
CANADA / JUDGMENT

R.A. v. W.A.

2020 BCSC 584

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Supreme Court of British Columbia

DECIDED

17 April 2020

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2020 BCSC 584 R.A. v. W.A.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R.A. v. W.A.,

2020 BCSC 584

Date: 20200417

Docket: E142148

Registry: Vancouver

Between:

R.A. also known as

R.S.A.

Claimant

And

W.A. also known as W.B.

also known as W.I.M.B.

Respondent

Before: The Honourable Madam Justice Forth

Reasons for Judgment

The Claimant appearing in person:

R.A.

The Respondent appearing in person:

W.A.

Counsel for Family Maintenance Enforcement Program:

J. Anderson

Place and Date of Hearing:

Vancouver, B.C.

December 11, 2019

Place and Date of Judgment:

Vancouver, B.C.

April 17, 2020

Table of Contents

I. Introduction.. 4

II. Background Facts.. 5

III. Non-compliance with Parenting Time.. 8

A. Positions of the Parties. 8

1. Position of the Respondent 8

2. Position of the Claimant 9

B. Discussion. 10

IV. Non-compliance with Counselling with Bob Finlay.. 12

A. Positions of the Parties. 12

1. Position of the Respondent 12

2. Position of the Claimant 12

B. Discussion. 13

V. Adjustment of Child Support Payments.. 13

A. Positions of the Parties and FMEP.. 13

1. Position of the Respondent 13

2. Position of the Claimant 14

3. Position of the FMEP.. 15

B. Discussion.	15
VI. Release of the \$20,000 holdback..	18
A. Positions of the Parties and FMEP..	18
1. Position of the Respondent	18
2. Position of the Claimant	18
3. Position of the FMEP..	18
B. Discussion.	19
VII. Section 7 special or extraordinary Expenses..	19
A. Positions of the Parties.	20
1. Position of the Claimant	20
2. Position of the Respondent	20
B. Analysis.	21
VIII. Overpayment of Child Support..	23
IX. RCMP Enforcement Order..	24
X. Other Issues..	24
XI. Costs..	25
A. Position of the Respondent	25
B. Position of the Claimant	25
C. Position of FMEP..	25
D. Discussion.	25
XII. Summary of Orders..	26

I. Introduction

- [1] These reasons for judgment address the issues argued at a hearing on December 11, 2019 (the "Hearing"), during which I heard submissions on an application brought by the respondent. I previously heard applications by these parties on August 20, 2018, and I delivered my reasons for judgment indexed at 2018 BCSC 1910 on November 2, 2018 (the "Reasons").
- [2] The parties have two children of the marriage, a boy, I.A., born May 2008, and another boy, Z.A., born July 2010 (collectively, the "Children").

- [3] The parties represented themselves at this Hearing. The director of Family Maintenance Enforcement Program ("FMEP") attended by counsel.
- [4] In the respondent's notice of application filed November 21, 2019, he sought the following orders:
1. Enforcement order of the final order made by the Honourable Madam Justice Forth on November 02, 2018 and entered into the registry on April 09, 2019.
 2. Enforcement order of paragraph #25/order #25 on page 4 of the order made by the Honourable Madam Justice Sharma made on October 08, 2015 pertaining to the division of the claimant's B.C. pension plan with the Municipal Pension Plan equally with myself, and at this point in time to specify the end date of the division, the divorce date vs today's date plus/minus costs relevant to the delay and breach [sic].
 3. An order to divide the Canadian Pension Plan of the claimant and the respondent equally (credit splitting) from date of separation to the date of the divorce due to the claimant's unwillingness to sign the documents.
 4. An order to adjust child support based on the updated child support guidelines and/or Form F8, and considering court orders abidance and parenting time orders, and crediting the child support overpayment to the respondents FMEP account for near future use in paying the new child support amount if applicable as we catch up on the 50/50 parenting time order that the claimant is in breach [sic].
 5. An order to have either the FMEP act on behalf of the claimant to adjust child support moving forward or having myself, the respondent, the legal privilege of adjusting child support based on the updated child support guidelines until the claimant proves to court her cooperation. Review the reasons for judgment of Madam Justice Forth.
 6. An order to have FMEP release the \$20000 held in trust plus interest to the respondent in lieu of the claimant's non-compliance with filing Form 8 that the claimant originally sought the order for it. Thus removing some hardship claims.
 7. An order to have FMEP collect the \$15497 plus interest that the claimant owes on child support overpayment made by the respondent due to the lack of the claimant's cooperation in calculating the section 7 expenses, and non-compliance with sharing income taxes that reveal deductions and expense claims made by the claimant and any reimbursements as a citizen of Canada in B.C. and as a client on disability benefits.
 8. RCMP enforcement order on orders # 1, 2 and 3 or the claimant to sign documents/ paperwork in court before Madam Justice Forth as done in the year 2014, when the claimant signed the franchise documents before Master Scarth. The order is meant to limit court appearances; and it was ordered in the past and no breach [sic] took place during the time the orders was in effect.

9. An order on Costs associated with the non-compliance of the claimant to the orders of Madam Justice Sharma, Mr. Justice Davies, Madam Justice Forth, and costs for this court hearing; to be collected by FMEP, I am not on Legal Aid.
- [5] The respondent advised at the Hearing that para. 2 had been dealt with.
- [6] In respect to para. 3, the parties agreed during the Hearing that the Canadian Pension Plan ("CPP") credits of the parties should be divided equally between them from September 19, 2007 to July 16, 2014. The claimant later submitted that she did not think the CPP credits should be divided equally because for a time during the marriage, she was working while he was in school.
- [7] I order that the parties' respective CPP credits accrued between September 19, 2007 and July 16, 2014 be divided equally. I have considered the claimant's submission that it is unfair to divide the CPP credits equally, but find that nothing before me rises to the level of a substantial unfairness that would justify an unequal division as set out in s. 95 of the Family Law Act, S.B.C. 2011, c. 25.

II. Background Facts

- [8] I do not intend to repeat the background facts and litigation history respecting these parties. They are summarized in the Reasons at paras. 7 to 41.
- [9] The following orders dated November 2, 2018 are made pursuant to the Reasons (the "November 2018 Order"):
1. Paragraph 19 of the Order of Justice Sharma dated October 8, 2015 is varied to add the following sentence: Any adjustment to the child support amount shall be agreed to by the parties in writing or by further order of the court.
 2. Both Children will attend counselling with Bob Finlay. If Mr. Finlay cannot see the Children on an immediate basis, the parties may agree to a different clinical counsellor. If the parties cannot agree to a different clinical counsellor, the parties may return before me to seek a court order appointing one for them.
 3. The respondent is entitled to immediately resume seeing Z.A. on the parenting schedule set out below:
 - a. The respondent will have parenting time on one weeknight commencing from 4:00 p.m. until the following day at 9:00 a.m. each week. The parties can decide which weeknight works best and if they cannot decide, it will be on Wednesday from 4 p.m. to Thursday at 9 a.m.
 - b. Every second weekend from on Friday from 5:00 p.m. to Sunday at 4:00 p.m.
 - c. Every Spring Break, Christmas holidays, the summer holidays, the religious holidays known as Eid, the parties will equally share the time.

- d. This schedule will start with the weekday overnight visit commencing the week of November 12, 2018 as set out in para. 3a above.
- e. On Friday, November 16, 2018 at 4:00 p.m. the respondent will pick up Z.A. Z.A. will spend the weekend of November 17 and 18, 2018 with the respondent. Z. A. will be returned to the claimant on Sunday, November 18, 2018 at 4:00 p.m. The alternative weekends will then commence.
- f. The children can be picked up or dropped off at the claimant's residence but the respondent is to wait in his vehicle.

(the "Parenting Schedule")

- 4. The respondent is entitled to resume phone contact with both Children on the same terms as set out in the Order of Justice Davies dated November 24, 2016.
- 5. The respondent is to resume parenting time with I.A. on the scheduled proposed by the clinical counsellor with a view that the reunification between I.A. and the respondent take place as soon as possible.
- 6. Once the clinical counsellor has agreed that parenting time with the respondent and I.A. can proceed then both Children are to see the respondent in accordance with the Parenting Schedule.
- 7. The Parenting Schedule should be gradually increased with a goal that within six to eight months the claimant and respondent will each have equal parenting time.
- 8. The Children are entitled to be cared for by their stepmother during parenting time with the respondent.
- 9. The respondent will initially pay for counselling for the Children with the ultimate responsibility to be shared by the parties as a s. 7 expense.
- 10. The respondent is found to be a resident of British Columbia and is found to have a gross income of \$95,191.66.
- 11. The respondent will pay the claimant the sum of \$1457.00 per month for the support of the Children commencing on November 1, 2018 and continuing on the 1st day of each and every month thereafter, for so long as the Children are eligible for support under the Family Law Act or until further agreement of the parties or court order.
- 12. The claimant will pay the respondent the sum of \$15,497.62 plus interest pursuant to the Court Order Interest Act R.S.B.C. 1996 c. 79, for the overpayment of child support.
- 13. The claimant is entitled to deduct the amount of s. 7 expenses that the respondent owes from the \$15,497.62 she owes to the respondent. The s. 7 expenses have not yet been determined.

14. Adjustments must be made to the proportions owed by each party for s. 7 expenses from July 1, 2015 to date based on their respective incomes.
 15. There is a stay on the payment of the \$15,497.62 to the respondent until the s. 7 expenses issue has been resolved.
 16. The Director of the FMEP shall immediately pay the sum of \$52,200 and all accrued interest to the respondent.
 17. The Director of the FMEP is entitled to keep the sum of \$20,000 to be held in an interest-bearing trust account as security for future child support.
 18. The respondent's application to have the claimant removed from the FMEP is dismissed.
 19. Justice Forth be seized with this proceeding and will hear all future applications unless urgent and she is not available to hear the matter.
- [10] The claimant filed an appeal of the Reasons. The appeal has not proceeded since she has failed to file the appeal record or a factum. She advised that the appeal had been moved to the inactive list. She intends to bring a chambers application to have the appeal moved back onto the active list. She advised me at the Hearing that as of that date, she intended to proceed with the appeal.
- [11] I will deal with each of the issues raised before me at the Hearing.

III. Non-compliance with Parenting Time

A. Positions of the Parties

1. Position of the Respondent

- [12] The respondent advised at the Hearing that the claimant was not abiding by the parenting time required by the November 2018 Order. That order provided for Z.A. to see his father on one overnight weeknight every week, alternative weekends, and equal time during Spring Break, Christmas holidays, summer holidays, and religious holidays.
- [13] The respondent advises that the current schedule is that he was seeing Z.A. on alternate weekends a month. He was picking him up on Friday at 5 p.m. and dropping him off on Sunday at 4 p.m. The holidays were going well initially but lately he has not seen Z.A. during the holidays and breaks. He only had Z.A. for one week over the summer of 2019. There were no arrangements made for Christmas 2019. The respondent says that I.A. is currently refusing to spend time with him. In addition, he advises the parties were not moving towards a 50/50 parenting arrangement as provided for in para. 7 of the November 2018 Order.
- [14] The respondent advises that in respect of phone contact with the Children, para. 4 of the November 2018 Order was not being complied with since he is not having any phone calls with I.A., and the phone contact with Z.A. is not as required by the order of Justice Davies

dated November 24, 2016 (the "Davies Order"). That order required that the respondent have telephone access with the Children on Tuesdays and Thursdays between 6 and 7 p.m. with the respondent initiating the call, and with the claimant making the Children available to receive the call.

- [15] The respondent points out that Davies J. found, back on August 11, 2016, that the claimant was not abiding by orders respecting parenting time that Sharma J. had made.

2. Position of the Claimant

- [16] The claimant's position is that I.A. does not want to have a relationship with his father. When Davies J. ordered three to four supervised visits, I.A. refused to get out of the car. I.A. is currently in Grade 6 and is 11 years old. He has shown some improvement in his mental status since 2016. He has joined volleyball, and has signed up for basketball and drumming. Academically, he is behind on reading and math. His principal and teacher say he is coming out of his shell. The claimant submits that I.A. is not at the point where he is ready to see the respondent.
- [17] Z.A. is 9 years old, and he is having some issues with aggression towards the claimant. She claims that when Z.A. comes back from visits with his dad, he will use foul language, swear at her, and tell her that she has "mental issues". He further appears to have some knowledge of the ongoing court proceedings and was aware that some type of hearing was coming up. The claimant said she did not tell him about the hearing so she assumed that the respondent must have done so.
- [18] The claimant advises that Z.A. chose to stop the mid-week visits in May 2019. There were issues with Z.A. having to go with the respondent when he was making pharmacy deliveries before school, and he disliked getting up early. There were also numerous times when Z.A. was sent to school with no lunch. The reason Z.A. did not see the respondent in the summer was because he had broken his finger and he wanted to stay home. The claimant says she encouraged him to go but he did not want to.
- [19] In her application response she states: "Currently [Z.A.] is attending his court-ordered visits every other weekend when he wants to." This statement appears to support the fact that the claimant is allowing her 9-year-old to decide whether or not he sees his father.
- [20] The claimant reports that there is a problem with the time frame of the telephone calls, as the parties had agreed to change the time of the calls to between 3 to 4 p.m. However, Z.A. is attending the Big Brothers club at his school on Tuesdays and Thursdays after school. The claimant says that Z.A. gets distracted when he gets home and forgets to call the respondent, but after she reminds him, he calls later that night or the next day. She suggests a better time for the phone calls would be to return to calls between 6 to 7 p.m. She also notes that pursuant to the November 2018 Order, it is the respondent who is obliged to initiate the call, not Z.A. Finally, she suggested that if the receiving party missed the call, it would be appropriate to require that the call be returned within 24 hours.

[21] I.A. continues to refuse to speak to his father on the phone. The claimant says she encourages him to get on the other phone when Z.A. is speaking to his dad but I.A. refuses.

B. Discussion

[22] In my view, the claimant has been in breach of the parenting schedule orders made in the November 2018 Order. I remind the claimant of the words of Davies J. in his unreported reasons for judgment of August 11, 2016 in which he specifically warned at para. 26:

I will accept absolutely no breach of that order [referencing the resumption of parenting time with the younger child]. I need not to remind counsel and the claimant that breaches of court orders are punishable by contempt proceedings, and I repeat that I will accept absolutely no breach of that order concerning the younger child.

[23] I further remind the claimant of my warning to her at para. 130 of the Reasons:

In my view, seizing myself of this proceeding is also necessary because the claimant has unilaterally disobeyed the parenting orders in the past. That conduct should not and will not be condoned. I echo the words of Davies J. on August 11, 2016, that court orders must be obeyed and any breaches are punishable by contempt.

[24] It is also inappropriate of the claimant to allow Z.A., as a 9-year-old, to make the decision of whether he attends the court-ordered parenting time: *van Gogh v. Goldberg*, 2012 BCSC 455 at paras. 156-57.

[25] The claimant should immediately put back in place, at a minimum, the parenting times as required by the November 2018 Order. The respondent should have the following parenting time with Z.A:

- a) overnight visits during one weeknight a week and every alternative weekend; and
- b) equal time every Spring Break, Christmas holidays, summer holidays, and the religious holidays known as Eid.

[26] There must be compliance with para. 3 of the November 2018 Order.

[27] In respect to moving towards a 50/50 shared parenting of Z.A, in my view, this should occur after Z.A. has been receiving counselling. The parties may seek the insight of the clinical counsellor on how best to move towards that 50/50 shared parenting.

[28] In addition, the telephone access should continue as ordered. If there is a better time for the telephone calls on Tuesday and Thursday, then the parties should change the time period of those calls. For added clarity, the phone calls must be initiated by the respondent and facilitated by the claimant.

- [29] At this time, I do not think it is in the best interests of I.A. to be forced to see the respondent. He requires counselling to assist him in resuming a relationship with his father. I.A. should have been attending counselling with Bob Finlay, Registered Family Therapist and Clinical Counsellor, after the parties agreed to his appointment in November 2018.
- [30] The parties are to immediately contact Mr. Finlay and see if some type of counselling can be arranged. During this COVID-19 crisis, it may not be possible for face to face counselling sessions to take place. It may be that Mr. Finlay can offer some other type of counselling accommodation. Once the COVID-19 crisis has abated, the counselling sessions should be immediately scheduled. Further, as soon as Mr. Finlay is of the view that it is appropriate for the respondent to participate in the counselling sessions with I.A., the respondent can participate in the counselling sessions with the ultimate goal of resuming their father-son relationship. There should be no delay in contacting Mr. Finlay to try and set out some type of counselling sessions.

IV. Non-compliance with Counselling with Bob Finlay

A. Positions of the Parties

1. Position of the Respondent

- [31] The respondent's position is that para. 2 of the November 2018 Order has been breached. He advises that the parties agreed on Bob Finlay as a counsellor. He has sent emails to the claimant about the counselling but the claimant has not responded. The respondent has attended counselling sessions with Mr. Finlay but the Children have not. The respondent confirmed that Mr. Finlay was available to provide counselling to the Children.
- [32] In reply to the assertion by the claimant that both Children are receiving counselling from counsellors of the Ministry of Children and Family Development (the "Ministry"), the respondent points out that it is important for the counsellor to hear both sides.

2. Position of the Claimant

- [33] The claimant submits I.A. is on a waitlist to obtain counselling from the Ministry. She submits that I.A. was also on the Child Youth Mental Health Clinic waitlist and he started seeing a clinical counsellor in November 2019. I.A. is currently seeing a clinical counsellor once a month. Z.A. completed ten sessions of a program for children who have witnessed abuse in September to November 2019. Z.A. will also be receiving counselling through the Ministry. It is anticipated that the counselling will be once a week for 45 to 60 minutes.
- [34] The Children are not getting counselling through their school but they do meet with a group led by a child support worker at school.

B. Discussion

- [35] While it is encouraging that the Children have received some counselling, the claimant has not complied with my November 2018 Order in respect of counselling for the Children. She does not have the freedom to seek alternate counselling programs in lieu of what was agreed to and ordered. She needs to immediately take steps to cooperate in having the Children attend counselling sessions with Mr. Finlay.
- [36] I will expect the parties to each report back to me by way of a sworn affidavit by Friday, November 27, 2020, to confirm compliance with both the parenting time orders and counselling orders as set out in the November 2018 Order.

V. Adjustment of Child Support Payments

A. Positions of the Parties and FMEP

1. Position of the Respondent

- [37] The respondent submits that the claimant had not provided her tax returns as required by para. 19 of Justice Sharma's October 8, 2015 order (the "Sharma Order"). Paragraph 19 of this order provided:

For so long as the Children are eligible to receive child support, the parties

will exchange copies of their respective income and corporate tax returns for the previous year, including all attachments, by no later than May 31 each year and copies of any Notices of Assessment or Reassessment provided to them by Canada Revenue Agency immediately upon receipt, with child support to be adjusted, if necessary, for the following year beginning on July 1 of each year based upon the Respondent's financial information.

- [38] The respondent submits that the child support payment he is making, being \$1,457 per month, should be varied because he was on a parental leave in 2018 and was earning less money. He claims he earned \$28,000 that year. Since February 2019, he has been self-employed as a pharmacist.
- [39] He put forward five options:
1. Based on his income being \$28,000 and the claimant's at \$35,000 with the claimant having sole custody of the children, he would pay \$456 per month.
 2. Based on the same income and custody, but the amount of \$456 would be split in half since he is currently supporting two other children with his new wife.
 3. Based on the same income but with shared custody, the claimant would pay the respondent the sum of \$133 per month.
 4. Based on the same income but with shared custody, there would be nothing paid since the respondent would give up on receiving any child support from the claimant.

5. Based on a higher income being imputed to the claimant and the same income for the respondent and with shared custody, the claimant would pay \$1,241 per month.
- [40] The respondent seeks to have the FMEP act on behalf of the claimant to adjust the child support moving forward. He further seeks an order that the FMEP be involved in collecting the \$15,497 plus interest that he is owed for the overpayment of child support, reflected at para. 12 of the November 2018 Order.
- [41] In his reply submissions, the respondent indicated that a fair approach would be to impute an income to him on what the average pharmacist in the province earned for 2019. He suggested the range would be between \$75,000 and \$85,000.
2. Position of the Claimant
- [42] The position of the claimant is that she is no longer on disability. She has returned to work as a registered nurse but only works three-quarters of full-time hours. In 2018, her Line 150 income was \$56,800. She expects to earn between \$3,000 and \$4,000 per month in 2019. Her position is that the current child support amount should remain the same, regardless of the respondent's actual income, and that the respondent should not have taken any parental leave but should have continued to work. She submits that in taking parental leave, he chose to prioritize his new family and harm the Children.
3. Position of the FMEP
- [43] The director of the FMEP submits that it has no authority to adjust child support and can only do so in accordance with a court order or the agreement of the parties in writing. There is no legislative authority for the director to determine what child support is due and owing based on documentation provided by the parties.
- [44] The director also has no mandate to collect any overpayment of child support. Section 3 of the Family Maintenance Enforcement Act, R.S.B.C. 1996, c. 127 [FMEA] provides a definition of "maintenance" and an overpayment does not come within that definition.

B. Discussion

- [45] The respondent's income was imputed at \$95,191.66 in the Reasons at para. 173, with the child support amount to be paid set at \$1,457 commencing November 1, 2018.
- [46] The respondent agreed in his reply submissions at the Hearing that for 2019, his income should be imputed based on the average earnings of a pharmacist in the province, being a range of \$75,000 to \$85,000.
- [47] In my view, it would be more satisfactory to use what the respondent actually earned in 2019. However, due to the COVID-19 crisis, it may be that that number will not be known until June 15, 2020, since the federal government has allowed for an extension of time for individuals who are self-employed to file their income tax returns.

[48] At this stage, I see no basis on which to vary child support payments until the respondent has produced his filed 2019 income tax return. The amount of child support to be paid by the respondent to the claimant will remain at \$1,457 per month.

[49] Some of the options provided by the respondent in his submissions were premised on a shared custody arrangement. That has not happened. It would be inappropriate to order a reduction of child support on a shared custody basis when the parties are not, in fact, sharing custody. Although the respondent would like to have a shared custody arrangement, what is most important is that the Children are supported.

[50] It is the right of the child to support and not of the custodial parent. The principles relating to child support enunciated in *Bennett v. Bennett*, 2015 BCSC 699, bear repeating for these parties:

GENERAL PRINCIPLES OF CHILD SUPPORT

Obligation to Pay Child Support

[40] Three fundamental principles apply to all child support applications:

1. parents have a joint and ongoing legal obligation to support their children;
2. it is the children, not the custodial parent, who have the right to support; and
3. support payments are based on earning capacity and not just on what a parent actually earns; as a result, a parent has a legal obligation to earn as much as he or she is reasonably capable of earning so the children can receive an appropriate level of support.

[41] The court has jurisdiction under both the federal Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), and the provincial Family Law Act, S.B.C. 2011, c. 25, to award support. Subject to certain exceptions, both Acts require that the amount of child support in any given case be governed by the Guidelines. These Guidelines are regulations which have been made under the Divorce Act. They include tables setting the amount of child support based on the incomes of the parents. They also provide for payment of "special or extraordinary expenses", undue hardship, variation of support orders, how a parent's income is determined, imputation of income in certain circumstances, and exchange of financial information.

...

[43] The court can issue orders requiring the payment of child support prospectively or retroactively. It also has the power to vary, rescind or suspend orders that have already been made, although the circumstances warranting any variation will be governed by the Guidelines.

[44] When exercising its discretion to make a retroactive child support order, the court will consider various factors including:

- the circumstances surrounding any delay in seeking a court order for support;

- whether the parent has engaged in blameworthy conduct;
 - the past and present circumstances of the children, including their needs and standard of living; and
 - whether any hardship would be caused by a retroactive award.
- [45] Generally speaking, the child support obligation fluctuates with the level of income available to the parents. The latter have an obligation to support their children in a way that is commensurate with their income. A payor parent who does not increase child support payments to correspond with increased income does not fulfill his or her obligation to the children.
- [46] Parents are obliged to fully and honestly disclose income information and documentation. At a minimum, this includes tax returns, notices of assessment/reassessment, 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.
- [51] In *D.B.S. v. S.R.G.*, 2006 SCC 37 at para. 66, the Supreme Court set out the framework for considering applications for retroactive child support payments. Justice Bastarache confirmed that a court may revisit a previous child support order where there has been a material change in circumstances.
- [52] If the respondent's income tax return for 2019 shows a significant difference in income, an adjustment can be made in accordance with the Federal Child Support Guidelines, S.O.R./97-175 [Guidelines]. Once again, I hope that the parties can agree to the appropriate amount of child support to be paid. To assist the parties, I provide the following guidelines:
- a. If the respondent's income is within \$10,000 above or below the \$95,000 currently imputed amount, then the child support payment will remain at \$1,457 per month;
 - b. If the respondent's income is greater than \$10,000 above or below the \$95,000 currently imputed amount, then child support payment will be adjusted in accordance with the Guidelines;
 - c. Since the respondent is self-employed, in deciding what his income is, reference should be made to ss. 16-18 of the Guidelines. To the extent that the respondent's income is derived from his business, he should consider the money available for the payment of child support as opposed to what he actually pays himself: *Chapman v. Summer*, 2010 BCCA 237 at para. 33; and
 - d. An adjustment, if any, to child support should be made on July 1, 2020.

[53] There is no responsibility on the FMEP to adjust child support as the FMEP can only enforce what is already in place. Any adjustment has to be done by a court order or the written agreement of the parties. Thus, that portion of the respondent's application is dismissed.

VI. Release of the \$20,000 holdback

A. Positions of the Parties and FMEP

1. Position of the Respondent

[54] The respondent submits that he has been abiding by the November 2018 Order and is making child support payments. He has no history of breaching support orders. Accordingly, he argues that there is no basis for FMEP to continue to withhold \$20,000 (the "holdback") from him since that sum of money belongs to him as part of the equity from the sale of his condo and was not family property.

2. Position of the Claimant

[55] The position of the claimant is that the holdback should remain with the FMEP as security for future payments on the basis that the respondent may not pay the child support.

3. Position of the FMEP

[56] The FMEP's position is that the current amount held is \$20,503.09 (\$20,000 plus accrued interest). The rationale for holding this money is if the respondent continues to be self-employed, there may be concerns about collecting child support. The director's position is that the funds should be held as security for the two young children so long as there remains an ongoing support obligation. The director has a statutory mandate to enforce the support payments and this holdback provides a mechanism to ensure future child support payments will be made.

B. Discussion

[57] As I noted at para. 201 of the Reasons, the money being held by the director came from the equity the respondent has in his condo, to which the claimant has no right.

[58] The purpose of the \$20,000 holdback was as security if, for some reason, the respondent did not pay the court-ordered child support. He has been fulfilling his obligation to do so. I see no basis for continuing to require that the holdback be maintained. The respondent has obligations not only to support the Children but also an obligation to support his two young children with his new wife. The \$20,000 holdback with accrued interest should be immediately released to the respondent.

VII. Section 7 special or extraordinary Expenses

[59] During the Hearing, the respondent advised that he had not received any receipts justifying the s. 7 special or extraordinary expenses the claimant seeks. He sought an order that the claimant provide particulars of the expenses and documents in support of her claim.

[60] At the end of the Hearing, I made the following orders:

1. R.A. shall file and serve on W.A. an affidavit setting out the particulars of and documentation in support of the s. 7 expenses of the two children by December 31, 2019.
2. W.A. shall file and serve on R.A. a reply affidavit with respect to the s. 7 expenses by January 10, 2020.

[61] The claimant filed an affidavit on December 30, 2019 and the respondent filed a reply affidavit on January 7, 2020.

A. Positions of the Parties

1. Position of the Claimant

[62] The claimant's December 30, 2019 affidavit provides particulars of the s. 7 expenses she has incurred on behalf of the Children from 2015 to 2019 with breakdown as follows:

a) Dental:

\$9,264.08

b) Martial arts lessons:

\$6,010.20

c) Music lessons:

\$2,544.00

d) Counselling sessions:

\$1,570.00

e) Medical service Plan family coverage:

\$1,275.00

Total:

\$20,663.28

[63] The claimant explains in her affidavit that there are more expenses but she was unable to locate the additional receipts.

2. Position of the Respondent

[64] In the respondent's January 7, 2020 reply affidavit, he raises issues unrelated to the s. 7 expenses. These are:

- a. "Questions" he has with the claimant's Form F8 financial statement filed December 10, 2019 relating to the educational financial planning for Z.A.;
- b. Emails sent by the claimant to the respondent's current wife containing "disturbing contents";
- c. Contact made by the claimant with some of respondent's character references referenced in previous filed materials in which she has been threatening them based on her belief they have lied;
- d. Emails sent by the claimant to some of the respondent's siblings seeking to isolate the respondent from his family;
- e. Postings of negative images and information to the respondent's place of employment and to his College in what he describes to be an attempt to have his licence revoked; and
- f. Postings on the social media accounts of the claimant information respecting the divorce matter.

(collectively, the "Other Issues")

[65] His position on the s. 7 expenses is that from 2017 and up to February 16, 2018, he purchased extended health benefits and dental coverage for the Children. The cost of both in 2017 was \$1,701.56. In 2018, the cost of both was \$253.23 for the month and a half of coverage. The dental plan coverage was 100% and the extended health benefits coverage, including counselling, were 80%.

[66] The respondent claims that since he was on probation at the time, he was not able to contact the claimant directly or indirectly. He claims that by a letter dated March 22, 2017, his former lawyer advised the claimant's former lawyer of the extended health benefits and dental coverage that were in place and provided the "card that can be used to assist in covering these costs". The respondent says that he has confirmed with the insurance company that the benefit cards for the Children were never used.

[67] The claimant, in an email to the respondent dated January 2, 2020, advised:

You did not inform me of that the children were covered under your plan. The onus is on you to notify me of this information or provide this information directly to the dental office. I confirm the dental office has not changed, just the location and you had this information from when the children were young so you easily could have provided this information.

B. Analysis

[68] In my view, all of the expenses listed in the claimant's December 30, 2019 affidavit are ones that should be covered as s. 7 expenses.

[69] An issue to be addressed is whose responsibility was it to make an insurance claim for the Children's dental benefits. It is most unfortunate that there was dental coverage that was paid for and not used.

[70] The evidence before me supports that the respondent, through his former lawyer, provided the information about the coverage to the claimant's former lawyer in March 2017. That step fulfilled the respondent's responsibility to notify the claimant of the coverage.

[71] There is no suggestion that the Children had dental coverage from either parent in 2015 and 2016. The dental coverage that the respondent arranged for 2017 and 2018 ended on February 16, 2018.

[72] I find the following amounts for dental expenses are s. 7 expenses:

2015:

\$3,637.00

2016:

\$552.00

2017:

\$0.00

(dental plan coverage for this year would have covered 100% of this expense)

2018:

\$1,462.00

(the dental plan coverage was only available for six weeks in 2018. As such, it is not clear that any amount would have been covered)

2019:

\$2,752.94

Total:

\$8,403.94

[73] It is important for the Children to have extracurricular activities such as music and martial arts. Accordingly, the music and martial arts expenses incurred in the amount of \$8,554.20 (\$6,010.20 + \$2,544) should be covered under s. 7 expenses.

[74] The respondent claims that the counselling expenses would have been covered at least for 2017 for the Children under the extended health benefits he purchased. It is not clear to me how much of the \$1,570 claimed was incurred in 2017. In all of the circumstances, I will permit all of the amount to be claimed as a s. 7 expense.

- [75] I find that the medical services plan family coverage of \$1,275 should also be reimbursed to the claimant.
- [76] Pursuant to para. 16 of the Sharma Order, the parties were to share the costs of the s. 7 expenses in proportion to their respective child support Guideline incomes--35% paid by the claimant and 65% paid by the respondent currently.
- [77] The total amount of outstanding s. 7 expenses I have found the claimant to have paid is \$19,803.14 (\$8,403.94 + \$8,554.20 + \$1,570 + \$1,275). Considering the parties' current incomes, I see no reason to vary the proportions regarding the parties' sharing of s. 7 expenses as set out in the Sharma Order. As such, the respondent is to reimburse the claimant for \$12,872.04, that being 65% of the s. 7 expenses set out above.

VIII. Overpayment of Child Support

- [78] In the Reasons at para. 171, I found that there had been an overpayment of child support made by the respondent to the claimant:

In my view, this can be achieved by an order that the claimant reimburse the respondent the sum of \$12,196 plus interest pursuant to the Court Order Interest Act, RSBC 1996 c. 79. I will leave it for the parties to work out the appropriate interest that should be paid.

- [79] I made an error at para. 226(12) and (13) of the Reasons with the amount set out in those two paragraphs as \$15,497.62. It should have been \$12,196. I have made that correction as part of these reasons. I have also removed the reference to interest for the reasons set out below.
- [80] The respondent may set off the overpayment owed by the claimant against the s. 7 expenses discussed above. Since both parties would be entitled to interest on the amounts they owe each other, it makes sense that no interest should be ordered. The net result of the s. 7 expenses (\$12,872.04) and the overpayment of child support (\$12,196) is that the respondent owes the claimant the amount of \$676.04.

IX. RCMP Enforcement Order

- [81] As I indicated at the Hearing, an RCMP enforcement order to compel the claimant to sign documents is not appropriate. I dismiss the respondent's application for such an order.

X. Other Issues

- [82] In respect to the Other Issues, I make no finding on whether the claimant has carried out the activities alleged, except in respect to emails being sent to the respondent's current wife. In respect to the other allegations, the claimant has not had an opportunity to respond to the specific allegations made in the respondent's affidavit filed January 7, 2020.
- [83] The respondent attaches an email dated December 25, 2019 from the claimant to the respondent in which she copies the respondent's current wife. The claimant states that she is going to continue to copy the respondent's current wife on all emails as it is "very

important for [the claimant's] safety". I disagree with this. There is no reason for the claimant to sent copies of emails to the respondent's current wife. The focus of this particular email relates to the past assault and other past misconduct of the respondent. This type of email should not be sent.

- [84] The claimant in turn alleges that the respondent has sent emails questioning the status of her "mental health", referencing a past sexual assault, and telling things to Z.A. about her mental status. She wants this to stop.
- [85] It is clear that these parties need some further guidelines in order to ensure that inappropriate actions are not taken. As part of my orders, I will put in place some guidelines on what are and what are not appropriate communications. If the parties breach these conduct orders, then they will be in contempt of my court order and will face the consequence of such breaches.
- [86] The issue of posting on social media sites was dealt with at paras. 217 to 222 of my Reasons. I see no basis for making an order in this regard. However, I reiterate what I said at para. 222 that both parties should be thinking of their sons and the impact their actions will have on their well-being in the future. It is clear these parties have not forged a new path of reconciliation, which is disappointing.

XI. Costs

A. Position of the Respondent

- [87] The respondent submits that the non-compliance with court orders made it necessary for him to return to court and bring this application. He seeks that the claimant pay costs and that the costs of the Hearing should be collected by FMEP.

B. Position of the Claimant

- [88] The position of the claimant is that each party should bear their own costs.

C. Position of FMEP

- [89] The director of FMEP submits that FMEP can enforce cost orders made by the court and taxed costs awarded in relation to an order for matters relating to maintenance and support.

D. Discussion

- [90] The breaches by the claimant of the parenting schedule and counselling orders made are significant. She was reminded by Davies J. in August 2016 and by me in November 2018 that she needed to comply with the court orders. She has not.
- [91] The respondent should not have to return to court to seek enforcement of court orders. He is being denied parenting time with his younger son and he continues to have no relationship with his older son.

- [92] The Children should have commenced counselling immediately after the release of the Reasons in early November 2018. It was not until one year later that I.A. has started seeing a clinical counsellor, and it was not the clinical counsellor set out in my order. A one-year delay is inexcusable. The Children should immediately be seen by Mr. Finley, or as soon as that can be arranged in light of the current COVID-19 crisis, and a much more intensive counselling agenda should be set up.
- [93] In light of these breaches by the claimant, I award costs of the application to the respondent.
- [94] The claimant advised at the Hearing that she had prepared a bill of costs and it had been delivered to the respondent for the trial costs ordered by Sharma J. in her reasons for judgment on costs indexed as 2016 BCSC 663 (the "Trial Costs").
- [95] I order that the respondent may set off the costs of this application against the Trial Costs that are owing. If the parties are unable to agree as to the amount of the Trial Costs or the costs of this application, they may take the matter before the Registrar for an assessment.

XII. Summary of Orders

[96] The following orders are made:

1. The parties' respective CPP credits accrued between September 19, 2007 and July 16, 2014 are to be divided equally. The parties will sign any paperwork required to effect this division.
2. There is no variation in the parenting schedule and counselling orders made in the order made November 2, 2018 and filed April 9, 2019, except in respect to para. 7, which should be varied to read:

The Parenting Schedule should be gradually increased on the advice of the clinical counsellor with the objective that the Claimant and Respondent will have equal parenting time.

3. The claimant and the respondent are required to file and serve affidavits that set out their respective compliance with the parenting schedule and with the counselling orders by Friday, November 27, 2020.
4. If there has been non-compliance with any order, I direct the parties appear back before me to address the non-compliance.
5. Paragraph 12 of the order made November 2, 2018 and filed April 2019 is varied and should read:

The claimant will pay the respondent the sum of \$12,196 for the overpayment of child support.

6. Paragraph 13 of the order made November 2, 2018 and filed April 2019 is varied to replace the sum of \$15,497.62 with the sum of \$12,196.
7. The child support that the respondent pays the claimant will remain at \$1,457 per month.

8. The respondent will provide to the claimant his filed 2019 income tax return as soon as it has been completed and filed.
9. If the respondent's income is \$10,000 greater or less than \$95,000 in his 2019 income tax return, an adjustment to the child support payment will be made in accordance with the Federal Child Support Guidelines.
10. An adjustment, if any, in the child support payment will commence on July 1, 2020 and will take place on the first day of July of each year thereafter.
11. The director of the Family Maintenance Enforcement Program shall immediately release the holdback sum of \$20,000 plus all interest accrued thereon to the respondent.
12. Paragraphs 4, 5, 7, and 8 of the notice of application of the respondent filed November 21, 2019 is dismissed.
13. The amount of s. 7 special or extraordinary expenses that the respondent owes the claimant is \$12,872.04.
14. The child support overpayment of \$12,196 owed to the respondent can be deducted from the outstanding s. 7 expenses owed to the claimant. The net amount to be paid by the respondent to the claimant is \$676.04.
15. The respondent will pay to the claimant his proportional share of the Children's future s. 7 special or extraordinary expenses. The parties' respective proportional shares are 35% for the claimant and 65% for the respondent.
16. The following will be s. 7 special or extraordinary expenses: music lessons, martial art classes, dental and medical expenses, counselling expenses, and such other expenses as agreed to by the parties or by further court order.
17. The party who incurs a s. 7 special or extraordinary expense shall provide the other party with a receipt prior to requesting for reimbursement.
18. The parties will:
 - a. put the best interests of the Children before their own;
 - b. encourage the Children to have a good relationship with the other parent and speak to the Children about the other parent and that parent's partner in a positive and respectful manner; and
 - c. make a real effort to maintain polite, respectful communications with each other, refrain from any negative or hostile criticism, communication, or argument in front of the Children.
19. The parties will not:

- a. question the Children about the other parent or time spent with the other parent beyond simple conversational questions;
 - b. discuss with the Children any inappropriate adult, court or legal matters; or
 - c. blame, criticize or disparage the other parent to the Children.
20. The parties will not email the other parties' partner or family members for any reason unless there is an emergency in which one party is trying to locate the other party.
21. The respondent is entitled to the costs of this application.
22. The costs of this application owed by the claimant are to be set off against the Trial Costs awarded in her favour.
- [97] Since the parties are self-represented, I request that counsel for FMEP draft the order and circulate for signature by the parties. I express my appreciation to the counsel for FMEP for the assistance she has provided throughout.

"Forth, J."

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