CANADA / JUDGMENT

R.A.V. v. J.M.M

2016 BCSC 1377

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2016 BCSC 1377 R.A.V. v. J.M.M.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R.A.V. v. J.M.M.,

2016 BCSC 1377

Date: 20160614

Docket: E150441

Registry: Vancouver

Between:

R.A.V.

Claimant

And

J.M.M.

Respondent

Before: The Honourable Madam Justice Arnold-Bailey

Oral Reasons for Judgment

In Chambers

Counsel for the Claimant:

Magal Huberman

Counsel for the Respondent:

Lewis Spencer

Place and Date of Hearing:

Vancouver and

New Westminster, B.C.

February 25 and March 31, 2016

Place and Date of Judgment:

New Westminster, B.C.

June 14, 2016

[1] THE COURT: These are my reasons for judgment in relation to this application.

Introduction

[2] This is an application brought on behalf of R.A.V. ("the Claimant"), for a review of child support payable by her former husband, J.M.M. ("the Respondent"), in relation to their child, S.I.V. ("the Child"), who will turn 14 years old this July. They parent the Child in a shared parenting arrangement. Therefore, the determination of child support in the present case engages s. 9 of the Federal Child Support Guidelines, SOR/97-175 [Guidelines], and the principles enunciated by the Supreme Court of Canada in Contino v. Leonelli-Contino, 2005 SCC 63.

[3] The Claimant seeks: retroactive child support based on an increase in the Respondent's income; an increased amount of ongoing child support; and some orders in relation to the disclosure of financial and other information relevant to the calculation of child support and s. 7 special and extraordinary expenses.

[4] The Respondent is opposed to any amount of retroactive child support being paid to the Claimant and seeks to have the income of her new husband included in her income as determined by the Guidelines, or at least considered in relation to the standard of living in her residence.

The Relief Sought by the Claimant

[5] The Claimant seeks the following orders with respect to the child support payable by the Respondent for the Child:

1. An order that the Respondent pay retroactive child support for the years 2013, 2014 and 2015 based on the Guidelines in accordance with his income; or alternatively, that the Respondent pay retroactive child support for the same years based on the set-off amount of child support payable pursuant to the Guidelines in accordance with his income and the income of the Claimant, or such other amount as the Court considers appropriate.

2. An order that the Respondent pay ongoing child support based on the Guidelines in accordance with his income; or alternatively, that the Respondent pay the set-off amount of child support pursuant to the Guidelines in accordance with his income and the income of the Claimant, or such other amount as the Court considers appropriate.

3. An order that the Respondent pay his retroactive share of the Child's s. 7 special and extraordinary expenses and the Child's expenses as defined in the agreement (the "Child's expenses") in accordance with the incomes of each party for the period of January 1, 2013 to the date of the order.

4. An order that each party's respective share of the Child's expenses be adjusted commencing on the date of this order and continuing on June 30 of every year, or such other date as the Court considers appropriate.

[6] The parties entered into a separation agreement ("the Agreement") dated September 30, 2011, which included parenting arrangements and child support for the Child.

[7] In addition to the relief specified above or in the alternative, the Claimant seeks an order pursuant to s. 148(3) of the Family Law Act, S.B.C. 2011, c. 25 [FLA], setting aside paras. 42(c), 43, 44 and 45 of the Agreement and replacing them with the following orders:

1. Effective January 1, 2013 or such other date as the Court deems appropriate and continuing each and every month thereafter, the Respondent will pay child support to the Claimant in the amount payable by him pursuant to the Guidelines in accordance with his income.

2. Alternatively, effective January 1, 2013 or such other date as the Court deems appropriate and continuing each and every month thereafter, the Respondent will pay child support to the Claimant based on the set-off amount of child support payable by him pursuant to the Guidelines in accordance with his income and the income of the Claimant, or such other amount as the Court deems appropriate.

3. Effective January 1, 2013 or on such other date as the Court deems appropriate, and continuing each and every month thereafter the Respondent will pay his share of the Child's expenses in accordance with the incomes of each party.

[8] In addition to the exchange of documents and information required of the parties pursuant to the Agreement, the Claimant seeks a number of additional terms to ensure timely exchange by the parties of the information necessary to determine the appropriate amount of child support and special and extraordinary expenses.

Background

[9] The parties married June 5, 1995. The Child was born July 17, 2002. The parties separated December 19, 2009 and subsequently became divorced on March 13, 2012.

[10] The Claimant has since remarried Mr. T.M. on June 23, 2012 and they commenced cohabitation in her residence in North Vancouver on June 7, 2013. Mr. T.M. previously resided in California.

[11] The parties entered into and have maintained a shared parenting arrangement whereby the Child lives with each parent more than 40 percent of the time. They share joint custody and guardianship of the Child, who is in the care of each party alternating weeks from Wednesday to Wednesday.

[12] Pursuant to the Agreement, the Respondent was to pay child support to the Claimant in the amount of $400 per month in two instalments of $200 each and they were to share specified expenses in proportion to their incomes.

[13] At the time of the Agreement, the Claimant's income was approximately $86,000 per year and the Respondent's was $150,000 per year. Based on the parties' incomes at the time of the Agreement, the set-off amount of child support payable by the Respondent would have been $521.

[14] Pursuant to the Agreement, the parties were to exchange specified income information each year. Neither the Claimant nor the Respondent has provided this information since the Respondent provided his 2012 Notice of Assessment.

[15] The parties' Agreement includes provisions specifying that their incomes will be used for determining child support in accordance with the Guidelines and that their incomes will be used to determine their respective shares of the Child's expenses, including s. 7 expenses. The Agreement sets out the information that each is obliged to share with the other and when it is to be exchanged. Provisions of the Agreement stipulate that the Child will live with each parent not less than 40 percent of the time and address their respective share of the Child's s. 7 expenses.

[16] The Agreement contains a provision that each party is obliged "to notify the other immediately upon becoming aware of a material change in circumstances that may affect child support obligations and entitlement to apply for variation of child support."

[17] The Agreement contains a list of circumstances that are agreed to give rise to a review of child support and s. 7 expenses at para. 66 that includes an increase in the "base income" of either party by $20,000 (para. 66(e)). It also provides that in the event of a dispute, the parties will attempt mediation before initiating court proceedings.

[18] Since the Agreement was made, the Respondent's income has increased as follows: in 2012 to $198,896; in 2013 to $278,111; in 2014 to $286,533; and in 2015 to $330,443, based on his T4.

[19] The Claimant's income has also increased: in 2012 to $87,732; in 2013 to $89,462, including $2,000 from a shared pension income with her current spouse; in 2014 to $91,409, composed of $89,409.85 in employment income and approximately $1,999 from a pension split with her current husband; and in 2015 to $93,569, based on her T4 slip.

[20] As of May 2012, the Respondent increased his child support payments to $600 per month, payable in two equal instalments and the parties' respective shares of the Child's expenses were modified such that the Respondent's share became 70 percent and the Claimant's share became 30 percent. The Claimant's position is that she did not agree that this amount of child support was sufficient but she did accept the increased amount.

[21] The Respondent provided some disclosure about increases in his income (Tab 6, para. 10) but the extent of the increases in 2013 and 2014 was not disclosed until April 2015.

[22] Subsequently, the parties continued to discuss payment of the Child's expenses in 2013 and 2014, but the Respondent did not agree to a further increase in child support.

[23] The parties disagree as to when notice of the Claimant's request for an increase in the amount of child support payable was effectively given. The Claimant commenced these proceedings in February 2015 seeking relief related to parenting arrangements for the Child and child support. Issues related to the parenting arrangements were resolved on an interim basis pursuant to a consent order pronounced by Master Scarth on February 24, 2015. The Respondent subsequently made an application to set aside the consent order that was dismissed.

[24] The parties attended at a Judicial Case Conference ("JCC") before Mr. Justice Funt on April 15, 2015 and, by consent order, agreed to return for a further JCC on June 9, 2015. However, the Respondent was of the view that nothing could be achieved at a further JCC and it was cancelled.

[25] While the parties exchanged their 2012 Notices of Assessment in 2013, neither party exchanged further or all of the documents stipulated in the Agreement thereafter until April 2015, prior to the JCC.

[26] The parties agreed to attend mediation before coming to court as required by the Agreement. However, in August 2015 the Respondent took the position that he would not attend mediation unless the Claimant provided comprehensive financial disclosure from her current spouse, Mr. T.M. Mr. T.M. retained separate counsel and refused to provide the financial disclosure sought by the Respondent.

[27] The Claimant brought the present application to be heard on October 27, 2015 but the Respondent sought orders that the matter be sent to mediation and that Mr. T.M. provide financial disclosure, including a sworn financial statement, income tax documents and statements from bank accounts he held jointly with the Claimant.

[28] Mr. Justice Bracken subsequently ordered that the parties to attend mediation; the Claimant to produce the statements for the bank accounts she held jointly with Mr. T.M. for 2014 and 2015; and the Claimant to provide a summary for 2014 and 2015 of all expenses and financial benefits contributed to by Mr. T.M. or associated with his presence in the household.

[29] Mr. Justice Bracken declined to order the further financial disclosure sought as Mr. T.M. was not a party to the litigation and was not before the court. He indicated that if the Respondent wished to press the point then he would have to take the proper steps to bring Mr. T.M. before the court. No such steps have been taken.

[30] Subsequently, the Claimant made available the materials ordered by Mr. Justice Bracken, including copies of the bank statements from the two joint bank accounts she shared with Mr. T.M.

Positions of the Parties

The Claimant's Position

[31] The Claimant submits that the amount of child support that the Respondent is currently paying is insufficient. A set-off amount of $600 per month, the amount currently being paid, corresponds to the Respondent as the payor having a Guidelines income in the range of $165,000 to $170,000. The Respondent's income is in fact significantly higher and thus the amount of child support he is paying does not correspond to his actual means.

[32] While the set-off amount is the starting point for a calculation of child support in a shared custody parenting situation, the Claimant acknowledges that it has no presumptive value. This is because the Court has a broad discretion to review the needs and means of each parent and the Child in such circumstances that includes an examination of the standard of living of the Child in each household. The objectives of the Guidelines require that there be a fair standard of support for the Child and fair contributions from both parents.

[33] The Claimant submits that while the Respondent disclosed some of the increases in his income, he did not disclose them all until after the Claimant began these proceedings. Further, she submits that the Respondent ought to have known that the amount of child support he was paying was inadequate given his income.

The Respondent's Position

[34] The Respondent's position is that the $600 per month of child support he is currently paying is sufficient. Without full financial disclosure by Mr. T.M., he submits that the Court cannot engage in the requisite detailed comparison of the Child's standard of living in the homes of each of his parents to determine whether an increase in the monthly amount of child support is warranted. He further submits that he has paid the amount he has been required to pay and has not engaged in blameworthy conduct such that the Claimant should not now be able to claim amounts of retroactive child support.

Analysis and Findings

The Claimant's Claim for Retroactive Child Support

[35] The leading authority on the court's discretion to order retroactive child support is D.B.S. v. S.R.G; L.J.W. v. T.A.R.; Henry v. Henry; Hiemstra v. Hiemstra, 2006 SCC 37 [D.B.S.]. In exercising this discretion, the court must attempt to balance certainty and flexibility: D.B.S. at para. 96. Certainty is achieved when the payor parent follows a court order (at para. 63) or pays the child support amounts required by a separation agreement, as in the present case. Yet flexibility demands that orders should be varied when the circumstances underlying them change. Child support orders are not set in stone: D.B.S. at para. 64. Parents have an obligation to support their children in accordance with their income.

[36] As Mr. Justice Bastarache points out at para. 54:

under the federal scheme, a payor parent who does not increase his/her child support payments to correspond with his/her income will not have fulfilled his/her obligation to his/her children.

[37] Against the backdrop of these underlying principles, Mr. Justice Bastarache set out the four factors for determining entitlement to retroactive child support:

1. Whether there was a reasonable excuse for why the recipient parent did not seek a variation of support earlier.
2. The conduct of the payor parent.
3. The circumstances of the child.
4. Any hardship that would be occasioned to the payor parent by a retroactive award.

[38] None of these factors is determinative: D.B.S. at para. 99.

[39] Before I discuss these factors in the context of the present case, I will deal with the issue of notice by the recipient parent to the payor parent that an increase in child support is being sought, which is known as the date of retroactivity.

[40] Mr. Justice Bastarache sets out four possible choices for the date of retroactivity at para. 118 of D.B.S.:

the date when an application was made to a court; the date when formal notice was given to the payor parent; the date when effective notice was given to the payor parent; and the date when the amount of child support should have increased.

[41] The date the application was brought and the date when formal notice was given should generally not be used. These encourage parties to bring their disputes to court as quickly as possible instead of informally resolving them: D.B.S. at para. 120.

[42] Similarly, the date when the amount of child support should have increased should generally not be chosen because it infringes on the payor parent's interest in certainty. However, this interest may be displaced when the payor parent has engaged in blameworthy conduct: D.B.S. at para. 124.

[43] Not disclosing a material change in circumstances such as an increase in income is considered blameworthy conduct for these purposes. In such circumstances it may be appropriate to award retroactive child support going back to the date of the income increase.

[44] As a general rule, the date of effective notice should be chosen: D.B.S. at para. 118. Any indication by the recipient parent that the current amount of child support needs to be renegotiated is sufficient to constitute effective notice. There is no need to take legal action, "all that is required is that the topic be broached": D.B.S. at para. 121.

[45] That being said, if the recipient parent engages in a prolonged period of inactivity once the topic is broached and fails to take any action, the payor parent may be lulled into believing that the status quo is sufficient. Accordingly, the payor parent's interest in certainty may have returned: D.B.S. at para. 123. Therefore, as a general guideline, "it will usually be inappropriate to make a support award retroactive to a date more than three years before formal notice was given to the payor parent": D.B.S. at para. 123. This is to ensure that a party gives effective notice and contemplates taking legal action if discussions on increased support do not move forward.

[46] The Claimant's position is that the Respondent's child support has been a live issue since 2013 (Tab 10, para. 5). The Claimant's position is contained in her fourth affidavit dated June 4, 2015 (Tab 6, paras. 14-18, Exhibit B, pp. 33-37 and Exhibit C, p. 45) and her fifth affidavit dated October 23, 2015 (Tab 10, Exhibit B, pp. 4-5 and Exhibit C, pp. 7-10). She indicated that the Respondent preferred to pay all the Child's expenses rather than increase the amount of child support he was required to pay.

[47] The Respondent's position is that the Claimant did not give effective notice that she sought an increase in child support until she filed her action in February 2015. In particular, his view of the matter is that an exchange of emails in early 2014 was not clear and unequivocal notice that she sought an increase in child support.

[48] The Claimant sent the Respondent an email on January 24, 2014 that included the following:

I just wanted to follow up as in Nov you mentioned your salary was going up this year & next. You shared one idea of assuming all of [the Child's] expenses, which you know I could not agree to. The primary reasons for this were;

- I need to agree on what we are doing for [the Child] & in turn pay my portion
- He already picks up on what you buy & doesn't want to tell me 'cause dad got it'. I just leave it be but [the Child] has figured a lot out.

Hopefully by now you have thought of some more ideas. The only one I came up with was you adjusting the amount you pay me.

Let me know your ideas.

[49] The Respondent responded by an email entitled "Re: Salary Stuff" on February 19, 2014, stating:

I am not sure on this. For a lot of reasons I am not inclined to increase the amount paid to you. I would rather contribute to a [the Child] only fund. Perhaps with his bar mitzvah and other ticket items (if he makes the Quebec tournament, school options etc) I could set up an account and pay into it.

As to my earlier suggestion, you would always have 50% share in decision making regardless of contribution % I have never discussed with [the Child] who pays what-it is always "Mom and I". And he picks up on what you buy for him and likewise has not told me cuz u got it for him

[50] The Respondent deposed in his third affidavit sworn October 21, 2015, at para. 11, that after this exchange of emails, up to the point that the Claimant filed the present action in February 2015, the Claimant never indicated to him that she wanted an increase in the amount of child support he paid to her. He deposed that this was so despite the fact that every year he does a reconciliation of expenses that they pay for the Child that results in him receiving a tax refund and providing her with a portion of the tax refund attributable to dependent credits or expenses she has paid. He also referred to an occasion where he sought her cooperation in relation to an audit by the Canada Revenue Agency (CRA) with respect to the Child's expenses and, even then, he deposed she did not request copies of his tax returns.

[51] The Claimant deposed at paras. 18-19 of her fourth affidavit that she did not pursue the issue of an increase in child support after February 2014 because she was occupied with other matters. In December 2012, she and the Respondent attended a mediation session with regard to an activity of the Child's that she did not wish to continue during her parenting time. They attended one session and did not resolve the matter. She did not take steps to increase the amount of child support before commencing the action in February 2015 because she was hoping to resolve this matter without taking legal action. She also deposed that her schedule was busy. She works full-time, runs her household, and is very involved in the Child's life. She preferred to avoid conflict and had concerns about financing the litigation. She stated that she endeavoured to resolve the issue by mediation, but then the Respondent sought financial disclosure from Mr. T.M. that was not forthcoming and the Respondent saw no value in mediation.

[52] The Court finds, based on the email correspondence set out above and the evidence deposed to by each party, that the Claimant did not give effective notice that she was seeking an increase in the amount of child support paid to her by the Respondent until she commenced these proceedings in February 2015. The parties had regular dealings about financial

matters and it would have been a simple matter for the Claimant to unequivocally respond to the Respondent's email set out above with a demand for current and past financial disclosure, make the same available herself, and seek an increase. Instead, she chose not to take this course of action hoping that matters would resolve.

[53] I will now briefly discuss each of the four factors referred to in D.B.S. in the context of the circumstances of this case to determine whether retroactive child support is appropriate.

[54] The first factor examines the recipient parent's delay in bringing forward an application for increased child support from the point in time that higher payments were warranted. A delay is not presumptively justifiable: D.B.S. at para. 101. If the recipient parent knew about the payor parent's income increases and decided arbitrarily not to bring an application, a reasonable excuse will not exist. This encourages recipient parents to act promptly to ensure their child's needs have been met.

[55] On the other hand, where the recipient parent justifiably feared retribution from the payor parent or lacked the financial means or legal advice necessary to bring an application, the recipient parent will have a reasonable excuse for their delay: D.B.S. at para. 101.

[56] The Claimant in this case deposes that the Respondent provided her with his 2012 Notice of Assessment in 2013, which showed an increase in his income to $198,896 from $156,027 in 2011. Then neither party exchanged financial information until shortly before the JCC in April 2015. No further steps were taken at this point as the parties continued their discussion about the payment of the Child's expenses.

[57] In assessing the nature of delay, the following is stated in D.B.S. at para. 102:

Notably, the difference between a reasonable and unreasonable delay often is determined by the conduct of the payor parent. A payor parent who informs the recipient parent of income increases in a timely manner, and who does not pressure or intimidate him/her, will have gone a long way towards ensuring that any subsequent delay is characterized as unreasonable: [citation omitted]. In this context, a recipient parent who accepts child support payments without raising any problem invites the payor parent to feel that his/her obligations have been met.

[Emphasis in original.]

[58] After providing his 2012 Notice of Assessment in 2013, the Respondent did not inform the Claimant of his income increases in a timely manner. He did not comply with the terms of the Agreement pertaining to timely disclosure of his income; however, neither did the Claimant. She accepted the increased amount of child support in May 2012 from $400 to $600 per month. She deposed that although she did not consider this to be sufficient, she continued to attempt to resolve issues between the parties amicably and she raised the issue of an increase in child support in the email in January 2014, to which I have referred.

[59] Considering these interactions, both parties are responsible for the issue of the sufficiency of child support not being addressed earlier. In terms of the Respondent payor, he did not take the necessary steps just referred to in D.B.S. to meet his disclosure responsibilities in a timely way. The Claimant accepted an increase in child support without clearly pressing the issue that she considered it to be insufficient and to a certain extent she lulled the Respondent into believing that his child support obligations had been met. She did not take legal steps to move the matter ahead until February 2015 and I do not accept that she did not have the means or the opportunity to give clear notice and embark upon the process set out in the Agreement. The Claimant also contributed to the delay up to early 2014 by not providing her financial information and thereafter not pressing the matter sooner. Delay in this case is not a compelling factor one way or the other.

[60] Turning to the second factor, when a payor parent has engaged in blameworthy conduct, their interest in certainty diminishes. Blameworthy conduct in this context is defined as "anything that privileges the payor parent's own interests over his/her children's right to an appropriate amount of child support": D.B.S. at para. 106.

[61] Concealing income increases as well as intimidating or misleading the recipient parent are all sufficient for this purpose and should be discouraged by the court, but a payor parent's failure to increase support payments when their income increases will not always be deemed blameworthy conduct. In this regard, the court can compare the amount that the payor should have been paying with the amount they actually did pay. The closer the two amounts are, the more likely it is that the payor parent reasonably believed that they were meeting their child support obligations.

[62] It is important to note here that given the shared parenting regime, an appropriate increased set-off amount to be paid by the Respondent requires disclosure of both parties' financial information. If the parties are unable to agree on the amount to be paid, the court is required to review this financial information and other relevant information to conduct an examination of the standards of living for the Child in both households, considering the means and needs of the parents.

[63] In the present case, it is also important to note that the parties discussed finances in relation to the Child. They were regularly in contact. They live near to each other. Neither is impoverished in any way. The Respondent had voluntarily increased the amount of child support he would pay from $400 to $600 per month. The main focus of their discussions up to at least 2014 was the Child's expenses that they shared on a percentage basis. The Respondent agreed to pay a greater proportion of the Child's expenses. He has paid the amounts he agreed to pay, both in terms of the increased monthly child support and his share of s. 7 expenses and the Child's expenses. It cannot be said that he has preferred his own interests over those of the Child. The Court does not find that the payor parent, here the Respondent, has engaged in any blameworthy conduct.

[64] The third factor, the past and present circumstances of the child, must also be considered to determine whether a retroactive child support order is appropriate. A child who has endured hardship throughout the period that the child support should have been increased may be entitled to compensation as a result. Furthermore, if the child is currently in need and will therefore benefit more from a retroactive award, this will militate in favour of such an award: D.B.S. at para. 111.

[65] The evidence before the Court indicates that the Child enjoys a high standard of living with each parent. He has not suffered and even if the Respondent's payments were to continue in their current amounts, he would not experience financial need.

[66] The last factor requires the court to consider financial hardship to the payor parent as retroactive child support orders affect the payor parent's finances in a way that prospective orders do not. The amount ordered is based on the payor parent's income during the period when it increased rather than their present income and they may also have new families and new children to support. Where possible, retroactive awards should be structured to minimize hardship.

[67] In the present case, based on the evidence before the Court, the Respondent's only financial obligation other than supporting himself is providing financial support to the Child. He makes a very good living as a lawyer and has not re-partnered. Any retroactive child support order to be paid by him to the Claimant would not constitute a hardship.

[68] On balance, a consideration of the D.B.S. factors leads the Court to conclude that a retroactive award of child support is not appropriate in the circumstances of this case. The first three factors militate against such an award or are neutral, while only the last factor, lack of hardship, weighs in favour of it. For these reasons, I do not find that the Claimant may claim increased child support retroactively for 2013 and 2014.

[69] Any claim for child support will be prospective and will commence as of February 2015, when the present application was filed, and will be based on a consideration of the parties' 2016 incomes.

The Claimant's claim that the Respondent pay the full table amount of child support

[70] In the relief sought, the Claimant seeks an order that the Respondent pay the full table amount of child support; or in the alternative, the set-off amount.

[71] There is no legitimate basis upon which this Court could order that the Respondent pay the full table amount based on his Guidelines income. The parties separated in December 2009 and divorced by desk order March 13, 2012, having dealt with all matters including property division in the separation agreement dated September 30, 2011. They embarked upon a shared parenting regime which results in the Child spending approximately equal time with each parent.

[72] Their Agreement initially upon separation required the Respondent to pay the Claimant $400 per month in child support that he then agreed to increase to $600 per month.

[73] The Claimant received a payment of $430,000 to represent her share in the former matrimonial home and a vehicle. She purchased her own home for $812,000 using presumably all or most of these funds and obtained a mortgage for $425,000 for the balance. In 2012, she married Mr. T.M., who has an income that exceeds hers, and she has made improvements to her residence. Together with Mr. T.M., she enjoys a good standard of living. She contributes 30 percent currently towards the Child's expenses. Mr. T.M. contributes to the household in ways I will discuss shortly. The Claimant continues to work with a gradually increasing salary which in 2014 was $91,409, including a modest amount from a pension split with Mr. T.M. Generally, she maintains separate finances from Mr. T.M., with some limited exceptions.

[74] The correct starting point to consider the amount of child support payable in this case is the set-off amount based on the incomes of both parents and then requires consideration of the other factors set out in s. 9 of the Guidelines.

Section 9 Considerations and the Quantum of Child Support

[75] Where the parties have equal or near equal parenting time with the Child, the Guidelines specify the following manner of determining the appropriate child support amount:

9 Where a spouse exercises a right of access to, or has physical custody of, a child for not less than 40 per cent of the time over the course of a year, the amount of the child support order must be determined by taking into account

(a) the amounts set out in the applicable tables for each of the spouses;

(b) the increased costs of shared custody arrangements; and

(c) the conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought.

[76] Each of the three factors must be considered once the 40 percent parenting time threshold is met.

[77] In Contino, the Supreme Court of Canada dealt with s. 9 of the Guidelines. A number of principles arise from the Contino decision. Section 9 does not provide for an automatic deviation from the Guidelines amount of child support; it is only a different method to determine the amount of child support: Contino at para. 30. There is no presumption in favour of awarding at least the Guidelines amount or in favour of reducing it: Contino at para. 31. Section 9 emphasizes flexibility and fairness and requires acknowledgement of the overall situation of the parents and the needs of the child. The weight to be attributed to each factor listed in s. 9 will vary according to the particular facts of each case: Contino at para. 39.

[78] The set-off amount is a useful starting point but it has no presumptive value; a court will depart from it or make adjustments to it if it is inappropriate in light of the factors considered under ss. 9(b) and (c): Contino at para. 41. The set-off amount must therefore be followed by an examination of the continuing ability of the recipient parent to meet the needs of the child: Contino at paras. 41, 49. The court retains the discretion to modify the set-off amount where, considering the financial realities of the parties, it would lead to a significant variation in the standard of living experienced by the child as between the two households, "something which Parliament did not intend": Contino at para. 51.

[79] Section 9(b) recognizes that shared custody may increase the overall costs of raising children, usually as a result of duplication of costs: Contino at para. 52.

[80] Section 9(c) gives the court "a broad discretion for conducting an analysis of the resources and needs of both the parents and the children": Contino at para. 68. When applying this section, it is important to keep in mind the objectives of the Guidelines, which require "a fair standard of support for the child and fair contributions from both parents": Contino at para. 68. The court will be especially concerned with the standard of living of the child in each household and the ability of each parent to absorb the costs required to maintain an appropriate standard of living in the circumstances: Contino at para. 68. Financial statements or budgets are necessary for this purpose.

[81] The broad discretion conferred by s. 9(c) also allows the Court to consider claims for special or extraordinary expenses falling within s. 7 of the Guidelines: Contino at para. 71.

[82] The parties have a binding Agreement that permits a review of the amount of child support to be paid by set-off in the event that the income of either party increases by $20,000 or more a year, which has clearly occurred only in relation to the Respondent, whose income has increased from $150,000 in 2011 to either $304,558 or $330,443 in 2015, depending on which figure turns out to be the correct figure; whereas even with minimal income splitting from her new spouse's pension for the last several years, the Claimant's income has increased less than $10,000 over the same period.

[83] In accordance with s. 9(a), I turn first to the applicable table amounts and the resulting set-off amount to be paid by the Respondent to the Claimant.

[84] Based on their 2015 incomes, the Claimant's Guidelines income is $93,569 and, taking the lower of the two figures put forward on behalf of the Respondent, his anticipated 2015 income is $304,558. This results in a set-off amount to be paid by the Respondent of $1,601 per month. If the higher T4 amount of $330,443 is attributed to the Respondent, the resulting set-off amount is $1,792. It is important to point out that s. 4 of the Guidelines provides the Court with discretion in relation to payor incomes in excess of $150,000.

[85] If the Court were to add to the Claimant's income an additional $20,000 to represent the benefit to Mr. T.M. of living with her "rent-free", as is asserted by the Respondent, the result would be a Guidelines income for her of $113,569. Using an income of $304,558 for the Respondent, the set-off amount is $1,434 per month. In other words, just looking at the Guidelines set-off amounts, the Respondent is required to pay an amount in the range of $1,400 to $1,600 per month to the Claimant.

[86] To put this set-off figure in some context, when the parties separated and they agreed in 2011 that the Respondent would pay $400 a month in child support to the Claimant, his annual Guidelines income was $150,000 and hers was $86,121. The table set-off amount at that time on those incomes would have been $521. Then, in May 2012, the Respondent agreed to raise the monthly amount he paid to $600. At that time, the parties referenced their child support obligation to the Guidelines.

[87] The Court is next obliged to consider the increased costs of shared custody arrangements pursuant to s. 9(b).

[88] There is no question that each parent, by establishing a separate residence in which the Child resides during their parenting time, incurs additional costs. The Claimant has an annual income of approximately one third that of the Respondent's upon which to draw to pay these additional costs. While she is clearly managing with some additional benefits to her lifestyle conferred by Mr. T.M., about which I will say more, her accounting of her personal finances in the past indicates that there is no excess. The table set-off amount highlights the disparity in the parties' incomes.

[89] Finally, the Court must consider s. 9(c), the condition, means, needs and other circumstances of each spouse and of any child for whom support is sought. In the circumstances of the present application, the Court finds the financial information provided by the parties, including complete Form F8s and the information each has provided in their affidavits, to be more than sufficient to allow the Court to consider the factors referred to in s. 9 of the Guidelines, including consideration of the standards of living experienced by the Child with each parent.

[90] The Court has considered the amount of detail provided by each party as to their current lifestyles, finances and what they do with the Child. In particular, the Claimant has provided sufficient information about the contributions of Mr. T.M. to her household. They are clearly articulated and documented and no application has been made to cross-examine the Claimant on her affidavits.

[91] Apart from his income being stated on the Claimant's tax returns, $108,678.91 in 2013 and $119,975.98 in 2014, Mr. T.M. has declined to make financial disclosure, stating that he is not a party to this action and is not legally obliged to provide the type of comprehensive financial disclosure required by litigants in family matters. The Respondent claims that the respective standards of living for the Child may not be fairly compared without this information.

[92] In the present case, this assertion is specious. As Mr. Justice Savage (as he then was) noted in Vlek v. Graff, 2013 BCSC 1906 at para. 52:

[52] The case law varies on whether and when it is appropriate to consider the income of a parent's new partner under section 9(c). Some decisions do take the new partner's income into account: Corsie v. Taylor, 2006 BCSC 528 at para. 22; Borrett v. Borrett, 2006 BCSC 711 at para. 68. Other decisions find that absent strong evidence that the new partner's income was actually available to the parent to meet the children's needs, it is not a relevant consideration: Bil v. McPherson, 2009 BCSC 351 at paras. 20-31; C.N.G. v. S.M.R., 2007 BCSC 822 at paras. 47-48.

[93] The Claimant has deposed details of her financial relationship with Mr. T.M. at paras. 24-33 in her fourth affidavit. She deposes that they married on June 23, 2012 and began living together in her home in North Vancouver on June 7, 2013. Mr. T.M. had previously lived in El Segundo, California and travelled to BC to visit her from time to time. She said when she bought her home in 2010, which is in her name alone, she did not know what the future held; although she was in a relationship with Mr. T.M. at that time.

[94] Apart from the specific matters referred to in the Claimant's affidavit, including limited use of joint bank accounts when Mr. T.M. did not live in Canada, which were used for payment of a dog walker for their dog and a shared cost of a club membership, she set out his limited contributions to her household. In particular, he purchases additional food because he is an additional person in the house such that she says that her food budget has not increased. He also pays for the costs of them eating out and going out, travel when they go to California with or without the Child, and provides transportation because he has a car and drives and she does not, which she says saves her money in taxis. As well, he purchases gifts from time to time for her and the Child. Also from time to time he contributes to household expenses by buying a new appliance or contributing in other defined ways.

[95] The evidence also indicates that Mr. T.M. has split a small amount of income with the Claimant in the tax years 2013 and 2014 in the approximate amount of $2,000 each year.

[96] Apart from the incidental benefits referred to above, there is no evidence that Mr. T.M.'s income is available to meet the needs of the Child as are typically encompassed in child support. That responsibility rests squarely with his parents.

[97] The Claimant deposes that she chose the house she now lives in to be close to her former matrimonial home (where the Respondent continues to reside) in order to provide increased stability for the Child. She stated that her present home is smaller and older than the one she previously shared with the Respondent but that it is pleasant and comfortable. She indicates that she pays her share of the Child's considerable s. 7 expenses that include hockey and summer camp, and the Respondent pays the balance. She contributes to her employment pension but is otherwise generally unable to save.

[98] A review of the Claimant's financial statement filed April 13, 2015 reveals the following about her circumstances. She works for Destination BC, which used to be Tourism BC. Her Guidelines income based on her 2014 tax return was $91,409.81, which includes $1,999 as a result of a pension income split with Mr. T.M. She received $7,200 in child support from the Respondent. She pays approximately $3,000 per month in relation to her mortgage and other household expenses, $339.56 in utilities and $220 in transportation costs relating to public transit and taxis. Her home was valued in the 2015 property assessment at $919,400 and is mortgaged for $424,162.69. Other than a locked-in RRSP of approximately $31,000, an RRSP of $115,892, and the BC Government pension that is not valued, her other assets are of no real consequence. She does not own a vehicle. She carries some credit card debt and pays $437 per month in relation to the Child's expenses and $150 per month in counselling for the Child.

[99] The Respondent characterizes some of the expenditures by Mr. T.M., including frequent and expensive travel with the Claimant and sometimes the Child (occasionally to California and once to Tahiti) as well as expensive tickets to sporting events for them and the Child, as indicative of Mr. T.M.'s significant contributions to the standard of living in the Claimant's household, such that no increase in child support ought to be forthcoming from him. He claims that she has performed significant renovations to her residence since Mr. T.M.'s arrival, including a new deck and an enclosed garage to replace a carport and a suite for Mr. T.M.'s mother in the basement.

[100] The Claimant counters that the basics for the suite were in the house when she bought it, that the changes made were very modest and that the cost of replacing the deck and the carport was factored into the purchase price of her residence.

[101] The Respondent submits that the Claimant has constructed a fictitious wall between her and Mr. T.M. in terms of finances that she uses to her advantage when it suits her but then disappears when it comes to things like splitting his pension income to reduce his taxes.

[102] The Respondent also pointed out in an affidavit that under the FLA, Mr. T.M. will be considered a spouse and entitled to an equal share of the appreciation in the value of her residence, which I note is decidedly the Claimant's business and irrelevant to the issue at hand.

[103] I find that the evidence generally does not support these claims in relation to the Claimant. Although it is clear that the Claimant and the Child upon occasion enjoy an enhanced lifestyle courtesy of Mr. T.M., these claims made by the Respondent appear, at least in part, to result from animus that the Respondent harbours for Mr. T.M. Both counsel made brief references to acrimonious differences between the Respondent and Mr. T.M. that are touched upon in some of the affidavit material. Apparently, this application is a remnant of a previous proceeding that sought other relief, including with regard to aspects of parenting the Child.

[104] The Respondent further claims that by living in the Claimant's residence, apparently without paying rent, Mr. T.M. is receiving a benefit that is worth approximately $1,500 a month, which could be contributed to the Claimant's monthly living costs, estimated to be about $3,000. His position is that the Claimant is seeking to receive additional funds from him that are in essence spousal support in the guise of child support. While it is not for the Respondent to direct how the Claimant conducts her finances, I considered this point above when I considered the Claimant's income for the purposes of a set-off calculation, which I reiterate is only one component and the starting point for a consideration of the factors outlined in s. 9.

[105] The Respondent's financial statement made April 14, 2015 indicated a Guidelines income at that time of $286,552.63 from employment as a lawyer for a professional organization. His monthly expenses related to his residence were estimated at $4,368, excluding utilities; household expenses for food were $750 a month; and transportation costs related to a car, insurance and parking as well as repair and maintenance were estimated at $675.53 a month. Including personal costs for himself and the Child, entertainment and his 70 percent share of the Child's expenses and support payments to the Claimant of $602.40, his total monthly expenses were estimated at $23,371.67. His residence was valued at $1,250,000 according to the 2015 property tax assessment with a mortgage of $710,989. He had about $9,000 of credit card debt at the time and his 2010 Audi vehicle that he had at the time, which has since been replaced by a 2016 BMW, was valued at $40,000. His assets total approximately $1,963,000 and include an RRSP in the amount of $595,000, while his debts are estimated to be $720,365.13.

[106] The Respondent's position, to which ultimately I do not accede, is that the Court should conclude that the standard of living between the households is equal and that the $600 per month in child support paid by him since June 2012 ought to continue.

[107] While it is clear that the Child enjoys a good standard of living in both homes, looking at the financial circumstances of these parents, it is likely that the Child enjoys a slightly enhanced standard of living when he is with his father, depending on what his father is willing to expend. The Respondent clearly has a significantly larger income, more assets and greater financial resources which are likely to translate into an appreciably enhanced lifestyle for the Child when he is with his father. It is also clear that the Respondent is wholly committed to supporting his son, no doubt works very hard, and carries

considerable debt as a result of his divorce from the Claimant.

[108] However, along with the Respondent's higher income and the significant increases that have occurred since 2011, it is also fundamental to a fair and flexible determination of the amount of child support payable in this case to consider the parties' Agreement and the amounts paid in the past. The set-off amount that the Respondent has historically paid has been less than the Guidelines. Based on these reasons and this analysis, I find that the Respondent is required to pay to the Claimant a set-off amount of $900 per month in child support.

Conclusion and Orders

[109] For these reasons, the Court finds that the Claimant's application that the Respondent pay retroactive child support, either based on a table amount as determined by his Guidelines income or a table amount based on the parties' Guidelines income and shared parenting, is dismissed; as is her application that the Respondent pay to her his share of the Child's expenses, including s. 7 and extraordinary expenses retroactive to January 1, 2013.

[110] The Court understands that the parties have reached an agreement to share such expenses with the Respondent paying 70 percent and the Claimant paying 30 percent. Any amounts owed by one party to the other are to be paid within 60 days of when they are incurred. In the future, such expenses are to be defined and paid as per the parties' Agreement in proportion to their line 150 Guidelines incomes.

[111] The Court declines to set aside paragraphs of the Agreement as sought by the Claimant unless by consent, except in relation to para. 42(c) of the Agreement, which is hereby replaced by the obligation of the Respondent to pay child support to the Claimant in the amount of $900 per month in two equal payments of $450 due on the 1st and 15th day of each month, effective March 1, 2015, until further court order or agreement in writing by the parties. Future changes in the amount of child support to be paid are to be governed by the terms of the Agreement, and in the event of disagreement, the parties are to proceed first to mediation before proceeding to court.

[112] The Claimant also sought further orders in relation to the exchange of financial information and documents. I assume that order is not opposed and I make the following order in that regard. There will be an order that the parties will exchange the following documents by June 15 of every year:

(a) A copy of their most recent income tax returns inclusive of all tax information slips and schedules.

(b) A copy of their Notice of Assessments.

(c) Details of any benefits received in respect of the Child in the previous year and anticipated in the coming year.

(d) Any other relevant information to facilitate determination of the parties' respective shares of the Child's expenses and the respondent's child support payments.

(e) Any information a party must provide to the other party that is not available by the required date must be provided to the other party within three days of the information being received and this exchange of documents and information is in addition to any additional exchange of documents or information required pursuant to the Agreement dated September 30, 2011.

[113] Finally, unless there are matters of which the Court is unaware, as success has been mixed, each party is to bear their own costs.

[114] MR. SPENCER: Finally on that point, I don't have a copy for my friend but she will recall that on October 26, 2015 I wrote to her, and my client offered to settle this on the basis that there would be a dismissal of the retroactive child support and s. 7 expenses and as of November 1, 2015 not March 1, 2015, my client offered to pay $1,000 per month and that he would be responsible for 90 percent of the s. 7 expenses and the letter closes with the standard paragraph pursuant to Rule 11-1 of the Supreme Court Family Law Rules, B.C. Reg. 169/2009, "my client reserves the right to bring this to the attention of the Court on the issue of costs."

[115] THE COURT: Mm-hmm.

[116] MR. SPENCER: I respectfully suggest that in light of this offer with my client's offer being off by about six months in terms of the date of effective notice, he has been more than substantially successful. He should have his costs. The reason I am suggesting that to Your Ladyship is because this has been quite a protracted matter where initially the application was brought, my client responded by saying it should be sent to mediation, that was opposed on October 27 in front of Mr. Justice Bracken, some financial disclosure that we were seeking was ordered, not admittedly the entire full Form 8 from Mr. [T.M.] but that the Claimant provide some information, and it was sent to mediation. So we have October 27, March 20 --

[117] THE COURT: I think you and your friend better try and resolve this and put it in writing to me. I will make no order as to costs at this time. I actually have a Chambers list to do --

[118] MR. SPENCER: Thank you.

[119] MR. SPENCER: So will you reserve this or are the parties at liberty to make submissions as to costs?

[120] THE COURT: What I will do then is that I will just make an order that the parties are at liberty to make -- to provide the court with brief written submissions as to costs within 30 days of today.

[121] MR. SPENCER: I will talk to my friend at the end of this two week trial. Thank you My Lady.

[122] THE COURT: Thank you very much.

"Arnold-Bailey J."

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