracek attempts to include these expenses for travel as s. 7 expenses. I will address this below.

[68] To conclude, Mr. Crees will pay retroactive child support of:

January 1, 2023 through December 31, 2023: \$1664 per month based on imputed income of \$189,446;

January 1, 2024 through December 31, 2024: \$2058 per month based on imputed income of \$240,000; and

January 1, 2025 and continuing: \$1382 per month based on imputed income of \$153,295.

[69] I ask counsel to calculate the total for retroactive child support owing to date after giving Mr. Crees credit for what he has already paid to date.

Section 7 expenses

[70] Justice Jenkin's order is that Mr. Crees contribute a fixed sum of \$1,800 per month towards his proportionate share of T's s. 7 expenses, not including the cost of Mr. Crees' payment of the life insurance and critical illness policies of \$600 per month, for a total of \$2,400 per month. Mr. Crees seeks his total contribution to s. 7 expenses be reduced to \$500-1,000 per month retroactively and going forward. He says that T. no longer has a nanny so the expenses ought to be lower now and his contribution, therefore, lower.

[71] Ms. Mracek submits that Mr. Crees' contribution to s. 7 expenses ought to increase to \$2,500 per month in addition to paying the insurance policy payments. She admits that the nanny costs ceased in 2020 but maintains these costs were replaced by other s. 7 costs, including T's physiotherapy, occupational therapy, summer camps, counselling, recreational activities, schooling expenses, braces and the like that surpassed the nanny costs. She has been paying for the extra costs herself but says that since January 2023, when Mr. Crees' income increased, he should have been paying more than \$1,800 per month. In the alternative, she at least seeks to maintain the \$1,800 contribution.

[72] T. has autism spectrum disorder, ADHD and special learning needs. Ms. Mracek currently receives \$6,000 per year in funding for T.

[73] Following the trial, Jenkins J. found that T's s. 7 expenses totalled approximately \$2,600 per month, including the nanny, and ordered that Mr. Crees pay \$1,800 towards s. 7 expenses plus the \$600 monthly for the insurance policy premiums.

[74] Ms. Mracek's evidence is that T's current s. 7 expenses include, but are not limited to:

- a. Childcare of \$4,800 per year (including summer camps);
- b. Medical premiums of \$1,440 per year for T.'s portion;
- c. Health and braces: \$4,200 per year (including spacers then braces costing \$4000 per year approximately 5 years)
- d. School fees of \$300 per year
- e. Home schooling which Ms. Mracek claims costs \$12,000 per year, including "experiences" that she provides for T. given his learning style; and
- f. Therapy of \$15,000 per year for autism spectrum, ADHD, occupational therapy, physiotherapy and speech language therapy net of autism funding.

[75] The above expenses total \$37,740 per year, or \$3,145 per month which is more than the approximately \$2,600 per month that Jenkins J. found for s. 7 expenses at the trial, even including the nanny.

[76] However, I find that the \$12,000 claimed by Ms. Mracek for "experiences" is not reasonable. This amount is not fully supported in Ms. Mracek's evidence and may include her vacations with T. In my view, taking T. on vacations is not a reasonable or necessary s. 7 expense. I am reducing this category of expenses from \$12,000 per year to \$1,000 per year. The rest of the s. 7 expenses are supported by the evidence. Therefore, I find that T.'s total s. 7 expenses currently are \$26,740 per year, net of autism funding, or \$2,228.33 per month.

[77] Mr. Crees shall pay Ms. Mracek \$1,550 per month toward these s. 7 expenses which is roughly 70% of the s. 7 expenses, roughly the same percentage he has been paying under Justice Jenkin's order. The parties' current incomes are almost exactly the same as in Justice Jenkin's order. The figure of \$1,550 per month does not include the insurances policies which I will address in the next section. The change from \$1,800 to \$1,550 per month will start on March 1, 2025. I decline to make this reduction retroactive for reasons including: (1) Mr. Crees' conduct in not providing timely and fulsome disclosure; and (2) I have not ordered that Mr. Crees to contribute more for 2023 or 2024 despite his much higher income increasing those years.

Insurance policies

[78] Mr. Crees' payment of his life insurance and critical illness policies, while enforced by the family maintenance agent, is not a s. 7 expense. It is to secure support. Mr. Crees says it is no longer necessary. Ms. Mracek says that the policies continue to be critical in terms of T.'s financial security to ensure that if Mr. Crees dies while child support is still payable, that T.'s needs are taken care of.

[79] I agree with Ms. Mracek. T. continues to be reliant on child support including Mr. Crees' contribution to s. 7 expenses. Despite Mr. Crees' challenges with his mental health in the past, he has continued working. However, he was also working at the time of trial when

Justice Jenkins ordered that he pay the premiums. Further, based on Mr. Crees' previous mental health challenges, he is likely uninsurable, and these policies are likely still the only way to give T. some financial security. Mr. Crees has given no real rationale as to why his obligation to pay for these policies should be retroactively terminated as of March 2021. Nothing has alleviated the underlying need to retain the policies.

- [80] Mr. Crees shall continue to pay the approximately \$600 per month for the premiums for the two life insurance policies so long as T. remains eligible for child support. I do not see fit to change Justice Jenkin's order that the \$600 be counted as a s. 7 expense for the purpose of enforcement. As such, the \$600 should be added to the \$1550 contribution to the more standard s. 7's for a total of \$2150 per month commencing March 1, 2025.

Spousal Support

- [81] Respecting spousal support, s. 17(4.1) of the DA requires that before a court varies an order for spousal support, it "must be satisfied that there has been a change in the condition, means, needs or other circumstances of either former spouse since the making of the spousal support order or the latest variation order. The courts have long interpreted this provision as requiring a "material change" in circumstances: *Zandbergen v. Craig*, 2024 BCCA 278 at para. 24.
- [82] A material change is defined as "one that if known at the time of the original order, would likely have resulted in different terms": *L.M.P. v. L.S.*, 2011 SCC 64; *Willick v. Willick*, [1994] 3 S.C.R. 670, 1994 CanLII 28; and *G. (L.) v. B. (G.)*, [1995] 3 S.C.R. 370, 1995 CanLII 65.
- [83] The principles regarding compensatory spousal support are well established. The goal of compensatory support "is the equitable sharing of the economic consequences of a marriage or its breakdown": *Cphoon v. Stobo*, 2023 BCCA 479. Compensatory support addresses disparities resulting from, for example, diminished earning capacity to one spouse due to childcare responsibilities, or increased earning capacity of the one spouse due to the other spouse sacrificing their own career opportunities. Compensatory support "attempts to equitably share the economic consequences of a couple's roles and their choices during the marriage": *Cphoon* at para. 32.
- [84] Non-compensatory spousal support aims to relieve any economic hardship of the spouses arising from the breakdown of the marriage, as well as promote the economic self-sufficiency of the spouses: *Chutter v. Chutter*, 2008 BCCA 507 at paras. 45-47. This basis for support takes into account the means and needs of the spouses post-separation and compares the marital and post-marital standard of living of the spouses: *Chutter* at paras. 54. 57. Non-compensatory spousal support aims to narrow the gap between the needs and means of the spouses.
- [85] The parties had a short relationship with long term consequences. At the start of the relationship, Ms. Mracek was a qualified physical therapist licensed in both Canada and the United States able to earn \$130,000 or more per year. When Ms. Mracek became pregnant

with T., she moved from private practice to public practice where she could get medical benefits, maternity leave and a pension but received a much-reduced salary. Mr. Crees' career was prioritized. Mr. Crees continued working and earning a significant income. Mr. Crees was able to travel for his work and earn additional moneys. Ms. Mracek took employment as a physical therapist within Vancouver Coastal Health earning significantly less income so that she did not have to travel and could take care of T.'s needs. She also took employment for the benefits it provided T.

- [86] T. was only 10 months old when the parties separated. Ms. Mracek has been the primary or sole caregiver since his birth. Justice Jenkins provided Mr. Crees supervised parenting time and a path to follow to obtain unsupervised parenting time. However, Mr. Crees has not seen or had any contact with T. for 10 years since the trial. As such, Ms. Mracek continues to be solely responsible for T., who has various special needs. During the COVID-19 pandemic, T.'s nanny returned to her home country. Ms. Mracek was required to homeschool T., which she did on a full-time basis during the pandemic and continues to do three days per week. T. has autism, learning difficulties and some physical challenges. Ms. Mracek is solely responsible for ensuring T. gets appropriate therapies and learning opportunities.
- [87] Despite being T.'s sole caregiver since the trial, Ms. Mracek did see some overall modest increases in her income leading up to the COVID-19 pandemic.
- [88] In 2020, Ms. Mracek was overwhelmed with the complexities of her life, homeschooling T. full time, and struggling from depression and chronic debilitating migraine headaches. As a result, since 2020, she has qualified for long-term disability from her employment.
- [89] In early 2021, Ms. Mracek contracted COVID-19 and developed long term symptoms including chronic fatigue syndrome, which she continues to experience. She describes her physical capacity as 10% of what it was previously. She continues to be under the care of her family doctor and specialists, including a neurologist.
- [90] By April 2024, Ms. Mracek was required to turn in her license as a physiotherapist as a result of her being off work too long.
- [91] While Ms. Mracek's income temporarily increased in the years leading up to the pandemic in 2020, it was not a significant or permanent increase. In 2021 and subsequently, Ms. Mracek's income has consisted of \$54,000 per year long term disability benefits through Vancouver Coastal Health plus \$5,800 per year from her small WCB pension for a pre-existing shoulder injury. Her total income is approximately \$58,000 (\$59,185 minus union dues of \$1,600 to maintain benefits for her and T.) which is roughly the same income of \$60,029 that Jenkins J. imputed to her at trial. There does not appear to be any real prospect of Ms. Mracek returning to employment in the foreseeable future.

- [92] I find that Ms. Mracek continues to be entitled to periodic spousal support on both compensatory and non-compensatory grounds. As a result of the role she took on during the marriage, the career sacrifices she made, and the circumstances resulting from the breakdown of the marriage, she has suffered economic disadvantage that continues to impact her today.
- [93] On the evidence before me, there is no material change in circumstances that warrants a variation of Jenkins J.'s spousal support order. Ms. Mracek's income capacity has not improved materially since trial. In fact, if anything, Ms. Mracek's circumstances seem worse now, given she is on long term disability from her health issues and may not be able to return to work. Meanwhile, Mr. Crees has no obligations to parent T. and his income has increased significantly since January 2023.
- [94] For all these reasons, I dismiss Mr. Crees' application to vary/terminate the spousal support order of Jenkins J.

Application to limit Mr. Crees' ability to obtain information from third parties

- [95] This application is granted. Mr. Crees has been uninvolved in T.'s life for the past 10 years. T. has no memory of him. Mr. Crees does not intend to have a relationship with T. at least until T. is an adult. In the meantime, Ms. Mracek worries that Mr. Crees can contact third parties and enter into her and T.'s lives and cause disruption or confuse T.
- [96] In my view, it is in T.'s best interests to grant Ms. Mracek the relief she is seeking in this regard. If this will alleviate her worries, that can only benefit her mental health and indirectly benefit T. I therefore vary the Jenkins J.'s order to the extent that para. 5 of the order is vacated. Mr. Crees no longer has the right pursuant to the court order to contact and obtain information from all third parties involved in T.'s life, including doctors, dentists, teachers, coaches, and daycare providers.

Application to eliminate the requirement to inform Mr. Crees when she travels with T.

- [97] This application is dismissed. I see this issue differently than eliminating the third-party contact. Ms. Mracek claims that some of the trips should be counted as s. 7 expenses. While I do not view the trips to date as proper s. 7 expenses and I have not increased Mr. Crees' contribution to s. 7 expenses, I am mindful that Ms. Mracek may in the future submit that her trips with T. qualify as s. 7 expenses. In light of this, Mr. Crees should be aware of when and where Ms. Mracek travels with T. As such, the requirement to notify Mr. Crees of travel will continue.
- [98] It may be that the parties through their counsel can reach consent whereby Ms. Mracek does not have to notify Mr. Crees regarding her trips with T. on the basis that she will not claim trips as s. 7 expenses in the future. However, I will leave that to them.

Application that Mr. Crees pay the remaining \$23,705 in costs ordered by Justice Jenkins

[99] This application is dismissed. Ms. Mracek claims that this portion of the costs award by Jenkins J. remains unpaid and ought to be paid. Mr. Crees submits that he paid the 75% portion of the costs which survived his bankruptcy. He maintains that this 25% portion of the costs did not survive the claim in bankruptcy and is no longer payable. I will not make any determination as Ms. Mracek has commenced a separate civil action to pursue this issue.

Application for security for costs for any further applications brought by Mr. Crees

[100] This application is dismissed. This was not pressed at the hearing, and I see no basis for ordering this relief.

Summary of Orders

[101] Mr. Crees' application for a retroactive reduction in child support is dismissed.

[102] Mr. Crees' application for a termination of spousal support is dismissed.

[103] Mr. Crees' application for a termination of the obligation to pay for the insurance policies is dismissed.

[104] Mr. Crees' fixed monthly contribution to T's s. 7 expenses shall be \$1550 from March 1, 2025 onward in addition to his obligation to continue to pay the \$600 to cover the two insurance policy premiums pursuant to Justice Jenkin's order for a total of \$2150 per month.

[105] Child support shall be retroactively increased as follows:

- Mr. Crees shall pay monthly child support of \$1664 for 2023 based on income of \$189,446;
- Mr. Crees shall pay monthly child support of \$2058 for 2024 based on income of \$240,000;
- Mr. Crees shall pay monthly child support based on an imputed income of \$153,295 from January 1, 2025 and continuing pending further order of the court or written agreement between the parties.

[106] The parties shall provide copies of the following information to each other each year in July, so long as T. remains eligible for child support:

- (1) their most recent full T1 income tax form;
- (2) their corresponding Notice of Assessment;
- (3) their most recent pay statement if applicable;
- (4) the most recent financial statement for any company in which they own a controlling interest.

- [107] Paragraph 5 of the order of Justice Jenkins (Mr. Crees' ability to contact third parties) is vacated.
- [108] Ms. Mracek's application to vacate the term in Justice Jenkin's order to notify Mr. Crees regarding her travel with T. is dismissed, subject to the parties reaching different terms in a consent order in this regard.

Costs and Calculations

- [109] Ms. Mracek was largely successful and shall be entitled to receive costs of these applications. She has asked for special costs but I am of the view that Mr. Crees' conduct does not rise to the level of reprehensible or worth of rebuke except in relation to his previous last-minute adjournment of the applications. The previous adjournment was to cross-examine Ms. Mracek but that never occurred. Mr. Crees shall pay Ms. Mracek the usual costs for the hearing of these applications. Mr. Crees shall pay special costs in relation to costs thrown away for his previous adjournment of the applications.
- [110] I will leave it to counsel to calculate the specific amounts owing for child support for 2023 to date using the income determinations above and crediting Mr. Crees for what he has already paid. If counsel cannot agree as to the calculations, they may within 30 days request a brief appearance before me at 9 am by Teams.

"Hamilton J."

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