

CANADA / JUDGMENT

S.L.D. v. W.A.D.

2024 BCSC 548

COURT

Supreme Court of British Columbia

DECIDED

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2024 BCSC 548 S.L.D. v. W.A.D.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

S.L.D. v. W.A.D.,

2024 BCSC 548

Date: 20240515

Docket: E43290

Registry: New Westminster

Between:

S.L.D.

Claimant

And

W.A.D.

Respondent

Before: The Honourable Justice Norell

Reasons for Judgment

Counsel for the Claimant:

C. Molloy

The Claimant, appearing in person:

S.L.D.

Counsel for Respondent:

B. St. Pierre

Place and Dates of Hearing:

New Westminster, B.C.

October 3 and 6, 2023;

January 19, 2024

Place and Date of Judgment:

New Westminster, B.C.

May 15, 2024

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Overview

- [1] In June 2022 the parties reached an agreement in the form of a signed consent order (the "COA"). If entered, the COA would vary: the child and spousal support, and parenting arrangements ordered by Justice Harvey in 2016 following a 29-day trial (the "Trial Order"); and an order of mine in 2021 (the "2021 Order") following an application to vary support. In between, there were other applications to vary support; in 2017 before Harvey J., and 2020 before me.
- [2] In summary, the COA replaces orders for monthly child and spousal support, s. 7 expenses, and parenting arrangements, with orders for:
- a) a lump sum payment of \$260,000, in satisfaction of the claimant's claims for past and future spousal support, past child support and s. 7 expenses, and any other claim including costs and fines up to November 30, 2021;
 - b) monthly fixed child support, in decreasing amounts, until the parties' youngest child turns 19, at which point monthly child support terminates;
 - c) agreed s. 7 expenses, and a \$50,000 cap on the respondent's contribution to s. 7 expenses exclusive of post-secondary expenses, which terminates at the latest when the youngest child turns 19;
 - d) a \$60,000 cap on the respondent's contribution to post-secondary expenses (\$5,000 per year per child for the parties' three children); and
 - e) a change in parenting time and final say for parental responsibilities.
- [3] The respondent seeks to "enforce" the COA by having it entered as an order. Alternatively, he seeks an order varying the previous orders to the terms of the COA, except amended to permit a review of child support by either party through arbitration when the parties' youngest child graduates high school. The respondent argues that this is a high-conflict matter. The COA was reached after the parties and their then counsel negotiated in a procedurally fair manner over the course of a year. The parties to a family law dispute and

their counsel have an obligation to attempt to resolve matters out of court, and to protect the children from conflict: ss. 7.2, 7.3 and 7.7 of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp) [DA]. The respondent argues that the COA is a compromise that will reduce conflict, and makes reasonable arrangements for the support of the parties' children.

- [4] The claimant seeks orders setting aside the COA so that it will not be entered as an order, and declaring the amount of arrears of child and spousal support owing pursuant to the 2021 Order, but also varied retroactively to reflect the changed parenting time of the children from just before the 2021 Order to the present. She also seeks orders that the payments made by the respondent pursuant to the COA be applied, after taking taxation into account, to the amounts owing pursuant to the 2021 Order as varied, and specifying amounts owed for s. 7 expenses. She also sought an order determining the respondent's income for the purpose of child and spousal support on a prospective basis, but that was changed during the hearing to seek an order for prospective child and spousal support based on the incomes in the 2021 Order but varied to reflect the current parenting time. She argues this is necessary because the respondent's financial disclosure is incomplete, and she cannot afford to hire an accountant to examine it. The claimant agrees this is a high-conflict matter. She does not dispute that the parties entered into the COA, but argues that it should be set aside because it does not make reasonable arrangements for the support of the children. She also argues that she was vulnerable and therefore the COA was unconscionable. Finally, she argues that there has been no material change in circumstances for spousal support to be varied to a lump sum.
- [5] The existing support orders were made under the DA, and the parenting arrangement orders were made under the Family Law Act, S.B.C. 2011, c. 25 [FLA]. The applications concerning variation of support are considered under s. 17 of the DA. The application concerning variation of parenting arrangements is considered under s. 37 and s. 47 of the FLA.
- [6] The parties' applications raise three broad issues:
- a) Issue 1 - Thresholds: Have the applicable material change thresholds in s. 17 of the DA and s. 47 of the FLA been met to vary the child and spousal support, and parenting arrangement terms of existing orders?
 - b) Issue 2 -Terms of the COA: If so, given the change in circumstances, does the COA meet the other requirements in s.17 of the DA and s. 37 of the FLA for variation of those terms?
 - c) Issue 3 - Unconscionability: If so, was the claimant vulnerable and is the COA unconscionable?
- [7] Although spousal support, child support, and parenting arrangements were all in issue, the parties' focus was on whether the COA made reasonable arrangements for the support of the children.

- [8] For the reasons below, I find that:
- a) The material change thresholds in s. 17 of the DA and s. 47 of FLA have been met.
 - b) The COA meets the requirements in s. 17 of the DA for variation of spousal support, and s. 37 of the FLA for variation of parenting arrangements. However, in part, it does not meet the requirements in s. 17 of the DA and the Federal Child Support Guidelines [Guidelines] for variation of monthly child support and s. 7 expenses.
 - c) There was no unconscionability in the negotiation of the COA.
- [9] The result is that the COA cannot be entered as an order of this court. The four areas of concern with respect to monthly child support and s. 7 expenses are:
- a) by way of non-variable and fixed amounts, termination provisions, and caps, it attempts to foreclose a variation of monthly child support and/or s. 7 expenses even if there were a material change in circumstances;
 - b) it makes monthly child support, which is not paid in accordance with the Guidelines, non-variable and fixed, and by my estimates, effectively terminates monthly child support at about age 19 for each child, despite that a child may remain a child of the marriage;
 - c) it caps s. 7 expenses (other than post-secondary expenses) to a likely inadequate amount despite that a child's right to support may be more, and terminates any such s. 7 expenses after the youngest child turns 19 despite that a child may remain a child of the marriage; and
 - d) it limits any support after age 19 to post-secondary expenses of \$5,000 per year per child to a maximum of \$20,000 per child, and states the claimant has no obligation to contribute, despite that the child's right to support may be more, or for a different reason.
- [10] The terms regarding child support are contrary to the principles of child support and are not enforceable. Parents cannot bargain away their children's right to support or limit the ability to seek a variation of child support if there is a material change in circumstances.
- [11] The four concerns identified are the arguments raised more generally by the claimant as to why the COA does not make reasonable arrangements for the support of the children. The claimant seeks to set aside the whole of the COA. The respondent argues this is an attempt to negotiate a better deal. The respondent seeks entry of the whole of the COA as negotiated, but if the court finds the child support terms are not adequate, the respondent seeks an alternative order for a "review" of child support, by either party through arbitration, upon the youngest child turning 19. This is not acceptable to the claimant.
- [12] In concluding that the COA cannot be entered, I acknowledge that this may result in the continuation of the very high-conflict litigation between the parties, which is what the parties sought to avoid by entering into the COA. However, given the parties' overall positions reflected above, the parties should be able to come to an agreement that will satisfy s. 17 of the DA and the Guidelines. As a result, I address below all of the parties'

arguments and my conclusions regarding them, and will conclude with a discussion of the alternative orders sought.

- [13] For reference, the reasons for the Trial Order are indexed at 2016 BCSC 616; the reasons for the variation application in 2020 (the "2020 Order") are indexed at 2020 BCSC 690; and the reasons for the 2021 Order are indexed at 2021 BCSC 942. The 2017 variation reasons are unpublished.

Procedural Background of the Current Applications

- [14] Following the signing of the COA in June 2022, the parties through their counsel submitted the 2021 Order for entry, and the COA for entry pursuant to Rule 10-7 of the Supreme Court Family Rules, B.C. Reg. 169/2009. No evidence was filed in support of the COA to show how it made reasonable arrangements for the support of the children. In a memorandum to counsel I asked them to consider what evidence was required to satisfy the statutory provisions, and directed that they make an application to attend before me with supporting affidavits.
- [15] Subsequently, the parties, now both self-represented, attended in chambers on November 21, 2022, without notices of application or affidavits. Despite that they were both present to have the COA entered, at the hearing they could not agree on matters. As the parties were now both self-represented, I issued reasons indexed at 2022 BCSC 2159 (the "2022 Reasons") so that the parties would better understand the issues and prepare their materials to seek approval of the COA.
- [16] The parties next attended in chambers on October 3, 2023, and briefly on October 6, 2023. At that time, the claimant was self-represented and the respondent had counsel. The claimant's notice of application did not adequately reflect the relief she was seeking, which was now, to not have the COA entered. In addition, some of her materials were served late. The respondent's notice of application was served late and also did not fully set out his position. I ordered that the parties have leave to file amended notices of application.
- [17] Both parties subsequently filed amended notices of application with additional affidavits, and the hearing continued on January 19, 2024. At that time, both parties had counsel.

History of the Litigation

- [18] For convenience, I replicate here a portion of the 2022 Reasons, which summarizes the relevant history up to then:
- [5] This is a high-conflict family law matter. The respondent is now 63 years old, and the claimant is 44. The parties began living together in 2004. They married in 2007, separated in 2012, and divorced in 2016. The parties have three children, now ages 17, 16 and 13.

- [6] The parties had entered into a pre-nuptial agreement which excluded all of the respondent's corporate holdings and personal assets from division, and restricted the claimant's property claim to an interest in the matrimonial home, an interest in an RRSP, and other joint chattels. Justice Harvey upheld the pre-nuptial agreement. The result was that of the respondent's then approximately \$7,500,000 in assets, the claimant received approximately \$450,000.
- [7] The respondent worked in the oil and gas industry. Through ownership of shares in companies, he owns a 50% interest in a special purpose industrial property in Alberta used in the pipeline industry. The respondent has earned income from: managing the Alberta property; the companies, the source of which is the lease of the Alberta property; work as a consultant; and his investments. Justice Harvey found that the respondent had arranged his financial affairs so as to minimize his income. Justice Harvey considered the pre-tax corporate earnings of the companies, over which the respondent had a controlling interest, in determining Guidelines income. Justice Harvey found the respondent's Guidelines income to be:
- 2012
- \$452,695
- 2013
- \$350,740
- 2014
- \$328,187
- [8] Justice Harvey found the claimant to be intentionally underemployed and imputed \$30,000 income to her, retroactive to 2014.
- [9] Given the significant economic disparity which resulted from the pre-nuptial agreement, Justice Harvey concluded that spousal support ought to be awarded at the high end of the Spousal Support Advisory Guidelines. He did not set a termination date but noted that the upper end of the range for duration would see support continue until the youngest child finishes high school, and that it would be reasonable that the respondent pay support until the youngest completes high school subject to an earlier variation owing to a material change in circumstances. Justice Harvey also ordered child support should be paid solely by the respondent on the basis of the factors in s. 9 of the Guidelines and *Contino v. Leonelli-Contino*, 2005 SCC 63. He concluded that the respondent's vastly superior financial resources made it inappropriate to order set-off of basic Guidelines amount payable despite the shared parenting arrangement. Section 7 expenses would be shared.

- [10] Justice Harvey ordered the yearly exchange of relevant financial documents, necessary to determine the parties' Guidelines income "so as to hopefully allow the parties to annually adjust both spousal and child support to accord with their current incomes".
- [11] The entered order states:
22. Effective August 1st, 2015, the Respondent shall pay to the Claimant periodic spousal support in the amount of \$6,520 per month subject to a material change in circumstances; and for the purposes herein, upon the graduation of "NW" from high school, the respondent may apply to cancel, vary or review spousal support;
24. Commencing forthwith, the Respondent shall pay ongoing child support in the amount of \$5,543 per month, until varied by further court order or agreement between the parties;
- [12] On January 27, 2017, Justice Harvey made a further order upon applications by both parties. In oral reasons for judgment, he determined the respondent's 2015 Guidelines income to be \$402,900, and varied the child and spousal support accordingly.
- [13] The 2020 and 2021 applications before me primarily concerned the respondent's Guidelines income. On those applications, the respondent filed evidence that the lease on the Alberta property would be expiring in the near future. There is no evidence of whether it is leased now. At the parties' most recent attendance, the respondent said the Alberta property was for sale but there is no evidence of the listing price or its current value, or if it is leased. Evidence in the two previous applications before me indicated that the property had about a \$5 million mortgage on it. As of the 2021 application, there was evidence that the respondent had additional market investments with an estimated value of about \$2.1 million.
- [14] At the applications before me, the parties had widely divergent positions on what the respondent's income should be determined to be. In the 2020 and 2021 applications, I determined that the respondent's Guidelines income was:
- 2016
- \$384,000
- 2017
- \$535,481
- 2018
- \$386,422
- 2019
- \$343,470

- [15] Nearly 10 years after separation, the claimant had yet to earn any income toward self-sufficiency despite her relatively young age. She was last completing certification to be a counsellor and had just started that career. In the 2020 reasons, I found the claimant continued to be intentionally underemployed and increased the imputed income to the claimant to \$40,000 commencing in 2019. She was receiving substantial spousal and child support but claimed an inability to meet her expenses, primarily because of lawyer fees. At the most recent hearing, the claimant said she was forced to sell her home, and she could not afford to fight legal battles any longer. There was no evidence of her current financial position or living situation.
- [16] With respect to parenting arrangements, Justice Harvey ordered continuation of the roughly week on/week off parenting time that the parties had been following. In the event the parties could not reach an agreement on a significant decision despite their best efforts, the respondent was given the right to make those decisions and the claimant had the right to apply for directions under s. 49 of the Family Law Act, S.B.C. 2011, c. 25 [FLA].
- [17] At the time of the 2020 application, the above parenting arrangement had continued. By the time of the 2021 application, there was evidence that since July 2020, two of the parties' three children had been residing only with the claimant, and since September 2020, one of the three children had been residing only with the respondent. I was told at the latest attendance, that in 2021 this arrangement changed again with the children now all living with the claimant, although the respondent said two of the children have now asked to live with him. Again, none of this most recent information is in an affidavit.
- [18] The previous parenting arrangement orders were made under the FLA, and the child support orders were made under the Divorce Act, R.S.B.C. 1985, c. 3 [DA].
- [19] In the 2021 Order, the respondent was ordered to pay: monthly child support of \$5,820 commencing June 1, 2020, and \$4,442 commencing October 1, 2020; and monthly spousal support of \$6,439 commencing June 1, 2020, and \$5,182 commencing October 1, 2020.
- [20] The change in child support reflected the decrease in the respondent's income and the change in parenting time up to the hearing for the 2021 Order. Consistent with the Trial Order, there was no set-off for the child living with the respondent. Although there was no change in the respondent's income for the purpose of spousal support (as opposed to child support), spousal support was changed effective June 1, 2020, because the 2020 Order had imputed increased income to the claimant for 2019, which affected spousal support as of June 1, 2020, and the parenting time had changed from shared to split parenting. The spousal support was still determined based on the income found by Justice Harvey in the 2017 variation application (\$402,900) and at the high end of the range.
- [21] Following the 2021 Order, both parties threatened each other with an appeal. However, the next month, in June 2021, negotiations began which ultimately led to the COA which was signed by their counsel a year later.

- [22] At the time of the hearing which led to the 2021 Order, the two youngest children were living with the claimant, and the oldest was living with the respondent. The claimant states that in mid-March 2021, shortly after the hearing and while the decision was on reserve, the oldest child moved back to her home. The claimant then had the three children living with her. This was not communicated to me, and I therefore based the 2021 Order on the split parenting time in place at the time of the hearing. The three children continued to live with the claimant.
- [23] This change in parenting time clearly would increase the amount of support. The difference is about \$2,250 per month. In my view, the parties should have been able to agree to this change. However, in a theme to which I will return, the level of conflict between the parties prevented them from doing so.
- [24] Following the 2021 Order, the respondent determined that he had overpaid support by about \$20,000. That is true to a point. The 2021 Order was retroactive to June 1, 2020, and had decreased support from the 2020 Order. This decrease should not have been unexpected by the claimant given the increase in the imputation of her income, the likely decrease in the respondent's income, and earlier changes in parenting time. On the other hand, the respondent knew or should have known that because of the further change from split to sole parenting, his support obligations were greater than the 2021 Order. Even if the respondent had continued to pay the amount of support in the 2021 Order, the overpayment would have gradually been eliminated over the next 10 months.
- [25] On July 7, 2021, the respondent gave notice to the claimant that he would be reducing support from \$9,624 per month to \$5,998 per month for five months commencing August 1, 2021, to make up the overpayment. On July 8, 2021, the claimant advised the respondent that she would be listing her house for sale and moving to a rental property. The respondent decreased the payments for five months. During this time, he also did not reimburse the claimant for s. 7 expenses she claimed, as he contested them.
- [26] Returning to the negotiations of the COA, by early November 2021, the parties had reached an agreement in principle sufficient to adjourn a hearing which the claimant had set for November 5, 2021. As I will return to this later when considering unconscionability, I note that this was an application by the claimant to reopen the applications that led to the 2021 Order, on several grounds, including the change in parenting time just prior to the 2021 Order. The parties continued to negotiate until the COA was signed in June 2022, after which they submitted it for entry without supporting materials.
- [27] Starting December 1, 2021, the respondent paid monthly child support in accordance with the COA. In June 2022, after the COA was signed, he paid the \$260,000 lump sum. In early 2022, the respondent established a \$50,000 fund for s. 7 expenses, but did not reimburse the claimant for any expenses until November 2023. The claimant contacted the FMEP in May 2023 to cancel the arrears which had been accumulating under the 2021 Order.

Circumstances of the Children and Parties

Children and Parenting Time

- [28] From March 2021, the three children continued to live with the claimant until the beginning of May 2023, when the oldest moved back to the respondent's home. The two youngest children still live with the claimant.
- [29] In June 2023, the oldest, MW, graduated high school. MW had originally planned to attend Kwantlen Polytechnic University in September 2023, but deferred acceptance for one year, and plans to attend this September. MW plans to continue to live with the respondent. Since September 2023, MW has been working full-time, and is paid a base salary of \$32,000 per year plus commissions. He is possibly no longer a child of the marriage as defined in the DA, at least for now, even though he does not turn 19 until later this year.
- [30] The middle child, MC, is in Grade 12. The claimant states that in February 2023, psychologist Dr. Corina Brown diagnosed MC with learning and mental health issues. MC is not on medications and sees a counsellor. MC has recently been approved for \$6,000 in yearly funding through the Ministry of Children and Family Development ("MCFD"). The eligible expenses include counselling. Dr. Brown's opinion was not in evidence and the claimant's evidence regarding the diagnoses is hearsay, however I accept that MC has had health difficulties.
- [31] The respondent states that despite MC's difficulties, she is well-adjusted and a successful student, and plans to attend university in the fall. The parties agree she is an athlete and had a part-time job. The claimant states that it is uncertain where MC will attend university, and where she will live. The respondent expects that MC will move to Kamloops to attend Thompson Rivers University, where she has been accepted, and where she will live with her maternal grandmother.
- [32] The youngest, NW, is in Grade 9. The claimant states that NW has had some anxiety in the past, but is generally very easy going, and he has "agreed to return to counselling". She does not explain why this is required. He currently plays soccer.

Parties and Financial Statements

- [33] The claimant is 45 years old and is now working as a counsellor. She is self-employed and was renting space, but has determined that this is not sufficiently profitable, and is looking for an employee position. She has had income imputed to her since 2014 due to intentional unemployment. The claimant's tax returns, assessments, and other income documents show the following:
- 2020 - \$66,757 in an RRSP withdrawal, and a net loss of \$24,029 from self-employment (revenue of \$5,110). She reported receipt of \$71,408 in spousal support, and legal fees of \$65,096 to establish or increase support.

- b) 2021 - \$1,666 in an RRSP withdrawal, and net income of \$7,169 from self-employment (revenue of \$25,495). She reported receipt of \$57,000 in spousal support, and \$44,026 in legal fees to establish or increase support.
 - c) 2022 - \$1,666 in an RRSP withdrawal, and net income of \$14,670 from self-employment (revenue of \$38,978). She claimed legal fees to establish or increase support of \$23,020.
 - d) 2023 -The claimant attaches her last earning statements up to September 15, 2023. As of then, she had revenue of \$56,350 before expenses. I estimate an income of \$25,000.
- [34] The claimant charges \$130 per hour for her services as a counsellor. Based on revenue, I calculate that she counselled clients about four hours per week in 2021, and about 12 hours per week in 2023. Her revenue is increasing. I conclude that as her clientele builds, or if she transitions to an employee position, that she will have capacity to earn more than the presently imputed \$40,000 per year.
- [35] The respondent is 64 years old and plans to retire later this year at age 65. He states that in late 2022 he was in the ICU with a pulmonary embolism, and in early 2023 he was diagnosed with prostate cancer. He has psoriatic arthritis. No medical reports were filed regarding these conditions and how they may affect his ability to work. He owns Connor Industries, which is a 50% shareholder of X, which in turn owns the commercial property in Alberta. Connor Industries also holds most of his marketable securities. The respondent is paid \$120,000 per year to manage X, but he expects this to cease by the end of this year because of his retirement and events currently affecting X.
- [36] In October 2023, the lease of the Alberta property ended and the tenant moved out. X no longer has any revenue, and it must service a significant debt. The respondent states that X has been trying to lease or sell the property for a year, and has not received any offers. The property is listed for sale for \$10.2 million. The financial statements show a mortgage of \$5.2 million on the property, plus \$2.4 million in shareholders' loans, one half of which is owed to Connor Industries. There was substantial cash of \$1.7 million in X as of September 2022. If the property is sold, the respondent calculates that he will receive about \$1.7 million net of taxes upon the winding up of X, but there is no explanation of how this was calculated, and the amount seems low if it includes the shareholder's loan. I assume that if X is wound up, Connor Industries' former share of income from X will be replaced by investment income that can be earned on the proceeds of the winding up; however, the respondent will no longer have employment income of \$120,000.
- [37] The respondent's tax returns, assessments, and the companies' financial statements from 2020 to 2022 are in evidence. I have not been asked to determine the respondent's Guidelines income for 2020 to 2022, and will not do so, however, I need to make some estimates for the purpose of assessing the COA. In making these estimates, for personal income, I have taken line 15000 income, and grossed up capital gains to actual gains. For Connor Industries, I have taken pre-tax corporate income, and added back any "unrealized loss on foreign securities" as it is a non-cash item. For X, I have taken 50% share of pre-tax corporate

income, added back 50% of amortization, and deducted what I have assumed is about \$156,000 per year, being 50% paid toward the principal of X's mortgage. The unrealized loss and mortgage principal were addressed in the reasons for the 2020 Order, and these assumptions are consistent with that. This results in the following estimates:

- a) 2020 - Total: \$965,965 (Personal - \$364,183; Connor Industries - 530,783; X - \$70,999). This year includes actual capital gains of \$233,635 (personal) and \$504,793 (Connor Industries).
- b) 2021 - Total: \$214,267 (Personal - \$120,071; Connor Industries - \$3,333; X - \$90,863).
- c) 2022 - Total: \$301,766 (Personal - \$120,091; Connor Industries - \$75,105; X - \$106,570).

[38] The respondent states that the capital gains in 2020 were non-recurring and "unusually high" as a result of sales during the COVID-19 pandemic, and argues they should not be included income.

[39] The respondent made a similar argument for an unexpected \$109,000 dividend when 2019 Guidelines income was determined in the 2021 Order. It was included in income. However, I accept that the capital gains are much more than what they have typically been since 2016. The gains represent about one third of the value of the marketable securities which had been held by Connor Industries. Without deciding the issue, there may be reasonable arguments, under s. 17 and s. 18 of the Guidelines, that not all this income should be included, or that an average should be used of the three years, or both, or even if all income is included, because it is above the "ceilings" for support, that support should be adjusted downward. If all of the capital gains are included in income, the average for the three years is \$493,999. If \$500,000 (a little over two thirds of the total) is included, the average is \$414,523. If \$200,000 is included, the average is \$314,523. Justice Harvey's determination of the respondent's 2015 Guidelines income was \$402,900, and that amount has been consistently determined to be the income for the purpose of spousal support up to and including the 2021 Order. It is in the middle of these figures.

[40] The parties' financial statements continue to show widely disparate financial circumstances.

Legal Framework

Divorce Act

[41] A court may make an order varying, rescinding or suspending, retroactively or prospectively, a final child or spousal support order: s. 17(1) of the DA.

Spousal Support

[42] Before a court may vary a spousal support order, it must first be satisfied that there has been a "change in the condition, means, needs or other circumstances" of either former spouse since the making of the last relevant order: s. 17(4.1); L.M.P. v. L.S., 2011 SCC 64 at para. 29. The onus is on the party seeking the variation. The change must be material, which is a

change that if known at the time, would likely have resulted in different terms: *Willick v. Willick*, [1994] 3 S.C.R. 670 at 688, 1994 CanLII 28. What amounts to a material change will depend on the actual circumstances at the time of the last order. In general, the change must not be temporary: *L.M.P.* at paras. 32-35.

- [43] If a material change is established, in making a variation order, the court must "take that change into consideration": s. 17(4.1). The court should limit itself to making only the variation justified by that change: *L.M.P.* at para. 47.
- [44] With respect to the objectives a court should consider in making an order varying spousal support, s. 17(7) states:
- (7) A variation order varying a spousal support order should
- (a) recognize any economic advantages or disadvantages to the former spouses arising from the marriage or its breakdown;
 - (b) apportion between the former spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
 - (c) relieve any economic hardship of the former spouses arising from the breakdown of the marriage; and
 - (d) in so far as practicable, promote the economic self-sufficiency of each former spouse within a reasonable period of time.

Child Support

- [45] Before a court may vary a child support order, it must first be satisfied that there has been a "change of circumstances as provided for in the applicable guidelines" since the making of the last relevant order: s. 17(4). Section 14 of the Guidelines defines circumstances which, subject to the principles in *Willick*, constitute a change of circumstances for child support. In the case of an order that determines support in accordance with the applicable table (as in here), this includes "any change in circumstances that would result in a different child support order": s. 14(a).
- [46] Section 17 of the DA provides the requirements for an order which varies child support. A child support variation order must be made in accordance with the Guidelines unless one of two exceptions applies: s. 17(6.1). One exception is where "special provisions" in an order or agreement have been made that directly or indirectly benefit the child, and applying the Guidelines would result in an inequitable amount of support given those special provisions: s. 17(6.2). The other exception is on the consent of the spouses, if "reasonable arrangements" have been made for the support of the child: s. 17(6.4). With respect to this exception, in determining whether reasonable arrangements have been made, a court must have regard to the Guidelines, but a court must not consider an arrangement unreasonable solely

because the amount of agreed support is not the same as what would be otherwise determined under the Guidelines: s. 17(6.5).

Family Law Act

- [47] A court may vary a final order respecting a parenting arrangement "if satisfied that, since the making of the order, there has been a change in the needs or circumstances of the child, including because of a change in the circumstances of another person": s. 47 of the FLA. This must also be a material change.
- [48] In making such an order, the court must consider the best interests of the child only: s. 37 of the FLA.

Domestic Contracts

Deference

- [49] The parties referred to *Miglin v. Miglin*, 2003 SCC 24 and *D.B.S. v. S.R.G.*, 2006 SCC 37 at paras. 75-78, regarding what deference should be given to spousal support and child support terms in a domestic contract. For spousal support, the considerations include encouraging spouses to settle family matters out of court, the autonomy of the parties to make agreements, the interests of certainty and finality, and the corresponding deference courts should give to fairly reached domestic contracts. For child support, the considerations include that support is the right of the child, and that while domestic contracts are encouraged and should be given weight, the welfare of the child must be the priority. "[C]oncerns around certainty and finality hold less weight in the context of child support agreements": *Hinz v. Davey*, 2022 BCCA 232.
- [50] While useful general principles have emerged from case authorities such as *Miglin*, *D.B.S.* and *L.M.P.* with respect to domestic contracts, "a statute-specific approach must be taken when considering such contracts". The general principles may, depending on the terms of the legislation, inform the analysis under those statutory provisions: *Anderson v. Anderson*, 2023 SCC 13 at paras. 25, 32-37. For example, the two-stage approach developed in *Miglin* for making an initial order for spousal support under s. 15.2 of the DA, when there has been a prior domestic contract, should not be imported into a variation analysis under s. 17: *L.M.P.* at para. 28.

Unenforceable Terms

- [51] The claimant seeks to have the COA not entered as an order, on the basis that it does not make reasonable arrangements for the support of the children. As noted at the beginning of these reasons, parents cannot bargain away the right of a child to receive support: *Lambright v. Brown*, 2003 BCCA 621 at paras. 14-17; *Kopp v. Kopp*, 2012 BCCA 140 at para. 37.

- [52] In *Chan-Henry v. Liu*, 2018 BCSC 2140 at para. 178, aff'd 2021 BCCA 318 (cross-appeal regarding income determination allowed), Justice Kent held that an agreement between parents to have child support paid in a fixed amount on an indefinite basis, was "contrary to public policy and unenforceable at law"; as was a term that child support was only reviewable upon certain events, which excluded variation for other events which at law would be a material change in circumstances. This is because such terms are contrary to the principles of child support. Those principles include that child support is the right of the child, and that parents have an obligation to pay child support commensurate with their capacity to earn income. In *K.A.B. v. P.D.M.*, 2023 BCSC 1156 at paras. 43-57, 143, and *L.W. v. F.W.*, 2022 BCSC 642, similar rulings were made.
- [53] An agreement between parents regarding child support is not binding on the court, and the court may make a different order: *Kaler v. Kaler*, 2013 BCCA 57 at para. 26.

Unconscionability

- [54] As an alternative to the argument that the COA does not make reasonable arrangements for the support of the children, the claimant seeks to set aside the entirety of the COA on the basis that she was vulnerable and the COA is unconscionable.
- [55] In the commercial context, unconscionability requires "both an inequality of bargaining power and a resulting improvident bargain": *Uber Technologies Inc. v. Heller*, 2020 SCC 16 at para. 65.
- [56] However, in the domestic contract context, the test for unconscionability is lower than the test in the commercial context: *Miglin* at paras. 82-83; *Newman v. La Porta*, 2008 BCSC 522 at para. 92; *Anderson* at paras. 33-37. This is because of the unique legal context in which a domestic contract is made, and where the intimacy of the marital relationship may result in vulnerabilities. The court must be sensitive to these potential vulnerabilities, but must not presume a power imbalance, or that the stronger party took advantage of any vulnerability. There must be evidence of a "fundamental flaw in the negotiation process" that vitiates the bargaining process. Emotional stress of separation alone does not give rise to a presumption that the parties are incapable of making a binding agreement. The existence of independent legal advice may overcome any imbalances between the parties, but a court must have regard to the financial and emotional pressures of the relationship, and must not be presume that the legal advice does overcome any imbalance.
- [57] While the two doctrines of unconscionability and of public policy may apply in the same circumstances, they are distinct: *Pearce v. 4 Pillars Consulting Group Inc.*, 2021 BCCA 198 at paras. 192-194. As our Court of Appeal explained in that case:

- [192] The concepts of unconscionability and public policy are separate but are doctrinal cousins, each of which provides grounds for departing from the general rule that parties' contracts should be respected. Unconscionability focuses on the vulnerability of and unfairness to the party who is seeking to void the contract. Public policy focuses on the harm to society that would flow from upholding a particular contract.
- [193] The decisions of the Supreme Court of Canada make it clear that a contract (or a clause in the contract) can be invalid and unenforceable either on the basis that it is unconscionable or on the basis that it is contrary to public policy.

Lump Sum Awards

- [58] The COA involves a lump sum amount for spousal support. In *Parton v. Parton*, 2018 BCCA 273 at para. 47, which concerned a lump sum prospective spousal support award, the Court quoted passages from *Davis v. Crawford*, 2011 ONCA 294, outlining some of the advantages and disadvantages that must be weighed:
- [67] The advantages of making such an award will be highly variable and case-specific. They can include but are not limited to: terminating ongoing contact or ties between the spouses for any number of reasons (for example, short-term marriage; domestic violence; second marriage with no children, etc.); providing capital to meet an immediate need on the part of a dependant spouse; ensuring adequate support will be paid in circumstances where there is a real risk of non-payment of periodic support, a lack of proper financial disclosure or where the payor has the ability to pay lump sum but not periodic support; and satisfying immediately an award of retroactive spousal support.
- [68] Similarly, the disadvantages of such an award can include the real possibility that the means and needs of the parties will change over time, leading to the need for a variation; the fact that the parties will be effectively deprived of the right to apply for a variation of the lump sum award; and the difficulties inherent in calculating an appropriate award of lump sum spousal support where lump sum support is awarded in place of ongoing indefinite periodic support.
- [59] In the 2022 Reasons at para. 19, I noted that the fixed non-variable monthly child support terms in the COA are akin to lump sum child support, but paid over time. This is because these terms raise similar advantages and disadvantages as for lump sum spousal support. While s. 11 of the Guidelines permits a court to order lump sum support, these orders are exceptional and should only be made in special circumstances: *Dong v. Liu*, 2008 BCSC 1795 at para. 54.
- [60] With that review of the legal framework which guides the analysis, I turn to the issues.

Issue 1: Thresholds

- [61] The first issue is whether the applicable change in circumstances thresholds have been met to vary the terms of existing orders.
- [62] The claimant argues that there has been no change in circumstances to warrant a variation of periodic spousal support to a lump sum, but otherwise accepts there is a material change for quantum of child and spousal support.
- [63] The respondent argues that there have been the following material changes with respect to both child and spousal support: the ages of the children with two nearing adulthood; the change in parenting time; the respondent's loss of income and his upcoming retirement; and the exceptional level of conflict between the parties, particularly regarding incomes and support. The conflict led the parties to conclude that it was better to enter into the COA, rather than return to court every year to expend more on legal fees than could be gained by any variation of support.
- [64] I am satisfied that there has been a material change in the circumstances with respect to the quantum of child support. The respondent's income has changed on a yearly basis, and the parenting time arrangements have also changed. Either of these would satisfy the threshold for a variation in the quantum. Similarly, the changed parenting time arrangements are a material change for the quantum of spousal support.
- [65] I am also satisfied that there is another change in circumstances which pertains to both child and spousal support, and which is relevant to whether the court should vary the monthly amounts to the lump sum and fixed monthly payments in the COA. This change is the exceptional level of conflict between the parties more than 12 years after separation, and more than seven years after the Trial Order.
- [66] The motivator for both parties entering into the COA was the high level of conflict between them, and what that conflict was costing them in time, stress, and legal fees. This was a comment by both experienced counsel in their correspondence during the negotiations of the COA. I appreciate that there was a high level of conflict prior to the Trial Order, however, despite the finality and relative peace that should have been expected following the comprehensive Trial Order, the parties' disputes continued and have become unmanageable by the parties. That is the change. In my view, it is likely that different orders would have been requested by both parties had they known at the time of the trial that they would go on to engage in this level of litigation, and at a cost which is not justified considering any potential gain.
- [67] Without detailing all of the disputes over the past several years, I will summarize by saying that the level of conflict is difficult to overstate. The disputes since the Trial Order have not been limited to income and support. There were applications or disputes regarding s. 7 expenses, parenting time, parental decision making (for example, school enrollment and changes to health care providers), enforcement of orders, settlement of orders, the parenting coordinator, and fines and costs, and continued even within the current applications, where 15 affidavits were filed on topics from s. 7 expenses, to whether private

school tuition had been paid, and the amount of arrears or overpayment of support going back to 2014. The claimant states that she could no longer afford the yearly battles between the parties. The claimant's tax returns show that her legal fees claimed in the past three years have consumed most of the spousal support she received. I expect the respondent's legal fees were similar.

- [68] It was entirely reasonable for the parties to recognize that their disputes should not and could not continue, and that they should attempt to reach a settlement to bring an end to their too frequent trips to the courthouse. The conflict is not in the best interests of the children. It is contrary to one of the objectives of spousal support, as the effort and expense was creating economic loss, and potentially impeding the claimant reaching self-sufficiency.
- [69] I am not suggesting that it would be appropriate for the parents of children to absolve one parent of the obligation to pay child support when that parent is financially able to do so, to buy peace and reduce conflict. That argument was rejected in *Lambright v. Brown*, 2003 BCCA 621 at para. 15. The parties here were not attempting to absolve one parent from supporting the children. The parties recognized the obligations for child support, and were attempting to find a way to reduce their expensive disputes, while still meeting their obligations.
- [70] In determining whether a particular change is material, the majority in *L.M.P.* at para. 35, noted that "[t]he subsequent conduct of the parties may provide indications as to whether they considered a particular change to be material". One of the orders sought in a March 2019 application filed by the claimant (which did not get heard because the parties focused on other disputes) was an order to vary the Trial Order to a lump sum amount because of the conflict. In this case, it is not the COA which is the material change, but the circumstances which led to it. By agreeing to the COA, the parties demonstrated that they viewed the ongoing disputes, persisting despite the Trial Order, as material. Given the level of conflict and the resulting applications and disputes over the past seven years, I agree.
- [71] Finally, I am satisfied that there has been a material change in circumstances with respect to the parenting arrangements for the children. No issue was raised regarding the parenting arrangement orders in the COA. The children are currently 18, 17, and 14 years old. They were all in elementary school when the Trial Order was made, and changes in parenting time have existed since 2020.

Issue 2: Terms of the COA

Spousal Support

- [72] The COA terminates the respondent's obligation to pay spousal support effective November 30, 2021, and requires the respondent to pay a lump sum of \$260,000 to the claimant. The COA states that the \$260,000 is:

on account of the claimant's entitlement to past or future spousal support, any child support or contribution to special and extraordinary expenses incurred or owed prior to November 30, 2021, costs, fines, or any other amount claimed as owing by the Respondent to the Claimant prior to November 30, 2021

- [73] The spousal support term was not the focus of the claimant's submissions. She argued that she cannot determine how the \$260,000 was allocated. The claimant alleges what I estimate to be up to \$50,000 in combined arrears of child and spousal support, and s. 7 expenses owing as of November 30, 2021, plus claimed costs and fines.
- [74] The respondent argues that at least \$225,000 is prospective spousal support, and that there was no child or spousal support owing as of November 30, 2021, under the 2021 Order, and very little s. 7 expenses owing. He alleges that the claimant owed him for a reduction of 2014 to 2017 spousal support which had not taken place as ordered in the 2017 variation application. He states that the \$35,000 was a compromise between the parties' differing positions.
- [75] From a review of the negotiation correspondence, I find that \$225,000 was prospective spousal support and that \$35,000 was a compromise of the parties' positions on the other issues. As of September 2021, the parties had agreed that a \$225,000 lump sum spousal support payment would be made as part of a comprehensive settlement. The correspondence does not state that this is prospective only, but the lump sum amount was later increased to \$260,000 and the other issues were settled. There is a wide variability in the potential results of the other contested claims, had they gone to a hearing, which is a relevant factor in assessing the lump sum amount.
- [76] I turn to compare the lump sum to what the parties had in contemplation at the time of the COA and what might reasonably have been ordered for monthly spousal support had the COA not been made. The respondent states that in entering the COA, the parties explicitly considered that both of their incomes could rise or fall, and that they could each argue to impute income to the other. I accept that evidence. The parties had experienced counsel representing them.
- [77] There are several possible combinations of incomes, durations of support, and parenting times, against which to compare the COA to the objectives of spousal support in s. 17. Using various assumptions, the parties each provided their own estimates of spousal and child support at this hearing.
- [78] As for incomes, considering only the determinations made to the date of the 2021 Order, I conclude that at the time the parties negotiated the COA, a reasonable possibility against which to assess the COA is that the parties' incomes would remain about the same as was determined in the 2021 Order until the end of 2024 when the respondent turns 65. After that, due to age and health problems known up to then, and the predicted loss of X's tenant, it was likely that his income would decline. It would also have been reasonable to consider that after 2024, the claimant's income would increase to over \$40,000 as her experience in

counselling and clientele grew. I also conclude that with the benefit of the 2020 to 2023 income information, the knowledge of the respondent's further health problems, that the tenant has left, and the growth in the claimant's revenue from counselling, that these continue to be reasonable assumptions against which to assess the COA. For the purpose of making the calculations below, I have assumed the respondent would have an income of \$402,900 for spousal support until the end of 2024, and will have an income of \$300,000 from 2025 on; and I have assumed that the claimant will have an income of \$50,000 from 2025 on.

[79] As for duration, this was an eight-year relationship, and as observed by Justice Harvey, spousal support paid until the youngest graduates high school would be the top of the range. I have assumed that a reasonable possibility is that spousal support would terminate at that time.

[80] Finally, as for parenting time and the number of dependant children, I have assumed that the children will continue with their present living arrangements, and will become independent at age 19. As I will discuss below, this appears to be roughly consistent with the amounts of monthly child support in the COA. I have also assumed that the respondent ceased paying support for his first child from a previous relationship by December 2021.

[81] These assumptions produce the following 2021 calculations of periodic spousal support at the high end of the range:

Dec. 2021 to April 2023: three children with claimant

$\$7,182 \times 17 = \$122,094$

May 2023 to July 2024: two children with claimant; one with respondent

$\$6,212 \times 15 = \$93,180$

Aug. 2024 to Nov. 2025: two children with claimant

$\$8,736 \times 5 = \$43,680 + \$5,875 \times 11 = \$64,625$

Dec. 2025 to June 2027: one child with claimant

$\$5,875 \times 1 = \$5,875 + \$7,009 \times 18 = \$126,162$

Total

$\$455,616$

Present-value, mid-point, lump-sum equivalent

$\$250,589$

- [82] The periodic payments need to be adjusted for tax consequences and present value. Lump sum spousal support is not deductible by the payor, and not taxable in the hands of the payee, whereas monthly spousal support payments are. The present value, mid-point, after tax consequences, is about 55% of the total payments. This is equivalent to a lump sum payment of \$250,589.
- [83] In my view, the \$225,000 for prospective spousal support is within the range of reasonable outcomes, and would continue to satisfy the objectives of spousal support in s. 17(7) of the DA. On the assumptions above, the lump sum is roughly equivalent to the present value of future periodic support which had previously been ordered and which is presumed to have met the objectives of support. Further, the claimant has spent over \$150,000 on legal fees from 2020 to 2022 to establish or increase support, and the lump sum promotes the objectives of spousal support by allowing the claimant to devote time to her career toward self-sufficiency, rather than to high-conflict litigation over incomes and support. The disadvantages and advantages of a lump sum are as follows. First, there is uncertainty of future incomes. As noted previously, there are several different calculations that could be made, but there is also a short period of time until the duration of support would reach the top of the range. Second, this amount is about \$25,000 below one possible lump sum payment. However, the difference in the parties' positions regarding what, if anything, was owed for the other claims including past spousal support, was much more than \$25,000. Third, a lump sum award is advantageous to reduce the conflict between the parties, and promotes certainty and finality.

Child Support

Monthly Child Support Payments

- [84] The COA states that prospective child support will now be "locked in" and "non-variable" until the youngest child turns 19 in March 2028, at which time it terminates. The COA provides for the following child support payments so long as at least one child resides in the claimant's home at least 40% of the time. The total is up to \$313,500, paid as follows:
- a) December 2021 to December 2023: \$6,000 per month;
 - b) 2024: \$4,000 per month;
 - c) 2025: \$3,500 per month;
 - d) 2026: \$3,000 per month; and
 - e) 2027 to March 1, 2028: \$2,500 per month, "following which no further child support will be paid".
- [85] The COA also states:

5. By consent, the parties agree that the terms of their settlement constitutes "special provisions" within the meaning of the Divorce Act and Federal Child Support Guidelines, and that each intends the Fixed Child Support and Lump Sum Compensation for Spousal Support provisions outlined herein to be a final, non-variable and binding settlement of each party's liability to the other.
- [86] The "special provisions" is a reference to s. 17(6.2) of the DA. In my view, there are no "special provisions", which would make the table amounts inequitable, nor was this argued by the parties at the hearing. For example, there was no evidence or argument that there was a larger spousal support amount, or further property division, or larger than could be expected monthly child support payments, to justify these terms of the COA. Therefore, the only applicable exception that would permit the court to make a variation order that is not in accordance with the Guidelines, is if the COA makes reasonable arrangements for the support of the children.
- [87] The focus of the claimant's argument regarding monthly child support was that the youngest child may still require support after age 19 if he attends post-secondary education.
- [88] The respondent argues that the monthly child support payments are a reasonable arrangement for the support of the children. As noted previously, he states that in entering the COA, the parties explicitly considered that both of their incomes could rise or fall, that they could each argue to impute income to the other, and that there were inherent risks associated with fixed quantum and term child support. Again, I accept that evidence. The respondent argues that it is presently unknown whether monthly child support would be payable after the youngest child's 19th birthday. That child may not enter post-secondary studies, and if he does, it is not known where he will reside.
- [89] I have made two calculations consistent with the Trial Order of no set-off. The first is based on the same income assumptions as for spousal support (\$402,900 / \$300,000), and assuming that child support will terminate in March 2028 (the same as the COA); and the second in accordance with the variation order requested by the claimant, being based on the income for child support in the 2021 Order (\$343,700 and with no reduction in the respondent's income starting in 2025). I have also assumed each child will become independent at age 19. As the chart below demonstrates, the COA amounts are roughly consistent with this assumption. These assumptions produce the following 2021 calculations, with a comparison column for the COA:

\$402,900 / \$300,000

\$343,700

COA

Dec. 2021 to April 2023: three children with claimant

\$6,747 x 17 = \$114,699

$$5,820 \times 17 = \$98,940$$

$$\$6,000 \times 17 = \$102,000$$

May 2023 to July 2024: two children with claimant; one with respondent

$$\$5,143 \times 15 = \$77,145$$

$$\$4,442 \times 15 = \$66,630$$

$$\$6,000 \times 8 + \$4,000 \times 7 = \$76,000$$

Aug. 2024 to Nov. 2025: two children with claimant

$$\$5,143 \times 5 + \$3,929 \times 11 = \$43,219$$

$$\$4,442 \times 16 = \$71,072$$

$$\$4,000 \times 5 + \$3,500 \times 11 = \$58,500$$

Dec. 2025 to Mar. 2028: one child with claimant

$$\$2,526 \times 28 = 70,728$$

$$\$2,865 \times 28 = \$80,220$$

$$\$3,500 \times 1 + \$3,000 \times 12 + \$2,500 \times 15 = \$77,000$$

Total

$$\$331,506$$

$$\$316,862$$

$$\$313,500$$

[90] There are potential benefits to a fixed amount of child support in this situation. I consider it much less likely that the respondent's income will significantly increase over the next four years, and more likely that it will decrease, consistent with the assumptions above. The fixed amount could potentially result in more child support than would otherwise be ordered on a yearly review of child support if the respondent's income decreases more than the assumptions made in the calculations above. The fixed amount also avoids a yearly costly dispute over income.

[91] However, despite that the above calculations show amounts that are reasonably close to each other, I conclude that there are three aspects of the monthly child support terms that do not make reasonable arrangements for the support of the children. First, while the COA appropriately stops all child support payments if the claimant does not have any child living with her, it does not appear to allow for the possibility that the claimant may have all three children living with her, or children past the age of majority living with her up to March 2028. I conclude this because the fixed decreasing amounts of child support in the COA are roughly consistent with the assumption made for the calculations, that each child would

become independent at age 19. Second, there is no provision for child support (except through s. 7 post-secondary expenses discussed below) after March 2028, even if a child remains a child of the marriage. Third, the COA purports to foreclose variation of child support even if there is a material change in circumstances. As I noted before, that could be an advantage or disadvantage with respect to income, but there are other changes that could take place which would be a material change which would require child support to be paid.

Section 7 Expenses other than Post-Secondary

[92] A summary of the pertinent terms of the COA concerning these s. 7 expenses are:

- a) to the extent it is possible, the respondent will maintain the children on his extended health plan;
- b) the respondent will establish a \$50,000 fund to be used for the respondent's share of s. 7 expenses, and his share will be capped at \$50,000;
- c) the respondent will pay 70% of the following:
 - i. private school tuition commencing September 2021 until the youngest child graduates high school in June 2027;
 - ii. MC's orthodontic fees, currently estimated at \$4,000;
 - iii. counselling for each of MC and MW, once every two weeks, between December 1, 2021 and December 2022;
 - iv. prescription and necessary medical costs for any child over and above insurance reimbursement;
- d) any dispute regarding the necessity of an expense will be resolved by arbitration;
- e) any money remaining in the fund upon the youngest's 19th birthday will be the sole property of the respondent and he will "have no further obligation to contribute to any s. 7 expense" save except as in the post-secondary expense provisions of the COA (clause 15); and
- f) the claimant will be solely responsible for payment of any s. 7 expenses not specifically included above, unless the parties agree in advance in writing to share the expense.

[93] The claimant argues that the \$50,000 fund will likely not be sufficient, and it is not a reasonable arrangement to limit medically necessary costs for the parties' children with a cap. The claimant is concerned that after private school tuition, the remaining funds may not be sufficient for MC's counselling, although recently MC has been approved for the MCFD funding. Counselling by a registered counsellor is not an insured expense under the respondent's extended health policy.

- [94] The respondent argues that the fund is sufficient. He maintains an extended health and dental policy with broad coverage for nearly all out-of-pocket costs for medical and dental expenses, including chiropractic treatment and treatment by psychologists. Other than counselling, most of the children's costs are paid by insurance. He has, and will continue to pay, the out-of-pocket portion of the expenses he submits to his extended health plan without seeking reimbursement from the claimant or drawing on the s. 7 fund. Based on the insurer's records in evidence, this has been about \$2,000 total since from 2018. The claimant alleges some of these might be expenses she has paid, but I have checked, and there is no overlap between her receipts and these. The respondent argues that he also pays the cost of the insurance without reimbursement from the claimant. It appears that this is about \$4,400 per year.
- [95] The respondent argues that in agreeing to the \$50,000 figure, the parties knew and explicitly contemplated how many years each of the children would be attending the private school, and with the knowledge that the children had at times incurred significant counselling expenses which were not covered by his extended health plan. I accept that evidence.
- [96] The respondent further argues that the caps for s. 7 expenses (including the \$20,000 per child for post-secondary expenses), were incorporated into the COA at the request of the claimant, and it is a bad faith argument for her to now apply to set aside the COA on the basis of terms which were included at her request. The respondent had initially proposed that the parties share s. 7 expenses with no caps.
- [97] The respondent states that prior to the COA, he and the claimant had often disagreed on counselling expenses. In light of this, the parties agreed upon a specific amount of counselling from December 2021 to December 2022 which would be a s. 7 expense. After this time period, he is required to contribute to expenses if they are "medically necessary" per the COA.
- [98] The respondent states that he is "committed to supporting" and "prepared to be flexible" to ensure MC's health is looked after and he will support the necessary costs, but the claimant has not yet provided the details of the psychological assessment or treatment recommendations of Dr. Brown. Some of MC's health costs will be addressed through MCFD funding and his extended health coverage. The respondent states that the oldest child is not currently interested in pursuing counselling, and the youngest has no significant need for it. The claimant states that contrary to the respondent's statement, MC gave Dr. Brown's assessment to the respondent.
- [99] The respondent also views the private school tuition as an unnecessary expense, and he wants the two youngest children to attend a public school with a better academic rating. This was the subject of a dispute in 2020 when the parties each enrolled the children in different schools. He agreed to the tuition being a s. 7 expense as a concession to the claimant.

- [100] Turning to the analysis, the biggest expense from the fund is the tuition. Despite the COA, the respondent's share for the 2021/22 school year will not be deducted from the \$50,000 fund. This is because the respondent had impliedly or explicitly represented that this tuition had already been paid, and it had not. The respondent's share of tuition that will be deducted from the fund is \$9,204 for the 2022/23 school year, and \$10,179 for the 2023/24 year. The respondent's 70% share of the estimated remaining cost of tuition until the youngest graduates (assuming the youngest continues to attend private school) is \$24,463. The total deductions for tuition will therefore be about \$43,846, leaving \$6,154 for other s. 7 expenses.
- [101] The claimant produced total health care receipts from December 1, 2021, to date, of over \$19,000. The vast majority of these expenses are for counselling, which is a significant dispute between the parties. The remainder are likely covered under the respondent's health plan. The claimant has not provided any medical evidence to indicate whether the level of counselling the children have received, or may receive in the future, is necessary or reasonable.
- [102] The respondent has recently reimbursed the claimant \$6,496, which is based on 70% of the orthodontics for MC and 70% of the counselling from December 2021 to December 2022 agreed to in the COA. With the payment of these, and all of the expected private school tuition in the future, the \$50,000 fund will be exhausted. However, other than the counselling, very little of other health expenses incurred to date are not insured, and there was no evidence of any other significant s. 7 expenses.
- [103] All of the above concerns only the respondent's obligations. The claimant also has s. 7 obligations. In the COA, the claimant agreed to pay all other s. 7 expenses not covered by the \$50,000 fund. She is the party who wants the children to attend the private school, which will consume most of the \$50,000 fund. I make no comments on the merits of whether the children should attend the private school, but am simply observing that it was an issue between the parties. I am reminded of one the general principles in *Miglin* at para. 78, that agreements should be considered holistically, as a smaller amount on one item, may be explained by concession or larger amount on another. So long as the children's s. 7 expenses are paid, these could be reasonable arrangements.
- [104] However, despite this, I conclude that there are three aspects of the s. 7 terms of the COA which do not make reasonable arrangements for the support of the children. First, implicitly, the s. 7 expenses cease by the time the youngest child is 19, because clause 15 provides that any funds remaining at that time be paid to the respondent. A child may remain a child of the marriage after age 19 and require support by way of s. 7 expenses. Second, if the youngest child continues to attend the private school, the fund will be exhausted with nothing left for health care expenses. Up to this point in time, the claimant has had minimal to no actual income, and the expenses she has incurred for the children, particularly for counselling (which I appreciate is highly contested) have been significant and likely beyond what she can afford. The risk is that the children will not receive the care

that they need because of the cap. Third, like the monthly child support provisions, the COA purports to foreclose an application to vary for a material change in circumstances.

- [105] Finally, there are other COA terms regarding s. 7 expenses which in my view are reasonable. For example, the proportionate split is reasonable (again assuming the parties' incomes stay roughly the same). The parties also spent much time and ink at this hearing on complaints regarding each other in relation to s. 7 expenses. The COA contains other terms which should assist the parties to reduce these types of conflicts, although unfortunately it did not for this application.

Section 7 Post-Secondary Expenses

- [106] The COA provides that the respondent will contribute a maximum of \$20,000 per child, not to exceed \$5,000 per year, for each child's post-secondary educational expenses on a number of conditions that are not in issue (e.g. full-time attendance with passing grades). In addition, the COA states that the respondent will not apply for an order that the claimant contribute to the post-secondary educational expenses of the children.
- [107] The claimant argues that the \$20,000 per child for post-secondary education will not cover their needs, and the \$5,000 per child per year is unlikely to cover tuition, with no contribution to books or other education related expenses. She states that she cannot afford to contribute to their post-secondary expenses.
- [108] The respondent argues that the two oldest children are expected to live with family while completing their studies, and will not incur significant living costs, and the \$20,000 per child will cover tuition or the majority of it. Their remaining tuition and book costs could be covered by only a modest voluntary contribution from the claimant, the children's earnings, a scholarship or bursary, or some combination. The parties do not yet know what the youngest NW will do after high school. The respondent repeats that the cap was the claimant's proposal. Finally, the respondent states that he funded an RESP account after family property was divided in 2016, which currently has a balance of \$78,745.53, and that he "intends to use 100%" of this account for the children's post-secondary education costs.
- [109] I acknowledge that the COA has the benefit of avoiding litigation over whether a child attending post-secondary education qualifies as a child of the marriage entitling that child to s. 7 expenses, and avoids disputes for expenses up to \$5,000. Although attending post-secondary education has been generally considered an "other cause" (under the definition of "child of marriage" in s. 2(1) the DA) as to why an adult child is unable to withdraw from a parent's charge, the assessment considers a number of factors: *Farden v. Farden* (1993), 48 R.F.L. (3d) 60, 1993 CanLII 2570 (B.C.S.C.); *Nordeen v. Nordeen*, 2013 BCCA 178 at paras. 16-17. As discussed by Justice Groberman in *Nordeen* at para. 16, determining whether an adult child's post-secondary education is a valid reason for continued dependence, and appropriate for the parents to finance, and to what extent, is "complex and value laden".

- [110] I have also considered that there is much uncertainty about what may happen in the future regarding the children's post-secondary education, if any. Both the \$5,000 per year and \$20,000 per year caps may turn out to be entirely adequate, but they may not.
- [111] Despite these considerations, I conclude that there are three aspects of the s. 7 post-secondary expense terms of the COA which do not make reasonable arrangements for the support of the children. First, in addition to other terms effectively not providing for any monthly support after age 19, the COA limits the respondent's obligation for s. 7 post-secondary education to \$5,000 per year, and a \$20,000 per cap per child, despite that these may not be adequate or representative of what his obligation should be. Second, the COA purports to absolve the claimant of any obligation for those expenses. Three, the COA purports to foreclose variation s. 7 post-secondary expenses even if there is a material change in circumstances.

Parenting Arrangements

- [112] As noted previously, no issue was raised regarding the parenting arrangement orders in the COA. I am satisfied that those orders are in the best interests of the children. Parenting time and final say on parental responsibilities have been a source of conflict, and the orders should reduce it. The orders also reflect that the children are older and greater weight is given to their views.

Issue 3: Unconscionability

- [113] The final issue is whether the COA was unconscionable. The claimant states that she was vulnerable at the time of the COA because she was "financially and emotionally devastated". She states that she could no longer afford to pursue ongoing court applications with the assistance of counsel. She states that she was forced to sell her home because the respondent had made unilateral changes to support payments, did not pay her the correct amount of support, was not contributing to s. 7 expenses, and the agreed \$260,000 lump sum was not paid until June 2022. She also states that she was under "significant stress" as a result of MC's health and her main focus was supporting MC as a result of MC's hospital stay for mental health issues. The claimant states that because the respondent has repeatedly tried to reduce support payments without a court order, she has had to pay legal fees every year.
- [114] The respondent argues that the claimant was not vulnerable, and he did not take advantage of any alleged vulnerability. The 2021 Order provided the claimant with a combined monthly total support of \$9,624 in addition to her employment income. The claimant disputes that the claimant was forced to sell her home. The closing was in December 2021 and the terms of the COA were not finalized until June 2022, and as such, the sale of the home could not have affected her ultimate decision to enter into the COA six months later. The respondent states that MC was in hospital for only one day, although the claimant states that it was five days in May 2022. Given the texts between the parties at that time, it appears

it was five days.

- [115] The respondent further argues that the correspondence and settlement proposals exchanged between counsel demonstrate that the COA was carefully considered and negotiated between the parties with the assistance of experienced counsel over the course of a year, and that the respondent made several concessions in favour of the claimant in order to reach the agreement. This was not a one-sided settlement dictated by the respondent, and the claimant was not forced to accept the COA. The claimant took significant and effective steps to advance her own interests in the negotiations, concessions sought by the claimant were incorporated into the COA, and the COA significantly favoured her interests.
- [116] I find that the claimant had much less ability than the respondent to bear the significant legal fees she was incurring, primarily because she did not have the capital the respondent has. While the respondent had correctly determined that he had overpaid support after the 2021 Order, I find that the respondent's conduct in abruptly and significantly reducing support in the summer of 2021 to recoup the overpayment is blameworthy conduct. It should have been obvious to him that because of the change in parenting time which had occurred just prior to the 2021 Order, that his child support obligation had increased, and the overpayment could have been gradually reduced over the course of 10 months if he had even carried on with the payments ordered in the 2021 Order.
- [117] However, despite the above, I cannot find that the claimant was in devastating financial circumstances. She has received substantial support for more than ten years. The support has been at the high end of the range, and without set-off for child support despite shared parenting for the majority of that time. She had been receiving between \$9,624 to \$15,888 in support per month since separation, and she has been intentionally unemployed or underemployed since 2014. Had she not been underemployed, her total funds in 2021 (imputing \$40,000), even after the respondent's \$20,000 reduction in support payments, would have been in the range of \$135,000, a large portion of which was non-taxable.
- [118] Despite the respondent's blameworthy conduct in reducing support between August and November 2021, I cannot conclude that this and his alleged delay in paying the \$260,000 lump sum caused the claimant to be forced to sell her home. First, even if support according to the 2021 Order, plus the increased support to which the parties should have been able to agree, was paid, this was far below the living expenses of \$207,000 (exclusive of legal fees) claimed by the claimant in her 2021 financial statement, and she was making very little income. Second, the mortgage statement dated October 18, 2021, shows that the mortgage was not in arrears. Third, the sale of the home closed in December 2021, after which the claimant received the equity in the home, and the negotiations leading to the COA did not conclude until June 2022. Finally, there was no delay in the respondent paying the \$260,000. The correspondence shows that while an agreement in principle was reached in November 2021, it was a condition that the lump sum would be paid upon the parties or their counsel signing the COA. Due to ongoing negotiations, this did not happen until June

2022, and the funds were paid shortly thereafter. The respondent paid \$6,000 per month child support from November 2021 to the signing of the COA.

- [119] I do not find that MC's brief hospital admission in May 2022 created any vulnerability in the negotiation process. An agreement in principle was reached in November 2021 and the COA signed on June 29, 2022. Nor would I assume that the stress and upset of this would be any less for the respondent than for the claimant, although it appears the claimant spent the most time at the hospital. Further, this negotiation took place nearly 10 years after the parties' separation, and not in the immediate aftermath of the break-up of their marriage, so I would not expect the emotional situation to be as acute.
- [120] Finally, and importantly, a review of the negotiation correspondence between counsel shows that the parties were both represented by experienced counsel who assertively represented their client's interests. I have considered the claimant's arguments that she could no longer afford legal fees. I accept that; however, she and her counsel were prepared to return to court, despite this. I noted previously that the claimant had scheduled another hearing before me in the midst of the negotiations, for early November 2021, to reopen the application which led to the 2021 Order. That hearing was adjourned when the parties reached an agreement in principle that took many more months to finalize. The correspondence between counsel shows that there were many proposals and counter-proposals with a large number of issues canvassed in detail. I cannot detect any inequality of bargaining power. The claimant advocated for and obtained concessions in her favour in negotiations. For example: the respondent's share of s.7 expenses increased; the claimant suggested the s. 7 fund (although she originally proposed \$58,000); the respondent agreed to the private school; the lump sum payment was increased from the respondent's initial offer of \$200,000 to \$260,000; child support was increased a few times over the negotiations, from the respondent's initial offer where the maximum amount was \$4,000 per month; and the claimant was not responsible for post-secondary expenses.
- [121] In considering all of the circumstances, although the claimant was definitely in a weaker financial position than the respondent, in my view, that was overcome by the legal assistance she received. I cannot find any fundamental flaw in the negotiation process. Both parties wanted to end the disputes, and they and their counsel appear to have worked hard to reach the COA.
- [122] Finally, returning to the distinction between unconscionability and an order that is contrary to the principles of child support, in Issue 2 I have reviewed the terms of the COA for substantive compliance with s. 17 of the COA. I cannot find that the terms were unfair to the claimant as opposed to the children, and it is on this latter basis that the COA cannot be made an order of the court.

Conclusion on the Applications

- [123] It follows from the above findings, that the respondent's application to "enforce" the COA cannot be granted. The respondent seeks an alternative order that the court make an order varying the terms of the COA with a review provision for child support by either party via arbitration upon the youngest's graduation from high school. That is not agreeable to the claimant. In my view, a review or variation provision would go some ways to addressing the concerns I have identified, but the term the respondent has proposed does not address all of the concerns. This court may only make an order that is not in compliance with the Guidelines if there are "special provisions", or if the parties consent and the court determines that reasonable arrangements have been made for the support of the children. Despite what is stated in the COA, there are no special provisions and the parties have not consented to terms that would address the concerns. The respondent's application for an alternative order is dismissed.
- [124] It also follows from the above findings that the claimant's application setting aside the whole of the COA on the basis of unconscionability is dismissed.
- [125] I have found the terms of the COA regarding spousal support and parenting arrangements to otherwise meet the statutory requirements for variation, and only certain aspects of the monthly child support and s. 7 terms to be unenforceable. Unfortunately, the parties did not address the possibility of severance of those terms, other than the claimant's one comment in response to the respondent's application to add a review term, that this was comprehensive agreement with give and take, and the court cannot re-write the COA for the parties. The give and take of a comprehensive agreement was a theme of the respondent's argument supporting the reasonableness of the COA. Given the lack of submissions from counsel, I conclude that I cannot address the severance without further submissions, and I cannot address the claimant's alternative orders sought.
- [126] I have also considered the length of time that has passed since the COA was reached, and that the parties have acted upon it. The \$260,000 was paid nearly two years ago. The claimant cancelled all arrears with the FMEP. The respondent has been paying monthly child support in accordance with the COA. Further, the parties want to avoid, as much as possible, yearly disputes regarding incomes.
- [127] As noted at the beginning of these reasons, given the parties overall positions, I would expect that acting reasonably, and with the best interests of the children only in mind, the parties should be able to come to an agreement that will satisfy s. 17 of the DA and the Federal Child Support Guidelines [Guidelines]. They ultimately both have the same goals: a comprehensive settlement of all matters between them to avoid their many disputes, and to appropriately provide for their children. There are only certain aspects of the COA that are contrary to the principles of child support. The claimant's main concern on this application was ensuring reasonable arrangements for the support of the children, and the respondent's position was that he had provided for that. I find that the claimant's concerns

were well-founded despite her earlier agreement to and support of the COA.

[128] In the circumstances, I am adjourning the claimant's alternate orders for variation of the 2021 Order for a period of four months. I am hopeful that the parties will use this time to reach an agreement that will address the concerns identified above. If the parties cannot reach an agreement, the claimant has leave to reset her application, and if necessary, the parties can address severance at that time. I will remain seized of that application only.

"Norell J."

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