

CANADA / JUDGMENT

S.K.S. v. A.A.S.

2023 BCSC 1777

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2023 BCSC 1777 S.K.S. v. A.A.S.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

S.K.S. v. A.A.S.,

2023 BCSC 1777

Date: 20231017

Docket: E191817

Registry: Vancouver

Between:

S.K.S.

Claimant

And

A.A.S.

Respondent

Before: The Honourable Mr. Justice Gibb-Carsley

Reasons for Judgment

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Place and Dates Hearing:

Vancouver, B.C.

May 16 and 17, 2023

Place and Date of Judgment:

Vancouver, B.C.

October 17, 2023

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I. Overview

- [1] The claimant, S.K.S., and the respondent, A.A.S., were married on July 31, 1999 and separated on August 15, 2017. The parties have two children: S.S. who is 16 years old and A.S. who is 15 years old (the "Children"). In addition to being married to each other, the parties also worked together in an optometry business (the "Optometry Business") operated by the respondent who is a trained optometrist. During the marriage, the claimant, who is trained as an accountant, worked at the business providing book-keeping, accounting and administrative services.
- [2] Given there are children involved in this matter, I have used initials to identify the parties. Further, I have been purposely vague in naming business entities and locations in order to protect the Children's identities.
- [3] The claimant brings an application seeking a review or variation of child support and a corresponding reallocation of special expenses both prospectively and retroactively to April 1, 2022. The claimant also seeks orders compelling detailed disclosure regarding the respondent's business on an ongoing basis.
- [4] The respondent opposes the claimant's application to vary the child support on a number of grounds. First, he says the parties consensually entered into a separation agreement on August 3, 2021 (the "Separation Agreement") that he argues fixed the amounts of child support and special expenses until at least July 2024. As such, he asserts this application is premature as it occurs during what he thought was a "hiatus" of litigation contemplated in the Separation Agreement. Second, the respondent disagrees with the income the claimant says he earned. He contends that the claimant and the expert she retained to determine his income to calculate his child support under the Federal Child Support Guidelines, SOR/97-175 [Guidelines], overstate his income. In addition to detailed criticisms of an incorrect analysis of the business income and refusal to deduct what he says are legitimate expenses, the respondent says the claimant has failed to account for the income fluctuations in the Optometry Business caused by the COVID-19 pandemic.
- [5] While the respondent was content to continue paying child support at the amount he agreed to under the Separation Agreement, he brings a cross-application to reduce his child support payments because he says his income has, in fact, decreased since the calculations under the Separation Agreement. His cross-application also seeks an order to limit the amount of disclosure he is to provide to what he says is reasonably necessary. Put bluntly, the respondent argues that the constant disclosure requests from the claimant regarding his business are disruptive, expensive and unwarranted.
- [6] These applications raise the following issues that I must determine:

- a) Whether the terms of the Separation Agreement prohibit the claimant from seeking to vary child support;
 - b) If I am persuaded that the Separation Agreement does not prohibit the claimant from seeking to vary the child support, then I must determine if there has been a material change in circumstances that allows for a variation; and
 - c) If I find that there has been a material change in circumstance that allows me to vary the child support, then I must determine the proper amount of child support to be paid by the respondent to the claimant and for what periods that amount should be paid. The determination of the child support amounts will necessarily require an assessment of the parties' incomes, which will include an analysis of the expert opinions provided by each party.
- [7] Before turning to my legal analysis and determination of the issues, I will provide a brief factual background for context.

II. Background Facts

- [8] The respondent is 52 years old and trained as an optometrist. He operates the Optometry Business in the Lower Mainland of Vancouver. He also is the sole shareholder of an investment company ("ASIC") that owns the Optometry Business. The respondent also holds all of the shares of a related corporation ("ASOC"). He earns income through management fees and consulting fees from the Optometry Business. As the focus of this application is on the respondent's income, I will discuss his business operations and earnings in more detail below.
- [9] The claimant is 53 years old and trained as a chartered accountant. She worked at the Optometry Business with the respondent providing accounting and administrative services. She currently works part time for an accounting firm providing accounting services. She asserts she earned income of \$39,039 in 2020, \$54,541 in 2021 and \$58,182 in 2022. The respondent argues that the claimant is underemployed and with her skills and training could earn significantly more income. Again, as the parties income is central to this application, I will return to the claimant's income below.
- [10] The Children, aged 15 and 14, currently reside primarily with the claimant and attend a private high school. While the respondent exercises parenting time and is involved in the Children's lives, there is no dispute that the Children's mother, the claimant, is the primary caregiver.

A. The Separation Agreement

- [11] The parties attended mediation with their counsel (I note, not the counsel appearing on this application) and a mediator on March 30, 2021, and were able to settle all of the issues arising from the breakdown of their marriage. They formalized that settlement in signed Minutes of Settlement and a final order pronounced by this court on August 3, 2021.
- [12] As I will discuss in more detail below, the Separation Agreement provided that the parties are to exchange financial information "no later than" May 1, 2024 and review the child support amounts set out in the Separation Agreement "no later than" July 1, 2024. I pause to note that the interpretation of these clauses of the Separation Agreement regarding the timing of the review process is hotly contested between the parties. The dispute is one of the main issues in this application.
- [13] In order to determine the respondent's child support obligations for the Separation Agreement, the parties jointly engaged a chartered business valuator, Mr. Kiu Ghanavizchian, to value the Optometry Business and to calculate the respondent's Guidelines income. Mr. Ghanavizchian calculated that the respondent's Guidelines income was as follows:
- a) 2017 - \$645,000;
 - b) 2018 - \$542,000; and
 - c) 2019 - \$386,000.
- [14] The parties agreed that for the purpose of determining the respondent's child support and s. 7 expenses under the Separation Agreement that the respondent Guidelines income was \$390,000. The parties further agreed that the respondent would pay monthly child support of \$5,000. In respect of the parties proportional sharing of s. 7 expenses, the parties agreed that the respondent would pay 75% and the claimant would pay 25%. As will be discussed in a moment, the claimant says that she agreed to accept that the respondent's Guidelines income was \$390,000 because she understood that the respondent planned to reduce his business activities, and thus his income, by selling a portion of the Optometry Business.
- [15] The Separation Agreement also provides that the respondent pay the claimant a lump sum amount of \$400,000 for spousal support.
- [16] Prior to entering into the Separation Agreement, the respondent claimed that he was suffering from stress and his physician recommended that he reduce his business activities. He included evidence from a psychiatrist, Dr. Catherine Fung who stated that, "[i]t is [her] opinion that it would be optimal for [the respondent] to sell his business and to become an employee."

[17] The respondent says given this advice he intended to sell part of the Optometry Business in 2017 to an associate, Dr. S. In his Form F8 Financial Statement sworn July 6, 2020, the respondent provided the following description of his intention:

It is intended that [Dr. S.], currently an associate, and a key employee, will be made a partner of [the business], the result of which the profits of the corporation will be shared by me and [Dr. S.].

[18] However, the sale of portion of the Optometry Business to Dr. S. never materialized.

[19] The relevance of the respondent reporting his health issues and the statement of his intentions to make Dr. S. a partner, is that the claimant asserts that she accepted a 25% reduction in the amount of the Guidelines income for the respondent based on the respondent's claim that he was going to scale back his business operations. In her affidavit, the claimant described her rationale for reducing the calculation of the respondent's Guidelines income as follows:

17. Even though the 3-year average of the respondent's income was \$524,000, the respondent insisted that, for health reasons, he was going to be selling 50% of his company, and, therefore, his income would be reduced.
18. He claimed that he would be selling half the company to one of his associates, Dr. [S.]. He claimed that he would sell in two tranches, 25% by August 31, 2021, and the remaining 25% in the near future.
19. I relied on the claims made by the respondent during negotiations, and I agreed to discount his income by about 25% to reflect his stated intention to sell 25% of his company by August 31, 2021.
20. We used the average Guidelines income of $\$524,000 \times 75\% = \$393,000$ to arrive at the \$390,000 that is stated in the Final Order.

[20] In my view, the claimant's perception that the respondent misrepresented his intention to scale back his work by selling a portion of the Optometry Business to Dr. S. is, in part, fueling her pursuit of obtaining increased child support payments in this application.

[21] For his part, the respondent denies that he misrepresented the potential sale of a portion of the Optometry Business to gain an advantage. He asserts that he had intended to sell a portion of the business to Dr. S., but for several reasons the deal never occurred. However, it is clear that the respondent's Guidelines income for the Separation Agreement was set at an amount that was lower than the three year average of his 2017, 2018 and 2019 incomes which equals \$524,000.

B. Issues Arising After the Separation Agreement

- [22] After the Separation Agreement, the claimant made a number of requests for financial disclosure from the respondent. I will not detail them all in these reasons, but note that the first request was made on March 21, 2022, and was not fully responded to by the respondent until August 11, 2022, nearly five months after the initial request. I will address the disclosure issues later in my reasons.
- [23] In April 2022, the respondent informed the claimant that starting in May 2022, he was moving to Toronto and intended only to spend one week a month in Vancouver. The claimant says that by moving to Toronto for three weeks every month, her child care responsibilities have increased. She argues that before moving to Toronto the respondent used to live and work in close proximity to where the Children attended school and so he could provide assistance with pick ups and drop offs. The claimant asserts that because the respondent spends more time in Toronto, a disproportionate burden of childcare now falls on her which limits her ability to work and also increases her expenses related to raising the Children.

C. Expert Reports Filed in this Application

- [24] Both parties provided expert reports that purport to assess the respondent's income for the purpose of calculating child support. The claimant obtained an expert report for the respondent's Guidelines income prepared by Derek Sanders of SVG dated January 25, 2023 (the "SVG Report"). The SVG Report provides only an opinion on the respondent's Guidelines income for 2021 which it finds to be \$740,000 consisting of \$691,000 of s. 18 income and \$49,000 of imputed income.
- [25] SVG did not provide a report for the respondent's 2022 income. The claimant argues that because the respondent failed to provide financial disclosure, she was unable to have SVG prepare a rebuttal report regarding the respondent's 2022 Guidelines income. Instead, the claimant, as a trained accountant, took the raw financial information from the respondent's businesses and added back certain amounts to his income that the claimant says were improperly claimed as business expenses. On this basis, the claimant argues that the respondent's income for 2022 is approximately \$652,000. However, she is content to calculate the respondent's child support amounts based on a Guidelines income for 2022 of \$600,000. Under the Guidelines, the child support for an income of \$600,000 would be \$7,469 per month.

III. The Parties' Positions

A. The Claimant's Position

- [26] In essence, the claimant's position is that the respondent is underpaying his child support obligations because his Guidelines income is significantly higher than the \$390,000 upon which his current support is based. On this basis, the claimant seeks retroactive child support in the amount of \$49,452, representing the difference between:
- a) child support in the amount of \$9,121 per month based upon the Respondent's 2021 Guidelines income of \$740,000, for the months April 2022 through March 2023; less
 - b) \$5,000 per month, being the amount of child support which the Respondent paid to the Claimant during that time period based upon a Guidelines income of \$390,000.
- [27] The claimant also seeks an order that the respondent pay to her \$18,770, being the underpayment of the children's private school expenses from April 2022 to March 2023.
- [28] She also seeks an order that the respondent pay to the claimant retroactive child support of \$4,938, representing the underpayment of child support for the months of April and May 2023 - May being the month these applications were heard before me.
- [29] Commencing on April 1, 2023, the claimant seeks an order that the respondent pay child support in the amount of \$7,469 per month, corresponding to his 2022 Guidelines Income \$600,000. She also asks that the respondent's share of s. 7 expenses be increased from 75% to 91% based on the Guidelines income.

B. The Respondent's Position

- [30] The respondent obtained an expert report regarding his Guidelines income prepared by Keith Jenson of BDO on January 17, 2023 (the "BDO Report"). The BDO Report calculates the following Guidelines income for the respondent:
- a) 2020 - \$273,000;
 - b) 2021 - \$597,000; and
 - c) 2022 - \$350,000.
- [31] As a result of this income, the respondent asserts that if child support is to be varied it should be reduced in 2022 and 2023 to reflect the Guidelines income presented in the BDO Report because it is less than the \$390,000 upon which his current child support payments were calculated under the Separation Agreement.
- [32] I will now turn to my legal analysis and determination of the issues.

IV. Discussion

A. Is the Court Permitted to Review the Child Support Amounts?

[33] As a starting point, I must determine whether the parties have satisfied the test to have the court vary the child support amounts set out in the Separation Agreement. This will require determining whether the Separation Agreement itself provides for a review--which is disputed by the parties. However, regardless of whether the Separation Agreement provides for a review, the court may vary child support if there is a material change in circumstances from the time the Separation Agreement was created.

[34] I will first examine whether the Separation Agreement permits the parties to review and vary the child support. The parties disagree as to the interpretation of the child support review clause in the Separation Agreement. The relevant clauses of the Separation Agreement relating to the timing of the parties exchange of financial information and the review of child support payable by the respondent to the claimant are as follows:

[The respondent] and [the claimant] shall:

- a. no later than May 31, 2024, exchange financial information as defined in Rule 5-1 of the Supreme Court Family Rules; and
- b. no later than July 1, 2024, review the amount of child support payable by [A.A.S.] to [S.K.S.]

[35] The claimant says that because the clause states that the parties are to exchange financial documents "no later than May 1, 2024" and to review the amount of child support "no later than July 1, 2024" she is not required to wait to seek a review. She argues that the clear language of the agreement allows for review at any time. I note that the Minutes of Settlement, signed by both parties and their counsel on the date of the mediation use the same language as the Separation Agreement that resulted into the order pronounced on August 3, 2021.

[36] The respondent says the intention of including a specific date for the review was to "give a period of peace" or a "hiatus" between the parties for three years after the Separation Agreement with a fixed amount of child support set. He asserts the purpose was so the parties would not need to engage with each other on contentious issues until July 1, 2024. The respondent argues that his interpretation is the only sensible interpretation of the terms of the agreement because it is illogical that the parties would enter a comprehensive agreement only to have it potentially relitigated immediately after signing.

[37] I accept that on its face, it appears strange that the parties would enter into an agreement that provided no guarantee that it would provide the "hiatus" that the respondent says he was seeking. However, it could be that the parties wanted to ensure that child support would not be fixed indefinitely into the future and so wanted to ensure that a review or reviews could occur frequently, but no later than three years after the Separation Agreement was signed. This is, of course, speculation and I am left with the clear language of the Separation Agreement.

[38] There was some argument raised by the respondent that that I should review the correspondence and notes surrounding the mediation that resulted in the Separation Agreement. As I understand his argument, it was to demonstrate that the respondent intended that the Separation Agreement would prevent a review before July 2024. I decline to review those documents for two reasons. First, it appears that the discussions between counsel and the parties in reaching the Separation Agreement would attract privilege. Communications between the parties through the mediator are without prejudice and "off the record". Second, I understand that the process used in this particular mediation was "shuttle mediation", in which the parties stay in separate rooms and the mediator meets with each party independently. As such, neither party knew exactly what was being said by the mediator to the parties in the other room. This negates the respondent's argument that he and the claimant were ad idem on the meaning of the review clause in the Separation Agreement.

[39] I also note that in an affidavit dated May 19, 2021, the respondent deposes what appears to be an acknowledgment that the Separation Agreement (referred to in this passage as the Final Order) represents the entire agreement between the parties:

While negotiating the Final Order, a variety of ideas and tentative arrangements were explored, but all of these are replaced by the Final Order, which is the entire agreement between the claimant and me.

[40] Given the foregoing, I see no basis for adopting an interpretation of the Separation Agreement that is contrary to its plain language. As such, I accept that the claimant is entitled to seek a review of the child support and special expenses. In doing so, I acknowledge that it is not controversial that child support is the Children's right. The Supreme Court reiterated the core principles of child support in *Michel v. Graydon*, 2020 SCC 24 at para. 10 which include that "child support is the right of the child, which right cannot be bargained away by the parents".

[41] In any event, even if I am wrong that the Separation Agreement provides the ability for the parties to review child support before July 2024, I am of the view that there has been a material change of circumstances based on a change in the respondent's income. I will discuss the specific change in income and its impact later in these reasons. However, I note that to vary a child support order, pursuant to s. 17(4) of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp), the court must be satisfied that there is a material change in circumstance. I accept that the respondent's income changed from \$390,000 when the child support amounts were set under the Separation Agreement, which amounts to a material change in circumstance. In this regard I reference s. 14 of the Guidelines:

14 For the purposes of subsection 17(4) of the Act, any one of the following constitutes a change of circumstances that gives rise to the making of a variation order in respect of a child support order:

- (a) in the case where the amount of child support includes a determination made in accordance with the applicable table, any change in circumstances that would result in a different child support order or any provision thereof;
- [42] In other words, a change in Guidelines income that results in a different amount of child support being calculated under the support tables can constitute a change in circumstances to vary an order. Whether as a review or change in circumstances, I am satisfied that I am able to engage in determining the effect of the respondent's change of Guidelines income to his child support obligations.
- [43] I will now consider the calculation of the respondent's Guidelines income.

B. Calculating the Respondent's Income for 2020, 2021 and 2022

- [44] The parties expended significant resources in attempting to persuade me of the correctness of their position as to the respondent's Guidelines income for 2020, 2021 and 2022. As referenced above, each party engaged an expert to provide an opinion as to the respondent's income. The claimant's expert, SVG, only prepared a report for 2021. The claimant says that the respondent's failure to provide disclosure prevented SVG from preparing a report for 2022. Instead, the claimant, who is trained in accounting, provided her comments and criticisms of BDO's opinion of the respondent's 2022 income.
- [45] In my view, the court is ill-equipped to conduct a de novo forensic audit to assess the respondent's income. The court lacks all of the source documents, the contextual details of the business and generally, the expertise to precisely conduct an accounting of the respondent's various business activities. Accordingly, I must rely upon the expert opinions and the positions of the parties put before the court, and assess the reasonableness of their conclusions. I will begin by evaluating the expert reports for 2020 to determine the respondent's Guidelines income for that year. I will then conduct the same analysis for 2021 and 2022.
- [46] Both the SVG Report and the BDO Report approach the calculation of the respondent's income as a combination of the pre-tax profit of the Optometry Business and then adding the management fees paid to the respondent's related company ASOC, as well as the management salary paid to the respondent back into his income. The SVG Report, and the claimant's criticisms, largely focus on what they argue are illegitimate business expenses deducted from the respondent's income that they contend would be available to the respondent personally.
- [47] I will now turn to each of the years in issue.

The Respondent's 2020 Income

- [48] BDO says the respondent's income in 2020 was \$273,000.

- [49] SVG provides no response or critique to BDO's assessment of the respondent's 2020 Guidelines income. In my view, there is no reason why SVG would not have been able to opine on the respondent's 2020 income because all material documents requested by the claimant for the 2020 fiscal year had been provided to the claimant in the summer of 2022. It appears that SVG was simply not asked by the claimant to carry out an analysis of the respondent's 2020 income.
- [50] The claimant provided comments and criticisms of the BDO Report's conclusions on the respondent's 2020 income. The claimant's concerns largely mirror her objections to BDO's assessment of the respondent's 2022 Guidelines income. As such, the comments I provide below, which are more particularized in respect of the 2022 income, are applicable to the 2020 income.
- [51] In my view, I am left with largely unchallenged expert evidence that the respondent's Guidelines income for 2020 was \$273,000. As I will discuss below, the evidence before the court is that the respondent's income in 2020 was significantly lower than other years due to the impact of the COVID-19 pandemic on his business. Accordingly, it is not surprising that his Guidelines income is, as BDO opines, significantly lower in 2020 and I accept BDO's assessment of the respondent's income for 2020.

The Respondent's 2021 Income

- [52] The BDO Report finds that respondent's Guidelines income in 2021 was \$597,000. SVG opines that the respondent's Guidelines income for 2021 is \$740,000.
- [53] SVG reviewed the BDO Report for 2021. While there is some agreement between the experts as to what should be included in the respondent's income, such as the \$338,000 of management salary paid by the Optometry Business to the respondent and the fees paid to the respondent by ASOC of \$300,000. SVG disagrees with the following adjustments to the respondent's 2021 income made by BDO:
- a) a deduction of \$93,587 for capital expenditure;
 - b) the following personal component of business expenditures that were not identified by the respondent:
 - i. meals and entertainment: \$5,000;
 - ii. excessive accounting fees: \$6,000;
 - iii. office rent paid to brother: \$12,000;
 - iv. travel expenses paid to brother's company: \$14,000;
 - v. other expenses identified by respondent as personal: \$6,000; and
 - c) gross up personal expenses for tax purposes: \$49,000.

- [54] The onus is on the respondent to persuade the court that corporate money should not be included in a calculation of his Guidelines income: *Teja v. Dhanda* 2009 BCCA 198 and *Hausmann v. Klukas* 2009 BCCA 32.
- [55] I have reviewed the BDO Report and the SVG Report. I accept the conclusions provided by BDO. In my view, the responding report of BDO provided on January 30, 2023 (the "BDO Response"), provides a full answer to the arguments raised by SVG and the claimant which I will now discuss.
- [56] In respect of the disagreement between SVG and BDO regarding whether to use amortization or capital expenditures in 2021, the BDO Response provides the following explanation for the different methodologies:

I enquired with [the respondent] as to why 2021 amortization was low as it was - he was not certain but speculated it may be due to some of the challenges [the Optometry Business] had with its accounting in the period, along with the fact that [the Optometry Business] assets were at or towards the end of their useful lives. At paragraph 2.4(f) of the BDO Report, I noted the significant expenditures that [the Optometry Business was expecting to incur in the foreseeable future to replace its fully depreciated assets. Accordingly, I assumed the actual capital expenditures in 2021 of \$93,587 is a more reasonable representation of [the Optometry Business'] sustaining capital expenditure requirements than the \$28,244 of amortization assumed in the [SVG Report]. In the circumstances, reference actual cash capital expenditures is also more reflective of the corporate monies that [the respondent] had available for support in 2021.

- [57] In my view, this appears a reasonable articulation of BDO's conclusions and I accept that BDO's methodology provides a better estimate of the corporate funds available to the respondent for calculating his Guidelines income.
- [58] In respect of the expenses that SVG asserts are either excessive or improper and thus should be added back to the respondent's income, again I accept BDO's explanation. For example, in respect of SVG's (and the claimant's) assertion that \$6,000 should be added back to the respondent's income because he overpaid for accounting fees, BDO's provided a response:

First, there is no indication that [the respondent] received any personal benefits by paying his uncle's accounting firm \$12,000 for the accounting services provided to the [Optometry Business] .

Second, even if the purpose was to calculate the market rate for the accounting fees paid to [the respondent's] uncle ... while I acknowledge \$12,000 seems high for a notice to reader and T2 corporate tax return engagement, my understanding is that [Mr. S.S.] has provided significantly more services to [the Optometry Business] than simply compiling its financial statements and preparing its T2 corporate tax return. I understand [Mr. S.S.] has been providing extensive support.

[59] Again, in my view, I accept the rationale used by BDO as reasonable. While the claimant says that when she provided accounting services for the Optometry Business she was paid only \$6,000 per year and now the respondent pays \$12,000 a year to his brother in Toronto, I cannot accept that it is unreasonable based on the evidence before me.

[60] I also accept that the rent of \$12,000 is a legitimate expense. BDO in response to the challenge by SVG provides the following explanation:

I understand the rent is for a furnished office and storage space used by [the Optometry Business] and [the respondent] in connection with the operations of [the Optometry Business]. For example, [the Optometry Business] receives mail at the rented office,. Similar to the accounting addback commentary above, there is also no indication that [the respondent] received a personal benefit by paying \$12,000 in rent to his brother's company.

[61] Finally, in respect of the travel for which SVG takes issue, BDO responds that it understands that the travel was related to flight passes for his professional development trips to Toronto. I conclude that the respondent, through BDO's explanations, has sufficiently justified that the expenses for travel need not be added back so as to increase the amount of his Guidelines income. There are no grounds to add the expenses into the respondent's income as argued by SVG.

[62] Given the foregoing, I accept BDO's determination that the respondent's Guidelines income for 2021 is \$597,000.

The Respondent's 2022 Income

[63] BDO concludes that the respondent's Guidelines income in 2022 was \$350,000. As mentioned above, as SVG was unable to review 2022 analysis provided by BDO, the claimant performed her own analysis. She concluded that the respondent's Guidelines income for 2022 is \$651,848.

[64] The claimant's analysis begins with BDO's assessment of \$350,000 and adds back into the respondent's income the following amounts:

- a) add back education, travel and meals expenses: \$102,177;
- b) add back other personal expenses: \$13,000;
- c) add back capital expenses which should have been amortized rather than expensed in 1 year: \$26,218;
- d) add back rent paid to brother: \$12,000;
- e) gross up for tax: \$13,806;
- f) accounting fees over-accrual: \$6,000;
- g) deduct amortization add-back: \$47,515;

- h) add back actual amortization: \$66,596;
- i) adjust net loss to conform with CRA filings: \$10,955;
- j) add back NeuroVision expenses: \$45,854; and
- k) gross up for tax: \$52,757.

- [65] As a starting point, I recognize that the claimant, although trained as an accountant, is not a neutral party in this litigation. Her interest aligns not with providing an objective opinion to the court but with increasing the respondent's Guidelines income. As such, I approach her analysis and criticisms with caution.
- [66] As set out above in my discussion of BDO's assessment of the respondent's 2021 Guidelines income, I accept BDO's approach and methodology. In response to the claimant's criticism of BDO's assessment of the respondent's 2022 Guidelines income, BDO provided a response dated May 11, 2023. That responding report provides additional details to support its assessment of the respondent's 2022 income. I will now detail the basis for my conclusion.
- [67] For the same reasons set out above regarding the respondent's 2021 income, I accept the rationale for BDO's findings that the expenses paid to the respondent's relatives for rent and accounting services are legitimate and need not be added back to his income.
- [68] In respect of the claimant's assertion that the respondent's expenses for continuing education, meals and entertainment and travel of \$102,177 seem excessive, BDO's response is that the claimant's analysis appears to be based on the amounts that were initially recorded to the Optometry Business's travel accounts and fails to recognize that these amounts were reallocated. For example, \$56,938 of the expense was accounted for by BDO in its first report and provided that \$40,000 was related to business (based on a percentage calculation) and the remaining \$16,938 was added back to the respondent's income as it had a personal component.
- [69] BDO further responds to the claimant's concerns by advising that \$22,496 of the travel expenses were reallocated to an "advertising and promotion" expense which were not personal expenses of the respondent.
- [70] Similarly, the claimant's argument that the respondent's expenses related to NeuroVision are not legitimate expenses of the Optometry Business seems speculative and unsupported. The respondent sets out that NeuroVision is a legitimate business venture that he is pursuing in Toronto and is related to the Optometry Business. In my view, there is no basis to find otherwise based on the evidence before me. In respect of NeuroVision, the respondent provides the following evidence:

While the Claimant suggests that I am travelling a significant amount of the time and living a "semi-retired" lifestyle, this is simply not true. When I am not in Vancouver, I am able to work just as efficiently as I do in Vancouver. I work and train 40 plus hours per week in [Optometry Business] (and NeuroVision Clinic in Ontario, where I am receiving on the job training for new

vision therapy procedures as I previously deposed). I am educating myself to prepare for the future sustainability of my business. Many business administration tasks are easily done remotely and I am even able to see patients remotely.

[71] Further, I note that Mr. Ghanavizchian, in his jointly commissioned report for previous years of income, added back only a part of the NeuroVision expenses, where the claimant seeks to disallow all of that expense as illegitimate.

[72] I also accept BDO's explanation of why the income loss of \$10,955 that differed between the corporate filings and BDO's accounting should not be added back into income. In the May 11, 2023 report, BDO explains this issue as follows:

While the loss reported in [the Optometry Business] 2022 T2 (tax return) is less than the loss in the financial statements reference in by guideline income calculations by approximately \$11,000, [the Optometry Business] 2021 T2 (tax return) income is lower than the financial statement income by the same \$11,000. In other words, from a tax perspective the net impact of 2021 and 2022 combined is nil. Further, I understand the income in the financial statements is a more accurate representation of the income/loss of [the Optometry Business] as it includes the required adjustments to the financial statements, whereas the T2 tax returns do not.

[73] In my view, this provides a comprehensive response to the concerns expressed by the claimant on the \$10,955 she argues should be added back to the respondent's 2022 income.

[74] I am satisfied that the response of BDO justifies its methodology and also demonstrates that the claimant's attempts to add income to the respondent appear, on a shaky foundation. Put bluntly, having reviewed the concerns of the claimant and the responses of BDO, through the rebuttals of the claimant's assertions, I have lost trust in her attempts to assail the conclusions set out by BDO. In my view, the articulated concerns expressed by the claimant have not disturbed the soundness of BDO's findings.

[75] Given the foregoing, I accept that the respondent's Guidelines income for 2022 is, as set out by BDO, \$350,000.

[76] Having now determined the amount of income I accept as the respondent's income for 2020, 2021 and 2022, I will turn to my review of what amounts should be used to calculate the respondent's child support obligations and share of s. 7 expenses for 2022 and 2023.

C. Calculating the Respondent's Guidelines Income for 2022 and 2023

[77] In my view the difficulty in using a single year as the basis for calculating child support is that there is a large fluctuation in the respondent's income for 2020 and 2021 as a result of the COVID-19 pandemic. The evidence is that in 2020 the business was adversely affected because individuals did not make purchases or have appointments due to the pandemic. As such, not surprisingly, sales and income were lower. In 2021, after the pandemic's grip lessened, there was a surge in customers who had put off having optometry appointments and purchasing glasses. Again, not surprisingly, the Optometry Business' sales increased

dramatically.

[78] In his affidavit filed in support of this application, the respondent described the business fluctuation:

In 2021 and 2022 the business experienced significantly greater revenues in comparison to previous years. I attribute much of the 2021 spike to "pent up" demand from fiscal 2020 that flowed over into fiscal 2021 (i.e. many patients did not obtain treatments in fiscal 2020 due to Covid-19). However, I also attribute a significant amount of the increase to the investments that I've made in business development since 2017.

[79] While neither counsel directed me to this provision, in my view, the circumstances of this case call for the use of a three-year average as contemplated by s. 17(1) of the Guidelines. Section 17(1) of the Guidelines sets out that the court may determine a spouse's income by averaging his or her income in the three years prior in circumstances where using one year would not be the fairest determination of the income due to income fluctuations. Section 17(1) provides:

17 (1) If the court is of the opinion that the determination of a spouse's annual income under section 16 would not be the fairest determination of that income, the court may have regard to the spouse's income over the last three years and determine an amount that is fair and reasonable in light of any pattern of income, fluctuation in income or receipt of a non-recurring amount during those years.

[80] Given the fluctuation of the respondent's income in 2021 and 2022 due to the COVID-19 pandemic and its impact on his business, I conclude that the fairest determination of the respondent's Guidelines income for 2022 is to take the average of the prior three years of the respondent's income being 2019, 2020 and 2021. As set out above, prior to the Separation Agreement, the parties' joint expert Mr. Ghanavizchian determined the respondent's income for 2019 was \$386,000. I also note that the claimant has not provided any significant evidence to contest BDO's assessment of the respondent's income for 2020 of \$273,000.

[81] Given my findings above in respect of the respondent's income, I find that the respondent's Guidelines income for the purpose of calculating child support and his share of s. 7 expenses for 2022 is \$418,667. I have arrived at this amount by finding the arithmetic average of \$386,000, \$273,000 and \$597,000, being the respondent's income for 2019, 2020 and 2021.

[82] Based on a Guidelines income of \$418,667, the respondent's monthly child support obligation for 2022 based on the table amount is \$5,321 per month.

- [83] In respect of the respondent's 2023 Guidelines income, and applying s. 17(1) of the Guidelines to obtain the fairest measure of the respondent's income requires me to use the three-year average of the respondent's income for 2020, 2021 and 2022, being the amounts I determined above of \$273,000, \$597,000 and \$350,000, respectively. The result is a Guidelines income of \$406,667 for 2023. Based on the Guidelines income of \$406,667, the respondent's monthly child support obligation for 2023 based on the table amount is \$5,188 per month.
- [84] With the respondent's Guidelines income for 2022 and 2023 established, I now turn to the respondent's retroactive and prospective child support obligations, if any.

Retroactive Child Support

- [85] The claimant seeks retroactive child support to April 1, 2022 on the basis that on March 22, 2022, she gave notice, through counsel, that she sought the respondent's updated financial disclosure, including a request as to whether he sold any portion of the Optometry Business.
- [86] The respondent says that the effective date of notice was April 22, 2022, the date that the claimant filed a notice of application seeking the disclosure that was not provided despite the claimant's request in March. The respondent says that because the March letter sought document disclosure pursuant to clause 9 of the Separation Agreement it was not effective notice.
- [87] I do not accept the respondent's position. In my view, the claimant's letter of March 21, 2022, indicated her intention to seek` a review of child support and, as such, put the respondent on notice of that intention.
- [88] The leading case on the assessment of retroactive child support is *D.B.S. v. S.R.G.*, 2006 SCC 37. In *D.B.S.*, the Supreme Court cautioned that retroactive awards are not always appropriate as they can impair the certainty and flexibility of prospective child support awards and can be unfair to a payor by disrupting a predictable status quo: at paras. 95 and 96. However, the Court held that retroactive child support awards should not be seen as exceptional because, in certain cases, such an award is the only manner to ensure that a child is returned to the support they are rightly due: para. 97.
- [89] In *D.B.S.* the Court set out four factors a court must consider to when asked to make a retroactive child support order:
- a) Delay: whether the party seeking an award of retroactive child support provides a reasonable excuse for not seeking support sooner;
 - b) Payor conduct: whether the paying parent engaged in blameworthy conduct that would support the making of a retroactive child support order;
 - c) Circumstances of the child: whether the child's past and present needs and circumstances support the making of a retroactive child support order; and

d) Undue hardship for the payor: whether the making of a retroactive child support order impose undue hardship on the paying parent.

[90] No one factor is definitive in and of itself. The question of whether and how much should be paid by way of retroactive child support must be assessed holistically and by reference to the unique facts revealed in individual cases: D.B.S. at para. 99.

[91] These principles were updated by the Supreme Court in *Colucci v. Colucci* 2021 SCC 24 where at para. 77 the Court held:

On an application for a retroactive increase, the recipient seeks the flexibility of a retroactive award to capture the payor's increased income and secure payment of child support in the correct amount. It is the payor who has some interest in the certainty and predictability supplied by an existing court order or agreement. However, this certainty interest is heavily qualified by the Guidelines-era principle that more income means more support. The payor cannot reasonably expect their child support obligations to remain static in the face of material increases in income. Given the structure of the Guidelines, the only real "certainty" in the fact of fluctuating income is that the payor is responsible for paying the table amount based on actual income. Further, a payor who has fallen into arrears cannot resist a retroactive increase based on their interest in certainty, as the payor cannot claim they relied on the order in arranging their affairs.

[Citations omitted.]

[92] D.B.S. also makes it clear that the date to which retroactive orders will be made is, generally speaking, the date of effective notice: paras. 121 and 122.

[93] I accept that the claimant provided notice of her intention to seek a variance in her counsel's letter of March 21, 2022 seeking disclosure. As such, any retroactive payments would commence no earlier than April 1, 2022.

[94] The claimant says that without the additional child support and because the respondent spends three weeks out of four in Toronto, she and by extension the Children, are suffering financial hardship. The result of this hardship is that she has depleted her savings, stopped contributing to her RRSP, had to withdraw \$11,000 from her TFSA, incurred \$18,000 in credit card debt, and incurred \$60,000 of debt on her line of credit.

[95] In respect of the claimant's assertions, I note that as part of the Separation Agreement she received a \$400,000 lump sum payment for spousal support as well as an equalization amount for the claimant's RRSPs that was the equivalent of \$221,194. While I accept the possibility that the claimant is experiencing some financial stress, it is not lost on me that she has invested significant resources in litigating these issues against the respondent. In my view, this is a case where the claimant seeks additional child support because she believes it is owed to her (or hopefully from her perspective to the Children) based on what she perceives as an increase to the respondent's income since she entered into the Separation Agreement. Of course, she is entitled to seek child support based on the respondent's

Guidelines income. However, I do not find this is a case where the recipient spouse or the Children are suffering significant hardship due to failure of the respondent to pay retroactive child support.

- [96] In any event, I am persuaded that having regard for the circumstances in this case and the factors articulated under D.B.S. that it is appropriate to order the respondent to pay retroactive child support. Part of my conclusion is based on my view that the retroactive child support will not be a hardship for the respondent because the increases are relatively insignificant as compared to his income and current obligations.
- [97] Having determined that the respondent's obligations for monthly child support in 2022 are \$5,321 and that he has paid \$5,000 per month, I conclude that the respondent was required to have paid a total of \$2,889 in child support from April 1, 2022 to December 31, 2022. I have arrived this total as the product of \$321 of underpaid child support for nine months.
- [98] In respect of the retroactive period from January 1, 2023 to the date of this order, as set out above, I determined that the respondent's monthly child support obligations for 2023 is \$5,188. Given the respondent has paid \$5,000 in monthly child support, I conclude that he is required to pay a total of \$1,880. Accordingly, the respondent is required to pay the total amount of \$1,880 from January 1, 2023 to October 31, 2023, being calculated as \$188 of underpaid child support for 10 months.

Prospective Child Support

- [99] As just discussed, going forward in 2023 the respondent is required to pay monthly child support of \$5,188 based on a Guidelines income of \$406,667. Accordingly, I order that commencing on November 1, 2023, and until varied by written consent of the parties or further order of the court, the respondent shall pay the claimant monthly child support of \$5,188.

D. Section 7 Expenses

- [100] In the normal course, section 7 expenses are divided between parents in proportion to their respective Guidelines incomes. Under the separation agreement the parties had agreed to share the s. 7 expenses with the respondent paying 75% and the claimant paying 25%. The claimant no longer wishes to be bound by this agreement which she says was not proportionate to the parties' incomes and favoured the respondent.
- [101] In terms of the claimant's income, the respondent provided a report from an expert economist, Darren Benning, providing an opinion that a person with the claimant's level of education could earn \$118,863 in 2022 and \$121,835 in 2023. The claimant's evidence is that she earned \$54,541 of net professional income for 2021 and \$58,182 in 2022.

- [102] The respondent also asserts that given the Children are 15 and 16, they are capable of "independently making their way home from school, carpooling with friends, taking transit, and many other arrangements." The respondent further argues that the claimant could work non-traditional and flexible hours to earn more income from providing her accounting services than she does now.
- [103] I am not persuaded that the respondent has provided a sufficient basis for me to impute income to the claimant pursuant to s. 19 of the Guidelines. It may be that in the future, as the Children age, she may be able to increase her income. Further, I note that it appears that the claimant has expended extensive time and energy on this application which would, undoubtedly take her away from the opportunity for paid employment. While I will not impute income to the claimant, I pause to note that the claimant's energies may be better spent on earning income from her accounting work as opposed to using her time to forensically audit the respondent.
- [104] The respondent argues that any s. 7 expenses must take into account the fact that the respondent paid \$400,000 in a lump sum spousal support under the Separation Agreement. Further, in the Separation Agreement the parties agreed that the respondent would release his interest in the claimant's RRSPs. The total value of RRSPs in the claimant's name at the time of the Separation Agreement (minus excluded property claims that she advanced) was approximately \$614,769. The total value of RRSPs as at the settlement date was approximately \$172,380. Had the respondent not released his interest in the claimant's RRSPs in the settlement, he would have been entitled to an equalization transfer from the claimant's RRSPs to his RRSPs of approximately \$221,194 $((\$614,769 - \$172,380)/2)$. Thus, the benefit to the claimant of the respondent releasing his claims to her RRSP equals \$221,194. Accordingly, the transfer for spousal support made by the respondent to the claimant was an equivalent of \$621,194 $(\$400,000 + \$221,194)$.
- [105] In support of his argument that the spousal support must be considered in apportioning s. 7 expenses, the respondent references our Court of Appeal in *Zilic v. Zilic*, 2021 BCCA 107 that sets out that where spousal support has been paid in a lump sum (as opposed to periodically) it is appropriate to make adjustments to the apportionment of s. 7 expenses:
- [215] Taking into account Mr. Zilic's payment of spousal support as though the lump-sum amount of \$113,500 was amortized over seven years would mean reducing his income by \$16,214 and increasing Ms. Zilic's income by the same amount. This would make his income \$133,786 and hers \$41,214, a ratio of 76.5/23.5. The judge's split of 70/30 was even more in Mr. Zilic's favour.
- [216] It is a reasonable interpretation of the Guidelines and Schedule III to consider the lump-sum payment of spousal support as though it was amortized over the years it was meant to address when determining the parties' incomes for purposes of calculating their proportionate share of s. 7 expenses.

- [106] I accept that there should be an adjustment to the parties' income for the purposes of calculating s. 7 benefits and that applying the methodology adopted in *Zilic* is appropriate in this case.
- [107] The duration of spousal support in this case is between 8.5 years and 17 years, with a midpoint of 12.5 years. Applying *Zilic*, I conclude that the respondent's income should be decreased each year (and the claimant's income increased each year) by an amortized amount of the lump sum amounts of spousal support he paid to the claimant under the Separation Agreement. In this case that amount is calculated by dividing \$621,194 by the 12.5 years of the mid-point duration of the spousal support. The result is an adjustment of \$49,695 to the parties' income. Accordingly, for 2022, the respondent's income is properly calculated for purposes of setting the proportion of s. 7 expenses as \$368,972 (\$418,667 - \$49,695). The claimant's income for this purpose is \$107,877 (\$58,182 + 49,695).
- [108] Given the adjusted amounts, I see no reason to deviate from the normal practice that parents share s. 7 expenses in proportion to their respective incomes. I find that the appropriate proportion upon which the parties must share s. 7 expenses is 23% (\$107,877 / \$476,849) for the claimant and 77% (\$368,972 / \$476,849) for the respondent.
- [109] Just as the child support amounts are retroactive to April 1, 2022, I will adjust the s. 7 expenses to be recalculated from April 1, 2022 to December 31, 2022 on the basis of 23% for the claimant and 77% for the respondent.
- [110] For the period of January 1, 2023 and forward, until varied by further written agreement of the parties or further order of the court, the parties shall share s. 7 expenses on the basis of their adjusted incomes of \$356,972 (\$406,667 - \$49,695) for the respondent and \$107,877 (\$58,182 + 49,695) for the claimant. As such, I find that the parties are to share s. 7 expenses such that the respondent pays 77% (\$356,972 / \$464,849) and the claimant pays 23% (\$107,877 / \$464,849). In setting the claimant's income for prospective sharing of s. 7 expenses, I note that I have used her income for 2022 as it is the best evidence of her most recent income before the court.
- [111] I recognize the parties may need to recalculate past s. 7 expenses to reflect the retroactivity of this order. I will leave it to the parties to make those determinations of s. 7 expenses on these proportions from January 1, 2023, onward. I am also cognizant that despite the time and energy expended by all in this litigation, the s. 7 expenses have changed only marginally from those set in the Separation Agreement.

E. Ongoing Disclosure and Future Reviews

- [112] The respondent asserts that the detailed analysis and document production demanded by the claimant is costing him time, energy and stress. The respondent's submissions summarize his position:

He deposes that he has personally spent about 150 hours responding to the claimant's disclosure requests and answering the numerous allegations that the claimant has made, and his staff and accountants have spent another 200 hours on this work. The respondent's mental health has been seriously affected and he has had difficulty concentrating on his business. He has incurred significant legal and accounting fees in order to address the many, convoluted, and generally incorrect allegations of the claimant since March 2022 (to say nothing of what was done in this regard before the Final Order). All of this has cost the respondent legal fees of \$171,430.22 since March 2022, expert fees of over \$22,000 for [the BDO Reports] reports, and tens of thousands of dollars of business disruption to [the Optometry Business] itself.

[113] On this basis, the respondent's cross application seeks an order limiting the disclosure that can be requested by the claimant and exchanged by the parties. In essence, he wants to avoid what he views as an annual forensic audit directed and carried out by the claimant each year.

[114] The respondent says that the demands of the claimant are not proportionate to any discrepancies that might be found. He points to the time and energies expended to review the 2021 business year where the ultimate result was a determination of \$4,000 difference in corporate income. He notes that while there were \$6,000 of expenses that should not have been claimed by the business, \$2,000 that was not claimed was determined to be a legitimate expense. His point is that while minute errors may be revealed in an extensive annual review, it is unwarranted in proportion to the time, expense and energy expended.

[115] The claimant says she is entitled to disclosure and proposes an order that only requires the respondent to produce documents he would need to produce from the businesses for tax or business purposes in any event. She asserts that the documents she requests are those set out in s. 5 of the Supreme Court Family Rules, B.C. Reg. 169/2009 with only minor additions.

[116] I accept that in this proceeding the respondent appears to have been slow or non-responsive to responding to disclosure requests from the claimant. This behaviour should not be condoned. Further, I cannot and will not limit a party from having to disclose documents that are required under the Supreme Court Family Rules. Lack of disclosure has been called the cancer of family law proceedings: Michel at para. 33. A party's failure to disclose relevant documents can cause great difficulties for the parties and the court achieving a fair and equitable result. However, excessive disclosure or demands for irrelevant or marginally relevant disclosure is not without its perils. As set out by Justice Perell in *Boyd v. Fields* (2006), [2007] W.D.F.L. 2449, 2006 CarswellOnt 8675 (O.N.S.C.) at para. 12:

Full and frank disclosure is a fundamental tenet of the Family Law Rules. However, there is also an element of proportionality, common sense and fairness built into these rules. A party's understandable aspiration for the utmost disclosure is not the standard. Fairness and some degree of genuine relevance, which is the ability of the evidence to contribute to the fact finding process are factors. I also observe that just as non-disclosure can be harmful to a fair trial, so can

excessive disclosure be harmful because it can confuse, mislead or distract the trier of fact's attention from the main issues and unduly occupy the trier of fact's time and ultimately impair a fair trial.

[117] In my view, the claimant's disclosure demands would have the parties engage in an annual forensic audit. As an example, the claimant disputes \$102,177 of the respondent's travel, meals and education expenses for 2022. Disclosure of the volumes of source documents for these expenses would, in my view, be an inefficient and improper use of the parties' time and out of proportion with the ultimate task of family law proceedings--to attempt to have the children have relatively equal standards in each of the households. Further, the time, energy and expense involved in conducting such a disclosure and review regime takes the parties away from parenting and other obligations. In my view, the disclosure sought by the claimant is out of proportion to standard disclosure requirements.

[118] I will make no orders to compel ongoing disclosure or to limit disclosure. Relevance can shift depending on the issue, and such a blanket authorization or prohibition is not, in my view, in the interests of justice and may be better achieved through the agreement of the parties or, if no agreement can be reached, through a discrete application. However, I encourage the parties, and especially the claimant, to have regard for the principle of proportionality when formulating any future disclosure requests.

V. Costs

[119] The general rule in respect of costs is that the party who is substantially successful is entitled to his or her costs: *Gold v. Gold*, 106 D.L.R. (4th) 452, 1993 CanLII 1248 (B.C.C.A.) at para. 19. This general rule accords with the rule that costs follow the event, as expressed in Rules 16-1(7) and 16-1(9) of the Supreme Court Family Rules.

[120] *Gold* has been interpreted as setting the standard of "substantial success" for the recovery of costs: see *Fotheringham v. Fotheringham*, 2001 BCSC 1321 at para. 45, leave to appeal ref'd 2002 BCCA 454; *Marquez v. Zapiola*, 2014 BCCA 35 at para. 16; and *Meghji v. British Columbia (Ministry of Transportation and Highways)*, 2014 BCCA 345 at para. 13. In *Fotheringham*, Mr. Justice Bouck determined that substantial success is equated with a party achieving approximately a 75% success rate. Mr. Justice Bouck wrote:

[45] [S]ubstantial success is about 75% or better. That does not mean a court must descend into a meticulous mathematical examination of the matters in dispute and assign a percentage to each matter. Rather, it is meant to serve as a rough and ready guide when looked at all the disputed matters globally.

- [121] In my view, there has been divided success in this matter. While the claimant has succeeded in increasing her child support and s. 7 expense entitlement, in my view, it is by an insignificant amount and certainly not in proportion to the time and energy expended in this application. Further, the claimant was unsuccessful in her proactive disclosure application. Accordingly, I conclude that the parties shall bear their own costs of this application.
- [122] In part, I base my decision on the respondent's initial position that he would continue to pay child support in the amount of \$5,000 and that he only sought to adjust his child support payments downward if the claimant continued with her application. In my view, this shows a reasonableness that could have avoided the expense and energy of litigation for what appears to be a pyrrhic victory in which child support was increased by only 6.42% in 2022 and 3.76% in 2023.
- [123] If there are any matters regarding costs of which I am unaware, or if the parties wish to make further submissions on costs, they may make arrangements to appear before me through Supreme Court Scheduling within 30 days of this order. If those arrangements are made, the parties are to provide brief written submissions setting out the issues.

VI. Conclusion

- [124] I thank counsel for their well-prepared and well-argued applications. However, before concluding, I wish to comment that the parties provided me with volumes of materials that, frankly, seem out of proportion to the matters in issue. While parties are to prepare the case as they see fit, and the gulf between the parties' positions regarding the child support was potentially significant, this proceeding strikes me as a case where the parties' resources would have been much better spent by cooperating or using their collective resources for the Children as opposed to funding litigation.
- [125] While litigants have a right to bring matters before the court on which they cannot agree, this application has cost the parties much expense, time, and energy. Moving forward, I encourage the parties--most particularly the claimant--to make genuine efforts to resolve disputes through cooperation and compromise, short of engaging in litigation.
- [126] If the parties require any clarification of the terms of the order, they may make arrangements through Supreme Court Scheduling to appear before me for that purpose.

"Gibb-Carsley J."

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