

CANADA / JUDGMENT

Paul v. Potts

2025 BCSC 499

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Supreme Court of British Columbia

DECIDED

20 March 2025

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2025 BCSC 499 Paul v. Potts

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Paul v. Potts,

2025 BCSC 499

Date: 20250320

Docket: E193385

Registry: Vancouver

Between:

Michelle Dawn Paul also known as Michelle Dawn Potts

Claimant

And:

David Warren Potts

Respondent

Before: The Honourable Madam Justice Wilkinson

Reasons for Judgment

In Chambers

Counsel for the Claimant:

D. Beck

Counsel for the Respondent:

K. Redmond

Place and Date of Hearing:

Vancouver, B.C.

January 17, 2025

Place and Date of Judgment:

Vancouver, B.C.

March 20, 2025

- [1] These are my reasons for judgment on the claimant's application in this family law matter.
- [2] The claimant seeks the following from the court:
- a. findings regarding the parties' respective Federal Child Support Guidelines, SOR/97-175 income from 2019 to the present for the purposes of determining the periodic child support amounts and proportionate responsibility of special and extraordinary expenses for the children of the parties relationship;
 - b. an order retroactively varying the amount of child support payable by the respondent for the periods of April 2020 to May 2023 and April 2024 to the present;
 - c. an order for ongoing child support and orders regarding s. 7 Guidelines special expenses; and
 - d. an order under s.224(1)(b) of the Family Law Act, SBC 2011, c 25, that the youngest child shall continue counselling with a designated counsellor.

Background

- [3] The claimant is employed as a paralegal with a current annual employment income of approximately \$105,000.00. The respondent is employed in law enforcement and his current employment income is \$140,753.00 per annum.
- [4] The parties began living together in a marriage-like relationship on or about January 2, 2005, and were married on January 27, 2005. The parties separated on July 1, 2016. They have two children, a daughter who is 18 years old and a son who is 15 years old (the "Children").
- [5] The parties entered into a separation agreement dated November 6, 2017, as a full and final settlement of all issues arising from the breakdown of their marriage (the "Separation Agreement"). The Separation Agreement set out that the parties should share parenting of the Children and that child support would be payable by each to the other based on their respective incomes as set out in their reciprocal financial disclosure each year. The parties were divorced on April 1, 2020.

- [6] Once matters were settled between the parties, the claimant purchased a three-bedroom townhome. The respondent began renting a two-bedroom apartment. Over the years the claimant experienced an increase in her debt load. In addition to the mortgage on her home she took on consumer debt on credit cards at high interest rates. The claimant states this was due to increased expenses for the Children.
- [7] The parties communicated their child support calculations to their shared accountant each year when they filed their tax returns. These communications confirmed the child support payments they were making to each other based on the shared parenting regime set out in the Settlement Agreement.
- [8] The parties disagree on the characterization of parenting time from some time in 2019 onward and the eventual cause of the change from shared parenting to primary residence with the claimant.
- [9] The claimant deposes that on May 29, 2022, she sent an email to the respondent advising him that she was seeking to review child support for the Children. The respondent deposes that he did not receive the email or otherwise notice it.
- [10] The record indicates that neither the May 29, 2022 email as described by the claimant, nor a request by the claimant to address child support were discussed or mentioned in person or by text or by email until the spring of 2023.
- [11] The respondent deposes that he first became aware that the claimant wanted to revisit child support when he received a text message from the claimant in April 2023, when she informed him that he owed \$1,569.70 for ten months of retroactive child support.
- [12] In or about September 2023, the claimant retained counsel. On December 13, 2023, she filed an application to be heard on January 17, 2023, seeking orders with respect to retroactive and ongoing child support and special or extraordinary expenses (the "First Application"). On December 20, 2023, the First Application was adjourned so that the parties could attend mediation.
- [13] On March 21, 2024, the claimant informed the respondent through counsel that she was planning to sell her townhouse. She also informed the respondent that their son wished to relocate with her and would attend high school in Squamish. The claimant further informed the respondent that their daughter, who would be graduating high school in June, was exploring future accommodations near Capilano University or Simon Fraser University.
- [14] The parties attended mediation represented by counsel on March 28, 2024 (the "First Mediation").
- [15] The respondent filed a notice of objection to the proposed relocation on April 10, 2024.

- [16] On April 14, 2024, the claimant signed a lease for a two-bedroom apartment for their daughter commencing May 1, 2024. She deposes that she first signed a two-month lease in order to secure the apartment; after that, she signed a lease with the same date for one year.
- [17] The parties were able to come to an agreement on a few of the outstanding issues between them, which were included in a Consent Order filed on April 29, 2024 (the "Consent Order"). The Consent Order included the following:
- a) the Children would forthwith meet with a child specialist, who would thereafter advise the parties on how the Children were doing and report to the parties the Children's wishes regarding the parenting schedule and the claimant's newly-proposed relocation to Squamish, British Columbia;
 - b) on an interim and without prejudice basis, the respondent would pay interim basic child support to the claimant for the months of April and May 2024 of \$1,321; and
 - c) the respondent would pay the claimant \$17,432 in retroactive child support for the period from June 2023 and March 2024 in full and final satisfaction for this period of time.
- [18] While at an appointment with the child specialist on May 1, 2024, the claimant confirmed that she had listed her townhouse for sale and also informed the respondent that she had signed a lease for their daughter to live in North Vancouver. The apartment is located within two blocks of the respondent's apartment.
- [19] It is clear that the claimant did not consult the respondent about relocation prior to her canvassing of the Children's views on relocation. In addition, the respondent was not consulted with respect to the new independent living arrangements made by the claimant for their daughter.
- [20] On May 28, 2024, both parties attended a second mediation session to resolve the outstanding issues, including retroactive and ongoing child support, special and extraordinary expenses and the relocation, but they were unable to resolve the outstanding issues (the "Second Mediation"). At the Second Mediation, the respondent learned that the claimant had sold her townhouse and was planning on moving into accommodation with her new partner in Squamish.
- [21] The claimant sold her house on July 10, 2024. She relocated to Squamish in July with their son. On July 6, 2024, their daughter moved into the North Vancouver apartment. On July 18, 2024, the claimant filed an application seeking orders with respect to the ability to relocate to Squamish with their son.
- [22] On July 31, 2024, a second consent order was filed that included terms with respect to the relocation (the "Second Consent Order"). The respondent deposes he consented to the relocation because he was extremely distressed and worried about the anxiety this was causing for their daughter in her graduation year, and because their son would otherwise be left in a position of doubt over which high school he would be attending, where he would be

living, or which hockey team he would be able to play for. The claimant deposes that their daughter did not wish to relocate to Squamish or to reside with the claimant. The claimant now indicates that their daughter may attend Simon Fraser University later in 2025.

[23] On July 11, 2024, the respondent advised their son's counsellor that she must cease further counselling sessions with their son due to a conflict of interest as perceived by the respondent. The counsellor is a long-time personal acquaintance of the claimant. The claimant objected to the respondent's suggested counsellor, also due to a perceived conflict of interest, since that counsellor had worked in the same work premises as the respondent for a period of time. Counselling with the previous counsellor has not resumed, nor does the son currently attend sessions with the respondent's suggested counsellor.

[24] In August 2024, the respondent withdrew his objection to relocation. He deposes he did this in an effort to reduce conflict for the children.

[25] The claimant's application before me was filed on October 31, 2024.

Child support

[26] Based on the tax information and as otherwise agreed, I find that the parties' respective Guidelines incomes are as follows:

Claimant

Respondent

a) 2019

\$115,586

\$107,259

b) 2020

\$124,367

\$103,574

c) 2021

\$137,046

\$105,332

d) 2022

\$137,044

\$187,011

e) 2023

\$121,128

\$140,753

f) 2024

\$105,000

\$139,467

- [27] However, the claimant's 2024 total income will likely be greater than \$105,000.00 based on her prior income to July 2024 totalling approximately \$99,000.00 before starting her current employment in September 2024 at an annual salary of \$105,000.00. Both parties will need to confirm their incomes in the usual course once their 2024 tax information is known.
- [28] The claimant submits that a significant change to the shared parenting arrangement started in April 2020.
- [29] The claimant seeks an order to retroactively vary the amount of child support payable from April 2020 to May 2023 and from April 2024 to the present.
- [30] From April 2020 to May 2021, the claimant seeks a retroactive variation of child support on the basis that both Children primarily resided with her for those 14 months. That amount would be \$22,652.00. From June 2021 to May 2022, the child support for the Children would be \$18,840.00. From June 2022 to May 2023 the child support would be \$19,116.00, reduced by the \$7,965.00 paid on December 2, 2024.
- [31] The claimant seeks an order for ongoing monthly support for their son based on the respondent's Guidelines income. The claimant seeks an order that expenses related to the parties' daughter's post-secondary expenses be shared in proportion to the parties' incomes. The claimant includes the cost of their daughter's housing as an education expense.
- [32] The respondent takes the position that for the years 2020 and 2021, the parties exchanged documents and child support as set out in the Separation Agreement. According to the respondent, no retroactive support is owed because the Children were in a shared parenting arrangement. With regard to 2022, he submits that, as usual, the parties exchanged documents and child support. For 2023, the respondent paid full child support for both Children from January to May by way of lump sum payment on December 2, 2024. In addition, the period between June 2023 and March 2024 was resolved at mediation. For April and May 2024, the respondent paid \$1,321.00 without prejudice pursuant to a consent order reached at mediation. In June 2024, the respondent paid \$1,321.00 without prejudice pursuant to terms of another consent order. From July 2024 to the present, the respondent has paid \$2,046.00 per month based on his 2023 T4. He sends \$762.00 each month to their daughter directly.

- [33] It must be noted that the COVID-19 pandemic was in full force as of April 2020 and for a long period of time afterward. The respondent is a front-line worker. Both parties agree they had a very fluid parenting schedule prior to 2020 and an exemplary co-parenting relationship. The respondent would often come to the claimant's home and cook for her and the Children while spending parenting time with the Children in the claimant's home. The pandemic forced a change in the respondent's work schedule from a reliable Tuesday to Friday rotation to a "watch" rotation in order to help the front line. The claimant was working from home and the Children were not leaving home for school. Given the public nature of the respondent's work, the parties were concerned about infection risk for the Children and the claimant.
- [34] The respondent states they discussed how unconcerned they were about the parenting schedule at each home and agreed to work as a team for all of them to stay safe, acquire food, and see one another. The respondent states the claimant expressed that the parties would exchange the kids to the best of their abilities, and that she would only like to balance out their support payments equally along with s. 7 expenses. He deposes the claimant would often express how the kids were now teenagers, how they could apply a fluid parenting approach, how much easier the Children were, and how she liked having them around while working from home. The claimant does not refute the version of events as described by the respondent in her responsive affidavit.
- [35] The claimant says she sought to revise the child support based on the fact of there no longer being a shared parenting relationship as early as May 2022, in an email the respondent states he never received. A July 30, 2022, voicemail referred to the court by the claimant does not actually confirm he received that email.
- [36] In August 2022, the parties adjusted their monthly child support payments in accordance with their 2021 tax returns, despite this being after the time in which the claimant deposes that she sent an email insisting that child support was not correct. The respondent explains this as her effort to still negotiate a change to child support. Until 2021, the respondent had historically earned more than the claimant. After that 2022 annual adjustment, the claimant sent the respondent \$1,836.62 per month starting in August 2022, and the respondent sent her \$1,569.70 with a top up of \$266.92, in order to equalize their monthly payments.
- [37] The claimant deposes that she only collected the child tax benefit for one of the Children on the understanding that the respondent claimed the other child. He deposes, however, that he has never collected the child tax benefit.
- [38] As noted, the respondent denies receiving an email from the claimant on May 29, 2022, requesting a change in the child support obligations. His evidence, as supported by the documentary materials before me, is that there was nothing to suggest that their ongoing conversations or emails between them and to their accountant did not represent a satisfactory resolution of child support. His evidence is that, had he received this email, he would have addressed it immediately. This evidence is consistent with his other emails and

text conversations with the claimant regarding financial issues and other issues more generally.

- [39] The respondent acknowledges a text message from the claimant in April 2023, telling him that he owed \$1,569.70 for ten months of retroactive child support. Following conversations between them in person, the parties again sent their tax information to their accountant on May 23, 2023. The parties emailed each other and their accountant throughout 2021, 2022 and 2023, providing tax returns and confirming the child support amounts they had paid each other. There is a sentence in the claimant's email May 23, 2023, that says, "Let's talk about CS [child support] from April 2023 onwards and what that looks like." The ongoing email correspondence between the parties details their continued conversations concerning child support payments to each other.
- [40] On August 4, 2023, the claimant sent a written proposal to the respondent suggesting \$1,100.00 per month of child support retroactive to June 2023 with \$125.00 paid directly to each of the children for allowance, plus \$200.00 contributions to their RESP. The claimant states in that email that the Guidelines Table amount of child support is too much. However, this August 4, 2023 offer was rescinded August 23, 2023.
- [41] As noted above, on March 28, 2024, the parties attended their First Mediation session. It would appear that the parties negotiated in good faith and agreed to an order that satisfied the claimant's claims for an adjustment of child support for the period of time between June 2023 and March 2024. The respondent acknowledges that, despite his objections, their daughter had been primarily residing with the claimant since that date. It would appear that at this time the daughter no longer wished to stay overnight with the respondent because the respondent only had one additional bedroom, and she did not want to share it with her brother.
- [42] The parties entered into a consent order that included a term that they would communicate about all parenting issues directly and that they agreed to engage a child specialist to speak to the Children and hear their views in order to help resolve the relocation issue. The respondent continued to request his shared parenting weeks with their son. From the communications in the record before me, it would appear that the claimant acceded to their son's wishes without exuding any pressure on him to continue his shared parenting time with the respondent, instead leaving the decision up to their son. She made it clear early on in her communications that the decision as to parenting time with the respondent was their son's to make and that she was not going to challenge his wishes.
- [43] By the summer of 2024, the claimant and their son moved to Squamish and their daughter was living in a North Vancouver apartment independently.

[44] At present, the respondent pays full Table child support in the amount of \$1,284.00 to the claimant for the support of the parties' son (based on his 2023 T4 of \$140,753.00). He pays \$762.00 directly to their daughter because she lives independently. The claimant agrees that child support may be paid directly to their daughter. Total support paid is \$2,046.00 which is the Table amount for two children.

[45] The principles 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.

[46] Under s. 17 of the Divorce Act, RSC 1985, c 3 (2nd Supp), 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;

[47] When making such an order the court must satisfy itself that there has been a change in circumstances as set out in the Federal Child Support Guidelines:

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.

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

[49] Our Court of Appeal has held that such statutory provisions indicate the legislature's (or parliament's) intention for child support agreements to be variable in the face of changing circumstances for 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.

[50] While the respondent claims he did not receive the May 2022 email, it is clear from the record that, at that point the claimant was of the view that the shared parenting regime recently changed and as of April 2022 and that the respondent should be paying child support based on the Children primarily residing with her.

[51] I accept that in 2020 and 2021 the parenting regime remained flexible given the pandemic conditions and the conduct of the parties. The Children were growing older and began expressing a preference for less overnight time with the respondent. The claimant's residence afforded the Children to each have their own bedroom. The respondent's residence did not provide that amenity and as they aged this was not attractive to them, particularly to their daughter.

[52] By the spring of 2022, it would appear that a normalised shift took place in the parenting time. By then the Children were each spending less than 40% of their time with the respondent. As such, this resulted in a material change in circumstances which continued from April 2022 onward.

[53] The parties' daughter is employed on a part-time basis, netting approximately \$600.00 a month. She is contributing toward her costs of living with these funds.

[54] Child support for both Children was payable by the respondent from April 2022 to the present based on his Guidelines income as set out in para. 26 above to be adjusted by subsequent T4 and tax return information. The parties are to reconcile their respective offset payments along with the subsequent payments made by the respondent under the consent orders to determine the amount of support outstanding. Given the time period involved, and the timing of effective notice provided to the respondent, this amount would not appear to rise to the level of hardship which would warrant a reduction. If the parties cannot agree as to the amounts payable I refer the parties to the Registrar to make such a

determination.

- [55] The respondent may pay ongoing support payable with respect to their daughter based on the current breakdown (currently \$762.00) directly to her so long as she lives independently.

What are the s.7 post-secondary education expenses for their daughter?

- [56] Their daughter has been living independently since July 2024. She is still under the age of 19. That decision was made unilaterally by the claimant, despite sharing guardianship with the respondent. This is unreasonable conduct. I agree with the respondent that their daughter could have resided either with the claimant or the respondent at that time. It is not a necessity that she should have her own apartment while attending Capilano University (or, prospectively, Simon Fraser University). Public transit is readily available.
- [57] Prior to separation, the parties did not enjoy a lifestyle which would have afforded separate accommodation for either of their children. That has not changed.
- [58] The Separation Agreement outlines certain agreed upon special or extraordinary expenses which include "expenses for post-secondary education that are not covered by the Children's RESPs". As well, the agreement provides that:

Neither party will incur a new Special or Extraordinary Expense for the Children for which that party expects the other party to pay his or her proportionate share without that expense being agreed to in writing by the other party in advance of the expense being incurred.

- [59] The respondent has never agreed to the expenses associated with an apartment for their daughter.
- [60] Section 7(1) subsection (e) of the Guidelines sets out considerations for what constitute post-secondary expenses:
- (b) expenses that the court considers are extraordinary taking into account
 - (i) the amount of the expense in relation to the income of the spouse requesting the amount, including the amount that the spouse would receive under the applicable table or, where the court has determined that the table amount is inappropriate, the amount that the court has otherwise determined is appropriate,
 - (ii) the nature and number of the educational programs and extracurricular activities,
 - (iii) any special needs and talents of the child or children,
 - (iv) the overall cost of the programs and activities, and
 - (v) any other similar factor that the court considers relevant.

- [61] The rental expense is not reasonable considering the income and expenses of the parties before and after separation. The claimant took on this financial obligation at her own risk. In addition to failing to comply with the terms of the Separation Agreement, it was not

reasonable for her to unilaterally enter into a lease on behalf of the parties' daughter. It is still open to their daughter to reside with the respondent, and for the claimant to find another sublet tenant until the lease runs out. Independent accommodation is not a necessary post-secondary expense in these circumstances.

- [62] As referenced in the Separation Agreement, there is a family RESP. That RESP is for the equal benefit of both Children. Since the apartment is not a necessity for their daughter's education, access to the RESP to pay for that apartment would be an unreasonable use of that fund. The respondent is not responsible to contribute toward their daughter's rent and the family RESP is not to be used for that purpose.
- [63] Tuition, books and schooling supplies should be paid first from their daughter's share of the family RESP and then any unpaid portion of their daughter's tuition will be paid proportionately by the parties. Household expenses are not education related expenses in these circumstances.
- [64] A cell phone is an expense that is covered by ongoing child support or otherwise by their daughter personally, unless agreed upon by the parties as a special and extraordinary expense.
- [65] The parties' proportionate share of agreed-upon special expenses is to be based on Guidelines incomes as set out in para. 26 to be adjusted by subsequent T4 and tax return information.

Counselling for the parties' son

- [66] It is agreed that counselling is a proper special and extraordinary expense.
- [67] Their son was enrolled in counselling with the counsellor previously mentioned. This counsellor and the claimant have travelled together and are friends who socialise together. The respondent was not consulted about retaining this counsellor. The respondent is concerned that this counsellor has a conflict of interest due to her personal relationship with the claimant. The counsellor also has prior knowledge of the Children through her friendship with the claimant and time spent with them along with her own children prior to her obtaining her counselling qualifications. The respondent submits she is not able to provide independent counselling to their son, or the parties.
- [68] The respondent suggested a child specialist for their son. That person was objected to by the claimant as a result of the child specialist disclosing that she had worked in the same building (but never actually met), the respondent a number of years ago. The claimant objected on the basis of a perceived conflict of interest.
- [69] On July 11, 2024, the respondent wrote to the child specialist advising her to discontinue counselling their son due to a conflict of interest. She did not respond to the respondent. The sessions with this child specialist have stopped.

- [70] I agree with the respondent that the claimant's proposed counsellor is too close to the family to provide independent counselling services to their son. The respondent's position is reasonable in this regard. The claimant asks the court to direct that their son may choose his own counsellor, who she submits will be the claimant's proposed counsellor. This is an unreasonable position to take. It is not in the best interests of their son to be counselled by a professional who is not at arm's length. I would be surprised if this counsellor even continues to offer her professional services to the parties or their son.
- [71] It is appropriate to take into account the child's wishes, but their son is still a child. He may not appreciate the professional boundaries at issue here.
- [72] The claimant has taken what appears to me to be an unreasonable position with respect to the respondent's proposed child specialist, but I will not direct that this specialist be the counsellor for their son. I will direct that the parties seek recommendations for alternative counsellors from either proposed counsellor, or from other professionals and select a counsellor from that list.

Conclusion

- [73] Child support is payable by the respondent to the claimant on the basis of a change in material circumstances as of April 2022, based on the respondent's Guidelines income as set out above. From July 2024 onward and so long as their daughter lives independently, the respondent may continue to pay the difference in the amount payable between one child and two children to their daughter directly.
- [74] Expenses for independent accommodation for their daughter are not special and extraordinary expenses payable by the respondent and they are not to be paid from the family RESP.
- [75] Special and extraordinary expenses are proportionately payable by the parties based on their Guidelines income as set out above.
- [76] The parties will arrange for a new counsellor for their son.

Costs

- [77] It would appear that no party has been substantially successful on the application. Unless there is information of which I should be made aware, the parties will bear their own costs on the application.

"Wilkinson J."

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