

CANADA / JUDGMENT

S.A.M. v. J.A.B.

2023 BCSC 2110

COURT

Supreme Court of British Columbia

DECIDED

30 November 2023

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2023 BCSC 2110 S.A.M. v. J.A.B. IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: S.A.M. v. J.A.B., 2023 BCSC 2110 Date: 20231130 Docket: E39198 Registry: New Westminster Between: S.A.M. Claimant And J.A.B. Respondent Before: The Honourable Justice Stephens Reasons for Judgment The Claimant, appearing in person: S.A.M. The Respondent, appearing in person J.A.B. Place and Date of Trial/Hearing: Port Coquitlam, B.C. July 24-26, 2023 Place and Date of Judgment: New Westminster, B.C. November 30, 2023 Table of Contents Overview.. 3 Issues. 4 Preliminary Issue: Expert Evidence and other Evidence regarding J.A.B.'s Guidelines Income. 5 Issue 1: What is J.A.B.'s Guidelines income?. 7 J.A.B.'s Family Trust (and Townhouse Purchase) 8 Standby Benefit for J.A.B.'s Tesla Vehicle. 9 Other Financial and Accounting Issues. 10 J.A.B.'s Guidelines Income - Findings. 10 Issue 2: What is S.A.M.'s Guidelines income?. 10 Issue 3: Should the child support order in the 2011 JCC Order be varied pursuant to s. 14 of the Guidelines?. 11 Issue 4: Should child support for B. have been terminated once she reached the age of majority in 2021?. 12 Issue 5: Should a retroactive child support order be made? If so, how far back should it extend?. 15 Issue 6: If B.'s child support continues after she reaches the age of majority, should any adjustments be made to the child support amount under s. 3(2)(b) of the Guidelines?. 17 Issue 7: Should an order declaring when child support payments end for B. and S. be made?. 18 Issue 8: What child support amounts should be ordered retroactively and prospectively?. 18 Retroactive Child Support from May 2015 to May 2023. 18 Prospective Child Support Commencing May 2023. 19 Issue 9: Should one party pay the other party for s. 7 expenses incurred by either party since 2013? If so, how much should be awarded?. 19 Issue 10: Should a prospective order for s. 7 expenses be made?. 21 Issue 11: What costs award is appropriate?. 21 Orders. 21 Overview

[1] S.A.M. and J.A.B. have two children. They do not agree on the quantum of child support and s. 7 expenses which are owing as between them over the last decade. J.A.B. also does not agree that child support should be payable for their first child, B., who turned 19 years old in 2021 and currently attends university, and he also asks to end his child support obligations for their second child, S., when she turns 19 in 2025.

- [2] On September 14, 2011, Master Tokarek made an order at the Judicial Case Conference ("JCC Order") requiring, among other things, that J.A.B. pay child support for their two children, S. (born in 2006) and B. (born in 2002), to S.A.M. at a set-off amount of \$240 monthly "until further Order of the Court." Parenting was to be shared. The JCC Order further required that s. 7 special and extraordinary expenses for the children were to be "agreed to by the parties in advance, [and] shall be shared equally."
- [3] Subsequent orders required both parties to share financial information and share s. 7 expenses equally.
- [4] Over the years, there have been some changes to the parties' circumstances as compared to those at the time of the JCC Order. First, J.A.B. lost his job in 2013 and took up new work as an accountant. Second, J.A.B. subsequently became a partner in an accounting firm, and his income changed. Third, parenting time changed during COVID-19: the children spent less time with J.A.B. initially, who, for health reasons, required quarantining at the beginning of each visit, and by September 2020, 100% parenting time was with S.A.M. Finally, there has unfortunately been friction between J.A.B. and B.
- [5] The financial implications of those and other changes of circumstance have been a matter of dispute between the parties. In the years since the JCC Order was made, the parties have not been able to agree on the adjustments that should be made to J.A.B.'s child support payments. They also do not agree on the quantum of each other's responsibility for the payment of s. 7 expenses going back to 2013. J.A.B. has maintained that after the JCC Order, S.A.M. should have been paying him child support, instead of the other way around as the JCC Order required.
- [6] Despite their disagreements, however, J.A.B. did unilaterally increase his monthly child support payment to S.A.M. from \$240 to \$540 in June 2022, and from \$540 to \$940 in January 2023.
- [7] S.A.M. now applies for: (1) retroactive child support (going back to 2015); (2) prospective child support; (3) a declaration of each party's incomes under the Federal Child Support Guidelines, SOR/97-175 [Guidelines]; and (4) orders respecting the sharing of s. 7 expenses going back to 2015. She seeks approximately \$89,000 in retroactive child support and approximately \$16,400 (or, alternatively, \$13,300) for s. 7 expenses.
- [8] J.A.B. opposes the relief sought by S.A.M., contending that the child support and s. 7 amounts are practically a "wash," meaning that very little needs to be paid. He also cross-applies to terminate child support for the children once each child reaches the age of majority, and for adjustments to retroactive child support payments going back to 2014. In this regard, J.A.B. presents his own calculation of s. 7 expenses that he has paid for B. and S. in the amount of \$7,291.21. He submits that when the amount of s. 7 expenses that he owes S.A.M. is reconciled against the amount of s. 7 expenses S.A.M. owes him, S.A.M. owes him \$135.

Issues

- [9] The various issues before me manifest principally in financial terms. However, the issues relate to the matter of child support, which fundamentally concerns the best interests of the children: Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.); Family Law Act, S.B.C. 2011, c. 25; Michel v. Graydon, 2020 SCC 24 at paras. 40, 52. I therefore consider these issues within that important context.
- [10] These applications raise the following legal issues:
1. What is the Guidelines income for J.A.B.?
 2. What is the Guidelines income for S.A.M.?
 3. Has there been a change in circumstances to justify a variation of the child support order in the 2011 JCC Order pursuant to s. 14 of the Guidelines?
 4. Should child support for B. have been terminated once she reached the age of majority (19 years of age) in 2021?
 5. Should there be an order for retroactive child support, and, if so, how far back should it extend?
 6. If child support for B. continues after she turns 19 years of age, are any adjustments to the amount of child support appropriate under s. 3(2)(b) of the Guidelines?
 7. Should an order declaring when child support payments end for B. and S. be made?
 8. What child support amounts should be ordered retroactively and prospectively?
 9. Should one party pay the other party for s. 7 expenses, and, if so, how much?
 10. Should there be any prospective order for s. 7 expenses?
 11. What costs award is appropriate? Preliminary Issue: Expert Evidence and other Evidence regarding J.A.B.'s Guidelines Income
- [11] S.A.M. filed the April 17, 2023 expert report of Patti Daum, a Chartered Professional Accountant from Daum Valuations, in support of her application. The report provided a calculation of J.A.B.'s income available for support purposes, calculated in accordance with the Guidelines, However, it did not provide a calculation of S.A.M.'s Guidelines income.
- [12] I accept that Ms. Daum is qualified to provide opinion evidence to the Court on financial matters relating to the determination of Guidelines income, and I place significant weight on the views set out in her report.

- [13] Ms. Daum prepared an independent calculation of J.A.B.'s Guidelines income for the years 2014 through 2021, in accordance with the Guidelines. She acknowledged that she had a duty to assist the Court and to not be an advocate for any party, and that she prepared the report in accordance with that duty.
- [14] She provided calculations for proposed s. 18 adjustments to J.A.B.'s Guidelines income in her report.
- [15] Ms. Daum also provided calculations for two s. 19 adjustments to J.A.B.'s income in her report, which she describes as relating to:
- a. Use of 50% of his personal residence that has is owned by The [B.] Family Trust and financed by monies provided by his mother, bearing interest at 1% per annum, with no principal amount owing (or paid) until payment is demanded. [J.A.B.] has yet to make a principal payment related to this financing.
 - b. A stand-by charge relating to the personal benefit associated with use of a Tesla owned approximately two-third by the Companies.
- [16] In her report, Ms. Daum also acknowledged that it is the Court's role to determine whether an adjustment should be made, and she provides calculations "to assist" the Court.
- [17] J.A.B. is an accountant. He did not file an expert report in response that challenges Ms. Daum's report. Instead, he responded directly to Ms. Daum's report and deposes that he consulted with two Chartered Business Valuators and provided affidavit evidence with his own views and calculations regarding the financial and accounting matters addressed in the report.
- [18] As a party to this proceeding, however, J.A.B. is not "independent" in the legal sense regarding expert evidence: *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 at paras. 2, 7, 10, 26, 32, 36. I also find that his opinions are not completely impartial since, as a party to this proceeding, he is unable to provide an objective and non-partisan (*White Burgess* paras 2, 10) assessment of the financial, accounting and valuation matters in this case which are opined on in Ms Daum's report. In addition, J.A.B. prepared a worksheet of "the sources of funds and budgeted expenses" for the parties' daughter, B., which he relied on in his submissions, but that worksheet included figures for B.'s future income, which I find to be speculative. The worksheet also included student loans that B. would have to pay back later and speculative future payments to B. from S.A.M. (and J.A.B.) that had not yet occurred and may not occur. I accept S.A.M.'s position that I should approach J.A.B.'s evidence on financial matters with caution. While not making any personal or professional criticism of J.A.B., I find that J.A.B. is not qualified to give expert evidence in this proceeding, and I do not regard his evidence on financial, accounting or valuation matters to be expert opinion evidence. I give his evidence about such matters little weight.

- [19] I have nevertheless considered J.A.B.'s views on factual financial matters and his evidence and submissions about proposed ss. 18 and 19 adjustments, both as set out in his affidavits and oral submissions. Issue 1: What is J.A.B.'s Guidelines income?
- [20] The court's approach to determining Guidelines income was succinctly set out by Justice Norell in *S.L.D. v. W.A.D.*, 2021 BCSC 942 at para. 4: The relevant provisions for determining income are set out in ss. 16 to 20 of the Guidelines. Pursuant to s. 16, the calculation commences with total income from line 150 (now line 15000) of a spouse's personal tax return and is adjusted in accordance with Schedule III: *Brown v. Brown*, 2014 BCCA 152 [Brown] at para. 16; *Vincent v. Vincent*, 2012 BCCA 186 at para. 35. The court must then consider if the circumstances in ss. 17 to 20 are present and whether there should be an adjustment to arrive at the fairest determination of income available for support.
- [21] J.A.B. argued that several aspects of Ms. Daum's report were incorrect and should not be accepted.
- [22] Section 19 should be interpreted in a way that is consistent with the objectives set out in s. 1 of the Guidelines: *S.L.D.* at para. 6, citing *Brown v. Brown*, 2014 BCCA 152 at para. 23, including to establish "a fair standard of support for children" and to "reduce conflict and tension between spouses": 1 The objectives of these Guidelines are
- (a) to establish a fair standard of support for children that ensures that they continue to benefit from the financial means of both spouses after separation;
 - (b) to reduce conflict and tension between spouses by making the calculation of child support orders more objective;
 - (c) to improve the efficiency of the legal process by giving courts and spouses guidance in setting the levels of child support orders and encouraging settlement; and
 - (d) to ensure consistent treatment of spouses and children who are in similar circumstances.
- [23] The imputation of income serves an important purpose of the Guidelines, which is to establish a fair standard of support for children: *Hanson v. Hanson*, [1999] B.C.J. No. 2532 at paras. 10-13, 1999 CanLII 6307 (S.C.).
- [24] However, imputing income is not something that can always be done with mathematical precision. For example, in an application to vary child support before this Court, the respondent's Guidelines income was originally imputed at \$1 million: *Hathaway v. Hathaway*, 2015 BCSC 1485 at para. 3, aff'd 2014 BCCA 310, leave to appeal to SCC ref'd, 36101 (12 March 2015). In reducing the amount to \$650,000, the Court cited the Guidelines' objectives, noting that "[i]t is not possible to apply a formula or to be mathematically precise in setting the respondent's income": *Hathaway* at paras. 83-84; see also *V.R. v. R.Z.*, 2019 BCSC 658 at para. 40.

- [25] In his Affidavit No. 3, J.A.B. set out numerous responses to Ms. Daum's calculations, including his own calculations associated with proposed ss. 18 and 19 adjustments. I accept Ms. Daum's calculations set out in her report, with one exception relating to the proposed s. 19 adjustment for the imputation to income for J.A.B.'s townhouse benefit. J.A.B.'s Family Trust (and Townhouse Purchase)
- [26] J.A.B. disagreed with the imputation to his income in Ms. Daum's report, including those arising from his living in a townhouse which was purchased 50% by a family trust. He contends, among other things, that he does not have a 50% ownership interest in that townhouse. Rather, he is merely a tenant in 50% of a portion of this townhouse, and he pays "reasonable" and "fair" monthly market rent for this (comprised of payments for ongoing costs related to occupying the property, as well as cash monthly rent which increases to \$840 every year). He therefore contends that no imputation to his income is merited.
- [27] Section 19(1)(i) of the Guidelines gives the court the discretion to impute "such amount of income to a spouse as it considers appropriate in the circumstances," including circumstances where "the spouse is a beneficiary under a trust and is or will be in receipt of income or other benefits from the trust."
- [28] I find that J.A.B.'s purchase of a townhouse in 2018 and his occupancy in it since then has been subsidized by a family trust. As a result, I find that J.A.B. is a recipient of a benefit from a trust under s. 19(1)(i) of the Guidelines. While J.A.B. contends that he pays market rent to the trustee to offset any benefit, he did not provide evidence of what market rent would be for a 50% interest in a townhouse, and I am not satisfied that he pays a market rent. Instead, I find that he has received a benefit from a trust in the form of a subsidized property purchase and subsidized housing, and the benefit of living in this townhouse under these circumstances.
- [29] I therefore consider it appropriate to impute an amount of income for this under s. 19(1)(i) of the Guidelines. Doing so does not require mathematical precision, and the court does the best that it can in the circumstances: *Pousette v. Janssen*, 2023 BCCA 176 at para. 48. I find that *Younger v. Younger*, 2017 BCSC 363, relied on by J.A.B., and which concerned treatment of payments by a trust to a beneficiary (paras 37-38) to not be of assistance on this issue.
- [30] I accept the proposed imputation to J.A.B.'s income set out in Ms. Daum's report, but I reduce her imputation amount to take into account that J.A.B. does not own 50% of this townhouse and he makes payments to the trustee in respect of his occupation. Specifically, I reduce Ms. Daum's proposed imputation amounts by \$5,000 in 2019 and \$8,000 per year thereafter. I find this adjustment to Ms. Daum's calculations results in the imputation of "amount[s] of income" which are "appropriate in the circumstances" for the purposes of s. 19(1)(i). Standby Benefit for J.A.B.'s Tesla Vehicle
- [31] J.A.B. also objected to Ms. Daum's proposed imputation of income for a standby benefit for J.A.B.'s personal vehicle. J.A.B. contends that he uses this car for business. However, he provided insufficient evidence as to his use of the car to demonstrate this. I find that J.A.B.

has failed to provide sufficient evidence as to the business use of this vehicle. In addition, J.A.B. stated that he limits his personal interactions for health reasons, which is consistent with his car having limited business use. Accordingly, I accept Ms. Daum's proposed imputation for the personal benefit from a vehicle. Other Financial and Accounting Issues

- [32] J.A.B. also disputed Ms. Daum's handling of financial matters, such as the end of his fiscal year, asserted unrealizable gains on marketable securities, working capital, the provision for bad debts in accounts receivable, and other accounting and financial issues as they relate to the proposed calculation of inclusions to J.A.B.'s Guidelines income. However, I find Ms. Daum, being the only independent qualified expert providing opinion evidence with respect to financial matters relevant to J.A.B.'s Guidelines income, to be persuasive on these matters, and I accept the remainder of her calculations as to J.A.B.'s Guidelines income calculations in this regard. J.A.B.'s Guidelines Income - Findings
- [33] With the exception of the calculation for the trust benefit (discussed above), I accept Ms. Daum's opinions and proposed calculations as to J.A.B.'s Guidelines income, and I find it to be as follows: Year J.A.B.'s Guidelines Income per Ms. Daum's April 17, 2023 Report
Adjustment to Ms. Daum's Guidelines Income Calculation re Townhouse Court Findings re J.A.B.'s Guidelines Income 2014 \$76,000 \$76,000 2015 \$88,000 \$88,000 2016 \$122,000 \$122,000 2017 \$103,000 \$103,000 2018 \$67,000 \$67,000 2019 \$205,000 –\$5,000 \$200,000 2020 \$158,000 –\$8,000 \$150,000 2021 \$157,000 –\$8,000 \$149,000 Issue 2: What is S.A.M.'s Guidelines income?
- [34] Ms. Daum's report did not address S.A.M.'s Guidelines income.
- [35] S.A.M. advanced a position as to her Guidelines income and she set out amounts for her proposed Guidelines income by year in a schedule to one of her affidavits. These figures did not agree with J.A.B.'s calculations of S.A.M.'s total income. S.A.M.'s submissions did not address the matter of Schedule III adjustments to her income. I find that S.A.M. did not take into account Schedule III of the Guidelines adjustments in her calculations.
- [36] J.A.B. contended that S.A.M. had not made the appropriate adjustments to her T1 reported income in accordance with Schedule III of the Guidelines. He provided his own calculation of S.A.M.'s Guidelines income for the years 2014 to 2021, adjusted for Schedule III purposes.
- [37] I accept J.A.B.'s calculations of S.A.M.'s Guidelines income for the years 2014 to 2021. J.A.B. did not provide any calculations for the years 2022 and 2023, and so I accept S.A.M.'s Guidelines income calculations for 2022 and 2023.
- [38] I find S.A.M.'s Guidelines income for the years 2014 to 2023 to be as follows: Year Court Findings re S.A.M.'s Guidelines Income 2014 \$88,103 2015 \$70,979 2016 \$73,861 2017 \$75,442 2018 \$90,203 2019 \$82,205 2020 \$74,501 2021 \$87,358 2022 \$87,638 January 1 to May 1, 2023 \$83,087 Issue 3: Should the child support order in the 2011 JCC Order be varied pursuant to s. 14 of the Guidelines?
- [39] This Court has the jurisdiction to vary a child support order: Divorce Act, s. 17(1).

- [40] Before the court varies a child support order, it must first "satisfy itself that a change of circumstances as provided for in the applicable guidelines has occurred since the making of the child support order or the last variation order made in respect of that order": Divorce Act, s. 17(4) A change of circumstances includes "any change in circumstances that would result in a different child support order" in accordance with the applicable table in the Guidelines: Guidelines, s. 14(a).
- [41] There have been at least two changes in circumstance that should result in a variation of the child support order.
- [42] First, for the reasons stated above, I find that J.A.B.'s Guidelines income has changed since the JCC Order (where it was stated to be \$80,000); and so too has S.A.M.'s Guidelines income changed since the JCC Order (where it was stated to be \$63,810).
- [43] Second, starting in September 1, 2020, after the beginning of the COVID-19 pandemic, J.A.B. and S.A.M. stopped having relatively equal or shared parenting time: J.A.B.'s parenting time has been less than 40%. Indeed, since September 1, 2020, S.A.M. has had virtually the entirety of parenting time of both B. and S., and there should therefore be no set-off in child support amounts starting at that time.
- [44] Overall, I am satisfied that there has been a change in circumstances that would result in a different child support order pursuant to the Divorce Act. Accordingly, I will make a different child support order below, subject to other considerations such as the retroactive nature of certain child support orders sought. Issue 4: Should child support for B. have been terminated once she reached the age of majority in 2021?
- [45] J.A.B. submits that the parties' child, B., was no longer a "child" within the meaning of the Divorce Act and for the purposes of the Guidelines after she reached the age of majority in October 2021: Divorce Act, s. 2(1) "child of the marriage." He has sought an order that child support for B. "be halted, and retroactively adjusted from the month of her 19th birthday (October 2021)": January 3, 2023 notice of application at para. 1.
- [46] Since approximately August 2021, B. has been enrolled at the University of British Columbia ("UBC"). She aspires to attend medical school after graduating from UBC.
- [47] Pursuant to s. 2(1) of the Divorce Act, a "child of the marriage" includes a child over the age of majority - 19 years old in British Columbia - who meets certain criteria. Such criteria include that the child is unable by "other cause, to withdraw from [the spouses'] charge or to obtain the necessities of life": child of the marriage means a child of two spouses or former spouses who, at the material time,
- (b) is the age of majority or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessities of life; [Emphasis added.]

- [48] The Court of Appeal set out the applicable analysis to determine this issue in *Dring v. Gheyle*, 2018 BCCA 435:
- [49] Once a child of the relationship reaches the age of majority, the presumption is that the child is no longer a "child" and child support is no longer required. At age 19, a child is an adult who, generally speaking, must support himself or herself. To remain a "child" for support purposes, the adult child must be unable to withdraw from his or her parents' charge, or unable to obtain the necessities of life because of illness, disability or another reason. Once a child reaches the age of majority, the party applying for child support bears the onus of proving that the child is still a child: *Olson v. Olson*, 2003 ABCA 56 at para. 13. [Emphasis in the original.]
- [49] In particular, the pursuit of post-secondary education may constitute "another reason" for an adult child's inability to withdraw from their parents' charge: *Dring* at para. 51. However, the court must consider the surrounding circumstances; mere attendance at an educational institution is not sufficient: *Dring* at para. 51, citing *W.P.N. v. B.J.N.*, 2005 BCCA 7 at para. 18.
- [50] The relevant considerations for determining whether the pursuit of education is a valid reason for continued dependence were set out in *Nordeen v. Nordeen*, 2013 BCCA 178, where the Court of Appeal referenced the factors in *Farden v. Farden*, 48 R.F.L. (3d) 60, 1993 CanLII 2570 (B.C.S.C.):
- [16] In determining whether pursuit of education is a valid reason for continued dependence, a court must consider two questions. The first is whether, considering all of the child's circumstances, the child's educational pursuits are reasonable. If they are, the court must also consider whether it is appropriate that the pursuits be financed by the parents. These questions can be complex and value-laden. In *Farden v. Farden*, (1993), 1993 CanLII 2570 (BC SC), 48 R.F.L. (3d) 60 at 64-5, Master Joyce (as he then was) set out a list of eight factors that may assist a court in making the determinations:
- (1) whether the child is in fact enrolled in a course of studies and whether it is a full-time or part-time course of studies;
 - (2) whether or not the child has applied for or is eligible for student loans or other financial assistance;
 - (3) the career plans of the child, i.e. whether the child has some reasonable and appropriate plan or is simply going to college because there is nothing better to do;
 - (4) the ability of the child to contribute to his own support through part-time employment;
 - (5) the age of the child;
 - (6) the child's past academic performance, whether the child is demonstrating success in the chosen course of studies;

- (7) what plans the parents made for the education of their children, particularly where those plans were made during cohabitation;
- (8) at least in the case of a mature child who has reached the age of majority, whether or not the child has unilaterally terminated a relationship from the parent from whom support is sought.
- [17] This Court has found the Farden factors to be useful indicators in deciding whether child support should continue to be paid in respect of a child over the age of majority who is attending a post-secondary institution (see, for example, *Darlington v. Darlington* (1997), 1997 CanLII 3893 (BC CA), 32 R.F.L. (4th) 406; *W.P.N. v. B.J.N.*, 2005 BCCA 7 and *De Beck v. De Beck*, 2012 BCCA 465). It must be emphasized, however, that the Farden factors are neither a checklist nor a set of statutorily-mandated criteria. Rather, they are considerations for the court in assessing whether the child's situation is consistent with the definition of "child of the marriage" in the Divorce Act. See also *Gron v. Gron*, 2021 BCSC 1375 at paras. 22-33.
- [51] I find that B.'s educational pursuits are reasonable, and that it is appropriate that the pursuits should be financed by the parents. I find that B. remained a child of the marriage after her 19th birthday in October 2021. In considering each of the Farden factors in turn:
1. B. is enrolled in a full-time Bachelor of Science program at UBC;
 2. She has obtained student loans and scholarships or grants;
 3. She aspires to attend medical school and pursue a career in health care;
 4. She has received some financial assistance during university from her parents through RESPs, but not a significant amount; and she has worked part-time during university, but still requires financial assistance;
 5. She is currently 21 years old, two years beyond the age of majority;
 6. She has performed well academically in university and has obtained many A-range grades to date; and
 7. S.A.M. and J.A.B. had discussed B. attending university before they separated.
- [52] With respect to the eighth Farden factor, while the quality of the parent-child relationship is relevant, only in the most "egregious circumstances" will this justify "a cut-off of support": *Shaw v. Arndt*, 2016 BCCA 78 paras. 29, 31, citing *A.C. v. M.Z.*, 2010 ONSC 6473 at para. 172. For example, a cut-off from child support has been justified in a case where a child's unilateral decision to completely exclude her parent from her life was not sufficiently explained or justified: *Oleksiewicz v. Oleksiewicz*, 2017 BCSC 228 at para. 38.
- [53] I do not find this case to be an egregious situation which would justify removing the obligation to pay child support for B. I do not find that B. unilaterally terminated a relationship with J.A.B. I find that they have had a falling out, and there is currently friction between B. and J.A.B. However, I find that this friction relates, at least in part, to the parties'

current litigation and its financial aspects which B. has been drawn into. For example, J.A.B. has corresponded with B. directly about matters pertinent to this application, including about financial and other information relating to this application, and she has written to him about such matters.

- [54] In the alternative, J.A.B. sought a reduction in child support payable for B. pursuant to s. 3(2) (b) of the Guidelines since she no longer lives with S.A.M. full-time and is in residence for approximately eight months of the year. I will consider that issue below under Issue 6. Issue 5: Should a retroactive child support order be made? If so, how far back should it extend?
- [55] The court does not have jurisdiction to make a statutory retroactive award, unless at the date of the application the child retains the status of a child, or there has been a prior application which brings the matter under the 'Henry exception': *Deng v. Zhang*, 2022 BCCA 271 at para. 74, leave to appeal to SCC ref'd, 40390 (9 February 2023), citing *Dring* at para. 97 (emphasis in the original). This is a preliminary jurisdictional issue for the determination of a claim for retroactive child support: *Deng* at para. 88.
- [56] There is generally no distinction between the Family Law Act and the Divorce Act on an issue concerning child support; the same factors and reasoning are applicable under both statutes: *Fisher v. McNicol*, 2022 BCSC 1491 at para. 21, citing *Sampley v. Burns*, 2018 BCCA 178 at para. 47.
- [57] I have found above that B., who is now 21 years old, is a child of the marriage as of December 22, 2022, the date of this application. I have also found S., who is now 17 years old, to be a child of the marriage. I therefore have jurisdiction to consider an application for retroactive child support.
- [58] Subject to certain exceptions, "the usual rule is that a retroactive award of child support will be made for a period of no more than three years before formal notice was given to the payor parent": *Deng* at para. 84, citing *D.B.S. v. S.R.G.*, 2006 SCC 37 at para. 123. The exceptions arise when the payor parent has engaged in blameworthy conduct, such that the "payor parents will have their interest in certainty protected only up to the point when that interest becomes unreasonable": *D.B.S.* at paras. 124-125.
- [59] The four D.B.S. factors that apply to determining entitlement to retroactive child support beyond three years are:
- a) the recipient's delay in seeking retroactive support;
 - b) the payor's conduct;
 - c) the child's circumstances; and
 - d) the hardship entailed by a retroactive award. These factors must be viewed holistically; none of these factors is individually determinative: *Deng* at para. 85, citing *Colucci v. Colucci*, 2021 SCC 24 at paras. 38, 96; *D.B.S.* at para. 99.

- [60] J.A.B.'s former counsel wrote to S.A.M. on May 7, 2018 seeking to resolve the matter of child support back to 2014. S.A.M. emailed J.A.B. back on May 29, 2018 seeking information about any businesses J.A.B. had ownership in. I find that this correspondence between the parties constituted formal notice to the payor (J.A.B.) for retroactive child support. However, the retroactive child support claim could only have gone back three years to May 2015, unless one of the exceptions applies.
- [61] Considering the four D.B.S. factors holistically, I find that neither J.A.B. nor S.A.M. engaged in any blameworthy conduct which should cause this Court to look back further than three years, and I will determine retroactive child support from May 2015 (not from January 2015 as sought by S.A.M.).
- [62] Further, at this hearing, J.A.B. sought a retroactive child support review going back to 2014. However, since the earliest formal notice to assess retroactive child support was May 2018, the Court's retroactive child support assessment will only go back to May 2015, and not 2014, given that S.A.M. has not engaged in any blameworthy conduct. Issue 6: If B.'s child support continues after she reaches the age of majority, should any adjustments be made to the child support amount under s. 3(2)(b) of the Guidelines?
- [63] Section 3(2) provides that the court may adjust the child support payable under the Guidelines and applicable table amount for a child over the age of the majority as it considers appropriate, having regard to specific factors: 3
- (2) Unless otherwise provided under these Guidelines, where a child to whom a child support order relates is the age of majority or over, the amount of the child support order is
- (a) the amount determined by applying these Guidelines as if the child were under the age of majority; or
- (b) if the court considers that approach to be inappropriate, the amount that it considers appropriate, having regard to the condition, means, needs and other circumstances of the child and the financial ability of each spouse to contribute to the support of the child.
[Emphasis added.]
- [64] Since August 2021 (her second year of university), B. has lived in residence for approximately eight months of the year while she is at university. She returns in April of each year and also stays with S.A.M. over the holiday period. As a result, B. does not live with S.A.M. full-time. S.A.M. assists B. with her living expenses while she is at university, including for groceries that amount to \$100 per month.
- [65] Given that B. does not live with S.A.M. full-time I find it appropriate to reduce the amount of child support by 20% of the one-half portion I notionally allocate in child support for B. I will therefore adjust downward by 10% the child support amount paid by J.A.B. to S.A.M. for B. and S. commencing in October 2021: s. 3(2)(b) of the Guidelines. Issue 7: Should an order declaring when child support payments end for B. and S. be made?

- [66] I am unaware of any case law which would justify the Court making a determination as to when child support should be terminated for B. and S. in the future.
- [67] The assessment of whether a child remains a child of the marriage is fact-dependent, turning on circumstances as they exist at a certain point in time, and I decline to speculate as to future facts to make such a determination.
- [68] Accordingly, I dismiss that part of J.A.B.'s notice of application which asks the Court to determine when child support payments to S.A.M. for both B. and S. should end.
- [69] My order does not preclude J.A.B. from making an application to cease or vary child support in future in the event there is a material change in circumstances with respect to B. or S.
Issue 8: What child support amounts should be ordered retroactively and prospectively?
- [70] Based on my findings above, I order child support in accordance with the Guidelines in the following amounts. Retroactive Child Support from May 2015 to May 2023
- [71] I find retroactive child support from May 2015 to May 2023 as follows: Year Respondent's Guidelines Income Respondent's Table Amount of Child Support for Two Children Claimant's Guidelines Income Claimant's Table Amount of Child Support for Two Children Table Child Support Payable by Respondent per month Table Child Support Payable by Respondent per year Child Support Paid by Respondent per year Arrears of Retroactive Table Child Support Payable by Respondent May - Dec 2015 (8 months) \$88,000 \$1,359 \$70,979 \$1,086 \$273 \$2,184 (8 months) \$1,920 \$264 2016 \$122,000 \$1,807 \$73,861 \$1,133 \$674 \$8,088 \$2,880 \$5,208 2017 \$103,000 \$1,562 \$75,442 \$1,164 \$398 \$4,776 \$2,880 \$1,896 2018 \$67,000 \$1,040 \$90,203 \$1,388 (\$348) (\$4,176) \$2,880 (\$7,056) 2019 \$200,000 \$2,659** \$82,205 \$1,269 \$1,390 \$16,680 \$2,880 \$13,800 2020 \$150,000 \$2,159 \$74,501 Jan - Aug: \$1,148 Sept - Dec: 0 Jan - Aug: \$1,011 Sept - Dec: \$2,159 Jan - Aug: \$8,088 Sept - Dec: \$8,636 Jan - Aug: \$1,920 Sept - Dec: \$960 Jan - Aug: \$6,168 Sept - Dec: \$7,676 2021 \$149,000 \$2,147 \$87,358 0 \$2,147 [and \$1,932 = \$2,147 x 0.9, as of October 2021] \$25,119 \$2,880 \$22,239 2022 \$149,000* \$2,147 \$87,638 0 \$1,932 \$23,184 \$4,980* \$18,204 Jan - May 2023 (5 months) \$149,000* \$2,147 \$83,087 0 \$1,932 \$9,660 \$4,700* \$4,960 TOTAL \$73,359 *Ms. Daum's Report did not provide 2022 and 2023 Guideline income figures for J.A.B., so I have used his 2021 income. ** I find that an additional \$500 per month is appropriate for child support over and above the income level of \$150,000: Guidelines, s.4(b)(ii). *** This figure includes J.A.B.'s change of monthly child support payment from \$240 to \$540 in June 2022, and to \$940 in January 2023.
- [72] I therefore order a retroactive child support payment from J.A.B. to S.A.M. in the total amount of \$73,359. Prospective Child Support Commencing May 2023
- [73] Commencing May 2023 onwards, J.A.B. shall pay monthly child support payments (for the two children) in the amount of \$1,932 (\$2,147 x 0.9), based on my finding of his current Guidelines income of \$149,000. Issue 9: Should one party pay the other party for s. 7 expenses incurred by either party since 2013? If so, how much should be awarded?

- [74] S.A.M. prepared a schedule of s. 7 expenses that she has incurred for B. and S. from 2015 to December 2022, and provided a calculation of amounts owing by J.A.B. said to be based on a proportion consistent with Ms. Daum's report, or based, alternatively, on a 50-50 split.
- [75] J.A.B. disputed the UBC residence fees and Medical Services Plan ("MSP") items in S.A.M.'s s. 7 schedule.
- [76] J.A.B. also provided his own schedule of s. 7 expenses which he asserts he has incurred for B. and S. since 2013, and provided a calculation of amounts owing by S.A.M.
- [77] S.A.M. disputed certain amounts in J.A.B.'s s. 7 schedule but did not otherwise dispute the amounts for s. 7 expenses set out by J.A.B.
- [78] I find that the amounts in S.A.M.'s claim constitutes a s. 7 claim, with the exception of one of the three UBC residence fee deposits for B. (there is evidence that one deposit was credited back in July 2021). Deducting one of the three UBC residence deposit claims in the amount of \$1,050 results in a total amount of \$22,225.92 (\$10,553.69 + \$12,722.23 – \$1,050) for s. 7 expenses paid by S.A.M. for B. and S. until December 2022.
- [79] I also find that J.A.B.'s claim constitutes a s. 7 claim, with the exception of the 17 martial arts classes (at \$115 each, totalling \$1,955), as these expenses were not proven in the evidence before me. Therefore, I find the total s. 7 claim paid by J.A.B. is \$5,336.21 (\$7,291.21 – \$1,955).
- [80] S.A.M. also disputed J.A.B.'s claimed s.7 expenses for a Simon Fraser University field trip, but I find that this is a s. 7 expense since school field trips fall within the scope of s. 7 expenses for both parties. In this regard, I note that both parties claimed school trip and workshop expenses as s. 7 expenses.
- [81] I also allow both parties' MSP expenses as s. 7 expenses.
- [82] I therefore order J.A.B. to pay S.A.M. for s. 7 expenses from 2013 to December 2022 in the total amount of \$8,444.86, calculated as follows: Section 7 Expenses Paid by S.A.M. Section 7 Expenses Paid by J.A.B. Equalizing Payment by J.A.B. to S.A.M. for Section 7 Expenses \$22,225.92 \$5,336.21 \$8,444.86
- [83] I find that for s. 7 expenses incurred after the date of these Reasons, both parties shall share s. 7 expenses on a 60-40 (J.A.B.-S.A.M.) basis, which roughly reflects my finding of the ratio between the parties' 2023 Guidelines incomes. Issue 10: Should a prospective order for s. 7 expenses be made?
- [84] S.A.M. requested that the Court make a ruling about future s. 7 expenses.
- [85] In these Reasons, I have made a decision about past s. 7 expenses from 2013 to December 2022, but I decline to make any prospective order about s. 7 expenses which may be claimed by either party in the future. Issue 11: What costs award is appropriate?

- [86] While S.A.M. has been substantially successful on these applications, her then counsel served J.A.B. with S.A.M.'s notice of application just prior to the 2022 winter holidays, which caused J.A.B. to work over his holiday to respond on January 3, 2023. That timing of service on J.A.B., who is self-represented, was regrettable, and I accept that it was a difficult time for J.A.B.
- [87] J.A.B. sought special costs or alternatively increased costs from S.A.M. for his application. I do not find an award of special or increased costs against S.A.M. is merited or appropriate. However, in the circumstances, I find that each party should bear their own costs of both of the applications.

Orders

- [88] In summary, I make the following orders disposing of the relief sought in both S.A.M.'s December 22, 2022 notice of application and J.A.B.'s January 3, 2023 notice of application:
1. Pursuant to s. 17(1)(a) of the Divorce Act, J.A.B. shall pay S.A.M. \$73,359 in retroactive child support for the period May 2015 to May 2023;
 2. Pursuant to the Guidelines, J.A.B.'s Guidelines income is \$149,000, and S.A.M.'s Guidelines income is \$83,087;
 3. Pursuant to s. 17(1)(a) of the Divorce Act, J.A.B. shall pay S.A.M. monthly child support of \$1,932 prospectively, commencing May 2023 onward;
 4. J.A.B. shall pay S.A.M. \$8,444.86 for s. 7 expenses for the period 2013 to December 1, 2022;
 5. Paragraph 1 of J.A.B.'s notice of application (seeking an order that child support be halted for B. as of October 2021) is dismissed;
 6. Paragraph 2 of J.A.B.'s notice of application (seeking an order that child support be scheduled to end for S. as of April 2025) is dismissed;
 7. Paragraph 3 of J.A.B.'s notice of application (seeking an order that S.A.M. pay special costs or, alternatively, increased costs of his application) is dismissed; and
 8. Each party shall bear their own costs of both notices of application. "Stephens J."

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Prepared on 28 October 2026 · Esheria