
CANADA / JUDGMENT

R.J.O. v. M.D.P

2021 BCSC 602

COURT

Supreme Court of British Columbia

DECIDED

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2021 BCSC 602 R.J.O. v. M.D.P.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R.J.O. v. M.D.P.,

2021 BCSC 602

Date: 20210401

Docket: E54035

Registry: New Westminster

Between:

R.J.O.

Claimant

And

M.D.P.

Respondent

Before: The Honourable Mr. Justice Majawa

Reasons for Judgment

Counsel for the Claimant:

A. M. Lees

Counsel for the Respondent:

T. E. Watkins

Place and Date of Trial:

New Westminster, B.C.

November 23-25, 2020 and February 1-3, 2021

Place and Date of Judgment:

New Westminster, B.C.

April 1, 2021

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OVERVIEW

- [1] In this family law matter, the primary issue is the amount of child and spousal support arrears owing pursuant to a separation agreement entered into by the parties. The amount of arrears owing is dependent upon the proper interpretation of the separation agreement as well as whether the claimant, R.J.O. ("Ms. O."), and the respondent, M.D.P. ("Mr. P."), shared the parenting of their son, J.M.P., between 2014 and 2018. Also at issue is the amount and duration of Mr. P.'s ongoing obligation for spousal support. I will refer to the parties by their initials in order to protect the privacy of their child.
- [2] The parties were married on December 28, 2000. Although there was some testimony to the contrary at trial, the parties have admitted in their pleadings that they began to live in a marriage-like relationship in late 1996. The parties have one child, J.M.P., who was born in November 2005. Ms. O. and Mr. P. separated in or around August 2014 and entered into a separation agreement that provided for spousal and child support as well as the division of the parties' assets and liabilities. The agreement was amended a number of times and there is a significant dispute in respect of the validity of these amendments. However, both parties are of the view that the agreement is valid and enforceable; it is the interpretation of the agreement that is in dispute.
- [3] Based on the pleadings, and the submissions and concessions made at trial, the following issues are raised in this proceeding:
1. What is the amount of arrears of child and spousal support that Mr. P. owes Ms. O. under the separation agreement up to December 31, 2020? This determination requires that the following matters be determined:
 - i. What is the proper interpretation of the separation agreement and do the various versions and amendments to the agreement effect the amount owing?
 - ii. Did Mr. P. parent the parties' son, J.M.P., for at least 40% of the time between 2014 and 2018?
 2. What is Mr. P.'s obligation for child and spousal support since January 1, 2021, and going forward?
 3. What is the amount of arrears of special and extraordinary expenses that Mr. P. owes to Ms. O. in respect of J.M.P and how should section 7 expenses be apportioned going forward?
 4. Should the interim order requiring that Mr. P.'s access to J.M.P. be supervised be set aside?

DIVORCE

- [4] The parties agree that the grounds for a divorce have been established pursuant to ss. 8(2)(a) and 8(3) of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) [DA]. Given the way that the scheduling of this trial unfolded, I granted the parties a divorce pursuant to s. 12 of the DA when the first part of the trial adjourned on November 25, 2020, and that divorce took effect 31 days from that date.

THE SEPARATION AGREEMENT

- [5] Both parties take the position that their separation agreement is valid, was intended to be an enforceable agreement, and that it should be enforced by this Court to determine the amount of child and spousal support arrears. However, there is a significant dispute about the interpretation of the agreement, the validity of various versions of the agreement, and the validity of an agreement that purports to amend the original agreement.

The Original Agreement

- [6] The first agreement in evidence in this matter is dated August 1, 2014 (the "Original Agreement"). It is signed by both parties; however, there were no witnesses to their signatures and the parties agree that they did not obtain any independent legal advice. The parties' evidence is conflicting as to the circumstances surrounding the execution of the Original Agreement.
- [7] Ms. O. takes the position that the Original Agreement was entered into on or around August 1, 2014, and perhaps as late as September 2014, but not beyond then. She testified that Mr. P. prepared the agreement and that it was presented to her and she signed it. She testified that she was still hopeful that her marriage wasn't over at the time she signed the agreement. Her testimony in these proceedings was that she and Mr. P. separated on or around August 1, 2014, although they continued to reside at the same address until early 2015.
- [8] Mr. P. takes the position that, although the Original Agreement is dated August 1, 2014, it was not prepared and executed until sometime in December 2014. He admits that he prepared the Original Agreement but testified that the final product was the result of discussions between the parties. Mr. P. testified that he and Ms. O. exchanged emails discussing the terms of the Original Agreement leading up to its execution in December 2014. Despite the fact that it must have been obvious that the date of the execution of the Original Agreement would be an issue in these proceedings, Mr. P. did not produce the aforementioned emails in advance of, or at, the trial of this matter.
- [9] Contrary to the admissions made in his Response to Family Claim and his Counterclaim, Mr. P. testified that the parties did not separate in August 2014. Rather, he testified that they picked the date of August 1, 2014, because, by December they realized their relationship was not going well and, in an effort to reduce the one-year waiting period required for a divorce, they decided to backdate the agreement by a few months. I will pause to note that Mr. P.

made no application to withdraw the formal admissions he made in his pleadings regarding the date of separation. Thus, I find that the parties separated on or around August 1, 2014.

- [10] The Original Agreement provided that Ms. O. and Mr. P. would be joint guardians of J.M.P. who turned nine years old in November 2014 (he was 15 years old at the time of trial). Ms. O. was to have primary care of J.M.P. and Mr. P. would have parenting time with their child based on Mr. P.'s work schedule, which would change monthly because of his employment as an airline pilot.
- [11] The relevant paragraphs of the Original Agreement as they pertain to child support and section 7 expenses are found in paragraphs 10-12:
10. [Mr. P.] will pay child support in the amount of \$1,000.00 (or the amount payable pursuant to Federal Support Guidelines of Canada) monthly to [Ms. O.]. Child support payments will commence on August 1, 2014 and \$500.00 will be paid on the 10th and 25th day of each and every month.
 11. The Parties will pay the cost of special and extraordinary expenses, such as [sic] extra expenses will be mutually agreed upon and split evenly, in proportion to their respective incomes as long as the child is a "child of the marriage" within the meaning of the Divorce Act of 1985.
 12. The Parties agree that each will provide the other a copy of their income tax return and any notices of assessment and re-assessment issued, on an annual basis.
- [12] The reason that payments were to be made on the 10th and 25th of each month is because that was when Mr. P. received his paycheques from his employer at the time.
- [13] The Original Agreement provides for spousal support in paragraph 15:
15. [Mr.P.] will pay spousal support in the amount of \$2,000 monthly to [R.J.O.] until such time as [Ms.O.] remarries or cohabits with another person in a common-law relationship or dies or until August 1, 2024, whichever will come first. Spousal support payments will commence on August 1, 2014 and \$1,000 will be paid on the 10th and 25th day of each and every month.
- [14] Also relevant to the payment of spousal support is paragraph 23 which reads:
23. Changes in income will result in changes in payments according to the Spousal Support Advisory Guidelines ("SSAG") - "With Child Support" Formula.
- [15] Mr. P testified that he used an online support calculator to determine the amounts referenced in the Original Agreement and then rounded the payment amounts to be within approximately \$100 of the amount shown in the calculator.
- [16] The Original Agreement also provided for the division of the parties' assets and debts and that division is not at issue in these proceedings.

- [17] It is common ground that Mr. P. continued to deposit his biweekly paycheques into the parties' joint account after August 1, 2014, including a final deposit on November 10, 2014. Thus, Ms. O. had to calculate the payments made for child and spousal support under the Original Agreement up to and including November 10, 2014, by subtracting Mr. P.'s personal expenses from the joint account to arrive at the amount of support paid.
- [18] Following a police-involved incident at the family residence on November 15, 2014, Mr. P. ceased depositing his paycheque into the joint account and began making payments to Ms. O. that correspond to the payment schedule set out in the Original Agreement. The first such payment was made on November 25, 2014, and the next was made on December 10, 2014.

Subsequent Version of the Original Agreement

- [19] Another version of the Original Agreement was entered into evidence (the "Subsequent Agreement"). Although it too is dated August 1, 2014, it is not entirely clear exactly when this agreement was prepared. The Subsequent Agreement appears to be identical to the Original Agreement save for the cover page which, unlike the Original Agreement, contains an address for Ms. O. and Mr. P. The address noted for Ms. O. is the family residence and the address noted for Mr. P. is the basement suite residence he obtained in February or March 2015 after completing a one-month residential alcohol treatment program. Thus, the Subsequent Agreement must have been prepared after the Original Agreement and sometime after February or March 2015.
- [20] Ms. O.'s signature on the Subsequent Agreement is not identical to her signature on the Original Agreement. However, Ms. O. testified the signature on the Subsequent Agreement was her signature but stated that she did not recall signing it. She testified to finding this agreement on her home computer in 2017 when Mr. P. stopped making spousal and child support payments. She filed the Subsequent Agreement with the Family Maintenance Enforcement Program ("FMEP") in order to enforce it.
- [21] The parties reported amounts of spousal and child support paid and received in their 2014 tax returns. It appears that sometime in the spring of 2015, the Canada Revenue Agency ("CRA") did not accept the amounts claimed on Ms. O.'s return and requested supporting documentation, perhaps because the parties' income tax returns showed them living at the same address.
- [22] It appears that the Subsequent Agreement was prepared and executed in order to provide support to the CRA for the amounts claimed on the parties' 2014 tax returns. Mr. P. prepared both of the parties' 2014, 2015, and 2016 tax returns. Ultimately, the CRA allowed all but \$500 of the amounts claimed in 2014 for child and spousal support.

The Amending Agreement

- [23] Yet another version of the separation agreement was entered into evidence. This version, which I will refer to as the Amending Agreement, was dated December 15, 2014. Unlike the Subsequent Agreement, the Amending Agreement made substantive changes to the amounts payable under the Original Agreement. Paragraphs 10 and 15 of the Original Agreement were changed to reduce the amount of child support payable from \$1,000 per month to \$333.33 per month and the amount of spousal support from \$2,000 per month to \$666.66 per month.
- [24] Notably, no changes were made to any other provisions of the Original Agreement, including paragraph 23 which provides for the amount of spousal support to be adjusted in accordance with the income of the parties.
- [25] The circumstances of the execution of the Amending Agreement were highly contested at trial.
- [26] There are in fact two different versions of the Amending Agreement (found at Tabs 16 and 17 of Exhibit 1). They are identical to each other in terms of content but the parties' signatures are different between the documents.
- [27] Mr. P. attempted to explain the creation of the two Amending Agreements during his testimony. He testified that the Amending Agreements were prepared in or around June 2016, following CRA's rejection of the spousal support declarations in the parties' respective 2015 income tax returns. In support of this, Mr. P. tendered printouts of text messages between him and Ms. O. in February 2016 that suggest that he made adjustments to the amount of support declared on their 2015 income tax returns to maximize a refund opportunity for Ms. O. Apparently, if he had claimed the support amounts referenced in the Original Agreement in the 2015 tax returns, Ms. O. would have been liable to pay a significant amount of tax and he would have been eligible for a significant refund. This is because Mr. P. had a significant decrease in his taxable income in 2015 due to the fact that most of his income was on account of long term disability payments in that year.
- [28] As mentioned earlier, Mr. P. attended a month-long residential alcohol treatment program during the month of January 2015. His attendance at this program appears to have been a condition imposed upon him by his employer at the time. Upon his completion of the program, Mr. P. was placed on long term disability by his employer at the time. He remained on long term disability until he returned to his employment in December 2015. Upon his return, Mr. P. was demoted from Captain to a First Officer and his pay was reduced due to a downturn in the oil industry.
- [29] Mr. P admitted that the Amending Agreement was not executed on December 15, 2014. Rather, he testified that he dated the agreement as such to reflect what shortly thereafter became his 2015 income, given that he was on long term disability for almost all of 2015.

- [30] Mr. P. testified that the CRA rejected the 2015 filings because the amounts claimed did not match the amounts referenced in the Original Agreement which had previously been sent to the CRA to support the 2014 claims. The documents tendered in evidence support the fact that the CRA rejected the parties' 2015 filings.
- [31] Mr. P. testified that he prepared the Amending Agreement in June 2016 in order to provide it to the CRA. He wanted to send the Amending Agreement quickly and was unable to attend at Ms. O.'s residence before she left for work the next day so he asked her to sign her name on a blank piece of paper a few different times in a few different sizes so that he could Photoshop her signature onto the Amending Agreement and send it to the CRA. He tendered text messages with Ms. O. in support of her agreement to do so. He testified that he did in fact Photoshop her signature onto the Amending Agreement and emailed it to the CRA. He said he did this with Ms. O.'s consent. He stated that he subsequently obtained Ms. O.'s original signature on the Amending Agreement.
- [32] The evidence also shows that Mr. P. paid significantly more to Ms. O. in child and spousal support in 2015 than the parties declared on their 2015 income tax returns. Mr. P. testified that the Amending Agreement did not reflect the amounts actually paid in 2015; rather, he admitted that the Amending Agreement was created solely to mitigate the tax owed by Ms. O.
- [33] Ms. O. adamantly denies any knowledge of the Amending Agreement at the time it was purported to be executed in December 2014 or in the spring or summer of 2016. She says that the first she became aware of the Amending Agreement was when it was provided to her by the FMEP in 2017 after she commenced enforcement proceedings.
- [34] Ms. O. originally testified that the signatures on both versions of the Amending Agreements were hers but that she had no recollection of signing either of them. She testified that she recalled signing her name in various sizes on a blank piece of paper at Mr. P.'s insistence. She testified that at some point, Mr. P. insisted that she create this "electronic signature" that could be scanned and inserted into documents. She didn't want to do it and only did it to get him out of the house. She testified that she signed the blank paper and authorized Mr. P. to scan and store it on her computer but that she did not provide Mr. P. with her permission to use her "electronic signature" on any document. She denies the authenticity of the text messages tendered by Mr. P. in respect of the circumstances of creating her electronic signature. She denies ever signing the Amending Agreement and testified that the signatures that appear there must have come from Mr. P.'s unauthorized use of her electronic signature.
- [35] During the course of the trial, what appears to be the originally signed version of the Amending Agreement was located in Court file E53051 in which the parties had filed the Original and the Amending Agreement as part of the FMEP proceedings. Ms. O. was recalled to the stand and once again denied signing the Amending Agreement despite the fact that the Amending Agreement was signed in ink and bore what appears to be the same signature

she identified on a photocopy as being hers during her earlier testimony. Her denial was based upon her understanding that Mr. P. took the position that the Amending Agreement was signed as dated in December 2014 and it was not possible for her to have signed it then for a number of reasons. However, it was clear that Mr. P.'s position was that the Amending Agreement was signed in or around June 2016 in support of the parties' tax filings for the 2015 tax year. Ms. O. did not directly address Mr. P.'s allegation that the Amending Agreement was signed in 2016 when she was recalled to the stand.

The Agreements are filed with the FMEP

- [36] Mr. P. continued to make spousal and child support payments to Ms. O. until early 2017. Although the amounts paid bore little resemblance to the specific amounts referenced in either the Original Agreement or the Amending Agreement, no evidence was tendered that Ms. O. took issue with the amount of support payments being made until they ceased being made in their entirety.
- [37] In early 2017, Ms. O. received a payment of approximately \$140,000, net of legal fees, in respect of the settlement of a lawsuit she commenced relating to a motor vehicle accident that occurred in 2007. It is not clear whether any of the settlement funds were paid on account of a claim by Ms. O. for loss of past or future income earning opportunities.
- [38] Mr. P. testified that he knew Ms. O. received a settlement in early 2017 but that he was unaware of the exact amount until Ms. O. testified to it at trial. The parties disagreed on the use that the settlement funds should be put to: Mr. P. was, and remains of the view, that some of those funds should have gone to paying back money the parties borrowed from his parents and his brother prior to separation. Ms. O. took the position that the settlement funds were hers and that the debt to Mr. P.'s family should be shared equally amongst the parties. Despite this, Ms. O. did not pay any of the approximately \$10,000 that the parties borrowed from Mr. P.'s brother.
- [39] It appears that the dispute over the use put to the settlement funds, and the fact that Mr. P. was unable to discern how much of the funds, if any, should be attributed to Ms. O.'s loss of earning capacity, prompted Mr. P. to cease making any payments for child or spousal support. At trial he recognized that this was not a wise decision.
- [40] Following Mr. P.'s cessation of payments, Ms. O. filed the Original Agreement in the New Westminster Registry of this Court on May 1, 2017, under file No. E53051 and enrolled in the FMEP making a declaration of payments that resulted in Mr. P. being found to be in arrears of \$59,842.45 as at July 10, 2017. The amount of arrears calculated by FMEP is based on Mr. P. being required to pay child and spousal support in the amount of \$1,000 per month and \$2,000 per month, respectively, from August 1, 2014, to the time Ms. O. enrolled in the FMEP in May 2017, and continuing thereafter.

- [41] On August 4, 2017, after he was notified of the amount owing by FMEP, Mr. P. filed the Amending Agreement in file No. E53051 and provided it to the FMEP. This resulted in a revised finding that he had a credit for pre-paid support of \$11,326.67 as of September 27, 2017. This revised amount is based upon on Mr. P. being required to pay child and support in the amount of \$1,000 per month and \$2,000 per month, respectively, from August 1, 2014, to December 14, 2014, and \$333 per month and \$666 per month, respectively, from December 15, 2014, to September 2017 and continuing thereafter.

The Applicability of the Separation Agreements in the Circumstances

- [42] As stated at the outset, both parties seek to enforce the terms of the separation agreement. Both say the Original Agreement is valid and should be enforced. They disagree, however, on what that means.
- [43] Mr. P. does not argue that the amounts set out in the Amending Agreement truly reflect what he owes in support. Mr. P. submits that the Amending Agreement filed with the FMEP was in effect an addendum to vary the Original Agreement in accordance with paragraph 23 to reflect the changed circumstances of his disability and reduced income in 2015. He admitted that the changes were made to obtain a better tax result for Ms. O.
- [44] Mr. P. acknowledges that the resulting overpayment calculated by FMEP was not fair when his income after 2015 is considered. He also acknowledges that a further variation was required by paragraph 23 when he returned to work in December 2015, and on an ongoing basis since then, as each parties' employment and income changed. Thus, he argues that the amount of arrears that he owes should be calculated based upon the parties' actual income in the relevant years. He also argues that the spousal support obligation should cease in August 2024 as set out in paragraph 15 of the agreements.
- [45] Ms. O. takes the position that the Amending Agreement is invalid and should be ignored. She points out that the parties agreed in the Original Agreement that Mr. P. would pay child and support in the amount of \$1,000 per month and \$2,000 per month, respectively from August 1, 2014. As I understand her argument, despite the fact that the parties incomes have changed over the years and despite the existence of paragraph 23 in the Original Agreement and despite the express words of paragraph 10 (which states that the amount of child support payable would be \$1,000 per month or the amount payable under the Federal Child Support Guidelines), Ms. O. takes the position that Mr. P. should be required to pay the specific amounts set out in the Original Agreement since 2014.
- [46] Also contrary to the Original Agreement, which provided that spousal support would be paid for 10 years and cease in August 2024, Ms. O. takes the position that spousal support should be payable to her indefinitely as a result of the Spousal Support Advisory Guidelines ("SSAG") "Rule of 65" which generally provides that spousal support should be paid indefinitely where the sum of the length of the relationship and the age of the party claiming support is greater than 65. On the admission of the parties in their pleadings, they had been in a marriage-like

relationship for approximately 18 years and Ms. O. was 49 years old when the parties' separated in August 2014. Therefore, the relevant sum is 67 years.

- [47] Ms. O. cites a litany of poor conduct she attributes to Mr. P. as being grounds for enforcing payment of the specific amounts set out in the Original Agreement. This poor conduct includes his alleged forgeries of the Amending Agreements, his alleged failure to provide updated income information, and certain alleged failures as a parent to J.M.P.
- [48] While I agree with Ms. O. (and Mr. P. for that matter) that the amounts set out in the Amending Agreement should not be enforced as the amounts owing since December 2014, I do not agree that the specific amounts set out in the Original Agreement should be enforced either. In my view, such an approach would require this Court to ignore the explicit words of paragraphs 10 and 23 of the Original Agreement, both of which require that the amount of support paid be adjusted for the parties' respective incomes.
- [49] Other than reliance on the doctrine of laches, counsel for the claimant has provided me with no authority that would support ignoring these particular provisions and enforcing the rest of the Original Agreement. In my view, laches does not operate to prevent Mr. P. from relying on paragraph 23 of the Original Agreement. If there was any delay on behalf of Mr. P. in respect of relying on paragraph 23, it is negated by Ms. O.'s conduct. Ms. O. accepted spousal and child support payments that did not accord with the interpretation of the Original Agreement she put forward at trial from 2014 until payments stopped entirely in 2017.
- [50] Similarly, despite being of the view that the Original Agreement is valid and enforceable, Ms. O. has put forward no authority in support of her position that the parties' agreement that spousal support would cease in August 2024 should be ignored.
- [51] It is important to note that Ms. O. is not arguing that the Original Agreement should not be enforced because of a vulnerability or some other unfairness inherent in the agreement. Rather, she is effectively requesting this Court to enforce the aspects of the agreement that suit her present purposes and to ignore the provisions that don't.
- [52] It is difficult for me to comprehend how Ms. O. can take the position that the Original Agreement is a valid and binding agreement, including her admission on cross-examination that paragraph 23 is valid and should be enforced, while at the same time taking the position that the amount of child and spousal support payable should be frozen in time, and thus, completely unrelated to the income earned by the parties. Not only is such a position contrary to the plain words of the Original Agreement, it defies common sense.
- [53] Consequently, as the parties both want this Court to enforce the provisions of the Original Agreement, it is my view that the amount of child and spousal support should be based on the parties' respective incomes at the relevant times as provided for in that agreement and that spousal support should cease in August 2024 as agreed to by the parties.

- [54] Given my conclusion, and the position taken by the parties, it is not strictly necessary for me to resolve the dispute between the parties as to when the Original Agreement and Amending Agreement was executed, nor whether Ms. O. did in fact execute the Amending Agreement. Nonetheless, the circumstances I have outlined above raise significant concern with respect to the credibility of both parties.
- [55] Ms. O. has made serious allegations amounting to fraud against Mr. P. She has alleged that he used her electronic signature without her permission. She alleges that Mr. P. broke into her home to affix her electronic signature to the Amending Agreement. When faced with what appeared to be an original signature, she maintained her position that she did not sign the Amending Agreement and submitted that he must have forged her signature. Despite having no evidence in support, counsel suggested that Mr. P. might have used a device purchased on the internet to do so. Ms. O. also alleged that the text messages tendered by Mr. P. in support of his position on why and when the Amending Agreements were prepared and her electronic signatures were created were also fraudulent. However, there is nothing on their face that would suggest they are not authentic and Ms. O. did not tender any evidence to the contrary, although she did tender other text messages between the parties. I find it troublesome that Ms. O. has made such serious allegations without any solid evidentiary support.
- [56] I also find Mr. P.'s credibility wanting in respect of the circumstances of the signing of the Original Agreement. Mr. P. maintained that the Original Agreement was not made until December 2014. However, in 2015 he prepared a document on Ms. O.'s behalf for presentation to the CRA that indicated that payments were made under the agreement commencing in August 2014. He made payments that match with the dates set out in the agreement commencing in November 2014. He provided no evidence to support his contention that he and Ms. O. negotiated the contents of the Agreement via email despite referring to its existence. In his pleadings, he formally admitted that the parties separated on or around August 1, 2014. On the evidence before me, it appears that the Original Agreement was likely executed more in line with when Ms. O. says it was, i.e., around August or September 2014. However, nothing turns on this finding.
- [57] It appears that the Amending Agreement was executed in 2016. The circumstances described by Mr. P. correlate with the documentary evidence before me (i.e., the correspondence with CRA and text messages). On the evidence before me, I am unable to find that he engaged in fraudulent activity in the creation of the Amending Agreement. However, Mr. P. appears to be willing to amend written agreements to suit the parties' tax preferences seemingly without any regard to the realities of the parties' financial situation. In my view, while this finding does not effect the calculation of the amount owing, it does negatively effect Mr. P.'s credibility.

THE PARENTING ARRANGEMENTS

- [58] The Original Agreement provided that the parties would have joint guardianship of J.M.P. and that J.M.P. would primarily reside with Ms. O. The parties also agreed that Mr. P. would have parenting time with J.M.P. and that his parenting time would be determined each month when his work schedule was released. The parenting time was modified by the order of Master Scarth made at a Judicial Case Conference on November 28, 2017. In essence, Master Scarth's order provided that parenting time would be shared equally on an interim basis and that the parenting schedule would be set by the 25th of the preceding month after the parties exchanged their respective work schedules.
- [59] Between August 2014 and March 22, 2018, Mr. P. exercised his parenting time rights; although the extent of the time he spent with J.M.P. is disputed. Mr. P. has not exercised parenting time rights under the agreement since March 22, 2018. On that day, an incident occurred while J.M.P. was in Mr. P.'s care at his residence in which the police attended after J.M.P. contacted Ms. O. to have her pick him up.
- [60] What exactly occurred on March 22, 2018, is another matter of contention between the parties. Mr. P. admits that when the police attended, he was asleep at the dining room table having consumed a combination of alcohol and cold medicine. Mr. P. testifies that he doesn't recall what occurred prior to being woken up by the police. For the present purposes, it is sufficient to say that whatever occurred that evening, it resulted in J.M.P. not wanting to see his father anymore.
- [61] Following the March 22 incident, Mr. P. agreed to a supervised access order. On May 17, 2018, Justice Bernard ordered that Mr. P.'s visits with J.M.P. be supervised by a professional company, twice per week for up to two hours per visit until the Ministry of Child and Family Development ("MCFD") completed their assessment of the March 22 incident. The order provided that once the MCFD investigation was complete, either party could apply to the Court on the issue of Mr. P.'s parenting time with J.M.P.
- [62] Shortly after Justice Bernard pronounced the consent order, Mr. P. had two supervised visits with J.M.P. but has not seen J.M.P. since those two visits.
- [63] On June 27, 2018, the MCFD completed its investigation into the March 22 incident and concluded that it was an isolated incident and there were no outstanding safety concerns. However, neither party returned to the Court to apply for Justice Bernard's order for supervised visits to be lifted.
- [64] In these proceedings, Mr. P. is not seeking an order for renewed parenting time in light of his understanding that doing so would be against the now 15 year-old child's present wishes. However, because the MCFD investigation concluded and found no ongoing safety concerns, Mr. P. seeks to set aside Justice Bernard's order so that there is no requirement for supervision in respect of the exercise of any parenting time that may be agreed upon in the future.

- [65] Ms. O. opposes setting aside Justice Bernard's order for supervised access. In essence, she argues that she was caught off guard by Mr. P.'s request to set aside Justice Bernard's order because, in her words, Mr. P. stated that there "are no parenting issues" in his trial brief. As I understand her argument, if she had known that Mr. P. sought to set aside Justice Bernard's order, she would have tendered evidence in support of her contention that the conclusion reached by the MCFD was flawed or incorrect because the individual who Mr. P. hired to supervise his two visits with J.M.P. was not a qualified child care counsellor or family support worker. She also argues that J.M.P. continues to need the "protection" of Justice Bernard's order and refers to the supervised access order as "protection order" throughout her submissions.
- [66] With all due respect, Ms. O. has mischaracterized what Mr. P. stated in his trial brief as well as the nature of Justice Bernard's order. In his trial brief, Mr. P. did not say there are "no parenting issues"; rather, he stated that he "does not seek an order for parental responsibilities or parenting time". That position is consistent with the position he took at trial. Also, Justice Bernard's supervised access order is not the same as a protection order. If Ms. O. is of the view that a protection order is required to prevent Mr. P. from attending J.M.P.'s sporting events then she will need to apply for one; Justice Bernard's order does not operate to prevent Mr. P.'s attendance at such events. Nonetheless, Mr. P. would be well-advised to respect J.M.P.'s wishes in this respect.
- [67] I am not persuaded that Mr. P. should be required to bring a separate application to set aside Justice Bernard's order. The evidence before me is that the MCFD assessment concluded that there were no longer any safety concerns as of June 2018. The contents of the MCFD letter advising Mr. P. of this does not indicate that its conclusion was based upon the report of the individual hired to supervise the visits. In fact, no mention is made of that supervisor's report. Rather, the MCFD's report is focussed on information it obtained about the March 22 incident itself. In the circumstances, the concerns that gave rise to Justice Bernard's order have been addressed and I see no reason why it should not be set aside.
- [68] However, the evidence before me does indicate that J.M.P., who is now 15 years old, does not wish to see his father. Whatever occurred on the evening of March 22, 2018, disturbed J.M.P. and has had a lasting impact. Mr. P. has indicated a desire to respect those wishes and does not wish to change the current parenting arrangement. It would not, in my view, be in J.M.P.'s best interests to revert to Master Scarth's order providing for equal parenting time. Nor would it be in his best interests to revert to the access provided for in the Original Agreement and thus the Original Agreement in that respect will be set aside as provided for in ss. 44(4) and 58(4) of the Family Law Act, S.B.C. 2011, c. 25 [FLA].
- [69] I am aware that substantial changes to the DA came into effect after the hearing of this matter, but before the release of this decision. This includes many amendments to s. 16. These amendments are binding on matters that have been heard, but not "finally disposed of" before the day they came into effect, which was March 1, 2021: see s.35.3 of the DA.

[70] I do not find it necessary to opine on the broader implications of these amendments in order to resolve the issues before me. As was the case under the previous language of the DA, I continue to be directed to take into consideration only the best interests of the child (formerly s. 16(8), now s. 16(1) of the DA. Here, I have given strong weight to J.M.P.'s clear views and preferences which has long been a component of the best interests of the child and is now an explicit statutory factor in the DA (s. 16(3)(e)).

[71] In light of the evidence before me in respect of the best interests of J.M.P., the position of the parties at trial, and the state of affairs in existence since March 2018, I make the following parenting order under s. 16.1 of the DA:

1. J.M.P. will reside with Ms. O. and Mr. P. will not have any parenting time without J.M.P.'s consent;
2. Ms. O. will have all of the decision-making responsibility with respect to J.M.P. under s. 16.3 of the DA;
3. Mr. P. is entitled to request from Ms. O. or from any other person who is likely to have such information, information about J.M.P.'s well-being, including in respect of his health and education, and to be given such information by those persons subject to any applicable laws; and
4. the parties may apply to this Court to vary this order or to enter into a consent order should J.M.P. wish to resume contact with his father while he is still under the age of majority.

[72] I have made the parenting order pursuant to the DA; however, I acknowledge that Mr. P. remains a guardian of J.M.P. under s. 39 of the FLA.

To what extent did the Parties share J.M.P.'s parenting from August 2014 to September 1, 2017?

[73] The extent to which the parties shared J.M.P.'s parenting since they separated is relevant to the amount of child and spousal support that should have been paid under the Original Agreement. The parties agree that there was shared parenting under s. 9 of the Federal Child Support Guidelines SOR/97-175 [Guidelines] from September 1, 2017, until March 22, 2018, and that Ms. O. has been solely responsible for parenting J.M.P. since March 22, 2018. However, the parties disagree on the parenting arrangement that was in place between August 1, 2014, and September 1, 2017.

[74] Ms. O. takes the position that she was solely responsible for parenting J.M.P. other than the agreed upon shared parenting period. Mr. P. takes the position that he was equally responsible for parenting J.M.P., or at least for 40% of the time from August 1, 2014, all the way until visits ceased in March 2018.

- [75] The parties' respective work schedules are relevant to the determination of parenting time during the material periods. When the parties separated in or around August 2014, Mr. P. was a pilot for a regional airline. Although the parties resided in Maple Ridge, British Columbia, Mr. P. was based out of Calgary, Alberta. As a result, he would have to fly to Calgary to begin his shifts and then fly home again once they were complete. Mr. P. testified that he would be away from Maple Ridge for up to 16 days per month.
- [76] As mentioned earlier, Mr. P. attended a residential alcohol treatment program during January 2015. He was on long term disability until approximately December 2015. However, while on long term disability his employer required him to regularly travel to Calgary for various check-ins as part of his return to work program. Mr. P. resumed employment with the airline in or around December 2015, although at a reduced salary.
- [77] In the first seven or eight months of 2016, Mr. P. testified that he was away from Maple Ridge for close to 20 days per month for work. In August 2016, Mr. P. obtained employment with a different regional airline, this time based out of Abbotsford. This job required fewer overnights but longer days. He testified that he would work 20 days per month. He continued to work for this airline on a similar schedule until July 2019.
- [78] Ms. O. was a customer service agent for a national airline. Her position was located at the Vancouver International Airport; about a one to one-and-a-half hour drive from their home in Maple Ridge. Although her particular schedule would change approximately every six months, Ms. O.'s work schedule generally permitted her to drop J.M.P. at school before she drove to work. She would often not return home until late in the evening. She would usually work four days on and three days off. Ms. O.'s sister and parents live nearby the family home and provided J.M.P. with childcare when neither Mr. P. nor Ms. O. could.
- [79] Ms. O. generally worked full time as described above until she had major surgery in relation to a cancer diagnosis on or around November 9, 2014. She did not return to work until June or July 2015. She stopped working in or around October 2018 following an incident that occurred at a London Drugs store in which she alleges she was injured. Other than a short period of time in early 2019, Ms. O. has not worked since and has been receiving disability payments.
- [80] Upon consideration of all the evidence, I find that the parties did not share J.M.P.'s parenting except for the period agreed to by the parties. While Ms. O. may not have solely exercised the parenting responsibilities up until September 2017, the evidence does not support a finding that Mr. P. provided 40% of J.M.P.'s parenting during this time.

- [81] I accept Ms. O.'s contention that Mr. P. was infrequently present at the family home in the months of September through December 2014 even though he did not formally move out of the family house until February or March 2015. First of all, Mr. P.'s work schedule at that time did not permit him to be in Maple Ridge for more than 14 days per month. Secondly, this accords with the parties' Original Agreement which stated that the parties separated on August 1, 2014.
- [82] It is also clear that a violent incident occurred between the parties on November 15, 2014, shortly after Ms. O. had major abdominal surgery in relation to her cancer diagnosis. The parties vigorously disagree on the circumstances of that incident and it is not necessary for me to definitively decide exactly what happened that evening in order to resolve the matters at issue in this litigation.
- [83] What is clear is that Ms. O. sustained some significant injuries and the incident resulted in the police being called and Mr. P. being arrested. However, it appears that he was either not charged or the charges were not proceeded with. Mr. P. spent one or two nights in a hotel and then returned to working out of town. It appears that he was not in back in Maple Ridge for at least another week following the incident. In my view, it is unlikely that Mr. P. spent any significant time at the family home immediately following this incident. It is also clear to me that if a chance of reconciliation existed before this incident it did not exist afterwards.
- [84] While Mr. P. was not working during most of 2015, the evidence shows that he was out of town for significant periods of time, including many weekends. He was in a residential alcohol treatment program for the entire month of January and he moved out of the family home in or around February 2015. Mr. P. testified that when he was in Maple Ridge, he would pick up J.M.P. from school and take him back to Ms. O.'s residence where he would spend time with him until Ms. O. would return from work late in the evening. He testified that he would sometimes stay over at Ms. O.'s residence and sometimes he would return to his own residence. However, Mr. P.'s evidence was vague with respect to how much time he would spend with J.M.P. and as to what parenting responsibilities he actually engaged in during these occasions. On the evidence before me, it is more likely that the time Mr. P. spent with J.M.P. during at least the first half of 2015 was inconsistent and sporadic at best.
- [85] I do accept that Mr. P.'s parenting of J.M.P. became more routine in the fall of 2015 and that he also began to play a role as assistant coach for his hockey team. Mr. P. also drove J.M.P. to his various sporting activities when he was available to do so. However, none of this equates to shared parenting under s. 9 of the Guidelines.
- [86] Although Mr. P. appears to have been more involved in parenting J.M.P. in 2016, it does not, in my view, amount to roughly equal shared parenting. As described above, Mr. P. was away from Maple Ridge for at least half the month during the first half of the year. On his own evidence, when he was in town, he spent half the time with J.M.P. at Ms. O.'s residence while waiting for her to return home from work and half the time at his residence. Ms. O. denies

that so much time was spent at Mr. P.'s residence. Considering that Mr. P. appears to have commenced a romantic relationship with someone else by the spring of 2016 at the latest, it seems unlikely that Mr. P. would have been as welcome to stay over at Ms. O.'s home as he suggests. In any event, the evidence with respect to 2016 was again vague as to how much time he would spend with J.M.P., and as to what parenting responsibilities he actually engaged in during these occasions.

- [87] I am unable to discern any significant difference in the parenting arrangement until September 2017 when the parties agree that shared parenting commenced.
- [88] Furthermore, I also accept Ms. O.'s testimony that she was entirely responsible for arranging for all of J.M.P.'s sporting activities, preparation of meals (even when Mr. P. did spend time with J.M.P. at her residence), as well as for shopping for school supplies, clothes, etc. Mr. P.'s involvement with J.M.P. appears to be limited to spending time with him when he was in town and available, and when Ms. O. was at work. Mr. P. also arranged for J.M.P. to spend time with his parents in Kitimat during school vacations but he would not always go with him on these trips as he would sometimes be required to work.
- [89] In sum, Mr. P. has provided no concrete evidence of the amount of time he spent with J.M.P. and little to no evidence was tendered as to what parental responsibilities he engaged in during those times, other than driving him to and from some of his sporting events. The evidence falls well short of establishing that Mr. P. has met the 40% threshold provided for in section 9 of the Guidelines for the period between August 1, 2014, and September 2017.

CALCULATION OF SPOUSAL AND CHILD SUPPORT

- [90] Having found that there was no shared parenting of the child except for the short period agreed to by the parties, and having found that the arrears of child and spousal support should be calculated in accordance with the Original Agreement and its reference to changes in the parties' respective incomes, the calculation of child support under the Guidelines is a relatively straightforward exercise. The parties have agreed on their respective incomes for the years 2014 through 2018. Each party tendered evidence with respect to their incomes for 2019 and 2020. There is also evidence from which the amount of support that has already been paid can be ascertained.
- [91] Although the above information is also relevant for the determination of spousal support, the calculation of ongoing spousal support and the arrears owing under the Original Agreement is slightly more complicated than the determination of child support. Paragraph 23 of the Original Agreement references the changes to amounts payable to be made in accordance with the parties' incomes and the SSAG. However, there is no explicit reference as to whether spousal support was payable at the low, mid- or high range of those guidelines. Thus, I must determine at what range spousal support is properly payable to Ms. O.

Should Spousal Support be paid at the mid or high range under the Original Agreement?

- [92] In light of the Original Agreement, it is common ground that Ms. O. is entitled to spousal support. In her submissions, Ms. O. argues that she is entitled to spousal support at the high end of the SSAG range mainly due to the strength of her compensatory claim, although she also relies on the disparity of the parties' incomes and their costs of living in support of her non-compensatory entitlement. Mr. P.'s position is that the appropriate amount of support is nearer the mid-range of the guideline amount.
- [93] Having regard to the factors set out in chapter 9 of the SSAG, in my view, Ms. O.'s compensatory claim would usually be more in line with the mid-range amount. I agree with Ms. O. that she has been primarily responsible for matters in relation to J.M.P. as he was growing up and since separation. Nonetheless, Ms. O. continued to work full time throughout the marriage, save for when she was not working due to disability. However, Mr. P. was provided the freedom to pursue his career as an airline pilot because of the role that Ms. O. took on with J.M.P. Given the amount of time that Mr. P. was required to be away from home for his employment, the contribution Ms. O. made to his career success by taking on the principal caregiving responsibilities for J.M.P. are not insignificant.
- [94] Furthermore, it was around the time when the parties' entered into the Original Agreement that Ms. O. was diagnosed with cancer and underwent significant surgery that caused her to miss a substantial period of work and was therefore expected to have a limited income for a period of time. As it turns out, Ms. O. is currently on long term disability for an unrelated matter and her return to work is uncertain and thus her income is currently expected to be limited.
- [95] It is also noteworthy that this was a long marriage and that normally, the rule of 65 would apply to make a spousal support award indefinite. The duration and quantum of spousal support are interrelated. Thus, while Ms. O.'s entitlement to spousal support for an indefinite duration would likely fall in the mid-range, the quantum of support she is entitled to is informed by the parties' agreement to limit the duration in which spousal support is to be paid. In this case, the parties agreed to limit the duration to 10 years. In my view, in light of the length of the marriage (nearly 18 years) and by operation of the rule of 65, a spousal support order of limited duration suggests that the quantum should be closer to the higher end of the spectrum.
- [96] Indeed, it would appear that is what the parties' contemplated at the time they entered the agreement. Mr. P. testified to using commonly available software to calculate the amount of spousal support referenced in the Original Agreement. The parties have agreed on their respective income for the 2014 year. The SSAG "with child support" formula in circumstances where Ms. O. provided sole parenting results in a spousal support amount of \$1,036 at the low end, \$1,492 at the mid-range, and \$1,944 at the high end of the range. The Original Agreement provided that Mr. P. would pay Ms. O. \$2,000 per month in spousal support and Mr. P. testified that he rounded the result he obtained from the calculator to

obtain a round number. Thus, it appears that the parties contemplated that spousal support payments would be made at the high end of the SSAG. I would also pause here to note that the amount of child support the parties agreed to in the Original Agreement is much closer to the amount provided for in the Guidelines calculation where Ms. O. is the sole parent.

[97] Therefore, I find that the Original Agreement provides for spousal support to be paid at the high-end of the SSAG range and this further accords with the interrelationship between Ms. O.'s entitlement to spousal support and the parties' agreement to compromise on the duration for which it is paid. I have been pointed to no material change in circumstances that would warrant a different result in the years since 2014 when the Original Agreement was entered into. In fact, Ms. O.'s current disability and limited income for the foreseeable future is further support for a determination at the high end of the range.

The amounts of Child and Spousal Support arrears owing in each year

[98] The parties have made admissions about their respective incomes under the Guidelines and the SSAG for 2014 through 2018 and there is evidence before me of their incomes for 2019 and 2020. Having determined that the parties were not in a shared parenting arrangement except for the period between September 2017 and March 2018, and that spousal support is payable at the high end of the SSAG range, all that remains to be determined to calculate the amount of arrears owing under the Original Agreement is the amount of support that has already been paid.

[99] At times throughout his submissions on the amount of arrears owing for 2014 to 2016, Mr. P. takes the position that the amount paid was fairly close to what he submits he owed under the Original Agreement and that the difference in the amount paid was not substantially unfair to Ms. O. Therefore, he argues that a retroactive order should not be made. However, it is important to note that in the circumstances of this case, I have been tasked with determining the amount of support that should have been paid under the Original Agreement, and thus, I must determine the amount of arrears owing; I am not determining whether a retroactive order for support should be made.

[100] The analyses for determining the entitlement to retroactive support and arrears are different. The person seeking to cancel arrears bears a higher onus than an individual seeking that a retroactive award not be made: *MacCarthy v. MacCarthy*, 2015 BCCA 496 at para. 54.

[101] Section 174(1) of the FLA provides that a court may cancel or reduce arrears of child or spousal support owing under an agreement if it is satisfied that it would be "grossly unfair" not to do so. An individual seeking to cancel arrears must also show a material change in circumstances (described as being "significant and long lasting") that renders them unable to pay arrears now and in the future: *Semancik v. Saunders*, 2011 BCCA 264 at para. 25.

[102] Section 174(2) provides that the court may consider:

- (a) the efforts of the person responsible for paying support to comply with the agreement or order respecting support,
- (b) the reasons why the person responsible for paying support cannot pay the arrears owing, and
- (c) any circumstances that the court considers relevant.

[103] In my view, Mr. P. has not provided any evidence of a material change in circumstances that is significant and long-lasting and would render him unable to pay the arrears now and in the future. Nor has he provided any evidence that it would be grossly unfair to not cancel the arrears owing under the Original Agreement. Any delay on behalf of Ms. O. in coming to court to enforce the payment of arrears is generally not reason for reducing arrears: *Holmstrom v. Holmstrom*, 2014 BCSC 545 at para. 42. Thus, Mr. P. will be required to pay the difference between what should have been paid under the Original Agreement and what was actually paid.

2014

[104] The Original Agreement required that Mr. P. pay Ms. O. \$2,000 per month in spousal support and \$1,000 per month in child support for a total amount owing of \$15,000 for the months of August through December 2014.

[105] Ms. O. reported to FMEP that she received eight support payments in 2014 totalling \$12,099.40. However, in her evidence in this proceeding, she acknowledged receiving two additional payments of \$1,500 each on December 10 and 29, 2014. Thus the total amount received in 2014 was \$15,099.40 and Mr. P. owes no arrears for that year. In fact, he paid \$100 in excess of what he was required to pay.

2015

[106] As discussed earlier, Mr. P. started a 28-day residential alcohol treatment program on January 1, 2015. At the same time, he began receiving a taxable short-term disability benefit, which transitioned to a non-taxable long-term disability benefit later in the year. The evidence supports that Mr. P. did not return to work until December 2015.

[107] Including a gross-up of the non-taxable benefits he received, the parties have agreed that Mr. P. had a 2015 Guideline income of \$108,200. The parties have agreed that Ms. O.'s Guideline income was \$44,241. In a sole parenting situation, Mr. P. owed Ms. O. child support in the amount of \$988 per month and spousal support in the amount \$1,346 per month at the high end of the range. Thus Mr. P.'s total liability for child and spousal support under the Original Agreement in 2015 was \$28,008.

[108] Ms. O. deposed that the support she received from Mr. P. in 2015 totaled \$21,922.48. This is similar to the amount that she reported to FMEP of \$21,927.70. Thus, the arrears owing under the Original Agreement for 2015 are approximately \$6,080 all of which are attributable to spousal support.

[109] The amount of spousal support payable under the SSAG assumes that periodic spousal support received will be taxable in the hands of the recipient and tax deductible by the payor. However, such tax treatment is not available for a lump-sum order of arrears. Therefore, I must consider the tax discount rate for the lump sum payment.

[110] In my view, it is appropriate to determine the discount rate by reference to the mid-point of the after tax cost to Mr. P. and the after tax benefit to Ms. O. In 2015, the mid-point of these numbers is \$1,019 which represents approximately 25% discount from the \$1,346 he was required to pay monthly. Thus, I find the appropriate tax discount rate is 25% for 2015 and the amount of arrears owing payable in a lump sum is therefore \$4,560 (\$6,080 less 25%).

2016

[111] By 2016, Mr. P. had returned to flying out of Calgary, although at a reduced wage initially. He changed employers in August and was then based out of Abbotsford. The parties have agreed that Mr. P.'s 2016 Guideline income was \$93,045, while Ms. O.'s was \$55,894.

[112] In a sole parenting situation, Mr. P. owed Ms. O. child support in the amount of \$861 per month. Due to the narrowing gap in incomes, Mr. P.'s obligation for spousal support was only \$17 per month at the high end of the range. Thus Mr. P.'s total liability for child and spousal support under the Original Agreement in 2016 was \$10,536.

[113] Ms. O. acknowledged having received support payments from Mr. P. totaling \$10,700 in 2016 and reported to FMEP that she had received a similar amount (\$10,761.12). Thus, Mr. P. made a slight overpayment of support in 2016 of approximately \$200.

2017

[114] It was in 2017 that Mr. P. ceased making support payments following a dispute between the parties which appears to have been in respect of the use of the settlement funds Ms. O. received.

[115] The parties have agreed that Mr. P.'s 2017 Guidelines income was \$115,334, while Ms. O.'s was \$43,877. As discussed earlier, Ms. O. had sole parenting responsibilities until September at which time the parties began to share J.M.P.'s parenting. Therefore, Mr. P.'s obligation for child support from January to August was \$1,075 per month and from September to December was \$662 per month for a total amount of child support owing of \$11,248.

- [116] On the evidence before me, I find that Mr. P. made a total of \$2,960 in support payments in 2017. I accept this as opposed to the amount of \$3,350 which was reported in Ms. O.'s tax return because the information reported in the parties' tax returns is unreliable. Thus, Mr. P.'s arrears of child support for 2017 are \$8,288 (\$11,248 less \$2,960).
- [117] Under the SSAG, Mr. P.'s obligation for spousal support at the high end of the range was \$1,534 per month for January to August while Ms. O. had sole parenting responsibilities for J.M.P. His liability for spousal support for the remainder of the year while the parties had shared parenting was \$1,759 per month. Thus, Mr. P.'s total spousal support obligation for 2017 was \$19,308 which must be adjusted for the tax discount in order to determine the appropriate lump sum.
- [118] As I did for 2015, I have referred to the mid-point of the after-tax cost to Mr. P. and the after-tax benefit to Ms. O. in order to determine that the appropriate tax discount rate for the lump sum payment of spousal support in 2015 is 33%. Consequently, the lump sum amount of spousal support arrears that Mr. P. is liable for is \$12,936 (\$19,308 less 33%). To this, I add the \$8,288 of child support arrears for a total lump sum payment of \$21,224.

2018

- [119] The parties agree that Mr. P.'s 2018 Guideline income was \$149,395 and that Ms. O.'s 2018 Guideline income was \$43,088. I have also determined that the parties shared J.M.P.'s parenting until the March 22 incident and that Ms. O. provided sole parenting after that time.
- [120] Based on the parties' incomes and J.M.P.'s parenting situation, Mr. P.'s obligation for child support and spousal support (at the high end of the range) was \$946 and \$2,805 per month, respectively for the first three months of 2018. His obligation for child and spousal support for the remaining nine months was \$1,351 and \$2,668, respectively. Thus, his total child support obligation for 2018 was \$14,997 and his total spousal support obligation was \$32,427.
- [121] Three interim Orders were made in 2018, creating support obligations. Those interim orders were:
1. the Order of Master Caldwell made June 20, 2018, which required the 'without prejudice' payment of \$2,500 towards Mr. P.'s support obligations as a condition of adjournment of an interim application;
 2. the Order of Master Tokarek made July 12, 2018, which required the 'without prejudice' payment of \$5,000 towards Mr. P.'s support obligations as a condition of a further adjournment of an interim application; and

3. the Order of Master Keighley made July 31, 2018, upon the hearing of the interim application, which fixed interim child support of \$1,072 per month and interim spousal support of \$1,500 per month, payable retrospectively from April 1, 2018, together with a further \$2,800 payable as special or extraordinary expenses (the "Keighley Order").

[122] Mr. P. made some payments to Ms. O. under the above orders; however, the amount of support ordered in the Keighley Order was based upon Mr. P.'s 2017 income which ultimately turned out to be less than his 2018 income. Furthermore, there was no order in place for the first three months of the year.

[123] The evidence from FMEP shows that Mr. P. made a total of \$16,216 of support payments to Ms. O. in 2018. This also correlates with the amount of support that Ms. O. reported having received on her 2018 income tax return (now being prepared by a professional). In that return, Ms. O. reported that \$8,523 of the amount received in 2018 was in respect of spousal support and the remaining \$7,693 was in respect of child support. Thus, Mr. P.'s arrears of child support for 2018 are \$7,304 (\$14,997 less \$7,693).

[124] The gross amount of spousal support arrears for 2018 is \$23,904 (\$32,427 less \$8,523). As I did for earlier years, I have referred to the mid-point of the after-tax cost to Mr. P. and the after-tax benefit to Ms. O. in order to determine that the appropriate tax discount rate for the lump sum payment of spousal support in 2018 is 35%. Consequently, the lump sum amount of spousal support arrears that Mr. P. is liable for is \$15,538 (\$23,904 less 35%). To this, I add the \$7,304 of child support arrears for a total lump sum payment of \$22,842 for the 2018 arrears owing.

2019

[125] The parties have not agreed on their respective incomes for 2019. On the evidence before me, I find that Mr. P.'s income for 2019 was \$145,072. In coming to this determination, I have included Mr. P.'s employment income from both airlines he worked for in 2019 (less union dues) as well as the disposal of his unvested pension plan from his previous employer in July 2019 in the amount of \$12,729. This amount was included in his sources of income under the heading total income in Mr. P.'s 2019 T1 General return and, as such, it should be included in his income for the purposes of support pursuant to s. 16 of the Guidelines. I have not been provided with any evidence or authority that would suggest that the proceeds of disposition from his pension plan should be deducted from his income or that this increase in wealth should not be included in his income for the purposes of support calculations.

[126] I have determined that Ms. O.'s 2019 Guideline income is \$41,716. My determination of her income for 2019 is based upon the disability and Employment Insurance benefits she received. I have also included her employment income, including the relatively small amount related to her brief return to work in March 2019.

[127] Based on the above incomes, Mr. P.'s monthly obligation for child and spousal support in 2019 was \$1,328 and \$2,634, respectively, for a total support obligation of \$47,544. On the evidence before me, Mr. P. made support payments totalling \$41,519 in 2019. These payments were made pursuant to the Keighley Order. From this total, I deduct \$2,800 which the Keighley order required be paid in respect of s. 7 expenses. Therefore, the total amount Mr. P. paid towards support in 2019 was \$38,719. Thus, the gross amount of arrears owing for 2019 is \$8,825, all of which is spousal support.

[128] As I did for earlier years, I have referred to the mid-point of the after-tax cost to Mr. P. and the after-tax benefit to Ms. O. in order to determine that the appropriate tax discount rate for the lump sum payment of spousal support in 2019 is 35%. Consequently, the lump sum amount of 2019 spousal support arrears that Mr. P. is liable for is \$5,736 (\$8,825 less 35%).

2020

[129] The parties do not formally agree on their Guidelines incomes for 2020; however, they were not far apart in the submissions on the topic. Mr. P.'s income was affected by both a change of employers and by a period of lay-off due to the COVID-19 pandemic and its impact on air travel. On the evidence before me, including paystubs from one employer and a T4 from another employer, I find that Mr. P.'s 2020 Guideline income is \$94,308.

[130] Ms. O. did not return to work in 2020 and continued to collect disability payments. Her evidence was that she is receiving long term disability benefits in the amount of \$1,235 bi-weekly or \$32,110 per year and I accept that to be her income. I have assumed that this amount is non-taxable.

[131] On the above incomes, Mr. P.'s obligation for child support in 2020 was \$898 per month or \$10,776 for the year. His obligation for spousal support at the high end of the SSAG range is approximately \$760 per month or \$9,120 per year. Thus, his total support obligation for 2020 was \$19,896. The evidence shows that Mr. P. made payments totaling \$23,576 in 2020. Thus, he has paid \$3,680 in excess of the amount required to be paid.

The total amount of arrears owing as of December 31, 2020

[132] In my view, the most efficient way to dispose of the arrears owing by Mr. P. is to set off the amount of arrears owing from 2014-2020 against any excess payments made during those years (as detailed above).

[133] Consequently, the amount of arrears owing by Mr. P. to Ms. O. under ss. 15.1 and 15.2 of the DA for those years is \$50,382. Payment of this amount by way of lump sum will satisfy all claims for child and spousal support and for arrears up to December 31, 2020. The lump sum of arrears is to be paid within 60 days. On the evidence before me, Mr. P. has the savings or means to borrow the funds to make the lump sum payment of arrears.

[134] I decline to accede to Ms. O.'s request that Mr. P.'s RRSP be held as security for payment of the outstanding arrears. Section 15.2 of the DA allows the court to make an order for provision of security for spousal support. Section 12 of the Guidelines allows the court to order security for payment of child support. While I am not condoning Mr. P.'s behaviour in ceasing to make support payments in 2017, those support payments were required to be made under an agreement, not a court order. Clearly, the parties had significantly different views as to what support obligations were provided for in those agreements. I have also described my concerns with respect to the position taken by the parties, and their credibility, regarding the amendments of those agreements. Mr. P. has made payments under the various interim orders in existence since 2018. There is no evidence that Mr. P. plans to relocate to a jurisdiction beyond the reach of this Court. On the evidence before me, I am not prepared to conclude that there is a real risk that Mr. P. will not make payment in compliance with this Court's order.

The amount of Child and Spousal Support payable commencing January 2021

[135] I now turn to the determination of the amount of child and spousal support payable commencing 2021 in accordance with the terms of the Original Agreement.

[136] The parties agree that Mr. P.'s income for 2021 is expected to be \$130,000. At this time, Ms. O. continues to receive disability payments as her only source of income and there is no indication that will change in the near future. Thus, Ms. O.'s non-taxable income is once again expected to be \$32,110.

[137] As discussed above, paragraph 23 of the Original Agreement requires that the child and spousal support obligations be adjusted in accordance with changes to the parties' incomes. I have also explained why Mr. P.'s obligation for spousal support should end in August 2024 as the parties agreed.

[138] Ms. O. has commenced litigation in respect of the injuries she allegedly suffered at a London Drugs store in October 2018. As discussed, other than a short period in early 2019, Ms. O. has not returned to work since that incident and her income has principally consisted of disability payments since that time. It appears that Ms. O. is seeking compensation for loss of income in respect of the incident at London Drugs.

[139] Mr. P. argues that spousal support be set at the low end of the SSAG range going forward to balance the likelihood of Ms. O. receiving compensation for loss of income in her ongoing action. However, in my view, one can only speculate as to whether she will receive such compensation, and if she does, there is no indication as to when such an amount would be received. The fact that she may receive compensation at some unknown point in the future does not change the fact that Ms. O.'s income currently consists of disability payments. Thus, spousal support will continue to be paid at the high end of the SSAG range. Ms. O. will, however, be required to account for any payments received as a result of her litigation so that the parties or the Court can determine if support obligations should be changed.

[140] Consequently, I make the following order for support:

1. under the Original Agreement and s. 15.1 of the DA, effective January 1, 2021, Mr. P. is to pay Ms. O. child support of \$1,195 per month for the support of J.M.P. on the first day of each and every month thereafter for as long as J.M.P. is eligible for support under the DA;
2. under the Original Agreement and s. 15.2 of the DA, effective January 1, 2021, Mr. P. is to pay Ms. O. spousal support of \$1,656 per month on the first day of each and every month until August 1, 2024, at which time spousal support will be terminated;
3. the parties are to exchange income tax returns and notices of assessment by June 30, 2022, and by June 30 in each subsequent year for which support remains payable;
4. in accordance with the Original Agreement, the amount of child and spousal support payable shall be adjusted annually based on the parties' previous year's income information and will be determined with reference to the Guidelines and the SSAG and the adjusted amount will be payable commencing on July 1 of each year;
5. Ms. O is to report to Mr. P on the status and result of her claims for compensation for income loss in respect of the incident at London Drugs by June 30 in each year, or within thirty days of the resolution of that claim;
6. either party is at liberty to apply for a variation of child or spousal support if warranted by a material change in circumstances; and
7. Ms. O.'s receipt of compensation for past or future income loss in respect of the incident at London Drugs gives right to a review of the quantum of support.

SECTION 7 EXPENSES

[141] Ms. O. seeks an order that the parties share the costs of special and extraordinary expenses proportionate to their incomes. This is consistent with the guiding principle set out in s. 7(2) of the Guidelines and there is no dispute that such an order should be made. It is also consistent with the Original Agreement. Ms. O. also seeks payment for s. 7 expenses for 2017, 2018 and 2019.

[142] The parties disagree on whether certain limited expenses claimed by Ms. O. properly fall within s. 7 of the Guidelines as a special expense or extraordinary expense.

[143] The relevant portions of s. 7 are set out below:

7 (1) In a child support order the court may, on either spouse's request, provide for an amount to cover all or any portion of the following expenses, which expenses may be estimated, taking into account the necessity of the expense in relation to the child's best interests and the reasonableness of the expense in relation to the means of the spouses and those of the child and to the family's spending pattern prior to the separation:

- (c) health-related expenses that exceed insurance reimbursement by at least \$100 annually, including orthodontic treatment, professional counselling provided by a psychologist, social worker, psychiatrist or any other person, physiotherapy, occupational therapy, speech therapy and prescription drugs, hearing aids, glasses and contact lenses;
- (d) extraordinary expenses for primary or secondary school education or for any other educational programs that meet the child's particular needs;
- (f) extraordinary expenses for extracurricular activities.

[144] In *Hsieh v. Lui*, 2017 BCCA 51 at para. 65, the Court stated that an order for contribution under s. 7 is discretionary.

[145] In this case, the real issue is whether certain expenses are "extraordinary expenses" for the purposes of s. 7(1)(d) and (f) of the Guidelines which are defined as:

(1.1) For the purposes of paragraphs (1)(d) and (f), the term extraordinary expenses means

- (a) expenses that exceed those that the spouse requesting an amount for the extraordinary expenses can reasonably cover, taking into account that spouse's income and the amount that the spouse would receive under the applicable table or, where the court has determined that the table amount is inappropriate, the amount that the court has otherwise determined is appropriate.

[146] Ms. O. seeks reimbursement for various items for J.M.P. including swimming lessons, a winter coat, a team photograph, a school hoodie, and a school fieldtrip. In my view, these are routine expenses; none of these items are individually more than \$50, and they are expenses that Ms. O. can reasonably cover considering her income and the amount of support she is entitled to.

[147] The most expensive item for which Ms. O. seeks reimbursement is a computer she purchased in 2019 for \$1,681.11 for J.M.P. to use at school. She has also claimed \$168 for some repairs made on that same computer. Ms. O. has not satisfied me that the computer she purchased was necessary for J.M.P.'s educational needs when she purchased it in 2019. Nonetheless, I am prepared to take notice that beginning in 2020, the COVID-19 pandemic has required some secondary school students to engage in their educational programs online using a computer. In my view, a reasonable expense for such a computer would be approximately \$800 and Mr. P. will be required to pay his proportionate share of that amount.

[148] Mr. P. has acknowledged his obligation to contribute to the cost of J.M.P.'s orthodontics and that he currently owes the orthodontist approximately \$800. Mr. P. will be required to pay the amount owed forthwith. Mr. P. will pay his share of any future orthodontics for J.M.P. directly to the provider, forthwith upon receipt of the invoice.

- [149] The parties generally agree that the remaining s. 7 expenses for 2017-2019 are properly claimed as extraordinary expenses. However, in her submissions, Ms. O. appears to seek reimbursement for 100% of the claimed extraordinary expenses in those years as opposed to Mr. P.'s proportionate share. To the extent that is what she seeks, I have been provided with no reason or authority that would persuade me to depart from the guiding principle in s. 7(2) of the Guidelines that the parties are to share these expenses proportionate to their incomes. Furthermore, the Original Agreement provides for s. 7 expenses to be paid for proportionally.
- [150] Mr. P. will be required to pay his proportionate share of s. 7 arrears for 2017-2019 for the following items: hockey registration (including high performance and spring and summer leagues), hockey equipment and clothing, math tutor, tennis registration, school camp and trip, religious camp, and golf clubs and lessons. Mr. P. will also be required to pay his proportionate share of J.M.P.'s counselling, dental and other health related expenses.
- [151] Based on my conclusions with respect to the parties' incomes and obligations for support, Mr. P.'s proportionate share for s. 7 expenses in 2017, 2018 and 2019 was 61%, 61% and 63% respectively.
- [152] Mr. P.'s proportionate share for 2017 is \$1,132. The evidence shows that he paid \$210 towards hockey and golf on January 17, 2017. Thus, he owes \$922 for 2017. Mr. P.'s proportionate share for 2018 is \$2,192 and his proportionate share for 2019 is \$1,833 including his contribution to the computer as described above. Therefore, his total arrears are \$4,947.
- [153] Mr. P.'s has paid \$2,800 towards these arrears pursuant to the Keighley Order. While there is some dispute as to whether this amount was paid, the payment appears in the FMEP's record of payments that was entered into evidence and I deducted \$2,800 from the support payments made to Ms. O. to account for this. As a result, Mr. P.'s outstanding arrears for s. 7 expenses from 2017 to 2019 are \$2,147.
- [154] Mr. P. will be required to pay his proportionate share of s. 7 expenses for 2020 and for as long as J.M.P. remains a child of the marriage. In 2020 and 2021, Mr. P.'s proportionate share is 66% and 67%, respectively. As discussed above, s.7 expenses do not include contribution to routine expenditures. It does include expenses incurred for J.M.P.'s participation in hockey both during the regular season and in the off season as he has been participating in for some years now. Expenses beyond this, such as for travel to tournaments, will need to be agreed upon by the parties.

COSTS

- [155] Success was divided in this matter. Ms. O. sought arrears of spousal support in the amount of \$85,000 to \$95,000. Mr. P. was of the view that the arrears owing were closer to \$23,000. I have determined that the arrears owing up to December 31, 2020, are \$50,382. There was no significant dispute in respect of the parenting arrangement, although I did find that the

requirement for supervised visits is no longer necessary. I have found the credibility of both parties to be lacking in certain respects and have not entirely accepted either parties' version of events in respect of the signing of the various agreements. The approach the parties took with respect to the various agreements unnecessarily complicated the resolution of this matter. In the circumstances, each party will bear their own costs.

"Majawa J."

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