

CANADA / JUDGMENT

Pasek v. Pasek

2025 BCSC 438

COURT

Supreme Court of British Columbia

DECIDED

13 March 2025

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2025 BCSC 438 Pasek v. Pasek

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Pasek v. Pasek,

2025 BCSC 438

Date: 20250313

Docket: E141561

Registry: Vancouver

Between:

Martin Paul Pasek

Claimant

And

Cynthia Ann Pasek

Respondent

Corrected Judgment: The text of the judgment was corrected at paragraph 6 and on April 29, 2025.

Before: The Honourable Madam Justice Wilkinson

Reasons for Judgment

In Chambers

Counsel for the Claimant:

K.J. Heinrichs

S. Basra

Counsel for the Respondent:

L.S. Klass

S. Xu

Place and Date of Hearing:

Vancouver, B.C.

January 15 and 16, 2025

Place and Date of Judgment:

Vancouver, B.C.

March 13, 2025

- [1] These are my reasons for judgment on the parties' applications in this family law matter.
- [2] The claimant seeks a declaration that he is not in arrears of any child support and section 7 expenses arrears pursuant to the final order of Justice Butler pronounced January 9, 2015 (the "Final Order"), or in the alternative, an order pursuant to section 17(1) of the Divorce Act, RSC 1985, c 3 (2nd Supp) reducing or cancelling child support and section 7 expenses arrears accrued under the Final Order. He further seeks an order to enforce clause 18 of the Final Order, such that the respondent reimburse the claimant \$52,268 for spousal support overpayment, that the respondent pay him \$15,000 for his share of the family property with regard to a refund of education expenses, and declarations that their son AP ceased being a child of the marriage as at September 2021, and their son MP ceased being a child of the marriage as at January 2023.
- [3] The respondent applies for a declaration that both AP and MP continue to be children of the marriage. She also seeks that the court grant the following:
- a) an order determining the claimant's Guidelines income from 2016 to present;
 - b) an order that the claimant pay child support in the Guidelines amount based on his actual or imputed income from January 2016 onwards;
 - c) an order that the claimant pay arrears of child support in the amount of \$406,998; and
 - d) an order that the claimant provide a copy of his most recent employment contract.

Background

- [4] The parties were married in August 1993 and separated in March 2011, after nearly 18 years of marriage. They settled all matters between them and incorporated the terms of settlement into a final consent order on January 9, 2015 (the "Final Order").

- [5] The parties have two children of the marriage: AP, who is now 26 years old, and MP, who is now 21 years old (the "Children").
- [6] Since the parties' separation, the respondent has been the sole caregiver for the Children. AP obtained an undergraduate degree in 2021 and is currently in his first year of a part-time three-year Master of Counselling program at an American university which has a location in Victoria, BC. His courses are conducted in-person outside of normal weekday working hours (i.e. Friday evenings and one or more days on the weekends) in Victoria.
- [7] MP is currently in his first year of a four-year program at Camosun College in Victoria, BC, to obtain a Red Seal Electrician Certificate. The Children have resided with the respondent since the parties' separation and continue to do.
- [8] The Final Order was made pursuant to the Divorce Act. Pursuant to the Final Order, child support obligations are set out as follows:
19. By consent, the Claimant shall pay to the Respondent upon pronouncement of this Order the following sums representing retroactive and ongoing child support to December 31, 2014 totalling \$1,023,824 being:
- a. 2011 child support of \$19,282 per month with retroactive support due to the Respondent of \$231,384,
 - b. 2012 child support of \$3,994 per month with retroactive support due to the Respondent of \$47,928,
 - c. 2013 child support of \$32,631 per month with retroactive support due to the Respondent of \$391,572,
 - d. 2014 child support of \$18,790 per month with support due to the Respondent of \$225,480 for 2014,
 - e. 85% of section 7 expenses to September 1, 2013, after adjustments, of \$127,460.
20. By Consent the Claimant has paid to or on behalf of the Respondent or the Children the sum of \$628,000 to September 30, 2014 and \$42,000 for the months of October and November to be set off against the above noted retroactive support of \$1,023,824 leaving a balance owing of \$353,824.
21. Commencing January 1, 2015 and payable on the first day of each month thereafter the Claimant shall pay to the Respondent, interim child support of \$4,625 and 85% of the s.7 expenses incurred by the Respondent based on estimated income of \$350,000 for calendar year 2015.

22. On December 31, 2015, if the Claimant's income for child support purposes is greater than \$350,000 for 2015, a lump sum payment of child support for any shortfall based on the difference between the amount paid and the amount which would have been payable in 2015 based on the actual income of the Claimant, shall forthwith be paid to the Respondent by the Claimant.
23. No adjustment to child support shall be made in the event the Claimant's actual income for 2015 is below \$350,000.
- [9] For nearly four years beginning in January 2016, the claimant stopped paying any child support to the respondent. The respondent registered with the BC Family Maintenance Enforcement Program, now the BC Family Maintenance Agency ("BCFMA"), in August 2019.
- [10] As at August 9, 2019, BCFMA calculated the amount of child support owed by the claimant to be in the amount of \$206,560.39. BCFMA calculated this amount based on the position that, unless otherwise agreed or ordered, the claimant was to continue paying child support at the rate of \$4,635 per month.
- [11] The claimant began paying child support after the respondent registered with BCFMA. However, according to BCFMA, child support arrears continued to accrue as the claimant did not pay the full amount of support required pursuant to the Final Order. The current amount of arrears owing is approximately \$404,500.

The child support applications

- [12] The respondent takes the position that the Final Order should be interpreted as requiring ongoing child support after 2015 based on the amount set for 2015. In addition to payment of the outstanding child support arrears accrued under the Final Order, the respondent also seeks to retroactively increase child support based on an increase in the claimant's income, both actual and imputed.
- [13] The claimant takes the position that the Final Order only sets out the amount of child support payable up to and including 2015. He submits the order did not set out the amount of support payable from 2016 onwards, hence he was not obligated to pay the respondent \$4,625 per month in child support after 2015.
- [14] While the claimant submits that he has no retroactive or ongoing child support payable, he does concede that he was obligated to provide child support for the years 2016-2022 as follows:
- a) 2016: Child support for two children based on a guideline income of \$187,751 is \$2604.46 per month or \$31,253.52 for the year.
 - b) 2017: Child support for two children based on a guideline income of \$81,616 is \$1,263.12 per month for 8 months is \$10,104.96. Child support for 1 child for the remaining 4 months based on a guideline income of \$81,616 is \$780.04. The total for the year is \$13,225.12.

- c) 2018: Child support for two children based on a guideline income of \$67,035 is \$1,040.53 per month for 5 months is \$5,202.65. Child support for 1 child for the remaining 7 months based on a guideline income of \$67,035 is \$636.34 per month. The total for the year is \$9,657.03.
 - d) 2019: Child support for two children based on a guideline income of \$8,937 is \$0 per month.
 - e) 2020: Child support for two children based on a guideline income of \$51,166 is \$797.49 per month or \$9,569.88 for the year.
 - f) 2021: Child support for 1 child for 9 months and 1 child for 12 months based on a guideline income of \$234,779 is \$3,172 for 9 months and \$1,950 for 3 months or \$34,398.00 for the year.
 - g) 2022: Child support for 1 child based on a guideline income of \$394,907 is \$3,266.27 per month or \$39,195.24 for the year.
- [15] The claimant submits that the total child support payable was \$137,298.79, accordingly. To date, the claimant has paid a total of \$156,388.43 (\$89,763.43 until April 2024, \$25,000 in April 2024 and \$41,625 (or, \$4625 x 9 months since) to the respondent through BCFMA.
- [16] Both parties had the benefit of legal counsel who negotiated and drafted the Final Order. The parties settled all matters between them and entered into the Final Order by consent. As part of his application for divorce and approval of the Final Order, the claimant testified to the terms of child support in the Final Order in his child support affidavit sworn on January 6, 2015. He deposed that the Final Order as proposed (and subsequently approved by the Court) requires him to pay child support in the amount of "\$4625.00 per month and continuing on the first day of each and every month therefore until further order of the court or agreement of the parties, which amount accords with the child support guidelines".
- [17] In his primary affidavit in support of the Final Order, also sworn on January 6, 2025, the claimant deposed that the terms of the Final Order provide for the Children in accordance with the Guidelines and are in the Children's best interests. He further deposed that, at that time, he was unemployed and needed to move from Russia as his work visa has expired. He deposed that he wished to facilitate his move with his new family out of Russia and, in order to do that, he had to remarry his new partner.

Is either child no longer a child of the marriage?

- [18] Section 2(1) of the Divorce Act provides that a child of the marriage means a child of two spouses or former spouses who, at the material time, is:
- a) 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.

- [19] The Child Support Guidelines at s.3(2) sets out that, [u]nless otherwise provided under these Guidelines, where a child to whom a child support order relates is the age of majority or over, the amount of the child support order is:
- a) the amount determined by applying these Guidelines as if the child were under the age of majority; or
 - b) if the court considers that approach to be inappropriate, the amount that it considers appropriate, having regard to the condition, means, needs and other circumstances of the child and the financial ability of each spouse to contribute to the support of the child.
- [20] In *Dring v. Gheyle*, 2018 BCCA 435, the Court of Appeal set out at paras. 49-50 the legal framework for determining whether a child who has reached the age of majority should remain a child of the marriage for the purpose of child support eligibility:
- [49] Once a child of the relationship reaches the age of majority, the presumption is that the child is no longer a "child" and child support is no longer required. At age 19, a child is an adult who, generally speaking, must support himself or herself. To remain a "child" for support purposes, the adult child must be unable to withdraw from his or her parents' charge, or unable to obtain the necessities of life because of illness, disability or another reason. Once a child reaches the age of majority, the party applying for child support bears the onus of proving that the child is still a child: *Olson v. Olson*, 2003 ABCA 56 (Alta. C.A.) at para. 13.
- [50] If an adult child is still living at home, "but is neither ill nor disabled nor under the effect of [another reason] by which he or she is unable to withdraw from parental charge or to obtain the necessities of life, then that adult child is no longer" a child entitled to support: *Ethier v. Skrudland*, 2011 SKCA 17 (Sask. C.A.) at para. 16. As noted in *Kohan v. Kohan*, 2016 ABCA 125 (Alta. C.A.) at para. 14, the wording "signifies something more than a mere lifestyle choice to remain dependent."
- [21] In *Nordeen v. Nordeen*, 2013 BCCA 178 at para. 16, the Court of Appeal confirmed that the factors listed by Master Joyce in *Farden v. Farden* (1993), 1993 CanLII 2570 (BC SC) at paras. 64-5 are of assistance in determining the reasonableness and appropriateness of parental financing of post-secondary education so long as these factors are not used as a checklist or considered to be statutorily-mandated criteria. The factors are:
- a) 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;
 - b) whether or not the child has applied for or is eligible for student loans or other financial assistance;
 - c) the career plans of the child, i.e. whether the child has some reasonable and appropriate plan or simply going to college because there is nothing better to do;

- d) the ability of the child to contribute to his own support through part-time employment;
- e) the age of the child;
- f) the child's past academic performance, and whether the child is demonstrating success in the chosen course of studies;
- g) what plans the parents have made for the education of their children, particularly where those plans were made during cohabitation; and,
- h) 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.

(the "Farden Factors")

- [22] This Court in *Chutter v. Chutter*, 2016 BCSC 2407 found that while a child in full-time school may be a child of the marriage, support is only payable after considering the needs, means and circumstances of the child:
- [92] A child who is over the age of 19 is an adult in our province and is not the type of person for whom child support orders are envisioned, even if that child should have received greater amounts of child support while he or she was still a minor. Child support is for children of the marriage, not adults who used to have that status: D.B.S. at para. 89.
- [23] The parties in the case at bar have two children. AP, born in 1998, is over 26 years old. MP, born in 2004, is 21 years old. When the parties reached an agreement with regard to child support in 2015 AP was 16 years old and MP was 11.

AP

- [24] AP graduated from university in May 2021, with an undergraduate degree in political science. He resided with the respondent during most of that time. Planning on enrolling in a Master of Counselling Psychology program, and still needing pre-requisite undergraduate course for such a programme, he took three more courses between June and September 2021. He took the third course over the span of a month in 2024. From January 2022 to August 2024, he was employed on a full-time basis as a counsellor. He deposes that he quit his employment in August 2024 due to his course load. However, he is still employed as a casual employee and picks up shifts as a counsellor.
- [25] No details of AP's income were in evidence until he provided a very late affidavit through the respondent. He has provided his tax assessments for 2021-2023. In 2021, his taxable income was \$300; in 2022 it was \$43,800; and in 2023 it was \$53,400. He does not indicate what income he earned in 2024 or what savings he has, if any.

- [26] AP deposes that, although he is enrolled in the part-time program, because he has a learning disability which is "registered with the school that requires academic accommodation [his] course load is considered full-time by the university". He provides no documentation confirming this accommodation. From the program materials provided, the university provides the same part-time program on a regular basis to all, without being considered some form of accommodation. The part-time programs offered simply take more time to complete, due to the part-time nature of the offering. The part-time program consists of two courses per term, both to take place on Saturdays. The respondent expects AP to graduate from his second post-secondary degree when he is 28, in October 2027.
- [27] AP does not provide any information about steps he has taken to secure loans, bursaries, or scholarships for his post-graduate studies. He does not state how his post-graduate plans will affect or impact his ability to withdraw from his parents' care to any greater extent than when he held his full-time work position prior to commencing his graduate studies.
- [28] AP does not provide evidence of what his current expenses are or what he contributes toward them. Neither he nor the respondent has provided a budget setting out AP's reasonable expenses or his capacity to meet those expenses. AP and his girlfriend, who apparently works full-time, both reside with the respondent. The respondent has not reported whether she charges AP or his girlfriend rent.
- [29] He had the ability to work since at least September 2021. Despite having a learning disability, AP completed a full-time undergraduate degree and took additional courses in order to begin to qualify for his post-graduate study plans. He has earned income above minimum wage in his field of choice.
- [30] The respondent deposes that AP was diagnosed with obsessive compulsive disorder in or around 2012 or 2013. She states that he was treated at the Children's Hospital in Vancouver and attended therapy sessions that dealt with AP's feelings of abandonment with respect to his father.
- [31] The respondent produced a letter from Dr. Hotz from 2017 setting out AP's learning disabilities, first diagnosed in 2010.
- [32] While AP may have a learning disability and require accommodations at school, he was nevertheless able to complete his undergraduate degree in 2021 within four years and obtain and maintain full-time employment afterwards.

MP

- [33] MP is currently 21 years old. He took courses at Camosun College for a semester after high school graduation in fall 2022, but did not finish them. The claimant deposes that MP then began full-time employment with a landscaping company and then at a grocery store. The respondent claims that MP worked only part-time during this period and does not provide an explanation as to why he was not working full-time. The respondent has provided no documentation to verify MP's income.
- [34] The respondent also states that MP was enrolled at Camosun College between January and April 2023 on a part-time basis. It appears that MP was enrolled in the psychology degree program. MP has started a Red Seal apprenticeship program as an electrician.
- [35] In his own affidavit, provided late along with AP's affidavit, MP attaches Notices of Assessment for 2022 and 2023, indicating an annual income of \$8,338 and \$9,587. He has not provided an explanation for the incomes set out. MP deposes that he is currently in a 10-month rotating work term of his apprenticeship and education. The income he is receiving from this apprenticeship is not set out. Based on the information provided, the program likely entails rotating 10-month work program, followed by a 2-month school term, although this information has not been provided.
- [36] The respondent deposes that MP informed her he earns \$40 per hour. This equates to an annual income of approximately \$83,000. For a 10-month apprenticeship, this equates to an annual income of approximately \$69,333.
- [37] The respondent has failed to provide any information with respect to employment insurance benefits and the amount for same, which may be available to MP during the presumed two-month school terms of the program. In the alternative, she has not provided evidence as to why MP would not qualify for such assistance.
- [38] The respondent states that she does not charge MP rent. There is no evidence that MP is unable to pay rent.
- [39] In his affidavit, MP states that he relies on his mother and stepfather for support in the following ways:
- "to keep the structure in my daily schedule that I need to maintain my health. They ensure that I am supported with any challenges I face, eating healthy food and getting enough rest..."
- [40] MP's affidavit does not provide any information as the savings he may have accrued from working between January 2023 and May 2024. He was not enrolled in post-secondary education between May 2023 and May 2024. MP does not provide any information as to any steps he has taken to secure loans, bursaries or scholarships for his current studies.

- [41] The affidavit fails to provide evidence of what MP's current expenses are and what he contributes to those expenses. Neither he nor the respondent has provided a budget setting out MP's reasonable expenses or his capacity to meet those expenses.
- [42] The respondent has also not provided evidence of the expenses for MP that she is contributing to other than to state that MP relies on her care and would not be able to support himself and continue his education at the same time. She deposes that "in addition to emotional support, I also ensure that MP is eating properly and attending his treatments regularly". She has not provided any evidence that she is currently incurring expenses for MP.
- [43] The respondent does provide receipts which she deposes were incurred for MP's health and school expenses from 2022 to 2023. No receipts, invoices or other evidence of any expenses for MP in 2024 have been provided.
- [44] The respondent states "the Children have struggled with early developmental trauma and the resulting health issues, which complicates the process of obtaining documents, as it is difficult for the Children to review documents that bring up past traumas." The affidavits of the Children do not provide evidence of this and there is no third party evidence to this effect.
- [45] The respondent has alleged that both AP and MP suffer from ongoing mental health and other health problems which contribute towards a continued status as the Children of the marriage. She states they "have struggled, and continue to struggle, with mental health and other health issues as a result of their feelings of abandonment and distant relationship in respect of the Claimant".
- [46] The respondent alleges that MP's mental health and physical health issues began in 2012 but became more aggravated on October 2022. It appears that MP was hospitalised once due to a condition which the hospital report notes had been effectively managed. There is no medical evidence for MP prior to 2022.
- [47] There is no medical evidence, or evidence from AP and MP indicating that mental health challenges faced by them render them unable to withdraw from the respondent's care.

Applying the Farden Factors to the circumstances

- [48] MP is enrolled in an apprenticeship program which, while educational, provides him with an income, considerably higher than the \$36,192 full-time minimum wage in British Columbia.
- [49] AP has a post-secondary degree and has worked on a full-time basis for approximately three years. His graduate degree is a part-time programme.
- [50] No information has been provided as to efforts to obtain loans or financial assistance, or receipt of same.

- [51] MP's current plans appear to be based on a genuine plan to achieve employment as an electrician. Prior to this, MP was enrolled in 2 different programs on a part-time basis which he did not complete.
- [52] AP's plans for a graduate degree are not necessary for him to achieve employment in his field or to achieve an ability to withdraw from his parents' care. AP was employed on a full-time basis for three years after his graduation from university.
- [53] AP's education is on a part-time basis. It would appear that he will have adequate time as any other student in the part-time program to complete any homework on his two courses and to work on a full-time or part-time basis.
- [54] No evidence has been provided as to AP's employment during his part-time second post-secondary degree other than that he resigned from his full-time position but is still employed as a casual employee and picks up shifts. He appears not to have paid for any accommodation expenses for many years, which continues.
- [55] As for MP, he earns an annual income of at least \$67,000. He does not have accommodation expenses.
- [56] MP is 21 and AP is now over 26 years old. AP cohabits with a partner.
- [57] MP was previously less successful in his academic pursuits and there is no evidence of his current progress. AP was previously successful academically; however, he also achieved employment success after graduation from his bachelor's degree, and has not been in school for over three years. He does not depose that if otherwise not employed, he would be unable to complete the program on a full-time basis. It does not appear that his disabilities have impeded his academic pursuits to date.
- [58] No evidence was provided by either party with regard to plans for the post-secondary education of the Children. The 2015 Final Order contemplated the parties making equal contributions to RESPs for the Children. The parties equally contributed towards AP's undergraduate degree expenses.
- [59] The Children have not terminated their relationship with the claimant. This factor is not applicable.
- [60] I find that the respondent has not met the burden of proving on a balance of probabilities that AP has been incapable of withdrawing from his parent's care since September 2021 or that MP has likewise been incapable of doing so since January 2023. AP ceased to be a child of the marriage as at September 2021 and MP ceased to be a child of the marriage as at January 2023.

Assuming the Final Order sets the ongoing amount payable based on the 2015 Guidelines income of the claimant, should that prevail over changes in circumstances?

[61] The principals underlining child support payments are helpfully set out in *Chan-Henry v Liu*, 2018 BCSC 2140:

161 Whether child support jurisdiction is governed by the Divorce Act or the FLA (or both), the Supreme Court of Canada cases *D.B.S. v. S.R.G.*, 2006 SCC 37, and *Kerr v. Baranow*, 2011 SCC 10, and their progeny, have articulated certain fundamental principles of law applicable to all child support matters:

1. a parent-child relationship is a fiduciary relationship of presumed dependency and the obligation of both parents to provide financial support for the child automatically arises at birth;
2. parents have a joint and ongoing legal obligation to provide financial support for their children in a way that is commensurate to their income;
3. this obligation and the children's concomitant right to support exists independently of any statute or court order;
4. child support is the right of the child, not of the parent seeking support on the child's behalf;
5. support payments are based on earning capacity and not just on what a parent actually earns - as a result, parents have a legal obligation to earn as much as they reasonably are capable of earning so that the children receive an appropriate level of support;
6. a parent does not fulfil his/her obligation to his/ her children if (s)he does not increase child support payments when his/her income increases significantly; and
7. both parents must put their child's interests ahead of their own in negotiating and litigating child support.

[62] Under s. 17 of the Divorce Act, the court may retroactively and prospectively vary orders with respect to child support:

Variation order

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

- (a) a support order or any provision of one, on application by either or both former spouses;

[63] When making such an order the court must satisfy itself that there has been a change in circumstances as set out in the Child Support Guidelines, as discussed in s. 17(4) of the Act:

Factors for child support order

17 (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.

[64] These provisions are substantially similar to provisions applicable to orders made under the Family Law Act.

[65] The Court of Appeal has held that such statutory provisions indicate the legislature's (or parliament's) intention that child support agreements (or consent orders) be variable in the face of changing circumstances for the parent and child. As set out in *Hinz v. Davey*, 2022 BCCA 232 at para. 58:

While courts have found that agreements between parents "should be given considerable weight" (D.B.S. at para. 78), concerns around certainty and finality hold less weight in the context of child support agreements.

[66] This Court in *Chan-Henry* at para. 178 held that an agreement by the parties to have child support paid in a fixed amount on an indefinite basis is contrary to public policy and unenforceable at law. The potential for injustice is too great: "Such provisions fail to recognize and, indeed, breach the fundamental principles of law applicable to child support matters ": *Chan-Henry* at para. 178.

[67] I agree with the claimant that, despite the wording of the Final Order and the nonexistence of a provision included for annual adjustment, and the claimant's own affidavit evidence regarding the ongoing child support amount, public policy dictates that this amount is subject to variation based on the circumstances of the parties. However, this does not mean that the Final Order does not set out any amount payable in child support for the years 2016 onward. If that were the case, it would not provide for the best interests of the Children. The Court would have relied on an ongoing child support provision when granting the divorce, based on the affidavit material submitted by the claimant in support of seeking court approval of the terms of the Final Order. It would not be in the best interests of the Children to simply leave them without any order for child support going forward.

[68] Changes in circumstances are relevant to determining the amount of child support payable for the years 2016 onward, despite the term of the Final Order setting the ongoing amount payable based on a Guidelines income of \$350,000.

[69] Given the wording of the Final Order that "Commencing January 1, 2015 and payable on the first day of each month thereafter", on their applications, the claimant seeks to vary that order and cancel arrears, and the respondent seeks to confirm that order, or alternatively vary that order and increase support as a result of imputation of income.

[70] The respondent has a longstanding enforcement proceeding by way of BCFMA that began in August 2019. I am not aware of any prior application to any court made by either party to seek financial disclosure or variation of child support prior to the applications before me.

Should the arrears under the Final Order be varied between 2016 to December 2022?

- [71] The factors to consider when determining when retroactive changes of support orders are appropriate are set out in *Colucci v. Colucci*, 2021 SCC 24. In *Colucci* at para. 38, the Supreme Court of Canada reaffirmed the four factors it first articulated in *D.B.S. v. S.R.G.*, 2006 SCC 37, governing the analysis of whether a retroactive child support order should be made.
- [72] Those factors are:
- a) whether the parent's delay in seeking variation is reasonable in the circumstances;
 - b) the payor's conduct;
 - c) the circumstances of the child and/or the spouse; and
 - d) whether any hardship would result from a retroactive award.
- [73] For parties seeking to retroactively reduce support payable, the general rule is that such an award, if made, would be retroactive to the date of effective notice of the material change of circumstances of the payor and no more than three years before the date of formal notice: see *Colucci* at paras. 39, 43, citing *D.B.S.* Here, the date of formal notice for the claimant's application was in April 2024 and the date for the respondent was in September 2024. As I have determined, these dates are after the last monthly child support payment was payable.
- [74] However, where the payor-parent engages in blameworthy conduct, the date when circumstances changed materially to require an increase in support will be the presumptive start date of the award: *D.B.S.* at para. 134.
- [75] In July 2020, the claimant provided some details of his low earnings since the date of the Final Order in an application regarding the enforcement of the pension division provisions of the Final Order. Neither party brought a child support-related application at that time.

Is the delay in bringing the application reasonable in the circumstances?

- [76] The claimant knew since August 2019, at the latest, with registration and enforcement through BCFMA, that the respondent took the position that he owed child support based on the amount set out in the Final Order. The claimant does not explain why he waited until 2024 to pursue his claim with regard to the proper amount payable and owing.
- [77] The respondent submits that she has been attempting to resolve various other issues relating to the Final Order since it was entered. She submits that from January 2016 to August 2019, during which the claimant paid no child support, she tried on numerous occasions to resolve matters with him. Ultimately, she felt she had to register with BCFMA in order to receive any child support. In July 2020, she brought on an application for the division of multiple pensions that were supposed to be divided forthwith following the Final Order. There were various reasons why the pensions could not be divided without the parties' incurring substantial tax consequences or fees. This matter still has not been resolved. The respondent submits, given these issues, she has not had the time or resources to pursue a retroactive variation of the Final Order.

- [78] However, I note that the respondent was informed in 2022 of the claimant's new highly paid employment in Saudi Arabia on a three-year contract. After this point, counsel went back and forth with financial disclosure requests and exchanging legal positions of the parties. The respondent submits that it was not until she obtained financial information filed in support of the claimant's application to cancel child support arrears that she became aware of his prior underemployment.
- [79] The claimant has not provided a reasonable explanation for the delay in bringing their respective applications. He is essentially silent on the issue and his delay is extraordinary.
- [80] The respondent relied on BCFMA for enforcement, which is reasonable. In July 2020, she was put on notice of some of the details of the claimant's stated earnings and financial position which now forms the basis of her argument in support of him being intentionally underemployed. But it was not until 2022, with the return of the claimant to his pre-Final Order high income level, and the position he took regarding the Children no longer being the Children of the marriage, that the respondent began to contemplate that this timing was not coincidental. This explanation is reasonable.

The payor's conduct

- [81] The respondent does not suggest he never had an obligation after 2025. Yet, he paid no child support from 2016 until December 2019. At that time, FMEP started to take enforcement action. His passport was under threat.
- [82] In the meantime, somehow, the claimant was able to pay his share of extraordinary expenses, which is not insignificant, but failed to pay any child support. This failure is in spite of the claimant taking the position he had no ability during that time to pay child support.
- [83] The claimant deposes that he decided to return to Canada, and Vancouver in particular, knowing that he could not regain his historically-experienced high remunerated employment here, because he wanted to be close to the Children. Nevertheless, he does not dispute the respondent's evidence that he has spent no meaningful time with the Children since 2009. Instead, from the claimant's own evidence, he was content to apply to some almost 300 positions via LinkedIn, stating he had some unsuccessful interviews. There is no evidence of any job application or rejection correspondence. He decided to begin a start-up and provide some low-paying consulting work for other start-ups. He did all this so he could work from home or otherwise locally, again, in order to be close to the Children. I find the claimant's evidence regarding his employment search efforts and reasons for taking himself off the market in his field of employment incredible.
- [84] The claimant also underutilised his income-earning assets. The former family property in Whistler ended up in the claimant's name as a result of the property division between the parties. This was an income-earning investment property. The suite was rented out on a long-term basis and the main body of the house was rented out as short-term vacation

property. The claimant deposes that when short-term rentals of less than 28 days were prohibited, he decided not to rent it out at all because he did not wish to do so. As a result, the cost of repairs financed through a new mortgage became a money losing enterprise such that it offset his personal taxable income.

- [85] If his actual income is as it is portrayed to be, then the claimant was intentionally underemployed between 2016 and 2022.
- [86] The claimant did not provide any significant financial disclosure until 2020 and only much later did a better picture of his post-divorce income and assets come to light through these applications.
- [87] This conduct is blameworthy.

Circumstances of the Children, respondent and claimant

- [88] The respondent has provided for substantially all of the parenting needs of the Children. The Children are no longer children of the marriage under the Divorce Act. However, their child support needs were not met by the claimant during the time in which they did qualify as such. The respondent, unemployed at the time of the Final Order, became self-sufficient in the intervening years. It is her efforts that have ensured that the Children did not greatly suffer due to the claimant's failure to provide child support as required.
- [89] The claimant is currently employed, earns a significant income, and again resides abroad.

What hardship will result from a retroactive award (or lack thereof)?

- [90] Neither party argues a particular hardship if their application is not granted.
- [91] Assuming the claimant's historic actual income is what he states, the Colucci factors weigh against the claimant's application for a retroactive award given the lateness of the application and his blameworthy conduct.

Conclusion on the claimant's application to retroactively vary the child support payable

- [92] If income is not imputed to the claimant, I would not in these circumstances order that the amount of child support payable under the Final Order be retroactively varied as requested by the claimant.

Should income be imputed to the claimant?

- [93] Pursuant to s. 19(1)(a) of the Federal Child Support Guidelines, the court may impute an income to a payor in the event a spouse is intentionally under-employed or unemployed.

- [94] Payment of child support is based on a payor's ability to pay, based not only on what the payor parent earns, but also what the payor parent can earn. Parents have a legal obligation to earn as much as they are capable of earning to meet their child support obligations: *Earle v. Earle*, 1999 BCSC 283 at para. 18, *aff'd Ghislieri v. Ghislieri*, 2007 BCCA 512 at para. 8.
- [95] The test for imputing a payer's income where there is intentional under-employment or unemployment is one of reasonableness, having regard to the party's capacity to earn income in light of their age, education, health, work history, and work availability. A spouse's capacity to earn income will include that person's ability to work or to be trained to work: *Marquez v. Zapiola*, 2013 BCCA 433 at para. 37.
- [96] On the evidence before me, the claimant only began seriously looking for employment suitable to his level of expertise in the summer of 2021. In 2021, the claimant's income began to increase again. In September 2022, the claimant began a position in Saudi Arabia. Since 2023, the claimant has earned 3,012,900 SAR annually. This is approximately \$1,150,000 CAD. In reality, this amount is equivalent to approximately \$2,367,000 CAD once grossed-up to take into consideration that the claimant is not taxed on his income earned in Saudi Arabia.
- [97] Historically, the claimant earned an average of \$1,700,000 CAD per annum from 2012 to 2014. The base 2015 income of \$350,000 in the Final Order was determined based on the known severance tranche to which the respondent was entitled in that year arising from the employment termination in 2014. He is currently earning a salary equivalent to over \$2 million. The claimant is a healthy, able-bodied individual with a high level of skill and experience in finance. Between 1994 and 2014, the claimant was employed in progressively responsible and remunerated positions at major financial institutions or financial services providers in multiple countries. There is no reasonable explanation for why he took a 95% pay cut, earning only an average of \$75,000 annually from 2016-2020.
- [98] After his termination from his position in Moscow in 2014, the claimant's stated efforts to secure a similarly paying position can be summarized as follows:
- a) The claimant's own evidence establishes that he did not look for high paying employment from 2015 to 2021.
 - b) Despite knowing that Vancouver is not a financial centre where he could find appropriate employment, the claimant voluntarily returned to Vancouver after leaving employment in Moscow. As I stated above, his reason for returning to Vancouver, being to spend more time with the Children is not plausible given the undisputed affidavit evidence of the respondent that the claimant has done nothing of the sort.

- c) After leaving Russia, the claimant chose work for various start-up companies for a nominal salary. The claimant states that, because Vancouver is not a financial centre, there were no appropriate employment opportunities for him. However, in addition to his unreasonable self-imposed geographic restriction, there are various financial services organizations in Vancouver that the claimant could have sought employment with. It would appear he did not do so.
- [99] The evidence shows that the claimant unreasonably chose not to seek employment suitable for his earning capacity and remained underemployed until the Children were no longer minors.
- [100] In addition, the claimant's lifestyle also does not accord with the minimal or no income he claims to have earned.
- [101] In 2015, the claimant purchased a property in West Vancouver (the "West Vancouver Property"). The claimant and his current spouse each held 50% of the company holding title to the property. On or about September 7, 2022, the claimant transferred his ownership of that company to his current spouse for no consideration. The West Vancouver Property was sold on or about September 13, 2024 for \$4,250,000.
- [102] The claimant testifies that his spouse paid for the expenses on the West Vancouver Property, as well as her personal expenses. However, the claimant also deposes that the respondent's income is approximately \$30,000 annually, raising questions about how she was able to pay the expenses on a property worth over \$4 million, in addition to her personal expenses.
- [103] Apart from a \$200,000 mortgage that the claimant obtained in November 2019, the claimant has provided no information regarding how he was able to maintain both the Whistler Property and West Vancouver Property.
- [104] It is not possible for the claimant to have maintained his lifestyle based on the income he claims to have earned. In his Form F8 Financial Statement of July 30, 2020, the claimant's annual expenses at the time were \$145,800. The mortgage payments on the Whistler Property alone (\$88,000 annually) exceed the claimant's alleged income from 2017-2020.
- [105] Where a payor's household expenses exceed their stated income, the court can impute that the payer's income must have been higher than disclosed in order to meet those expenses: *Moytka v. Moytka*, 2001 BCCA 18 at para. 16.
- [106] The claimant did not provide documentation regarding the terms of his employment or contract with various companies he worked with from 2015-2022.
- [107] Based on the documentation that the claimant has produced, it is evident that he had access to additional funds. From 2018 to 2020, the claimant deposited the following amounts of money into his TD account:

- 1) For 2018: \$246,773;
- 2) For 2019: \$199,125, and he received an additional \$200,000, from a mortgage he took out in November 2019;
- 3) For 2020: \$145,785; and
- 4) For 2021: \$406,700.

These deposits exceed by a significant amount the amount of income the claimant says he earned in those years. He has not produced bank statements for his TD account for 2016 and 2017. I do note, however, that the claimant did receive approximately \$1,000,000 in cash or financial assets arising from the terms of the Final Order. He has not accounted for how that amount was handled.

[108] The Court may draw an adverse inference about a person, and attribute income to that person, if they fail to comply with a requirement to disclose information in accordance with the Supreme Court Family Rules, BC Reg 169/2009 in the manner required by the Rules, or provide information that is incomplete, false, or misleading: Family Law Act, SBC 2011, c 25, ss. 213(1)(ii), 213(1)(b), 213(2)(b). The respondent referred me to the recent decision *Popein v Popein*, 2024 BCSC 1159 at paras. 82-83, in which our Court made an adverse inference against a party who failed to produce documentation clarifying discrepancies in his evidence regarding his income.

[109] Parents are obliged to fully and honestly disclose income information and documentation in family law proceedings. At a minimum, this includes tax returns, notices of assessment, statements of earnings, financial statements for self-employment, partnership or incorporated enterprises, and the like. Failure to provide disclosure can result in adverse inferences against, and the imputation of income to, the non-disclosing parent as the court considers appropriate: *Bennett v. Bennett*, 2015 BCSC 699 at para. 46.

[110] I agree with the respondent that the claimant's income from 2016-2022, should be imputed for the following reasons: First, I find that he was deliberately underemployed while the Children were minors. In the circumstances before me, this is likely an indication that this was a calculated plan to avoid paying child support. Second, the claimant also had a high standard of living, which on the financial information provided could not have been supported by his stated income or known assets at the time of the Final Order.

[111] I agree with the respondent that the following amounts, still only a fraction of the claimant's historic and current income, are more than reasonable to impute to him:

- a) For 2016: \$350,000;
- b) For 2017: \$450,000;
- c) For 2018: \$550,000;

- d) For 2019: \$650,000;
- e) For 2020: \$350,000 (despite there not being any evidence that COVID-19 had a significantly detrimental impact on the area of employment for the claimant);
- f) For 2021: \$750,000; and
- g) For 2022: \$850,000.

[112] In consideration of the factors set out in D.B.S. and Colucci, a retroactive award is appropriate, with the order being made retroactive to January 2016. This is a reasonable date given that the claimant says he lost his job in Moscow in April 2014. The D.B.S. and Colucci factors do not support a retroactive decrease. The claimant delayed in seeking a variation of his child support obligations for a decade, has engaged in blameworthy conduct, and faces no hardship if his child support arrears are not reduced given his current financial circumstances. In his oral submissions the claimant did not seek a cancellation of arrears in any event.

[113] Retroactive child support will be calculated based on the claimant's imputed income from 2016 pursuant to the Guidelines income as set out below:

Year

Claimant's Income

Respondent's Income

2016

\$350,000

\$87,123

2017

\$450,000

\$110,363

2018

\$550,000

\$75,874

2019

\$650,000

\$100,189

2020

\$350,000

\$177,856

2021

\$750,000

\$128,739

2022

\$850,000

\$101,202

The years 2017 and 2018 account for AP residing on campus from September to December 2017, and January to April 2018.

[114] I expect that BCFMA will be able to reconcile these figures with their collection efforts.

Overpayment of spousal support

[115] Based on an income of \$361,607 in 2015, the claimant's mid-range lump-sum spousal support obligation should have been \$65,732 for 2015 under the terms of the Final Order. Considering the \$41,940 in s.7 expenses he paid for the Children that year, the spousal support obligations would have been \$55,794. Ignoring those s.7 expenses, this meant that the respondent was obligated by the Final Order to reimburse the Claimant the sum of \$52,268 (the "Spousal Support Overpayment") over the course of 2016.

[116] The respondent did not reimburse the claimant for the Spousal Support Overpayment in 2016. This is understandable given the failure of the respondent to pay ongoing child support. The respondent is to pay the claimant the sum of \$52,268. No interest will be accredited due to the circumstances.

Reimbursement of tuition deposit

[117] The parties agree that the claimant is entitled to a reimbursement from the respondent of s.7 tuition expenses in the amount of \$15,000 and I will make that order.

Conclusion

[118] In conclusion, the claimant's application regarding when the Children ceased being children of the marriage, overpayment of spousal support, and reimbursement of tuition funds is granted, as set out above.

[119] The respondent's application regarding retroactive child support owing is granted as set out above.

[120] The respondent's applications regarding orders affecting BCFMA were adjourned by consent.

[121] The remainder of the applications are dismissed.

Costs

[122] If the parties cannot agree on the matter of costs within 30 days of this decision, they may contact scheduling to arrange a 30-minute hearing before me.

"Wilkinson J."

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