

CANADA / JUDGMENT

S.E.S. v. K.E.H.

2024 BCSC 1282

COURT

Supreme Court of British Columbia

DECIDED

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2024 BCSC 1282 S.E.S. v. K.E.H.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

S.E.S. v. K.E.H.,

2024 BCSC 1282

Date: 20240716

Docket: E232489

Registry: Victoria

Between:

S.E.S.

Applicant

And:

K.E.H.

Respondent

Before: The Honourable Justice Morley

Reasons for Judgment

(Interjurisdictional Support Variation Application)

Counsel for the Applicant:

D. Yeboah

The Respondent, Appearing in Person:

K.E.H.

Amicus Curiae:

J. Kahan

Place and Date of Hearing:

Victoria, B.C.

June 18, 2024

Place and Date of Judgment:

Victoria, B.C.

July 16, 2024

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I. Overview

- [1] S.E.S. (the "Payor") and K.E.H. (the "Recipient") are divorced former spouses with three children: E. (born March 7, 1996), H. (born November 10, 2000) and K. (born March 25, 2002). The Recipient has had parenting responsibility for them since separation 22 years ago. For almost all of that time, the Payor has been under an obligation to pay \$681 per month in child support, an amount calculated based on a guideline income of \$36,000 per year, and the assumption that there are three children of the marriage for whom "table

support" should be paid.

- [2] The Payor, who now lives in Manitoba, applies under the interprovincial support variation provisions set out in section 18.1 of the Divorce Act, R.S.C. 1985, c. 3, to rescind child support for E. and K., retroactive to their 19th birthdays, and to terminate support for H. as of June 1, 2025, when she is expected to finish her undergraduate degree. In the alternative, if E. and/or K. remained eligible for child support after they turned 19, he asks that table support be discontinued and that child support for them instead be calculated based on a proportional sharing of their expenses net of the children's income. He also asks for an order that late penalties accrued on past arrears of child support under Manitoba's Family Support Enforcement Act, CCSM c. F26 be cancelled.
- [3] The Recipient argues in response that child support for E. and K. should continue because, even though they are over the age of majority, they are disabled and she still has to look after them as a result. The Recipient points out that, with some interruptions, the Payor has earned substantially more than \$36,000 per year. She therefore seeks a variation order retroactive to January 1, 2015 to increase the amount of child support payable based on an average guideline income of \$50,000 per year, which she says better reflects what the Payor has actually been earning. She opposes any cancellation of penalties on the grounds that they arise out of the Payor's defaults in payment many years ago, defaults which caused her and her children economic hardship at that time.
- [4] For reasons I will set out in more detail, I agree with the Recipient that, on the present evidence, E. and K. are "children of the marriage" within the meaning of the Divorce Act because they are not able to withdraw from her charge by reason of disability. I will make certain orders requiring her to share information with the Payor about prospects and plans for working towards independence. Once he obtains this information, if it shows a realistic path to independence, he can apply again for termination of child support. For now, though, child support needs to continue.
- [5] But while E. and K. are still children of the marriage, there was a material change in circumstances when they each started receiving disability payments from the provincial government that affects the amount of support. I will order "table" child support for H., based on a guideline income of \$50,600. For Manitoba, that comes to \$424/month. For E. and K., child support should no longer be calculated as "table support", but each parent should contribute to their expenses proportionate to their incomes: since these are approximately equal, I will order that those expenses be split 50/50. These variations to support should be retroactive to November 1, 2023 to reflect the date when both parties had "effective notice" that a variation was contemplated.

- [6] The Payor's penalties should be reduced to the (lower) interest that would have accrued under s.11.1 of the British Columbia's Family Maintenance Enforcement Act and its attendant regulations. This reduction, along with the variation of child support, should make it realistic for the Payor to get out of the child support debt he has built up. I do not consider this an appropriate occasion on which to cancel interest altogether.

II. Background

- [7] The Payor and the Recipient married on March 14, 1997. They initially lived in North Vancouver and moved to Victoria before H. was born. They separated in 2002.
- [8] The original divorce proceeding was Victoria BCSC Action No. 02 5644. On January 16, 2003, Mr. Justice Vickers ordered interim custody for the Recipient and awarded child support of \$681 per month based on a guideline income of \$36,000 per year.
- [9] When Madam Justice Quijano made an order for divorce on March 4, 2004, she awarded sole custody of the children to the Recipient on a permanent basis and confirmed the amount of child support ordered by Mr. Justice Vickers. She found that the Payor was in arrears on his child support, which she set at \$4,906.13 accruing to February 24, 2004.
- [10] While the March 2004 divorce order appears to have been a final order, a number of issues - including asset division, spousal support, orders sought by the Recipient in relation to the arrears, and parenting time ("access") for the Payor - were adjourned generally and have never since been adjudicated. With the exception of a brief phone conversation with E. in 2018, the Payor has had no contact with his children since the divorce.
- [11] The Payor moved to Manitoba in or around 2005. He initially did cash work. From 2006-2012, he worked at a single employer. He continued not to pay his child support in full. The Debtor Statement of Account of the Manitoba Maintenance Enforcement Program goes back to December 2, 2011, at which point he had an arrears balance equal to \$19,249.91. Monthly penalties at that point, representing interest on this balance, were over \$270.
- [12] The Payor began paying \$700 per month to Manitoba's enforcement authorities, of which \$681 was child support and \$19 went to pay arrears. Since monthly penalties are calculated as simple interest, they slowly reduced as his arrears were incrementally paid down, but of course the total amount of penalties continued to grow.
- [13] There is a gap in the Payor's support payments between June 1, 2012 and March 18, 2013. In his affidavit, he says he suffered multiple spinal fractures in an accident and then was fired by his employer. He successfully brought a discrimination complaint under Manitoba's human rights legislation. There is no evidence of the amount he recovered or what was done with this.

- [14] On August 12, 2013, the Payor began work with his current employer. He has paid his child support since that time, and, very incrementally, reduced the arrears owing. Penalties have continued to accrue. He was laid off between November 2019 and the end of 2021. During that time, his employment insurance payments were garnished to pay down his arrears.
- [15] The Payor has now paid off most of the arrears, but, as of January 11, 2022, the last date of the records before me, he still had not reduced his accrued penalties, which totaled \$32,286.
- [16] Based on his income tax returns (and in the case of 2023, his payroll records), the Payor's annual income has been the following:

Tax Year

Total Income

2013

\$18,792

2014

\$56,123

2015

\$51,714

2016

\$58,709

2017

\$60,244

2018

\$56,116

2019

\$52,265

2020

\$29,663

2021

\$57,452

2022

\$50,598

As of Sep 8, 2023

(35 weeks)

\$34,818.75

(\$51,730 annualized)

- [17] The Recipient has been employed with the Vancouver Island Health Authority ("Island Health") since August 1, 2019 in a full-time position (which her employer characterizes as 75 hours bi-weekly) with a rate of pay of \$27.82. She is currently on leave as a result of a workplace injury. Her current income is a payment under the Workers Compensation Act, R.S.B.C. 2019, c. 1, about which I do not have the details. Because such payments are not taxable, her income would have to be "grossed up" if it became part of a support calculation. Once she returns to work, I find her income would be \$54,250 per year.
- [18] After turning 19, all the children continued to live with the Recipient, with a brief exception for H. when she attended college at the Recipient's expense in the Interior of British Columbia between September 2019 and March 2020.
- [19] E. and K. are both in receipt of social assistance under the Employment Assistance for People With Disabilities Act, SBC 2002, c. 41. E. receives \$1230 per month and appears to have done so since 2019. From the evidence, I cannot tell exactly what K. gets on a monthly basis, since the standard forms do not require this evidence, and the basis for her support changed mid-2022, which is also the last year for which I have tax records.
- [20] The Payor filed an Interjurisdictional Support Variation Application on July 19, 2023. The Recipient filed a response on September 26. The Payor's application for reduction in his child support came before Mr. Justice Jones on October 5, 2023. It is clear that at this hearing the Recipient raised the point that the Payor had been paying table support below his actual income. Mr. Justice Jones adjourned the hearing and gave the Recipient leave to file a counter-application for retroactive child support, which she did on December 6, 2023. Both applications are now before me.

III. Are E. and K. Still "Children of the Marriage"?

- [21] The first issue before me is whether I should terminate child support. Since a child support award can only be made with respect to a "child of the marriage", I must first ask whether this still applies and, if so, for how long.

- [22] "Child of the marriage" is defined in s. 2(1) of the Divorce Act as follows:

child of the marriage means a child of two spouses or former spouses who, at the material time,

- (a) is under the age of majority and who has not withdrawn from their charge, or
- (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;

- [23] Since the age of majority in British Columbia is 19, once a child reaches that age, the onus is on a recipient to establish that they are unable by reason of illness, disability or other cause, to withdraw from the recipient's charge. One "other cause" that is widely recognized is the need to pursue post-secondary education.
- [24] To be sure, it is not enough for the recipient to establish that a child over the age of 19 is disabled or pursuing a post-secondary education. They must also establish that by reason of that factor the child is unable to leave the recipient's charge.
- [25] I adopt the three-part test for analysis set out in *Jefic v. Jefic* (Grujicic), 2022 ONSC 7240 at para. 72, which essentially sets out the statutory requirements for a person over the age of majority to be a "child of the marriage". The recipient must establish:
- a) The child above the age of majority has a disability;
 - b) The child above the age of majority is in the care of the recipient;
 - c) The child is unable to withdraw from the recipient's charge due to inability to manage daily living on their own without that parent's consistent care, monitoring, and support, or, is unable, due to the disability, to obtain the necessities of life.
- [26] With respect to the third element of this test, it is important to recognize that managing daily living on one's own is - or at least can be - an ongoing process. So in some cases, the evidence will be such that it is appropriate to continue child support, but on the condition that further information is exchanged about the prospects of developing independence.
- [27] Even if a child who remains in the care of one parent as a result of disability or post-secondary studies is a "child of the marriage", it is open to the court to terminate child support or, less drastically, recalculate it so that it is based on sharing certain expenses, rather than "table" support. Because Parliament was aware of this possibility, it is not appropriate to interpret the standard of the child being "unable" to withdraw too strictly when considering the threshold question of whether the child is a "child of the marriage".

A. E.

- [28] The Payor concedes that E. has a disability and is in the Recipient's care. The issue is therefore whether E. is currently unable to withdraw from the Recipient's charge due to an inability to manage daily living on his own.
- [29] E. has been diagnosed as having low functioning Autism Spectrum Disorder and a unique chromosomal syndrome. He receives assistance under the Employment Assistance for Persons With Disabilities Act and is registered with Community Living BC. He is on a waitlist for supportive housing.

- [30] According to a Psychological and Vocational Assessment carried out by Dr. James McClelland, a registered psychologist, in March 2021, E. is unable to carry out full-time work or any work without the support of others, the use of scripting, the establishment of a routine, careful supervision, patience and acceptance of his limitations. According to Dr. McClelland, "Employment can be used as part of his adaptive development but self-sufficiency through employment doesn't appear to be an attainable goal".
- [31] E.'s academic cognitive functioning is in the bottom 1 percentile of his age group, although he has a good (better-than-average) vocabulary. His adaptive learning and socialization scores are extremely low. With scripting and other assistance, he can learn some basic daily living tasks, such as cooking for himself and handling money, but these present real challenges. The Recipient is his principal source of support.
- [32] I find that E. is currently unable to withdraw from the Recipient's care as a result of his disability and therefore remains a "child of the marriage".

B. H.

- [33] H. is currently pursuing psychology and social work studies at UVic, which follows from previous work at community colleges dating back to 2019. She is expected to complete her studies in June 2025. She moved out to attend college elsewhere in British Columbia in 2019, but the Recipient paid her rent and expenses. With the cancellation of classes as a result of the COVID-19 pandemic in March 2020, H. returned home where she has resided ever since. She is expected to graduate from UVic in June 2025.
- [34] The Payor does not dispute that H. remains a child of the marriage. I find that table support remains appropriate for her until she finishes her studies, presumptively next June. I will order that the Recipient provide the Payor with updates on H.'s progress in school at the end of each term and that she let him know within 2 business days if H. expects to complete or abandon her studies earlier than June 2025.

C. K.

- [35] K. completed Grade 10 in 2019, but did not graduate high school and is not going to high school now. According to the Recipient's "Child Status and Financial Statement", she has a medical condition called dysautonomia and suffers from postural orthostatic tachycardia as well as severe social anxiety and depression. The Recipient's evidence is that K., like E., has Autism Spectrum Disorder and that she suffers from learning disabilities.
- [36] On May 11, 2022, the Ministry of Social Development and Poverty Reduction approved a designation of K. as a "Person With Disabilities" under the Employment and Assistance for Persons with Disabilities Act, effective June 1, 2022. K. is not employed and her mother's evidence is that she cannot obtain gainful employment in light of her disabilities.

[37] I have no trouble finding both that K. has a disability and that she remains in the Recipient's care. The more difficult question is whether she is unable to manage daily living on her own without the Recipient's intervention. The evidentiary record is weak on that point. In my view, there is sufficient evidence for me to come to the preliminary conclusion that K. remains a child of the marriage, but more information will have to be provided to the Payor. Depending on what that information shows, he may be able to renew his application to terminate child support for K.. However, at this point, the most probable conclusion is that K., like her siblings, remains a "child of the marriage".

IV. Basis for Child Support Order

[38] The Child Support Guidelines provide a clear rule for children under the age of majority. Section 3(1)(a) sets out that basic child support will be based on the "amount set out in the applicable table". This is therefore referred to as "table support".

[39] However, there is greater flexibility where a child is over the age of majority. While table support is one possible order (s. 3(2)(a)), if the court considers that approach to be inappropriate, it can order the amount 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 (s. 3(2)(b)).

[40] The Payor accepts that table support is appropriate for H. until the earlier of June 2025 or when she either finishes or abandons post-secondary education. I will therefore make that order. The question is thus what is appropriate for E. and K.

[41] E. and K. both now receive income under the Employment and Assistance for Persons with Disabilities Act. They therefore have some "means" to contribute financially to their own support. I find it would not be appropriate to order "table support" for them. Instead, the Recipient's reasonable and additional costs as a result of having them under her care should be split in accordance with the "financial ability of each spouse to contribute to the support of the child".

[42] I do not think it is in anyone's best interests to create a complex financial reporting regime for these two parties for the indefinite future. As of right now, they have approximately equal financial ability to contribute to their children's support. I will therefore order that once these expenses are either agreed to or assessed, they be split equally. This can of course be changed if there is a material change in circumstances, but ordinary fluctuations of income should not require the parties to return to court. To be clear, the Recipient returning to her position as a result of recovering from her injury would not constitute a material change.

[43] The parties will, however, need to either come to an agreement or return to court to determine the amount of expenses attributable to E. and K. In doing this, the focus should be on the expenses the Recipient is required to make because each of them are in her care, but that she would not incur if they were not. These expenses must be reasonable and cannot, net of E. and K.'s assistance from the government, exceed table support.

V. Should I make a Retroactive Order?

[44] Under the Divorce Act, I have discretion as to whether to make a variation in support retroactive or prospective. The Payor asks for a retroactive order terminating support for E. and K. effective on their 19th birthdays (i.e., March 2015 and March 2021 respectively). The Recipient, on the other hand, asks that an order increasing the amount of support to reflect the fact the Payor's income was higher than that attributed to him back to 2004 be made retroactive back to January 1, 2015.

[45] It is clear that the circumstances that are the basis for my variation of the child support order of Madam Justice Quijano have been in place for some time. On the one hand, the Payor has been earning considerably more than \$36,000 per year (with some interruptions) for many years. On the other hand, E. has been receiving social assistance since at least 2019 and K. since 2021.

[46] I must therefore consider whether I am going to exercise that discretion and, if so, how far back I will go. The Payor asks for a retroactive reduction and the Recipient for a retroactive increase. While the issues involved differ in detail, the broad framework for considering either of these requests is the same: *Colucci v. Colucci*, 2021 SCC 24 at para. 5.

[47] Under *Colucci*, the first part of the analysis is to determine a "presumptive date" for retroactivity. At least in cases where a payor is seeking a decrease, the presumptive date is the date of effective notice, so long as that is not more than three years before formal notice: *Colucci* at para. 80.

[48] The problem is that the parties notified each other at different times. I therefore need to consider whether it would be appropriate to start my analysis with different presumptive dates, or if I should use the same presumptive date. If the latter, I will need to decide whether I should use the earlier date when the Payor effectively notified the Recipient that he wanted to terminate support for E. and K. as the date for retroactively adjusting his guideline income as well or if I should use the later date when the Recipient effectively notified the Payor as the date for considering changes to the support for E. and K.

[49] At least in the circumstances of this case, it would not be appropriate to use different dates for retroactive changes. The Payor has been overpaying to the degree that social assistance income to E. and K. has not been taken into account; he has been underpaying to the degree his own income increases have not been taken into account. It is not clear on the present evidence which adjustment will have a greater magnitude. In my view, it would be unfair to either spouse if a one-sided adjustment was made for a particular period of time. In each

case, there was a (similar) information asymmetry, in that the Payor knew all about his income, while only the Recipient knew about the circumstances of the adult children. It is a minimum requirement of a fair resolution that a single date be chosen as the presumptive retroactive one, whether it is the date the Payor gave the Recipient effective notice, or vice versa.

- [50] This leaves the issue of which of these two dates should be chosen. Either choice would be broadly equitable. The earlier date would better address the problem of a parent taking advantage of information asymmetry, while a later date would better reflect the certainty interest that builds up with an existing order.
- [51] In the circumstances of this case, I think a later presumptive date is the better choice. That is because this is a case with an exceptionally low level of financial or other communication between the two parents. The parties were not communicating at all primarily because of the circumstances of their original family law dispute and how it was resolved. A different result might well occur in a case where the mechanics for exchange of financial information were addressed or where there was ongoing co-parenting.
- [52] I therefore consider that the presumptive date would be when the Payor received effective notice that the Recipient would seek a retroactive order that might result in his child support increasing. Since the Payor clearly received effective notice when the parties appeared before Mr. Justice Jones, the presumptive retroactive date is November 1, 2023.
- [53] The second part of the analysis under Colucci is to consider whether there are reasons to depart from the presumptive retroactive date in light of the factors of the conduct of each parent, the circumstances of the child and hardship occasioned by a retroactive award. In my view, none of these factors are reasons to depart from the presumption here. I therefore will apply the presumptive retroactive date as I have found it.
- [54] If, however, I am wrong in holding that the same presumptive date should apply to both parties, then I would find that the factors at the second stage of the Colucci analysis apply. It would unfairly reward the Payor's conduct of not communicating his increases in income and would cause hardship if I were to make the reduction retroactive to when he gave effective notice if that would go along with only putting in place the offsetting factor of his increase in income to the point at which the Recipient gave effective notice. Thus, even if I am wrong in thinking I can use a single presumptive date, I would come to the same ultimate result of only making the order retroactive to November 1, 2023.

VI. Should I Cancel The Penalties Issued Against the Payor?

A. Jurisdiction

- [55] My jurisdiction to vary the amount of the child support order of Madam Justice Quijano, whether retroactively or prospectively, is set out in s. 18.1(1)(a) of the Divorce Act and is not contested by the parties. The Payor says I also have jurisdiction to cancel the penalties that have been assessed against him under the Manitoba Family Support Enforcement Act. Ms. Kahan agreed with this position and the Recipient took no position. However, because this is a jurisdictional issue, I must satisfy myself as to whether they are correct.
- [56] Section 18.1 of the Divorce Act does not apply to the Payor's request to cancel the penalties. Orders under s. 18.1 must be for variation, rescission or suspension of a "support order". A "support order" is defined in s. 2(1) of the Divorce Act, where it is confined to child and spousal support orders under the Divorce Act itself. While the orders of Mr. Justice Vickers and Madam Justice Quijano qualify, the penalties that the Payor seeks to cancel accrued under provincial Manitoba legislation. While they were calculated based on arrears that are ultimately traceable to child support orders under the Divorce Act, the penalties are not themselves such orders and I therefore have no authority to cancel them under the Divorce Act.
- [57] However, there is a broader meaning of "support order" in the definition provided in s. 1(1) of the Interjurisdictional Support Orders Act, S.B.C. 2002, c. 29 [ISOA]. If the issuance of penalties under Manitoba's Family Support Enforcement Act comes within this definition, then I would have jurisdiction under the ISOA. Since this is a matter of statutory interpretation, I must consider text, context and purpose.
- [58] Text is particularly important in statutory interpretation where there is a stipulated definition of a concept. In the case of the definition of "support order" under the ISOA I note that it is exhaustive (it uses "means", rather than "includes"), so an order of a court or tribunal would have to fit within one of the paragraphs set out in the definition. There are a number of potentially relevant paragraphs, but it is sufficient for my purposes to consider para. (a), which includes within the definition of "support order" anything answering to the following description:
- (a) an order, including an interim order, made by a court or by an administrative body, that requires the payment of support;
- [59] It follows that any order, whether from a court or not, that requires the payment of "support" is a support order under the ISOA. "Support" is defined in s. 1(1) of the ISOA and includes "maintenance". Thus any administrative order for "maintenance" is included as a support order under the ISOA.
- [60] This of course pushes the inquiry to what counts as "maintenance". Here, context is critical. Under the doctrine of "in pari materia" (statutes relating to the same subject matter can be interpreted together), I can refer to the definition of "maintenance" in British Columbia's Family Maintenance Enforcement Act, which, in para. (i) of the definition in s. 1(1) includes

interest levied under the British Columbia equivalent of Manitoba's Family Support Enforcement Act. In other words, under British Columbia law, "maintenance", and therefore "support" includes administratively ordered interest on arrears. This would suggest that analogous orders in other jurisdictions are support orders under the ISOA.

- [61] This conclusion is also supported by the purpose of the ISOA, which is to provide statutory jurisdiction for British Columbia courts to address the inter-jurisdictional issues affecting families, especially when the habitual residence of the children is in British Columbia. It would defeat this purpose if Supreme Court judges in British Columbia were not able to address orders like the penalties under Manitoba's Family Support Enforcement Act when there is a substantial connection to British Columbia. I will therefore consider the Payor's application to reduce the penalties as an application under Part 4, Division 2 of the ISOA.
- [62] Since British Columbia is the jurisdiction of habitual residence of the children, to the extent the substantive law of Manitoba and British Columbia differ, it is British Columbia law that prevails: ISOA, s. 31.

B. Substance of the Payor's Application to Cancel or Reduce Interest Penalties

- [63] The Payor's penalties accrued under Manitoba's Family Support Enforcement Act and its attendant regulation. At least at present, the interest rate in Manitoba is substantially higher than in British Columbia: compare Family Maintenance Enforcement Act Regulation, B.C. Reg. 346/88 (as amended), s. 6.1 (providing for simple interest at the prime rate for the banker to the provincial government) with s. 24(1) of the Support Enforcement Regulation, Man Reg 51/2023 (providing for simple interest at the rate of 18%). The current rate of interest in British Columbia is 7.2%. I have not reviewed how the two interest rates have changed over the years, but it seems that the Manitoba interest rate has been consistently higher.
- [64] Since it is the British Columbia law that prevails, under the ISOA I will order reduction of the penalties that have accrued to correspond to what would have accrued had the British Columbia law been applied all along.
- [65] While the prescribed interest rate is different in the two jurisdictions, the test for cancellation or reduction is at least superficially similar. Section 39(2) of the Manitoba Family Support Enforcement Act states as follows:

On application, a court may cancel the penalty, in whole or in part, if the court is satisfied that

- (a) having regard to the interests of the support payor in arrears or their estate, it would be grossly unfair or inequitable not to do so; and
- (b) having regard to the interests of the support recipient to whom arrears are owed or their estate, the cancellation is fair and equitable.

[66] Section 174(4) of the B.C. Family Law Act provides the following test:

If a court cancels arrears under this section [i.e., s. 174], the court may cancel interest that has accrued, under section 11.1 of the Family Maintenance Enforcement Act on the cancelled arrears if satisfied that it would be grossly unfair not to cancel the accrued interest.

[67] The similarity is that the test turns on whether the continuation of the interest is "grossly unfair" to a payor. But this similarity masks differences, the most important of which is that in British Columbia, cancellation of interest can only occur if the court cancels the underlying arrears. Courts in British Columbia have no authority to cancel interest only, which they clearly do in Manitoba. This may reflect the fact that in Manitoba there has been a choice to have a higher rate of interest.

[68] In my view, there is no basis to cancel any of the arrears that the Payor accrued, and therefore no basis to cancel interest.

[69] Arrears first arose after Mr. Justice Vickers' order at the beginning of 2003. The Payor attributes these arrears first to health difficulties he was having at the time: in 2002, he had his third hernia surgery and says he was unable to work. This would presumably have been something the Payor or his lawyer would have told Mr. Justice Vickers at the time and may well have been taken into account in assessing a guideline income. In fact, the Payor did work in 2003, at Home Depot in Victoria.

[70] It appears from the evidence that the Payor stopped working at Home Depot between the Vickers Order and the Quijano Order. He says the reason was that he could not return there after a two-three week hiatus at work because the Recipient poisoned his co-workers against him. Again, I note that if this happened before April 23, 2004, it is something that could have been brought up before Madam Justice Quijano, and perhaps was, while if it happened later, then it cannot explain the arrears at that time. Either way, I do not have sufficient evidence to conclude that these arrears were excusable. We know the Payor made no attempt to go to court to have his child support varied.

[71] I have no explanation for the increase in the arrears between the time of Madam Justice Quijano's order and December 2, 2011. The Payor is not seeking a retroactive variation for this period, he did not provide effective notice and I have no evidence of what his income was at that time. I therefore see no reason to conclude that it would be unfair for him to pay simple interest on the arrears accumulated at that time, particularly at the lower British Columbia rate.

[72] The Payor attempts to provide an explanation for the gap in his support payments between June 1, 2012 and March 18, 2013, although he does not seek a variation in the amount of child support for that time period. In any event, the difficulty with his explanation is that on his own account he obtained a compensatory award for his wrongful termination and yet does not account for that award.

[73] I note that so far the Payor has been (slowly) paying off the principal of his arrears and has not paid down any interest. However, it is, in my view, realistic for him to do so once child support has been adjusted and once the interest is recalculated based on the lower British Columbia rate. If I were to ask whether it is "grossly unfair" to the Payor to cancel accrued interest on uncanceled arrears, I do not think it would be in the circumstances.

VII. costs

[74] I am not going to order costs to either party. The Payor was not "substantially successful", since I found that all three children remain children of the marriage and did not cancel his accrued interest. On the other hand, the Payor did obtain some degree of relief, both in the way support should be calculated for the children and in the amount of interest. The Payor had no realistic choice but to bring a support variation application, but the Recipient also had no realistic choice but to oppose it in the form it was brought.

VIII. Orders

[75] I therefore make the following orders:

- a) A declaration that E., H. and K. [names and birthdates to be fully set out in the order] are each a "child of the marriage" within the meaning of s. 2(1) of the Divorce Act.
- b) An order that, no more than 14 days after the date of this order, the Recipient must provide to counsel for the Payor the following information:
 - i. The amount of income of each of E. and K., with supporting documentation.
 - ii. The monthly expenses attributable to each of E. and K., with supporting documentation.
 - iii. All information in the Recipient's possession regarding the disabilities of E. and K.
- iv. One of the following for each of E. and K., with supporting documentation:
 - 1) A plan for how they may become able to withdraw from the charge of the Recipient, with timelines, or
 - 2) An explanation for why withdrawal from the charge of the Recipient is not realistic.
- c) A direction that if the Payor objects to the amounts referred to in paras. (c)(i) or (c)(ii), he must provide notice of that objection to the Recipient no later than 14 days after the date of receipt of the information.
- d) A declaration that the Payor's guideline income is set at \$50,600.
- e) An order varying child support, as ordered by Madam Justice Quijano on March 4, 2004 in Victoria BCSC Action No. 02 5644 to the following, effective November 1, 2023:

- i. In this "order", "monthly expenses" in relation to a child is the amount of expenses reasonably incurred by the Recipient as a result of having that child in her care that the Recipient would not have expended if the child was not in her care.
- ii. The Payor must pay child support monthly in the amount of \$424 payable on the first day of the month for the support of H.
- iii. Unless otherwise ordered, the last payment under paragraph (ii) will be June 1, 2025.
- iv. The Payor must pay, on the first day of each month, an amount equal to half of the difference between E.'s monthly expenses and \$1,230, unless:
 - 1) E.'s monthly expenses do not exceed \$1,230, in which case the Payor will pay no child support for E., or
 - 2) The difference between E.'s monthly expenses and \$1,230 is more than the table support that would otherwise be attributable to E., in which case the Payor will pay the table support amount.
- v. The Payor must pay, on the first day of each month, an amount equal to half of the difference between K.'s monthly expenses and K.'s monthly income, unless:
 - 1) K.'s monthly expenses do not exceed her monthly income, in which case the Payor will pay no child support for K., or
 - 2) The difference between K.'s monthly expenses and her monthly income is more than the table support that would otherwise be attributable to K., in which case the Payor will pay the table support amount.
- f) If the parties do not agree on the amount of child support due under para. (e), either party may request a review in the Supreme Court of British Columbia on notice to the other party.
- g) The Recipient has an ongoing obligation to provide the following information to counsel for the Payor within two business days of obtaining it:
 - i. Any material change in E. or K.'s capacity for independence.
 - ii. Any information of a change in H.'s expectation or intention to complete her studies at UVic.
- h) Each party will bear his or her own costs.

"J. G. Morley, J."

The Honourable Justice Morley

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