

CANADA / JUDGMENT

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

2025 BCSC 865

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Supreme Court of British Columbia

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2025 BCSC 865 S.L.D. v. W.A.D.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

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

2025 BCSC 865

Date: 20250508

Docket: E43290

Registry: New Westminster

Between:

S.L.D.

Claimant

And

W.A.D.

Respondent

Before: The Honourable Justice Norell

Reasons for Judgment

The Claimant, appearing in person:

S.L.D.

Counsel for Respondent:

B. St. Pierre

Place and Dates of Hearing:

New Westminster, B.C.

January 23, 24 and 29, 2025

Place and Date of Judgment:

New Westminster, B.C.

May 8, 2025

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Overview

- [1] These are reasons on the parties' competing applications in their long-running, high-conflict family law litigation. Both applications concern an agreement in the form of a draft consent order (the "COA") that had been reached by the parties in 2022. The COA was the subject of applications heard in late 2023 and early 2024 (the "2023/24 Applications"). The result of the 2023/24 Applications was that the COA was not entered as an order because some of the child support terms did not provide reasonable support for the parties' children.
- [2] The respondent seeks to have the offending child support terms of the COA set aside, and replaced with orders that he argues remedy the deficiencies identified, and to have the remainder of the COA entered as an order. The claimant, as she did in the 2023/24 Applications, seeks to have the entire COA set aside, and to have new orders made varying the existing child support orders. Both parties want to find a way to end their continuing disputes on incomes and support.
- [3] For the reasons below, I dismiss the claimant's application to set aside the entire COA. I set aside the offending child support terms of the COA, make orders to replace them, and incorporate the remainder of the COA into an order. Finally, I address other orders requested by the claimant on unrelated issues.

2023/24 Applications and 2024 Reasons

- [4] The reasons for the 2023/24 Applications are indexed at 2024 BCSC 548 (the "2024 Reasons"). For convenience, I replicate below portions of the Overview section which summarize the orders sought, the issues, and the rulings:
 - [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.

[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.
- [5] In the 2024 Reasons, I provided a road-map to the parties as to what needed to be changed with respect to certain child support terms and gave them an opportunity to come to an agreement regarding that:
- [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.
- [6] Unfortunately, the high conflict nature of the parties' relationship has prevented the parties from reaching an agreement, and they have returned to court. The reference to severance in the above paragraph was an alternative argument made by the claimant near the end of her submissions and was not developed. The claimant argued that if the child support provisions were not enforceable, the entire COA was not enforceable, as this would be re-writing the COA reached by the parties.

Orders Sought by Respondent

- [7] The respondent is generally content with the COA and in contrast to his previous application which sought to enter the entire COA, he now applies under s. 148(3) of the Family Law Act, S.B.C. 2011, c. 25 [FLA], to set aside the offending child support terms and replace them with orders which he submits address the concerns identified in the 2024 Reasons, and for the remainder of the COA to be made an order. The respondent submits that his income has declined significantly in the last year, and will continue at a lower income, and that the monthly child support in the COA is actually more than he would have to pay if incomes were determined yearly. However, he wishes to retain the monthly set child support obligations in the COA with modifications, rather than engage in yearly battles over incomes.
- [8] In the alternative, if the respondent is not successful in the above, he seeks an order that the court determine his Guidelines income, and that the last child support order (the "2021 Order") be varied and/or the COA monthly child support terms be set aside and replaced. The respondent submits that his decline in income is a material change in circumstances. In

the event he has overpaid support, he seeks an order that these funds be repaid to him or credited against his future child support obligations. The respondent is agreeable to the court fixing child support for up to three years in the future to avoid future applications regarding child support and income.

Orders Sought by Claimant

- [9] The claimant is not content with the COA and again seeks to set it aside entirely on the basis that she was vulnerable leading to unconscionability, such that it is of no force and effect. Alternatively, she argues that if the child support terms are unenforceable, all of the COA is unenforceable, as this was a global settlement between the parties and the child support terms cannot be severed and the COA re-written.
- [10] If either of the above arguments are successful, she seeks orders: (a) determining the respondent's Guidelines income since 2020 for the purpose of calculating child support; (b) varying the child support terms in the 2021 Order and determining the retroactive monthly child support owing since that time as well as prospective child support, in accordance with the determination of the respondent's Guidelines income for the years 2020 to the present, or an average of the same, for up to three years into the future; (c) determining s. 7 expenses owing, and making orders to specify certain s. 7 expenses are shareable to reduce the conflict with respect to future s. 7 expenses; and (d) "any claims or potential claims that the claimant has with respect to spousal support on a retroactive, interim and/or ongoing basis will be adjourned to a future hearing".
- [11] In the alternative, if the claimant is not successful in setting aside the entire COA, she seeks an order setting aside all, as opposed to only some, of the child support terms of the COA under s. 148(3) of the FLA, and that they be replaced with the above child support orders.
- [12] The claimant also seeks orders a declaration as to where the children have been residing since 2020 as a result of a tax issue that has arisen between the parties; and a fine pursuant s. 213 of the FLA, and special costs.

Circumstances since the 2023/24 Applications

Children and Parenting Time

- [13] The oldest child, MW, graduated high school in June 2023 and had originally planned to attend Kwantlen Polytechnic University. At the time of the 2024 Reasons, he had deferred acceptance and was planning to attend in September 2024. Since then, MW decided not to attend Kwantlen and is employed. He continues to live with the respondent. He is an adult and currently not a child of the marriage.

- [14] MC graduated high school in June 2024, and in September began attending Thompson Rivers University in Kamloops. She lives with her maternal grandmother while attending university, and otherwise with the claimant. She is reported to be doing well academically, and plans to continue studies in September 2025. She turns 19 later this year.
- [15] The youngest, NW, is in Grade 10. He continues to live with the claimant. He is a good student, plans to attend university, and has a goal of becoming a doctor.

Claimant

- [16] The claimant is 46 years old. She is now a qualified counselor, becoming a Master Practitioner Clinical Counselor in November 2024. In the past year she also completed a certificate program in Trauma and Crisis Intervention.
- [17] It is not necessary to determine the claimant's Guidelines income because pursuant to the trial order of Justice Harvey in 2016, child support is to be determined without set off. However, I will provide a general review of her income.
- [18] Since 2019, the claimant has had \$40,000 per year of income imputed to her, and had a lesser amount imputed to her prior to that time. The claimant's tax returns, assessments, and other documents were reviewed at para. 33 of the 2024 Reasons. These and her updated financial information show that she continues to earn less than the imputed income. Her 2024 total self-employment revenue before expenses was \$35,132, which at even her lower charge-out rate, is part-time employment.
- [19] The respondent alleges that if the claimant were working only 80 hours per month, at her hourly rate of \$130 per hour, less 30% for overhead, she would earn \$87,360 per year, which is more than the average salary of a counsellor on the workbc.ca website.
- [20] In the 2024 Reasons, I concluded that as the claimant's clientele builds, or if she transitions to an employee position, by 2025 she should have the capacity to earn more than the presently imputed \$40,000 per year. In my view, that continues to be a reasonable assumption.
- [21] The claimant has about \$300,000 in investments and no other significant assets.

Respondent

- [22] The respondent is 65 years old. At paras. 35-36 of the 2024 Reasons, I reviewed his health history, and his shareholdings which provide him with income. He owns Connor Industries, which is a 50% shareholder of X, which in turn owns a commercial property in Alberta. Connor Industries also holds marketable securities. The respondent is paid \$120,000 per year to manage X, but at the time of the 2023/24 Applications he expected this to cease by the end of that year because of his retirement and events then affecting X.

- [23] At the time of the 2023/24 Applications, the respondent represented that there was no tenant for the commercial property owned by X, and he was forecasting a significant loss. At para. 36 of the 2024 Reasons I summarized this evidence:
- [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.
- [24] The respondent's information may have been correct when he filed his affidavit #42 on November 7, 2023 but it was no longer true later that month. In November 2023, X found a new tenant. This was not disclosed by the respondent when the parties continued their 2023/24 Applications in January 2024. The claimant discovered that X had a tenant after the applications were heard. The respondent's explanation for not advising his counsel or the Court of this new information was as follows:
9. A new tenant was acquired in November 2023, after I filed my affidavit #42 on November 7, 2023. Simultaneously, [X] was required to renew its commercial loan of approximately \$5,000,000 in November 2023, and a copy of the renewal notice is attached here . As interest rates were much higher at the end of 2023 compared to the previous rate, the annual interest costs of the mortgage increased to approximately \$433,000 per year, compared to the \$145,435 paid in 2023 toward interest costs. This increase in interest costs significantly reduced the profitability of [X]. The company also paid a significant commission fee in 2024, listed as a professional fee in the expenses, to the realtor who acquired the new tenant.
 10. I did not provide an update on the new tenant prior to the hearing on January 19, 2024 or the new loan rate, nor did I inform my counsel of the same, because I understood I was not permitted to file any further affidavits per the directions issued by Justice Norell in the Fall of 2023. It was also clear, when comparing the expected rental income to the new mortgage rate, that [X] would not turn a profit in 2024. At no time did I intentionally withhold information in this regard.
- [25] I will return to this later with respect to the claimant's application for a fine and special costs.

- [26] In the respondent's most recent F8 financial statement he states that he expects that if X were wound up, he would receive \$1.7 million "excluding the intercompany balance with Connor Industries and without tax discounts". The respondent states that X is presently unprofitable and has "used up" the majority of its cash holdings over the past year. The financial statements show that in 2024, \$1 million of the cash in X was paid out to its two shareholders towards the shareholders' loans owing by X. Of that amount, Connor Industries received \$500,000.
- [27] The current value of the marketable securities and other assets within Connor Industries is about \$2.5 million. This includes the remaining approximately \$700,000 owing to it by X as a shareholder's loan.
- [28] The respondent has \$833,000 in an RRSP, owns his home worth approximately \$1 million, and in 2021 he purchased a boat worth more than \$400,000.

Issues

[29] The broad issues to be addressed are:

1. What is the respondent's Guidelines income from 2020 to 2024, and what is his estimated Guidelines income for the near future?
2. Should the entirety of the COA be set aside on the basis of vulnerability and unconscionability, or because the offending child support terms are not severable?
3. If the answer to Issue 2 is yes, what orders, if any, should be made varying previous orders of the court? If the answer to Issue 2 is no, what child support terms of the COA should be set aside pursuant to s. 148(3) of the FLA, and what new orders should be made?
4. What other orders should be made as requested by the claimant?

Issue 1: What is the respondent's Guidelines income from 2020 to 2024, and what is his estimated Guidelines income for the near future?

- [30] In the 2023/24 Applications, I was not asked to determine the Guidelines incomes of the respondent, however it was necessary to estimate them to assess the support terms of the COA. At paras. 37-39 of the 2024 Reasons, I estimated the respondent's Guidelines income for 2020 to 2022 and discussed possible treatment of a very large capital gain in 2020. On these applications, both parties seek determination of Guidelines income as part of alternative orders. As I need to again at least estimate Guidelines income in order to assess the COA with updated information, I will make the determination.

- [331] A central issue regarding the respondent's Guidelines income is the treatment of the capital gains in 2020. The respondent received a gain of \$233,635, and Connor Industries received a gain of \$504,793. I will first calculate the respondent's Guidelines income for all years assuming the inclusion of all of the capital gain in 2020. I will then address whether all of it should be included, or whether there should be an averaging, pursuant to ss. 17 and 18 of the Guidelines.
- [332] The resulting figures for the first calculation, including all capital gains in the year they were earned, are (to the nearest \$1,000):
- a) 2020 - \$951,000;
 - b) 2021 - \$230,000;
 - c) 2022 - \$318,000;
 - d) 2023 - \$301,000;
 - e) 2024 - negative \$32,000 (estimate).
- [333] At this hearing, the respondent appended as exhibit B to his 44th affidavit, calculations of Guidelines income by his accountant, Mr. Chris Dyck. Mr. Dyck's calculations are not in the form of an admissible expert report, and I do not use them for that purpose. I have made my own calculations. However, except for one major and a few smaller differences, his calculations and mine for 2020 to 2024 were the same. Mr. Dyck's calculations are conveniently set out on two pages for all years, so for ease of reference, I will refer to Mr. Dyck's summary to explain how I arrived at the above figures. Unless described below, Mr. Dyck's calculations and my own calculations were the same.
- [344] For 2020, Mr. Dyck made the adjustment between actual and taxable Canadian dividends (about \$2,000) and carrying charges (\$11,000). I agree those should be made. This year includes the large capital gains.
- [355] For 2021, Mr. Dyck adjusted for carrying charges. I agree. He also deducted from income in X, a \$722,000 increase in the mortgage principal of X. I do not agree with this, and it accounts for the one significant difference in our respective calculations. The increase in the mortgage was not explained in any affidavit. Pursuant to the ruling in 2020 (indexed at 2020 BCSC 690, the "2020 Reasons"), starting with X's pre-tax income, the amortization of X's real property should be added back, but the principal repaid on the mortgage should be deducted (\$313,000) as I found these funds were not available for support. The respondent's 50% share of the mortgage principal was \$156,000. I do not see how an increase in the mortgage can result in a similar deduction. In the absence of any information as to when in 2021 the mortgage was increased, I assume it was half-way during the year. Based on the principal repayment which is shown in the financial statements for the following year (\$219,000), and what was repaid in past years (\$313,000), I have assumed a mid-point \$266,000 repayment of the mortgage principal during the year despite the increase in the

mortgage. I therefore calculate the income available for support from X to be \$310,000 pre-tax income, plus \$184,000 amortization, less \$266,000 principal repayment. The respondent's 50% interest is \$114,000. Connor Industries had \$4,000 of adjusted pre-tax income. The respondent earned \$120,000 in personal income less carrying charges, for a net personal income amount of \$112,000. Connor Industries also paid the respondent \$343,000 in dividends. I assume these were capital dividends and hence non-taxable as they are not shown in the respondent's 2021 tax return. I do not include them as income available for support, because as I conclude below, all of the capital gain in Connor Industries from which these dividends would be sourced, will be included in the respondent's income. Therefore, the total income in 2021 is \$230,000 (\$114,000 + \$4,000 + \$112,000).

- [36] For 2022, Mr. Dyck adjusted \$1,000 for carrying charges. I agree. Further, Mr. Dyck's calculations, which are confirmed by X's financial statements, show that the principal repaid during the year was \$219,000. In the 2024 Reasons, I assumed the 2022 mortgage principal repayment was \$313,000 as it had been in previous years. I had also calculated Connor Industries' pre-tax income to be \$75,000. This is because \$30,000 was shown on the then financial statements as "other income" and I included it. A subsequent restatement of the 2022 income (now shown in the 2023 statement) shows that this was actually an unrealized gain on foreign exchange, and should not be included. I agree with Mr. Dyck's calculation that removes this amount.
- [37] For 2023, there is approximately \$22,000 in "employee benefits" expenses claimed in X, something not previously paid on that scale except in 2019. In a ruling in 2021 (indexed at 2021 BCSC 942, the "2021 Reasons") at para. 52, this expense plus the tax savings to the respondent were included in the respondent's income. I have adjusted for this, and Mr. Dyck did not. This adds \$33,000 to the respondent's Guidelines income. I have not adjusted for this in other years where the employee benefit expenses claimed were much smaller.
- [38] For 2024 Mr. Dyck's and my prorated estimate of Connor Industries' income is slightly different. I find that Connor Industries' pre-tax income is \$3,000 (prorated), and with the deduction of unrealized gain of \$8,000 (prorated), the net income before taxes is negative \$5,000 (prorated). This estimate assumes that nothing unusual took place in Connor Industries in the last three months of 2024 for which there were no financial statements at the time of these applications. In 2024, there was another approximately \$22,000 in employee benefits expense claimed in X, and for the same reasons as in 2023, I add back this expense and the tax savings, decreasing the respondent's loss in X from negative \$179,000 to negative \$146,000. The primary reasons X was unprofitable in 2024 were an increase in the interest rate when the mortgage was renewed, a \$206,000 realtor's commission paid in connection with the new tenant, and an unusually large repair and maintenance expense of about \$76,000. With the respondent's 2024 income of \$120,000 from X, and \$1,000 in carrying charges, the estimated Guidelines income for 2024 is negative \$32,000 (negative \$5,000 + negative \$146,000 + \$119,000).

- [39] Having made those preliminary calculations, I turn to the respondent's investment income, specifically the 2020 capital gains and the respondent's fluctuating investment income over the years. The issue is what portion, if any, of the 2020 capital gains should be included in the respondent's income, and if included, should it be averaged over a period of years?
- [40] The respondent states that in 2020 Connor Industries sold securities for a profit, which was then reinvested in other securities after the payment of tax. This happened during the COVID-19 pandemic for the purpose of managing risk. He submits that the "non-recurring" capital gains were the restructuring of capital for legitimate business reasons, and were not in the nature of income, and they should not be included in his income. He argues the factors in *Dunnett v. Dunnett*, 2018 BCCA 262, support his position. The respondent does not state what happened to the personal capital gains, nor identify from what account those gains came. I will return to this below.
- [41] The claimant states that she does not have the knowledge to calculate Guidelines income or the funds to hire an accountant or lawyer. She had counsel prepare her notice of application and noted that s. 17 of the Guidelines gives the court discretion to deal with income that fluctuates from year to year, and also permits the inclusion of non-recurring capital gains: *Vincent v. Vincent*, 2012 BCCA 186 at para 36. Further, she argues that the respondent has not made full financial disclosure.
- [42] For the following reasons, I find that all of the 2020 capital gains should be included in the respondent's income, and that his income should be averaged over the five years from 2020 to 2024.
- [43] First, in the 2021 Reasons at paras. 23-38, I addressed a smaller capital gain received by the respondent in 2019. I adopt the discussion of the law in those paragraphs, which includes the factors in *Dunnett*, which I address below.
- [44] Second, the respondent has substantial investments, which up to 2020, had regularly generated investment income in the form of dividends, interest, and capital gains. Although the 2020 amount is unusual, the receipt of investment income is not. In the 2021 Reasons, I summarized the investment income earned by Connor Industries from 2016 to 2019. The average annual rate of return was about 6.2%.
- [45] Third, after 2020, Connor Industries' portfolio has realized very little net investment income between 2021 and 2024. This is despite that in 2019 it had marketable securities valued at about \$2.1 million, and currently has assets (not including the \$700,000 shareholder's loan owing to it by X) of about \$1.8 million. I calculate the net realized rate of return at below one percent. Similarly, the respondent has not reported any personal investment income after 2020. A person is able to control investment income by investing in securities that yield only capital gains, and deferring the realization of that gain until the securities are sold.

- [46] Fourth, the capital gains are investment income and not merely the result of a restructuring of capital for business reasons. The marketable securities are not an asset that is akin to those that form the base of a business such that it is a return of capital rather than a return on capital.
- [47] Fifth, if the capital gain is not included now, the children will never benefit from it. The gain sought to be included in Guidelines income is the difference between the adjusted cost base and the sale price. The respondent states he has re-invested the proceeds. The extension of the respondent's argument is that when the new investments are sold in the future, that gain will never be included in Guidelines income because it will form part of the adjusted cost base.
- [48] Sixth, I have considered that Connor Industries was excluded from division by the parties' pre-nuptial agreement, but as discussed at para. 36 of the 2021 Reasons, that agreement provided that income from excluded assets may be considered for support. The gains sought to be included are only the income from, and not the capital of those excluded assets. Including the gain is not wealth re-distribution but the proper inclusion of investment income available for support.
- [49] Seventh, an objective of the Guidelines is consistent treatment of spouses and children who are in similar circumstances. This gain is investment income which is regularly included in Guidelines income. The fact that there is a very large amount in one year, and very little reportable realized investment income on what was about \$2.1 million in investments for the next four years, simply reflects how the respondent chooses to realize his gains.
- [50] Eighth, another objective of the Guidelines is that the children continue to benefit from the financial means of each parent after separation. The respondent has substantial assets and an obligation to support his children. This is the children's right. In my view, if the parties were not separated, the children would benefit from the gains in investments over the years.
- [51] Ninth, I have considered that the respondent is 65 years old and nearing retirement. However, he is still accumulating substantial wealth for retirement, even if this investment income is included in Guidelines income. Assuming the value of the commercial building owned by X does not decline, each year the respondent's wealth is increasing by the equity in that warehouse as the mortgage is paid down, and this is not included in his income. Further, he has an RRSP from which he has not withdrawn income and which presumably is increasing in value. Ultimately the respondent will have all of these funds available for retirement or other purposes.
- [52] Finally, given the pattern of realization of investment income, and the wide fluctuations, I conclude that the fairest determination is that the respondent's income is averaged over a period of years: s. 17 and *Harras v. Lhotka*, 2016 BCCA 246. Although s. 17 of the Guidelines refers to averaging over three years, the court has a broad discretion under s. 19(1) of the Guidelines to use a five-year average if it determines that this is the fairest determination of income: *Harras* at para. 36. Given that the Court is now being asked to determine Guidelines

income from five years ago and that if I had been asked to determine Guidelines income in the 2023/2024 Applications I likely would have averaged income then, the ability of the respondent to defer realization of investment income which leads to a basis to impute income if it is not otherwise included, and the very large amount of the capital gains in 2020 coupled with the loss in 2024, I conclude that the fairest determination of income is to average it over the past five years. In my view, this more accurately reflects the respondent's income that is fairly available for support. It is also close to his historical average income.

- [53] The five-year average from 2020 to 2024 is \$354,000 (to the nearest \$1,000). I find that this is the respondent's Guidelines income from 2020 to 2024, each year.
- [54] I pause to address an alternative argument by the respondent as to investment income, and why I have rejected it. While maintaining that none of the 2020 capital gains should be included in income, the respondent submits that for 2023 and later years, pursuant to s. 19 of the Guidelines, the Court could impute a three percent rate of return on the respondent's investments, as was done in *Ferguson v Ferguson*, 2019 BCSC 1946 at para. 23. The respondent submits that based on a market value of the securities in Connor Industries in 2023 (about \$1.455 million). This would increase his Guidelines income by about \$45,000.
- [55] For the following reasons, I do not agree that 3% is a reasonable rate of return on the facts of this case, and nor do I agree that it should be based on only \$1.455 million in investments, and only commencing in 2023.
- [56] First, In *Ferguson*, the court relied on *Kim v. Hong*, 2013 BCSC 587, where there was no evidence of the rate of the return on the payor's investments: at para. 353. In this case, there is evidence of how much the respondent has earned. Based on the table at para. 31 of the 2021 Reasons, the average annual rate of return in Connor Industries prior to 2020 was about 6.2%. In my view, absent other evidence, that is a more appropriate rate of return as it is actually what the respondent has been earning, and that is before the effect of any deferral of realization of income.
- [57] Second, if the 2020 capital gains are not included in income, investment income should be imputed on all years since 2020 since the respondent had the investments throughout those years.
- [58] Third, Connor Industries currently has about \$1.8 million in assets excluding the loan owing by X (comprised of cash, a recent loan owing to it from the respondent, and marketable securities) but there appears to have been dispositions of other assets that have not been reported, and there is no explanation of where those funds went. There is no evidence about from where the \$233,635 in personal capital gains in 2020 arose. Mr. Dyck's calculations indicate that this gain was realized in "RBC Dominion Securities". The respondent's 2021 financial statement lists an "RBC Personal Investment Account" valued at \$350,000, but his 2023 and most recent financial statements do not list this account or a disposition of it. There is no explanation of where those funds went. Further, the respondent's 2021 financial statement lists a home in Langley valued at \$1.8 million, a home in Arizona worth \$300,000,

and \$725,000 in mortgages. His 2023 and current financial statements no longer list these homes, or any personal mortgages, but list a condominium worth about \$1 million. The claimant states the Langley home was listed for sale for over \$2 million. It appears those homes were sold, the mortgages paid, and presumably the funds used to purchase the condominium. However, again, no disposition of these assets is shown on the 2023 or recent financial statements. There is no evidence of where the apparent excess equity went.

- [59] I will return to the notion of imputing a rate of return on the respondent's assets in estimating the respondent's future investment income for the purpose of assessing the COA with updated information. I turn to that next.
- [60] For the reasons below, I estimate the respondent's future annual income, excluding investment income, to be at least \$153,000. To come to this estimate, I have relied on X's last complete financial statement ending at its usual year end on September 30, 2024. This statement includes what I assume is 10 months of new tenant revenue commencing December 2023, and which I have prorated to full year of revenue. I have assumed all other expenses will remain about the same except that there will not be the realtor fee, or the unusually large repair and maintenance expense of about \$76,000 incurred in 2024. I have also assumed that there will not be an unusual employee benefit expense. That expense has only been incurred occasionally, and not in all years. On those assumptions, I estimate the 2025 income of X to be about \$65,000, of which the respondent's share is \$33,000. The respondent expects to continue to be paid a \$120,000 salary. Therefore, the total is \$153,000 excluding any investment income.
- [61] As for future investment income, based on the issues identified above regarding the respondent's apparent disposal of assets outside Connor Industries, I impute that the respondent has at least \$2.1 million in investments within and outside Connor, excluding his RRSP. I also impute an average yearly rate of return on future investment income at 6.2%. This is about \$130,000 per year. This combined with the respondent's estimated 2025 income from X of at least \$153,000, results in estimated future Guidelines income of at least \$283,000.
- [62] Finally, I turn to compare the actual Guidelines income I have determined to date and estimated for the future, with what I concluded in the 2024 Reasons was reasonable for the parties to have assumed when they negotiated the COA in 2022. In the 2024 Reasons I compared the COA to two possible reasonable scenarios: (1) the respondent would have an income of \$402,900 until the end of 2024, and would have an income of \$300,000 from 2025 on; or (2) the respondent would have an average income of \$343,700 consistently. I have found, on updated financial information, that the respondent's actual Guidelines income is an average of \$354,000 from 2020 to 2024. Were it not for the realtor fee and unusual maintenance and expense fee in 2024, the average income for those years would have been \$410,000. The scenarios for child support in the 2024 Reasons were reasonable and do not affect the conclusions reached there.

Issue 2: Should the entirety of the COA be set aside?

- [63] At the 2023/24 Applications, the claimant argued that she was vulnerable at the time the COA was made, leading to an unconscionable COA, and therefore the COA should be set aside in its entirety. I dismissed this argument: 2024 Reasons at paras. 113-122.
- [64] At this hearing, the claimant again sought to set aside the COA in its entirety on the same basis. She again reviewed the history of the litigation going back to 2014, and what she sees as emotional and financial abuse by the respondent. She submitted this was the backdrop to the COA. She argues that she received no benefit from the COA because of the legal fees and expenses she incurred prior and subsequent to it.
- [65] All of the matters the claimant raised at this hearing, were raised at the 2023/24 Applications. The claimant did not apply to reopen. The claim is *res judicata*. I dismiss the claimant's application to set aside the COA in its entirety on this basis.
- [66] At the 2023/24 Applications, at the end of submissions, the claimant argued, but did not develop, that because some of the child support terms could not be enforced, the entire COA should be set aside. The claimant argued that the COA was a global settlement of all issues and the court could not re-write the terms of the COA. The claimant argued that this was making a new agreement for the parties. The respondent argued that the claimant was attempting to re-negotiate a better deal. In the concluding paragraphs of the 2024 Reasons, I stated that if the parties could not reach an agreement to revise the offending child support terms of the COA, that they could address this at a further hearing.
- [67] The issue is whether the unenforceability of some of the child support terms as being contrary to the Guidelines and public policy makes the entire COA unenforceable. In my view, in the circumstances of this case, the answer is no, and the claimant's application to set aside the entirety of the COA is dismissed on this basis as well.
- [68] First, child support terms in family law agreements are not subject to the same level of deference as other terms such as spousal support and property division, and the test for setting child support terms is lower: *Davey v. Hinz*, 2022 BCCA 232 at para. 52-55; *Reid v Reid*, 2017 BCCA 73 at paras. 87-88. This reflects the courts' overriding concern with the best interests of the child and the child's right to support. The court is not bound by an agreement reached by guardians as to the support of children: *Kaler v. Kaler*, 2013 BCCA 57 at para. 26.
- [69] In *Miglin v. Miglin*, 2003 SCC 24 at para. 78, the Court directed that family law agreements should be considered holistically, as a smaller amount on one item may be explained by a concession or larger amount on another. However, that does not mean that a term that is found to be lacking in some way, necessarily results in the entire agreement being void or unenforceable. Rather, the Court's statement reflects the deference that should be given to family law agreements, particularly those that concern spousal support or property division. As stated in *Kopp v. Kopp*, 2012 BCCA 140.

[37] The generally deferential approach to separation agreements mandated by the Supreme Court in *Miglin* applies, in my opinion, primarily in the context of agreements for spousal support. The policy issues and legislative requirements for child support are significantly different. A child's right to support cannot be bargained away by a parent (see *L.S. v. E.P.*, 1999 BCCA 393 at para. 58), *Dickson v. Dickson* (1987), 1987 CanLII 158 (BC CA), 21 B.C.L.R. (2d) 69 (CA), and Parliament has set out clear standards in the Guidelines for determination of child support obligations. The options available to parents to negotiate child support are limited, and while negotiated settlements in matrimonial matters are encouraged, courts have a separate responsibility to children to ensure their interests are upheld. Thus, the appropriate weight to be accorded an agreement for child support will be less than that accorded to an agreement for spousal support.

[Emphasis added.]

[70] Second, s. 148(3) of the FLA specifically provides the court with authority to set aside terms in a family law agreement that concern child support, but this includes consideration of how any variation would affect the balance obtained in an agreement. In *Hinz*, the Court stated:

[62] Finally, I should comment on the respondent's argument that interpreting s. 148(3) to allow for retroactive variation of child support orders risks upsetting the equilibrium reached through the terms of the Agreement and ignores the principle that agreements reached by parents should be given considerable weight. These arguments were considered by the Court in *D.B.S.*, which acknowledged those concerns but found that a variation could be ordered if the statutory regime permits it and circumstances have changed in a material way: at para. 78.

[63] I have concluded that the statutory scheme here clearly permits retroactive variation of a child support agreement. I note as well that the provisions of s. 150(4) are intended to allow a court to consider the child support provisions in an agreement along with the direct or indirect benefits obtained by the agreement and order an amount different from that required by the Guidelines. It can do so where adequate provisions for support have been made and it would not be inequitable. In other words, the court is given the ability to consider the whole of the agreement arrived at by the parties as well as the surrounding circumstances in deciding whether to order a variation. This would necessarily include considering whether the equilibrium would be upset by variation of the child support term in isolation.

[Emphasis added.]

[71] Third, and most importantly, while both parties argued that this was a global settlement, and the court must consider the COA holistically, the claimant could not point to any concession that she made that would make setting aside the impugned child support terms and replacing them with a more favourable order for the children (and indirectly her) somehow prejudicial or detrimental to her. The respondent has now accepted the concerns

that were identified in the 2024 Reasons, and is attempting to remedy them. These were generally the concerns that the claimant identified when she decided that she no longer wanted the COA entered as an order of the court. The claimant has not given up something in exchange for terms that are now being made worse from her perspective. The opposite is being proposed. She and the children are benefitting from the proposed replacement orders. Further, I note that child support is the right of the child, not the claimant's right.

- [72] Fourth, there is no suggestion that the parties were intentionally attempting to bargain away the children's right to support, such that the COA had an illegal purpose. As discussed in the 2024 Reasons, both parties had competent counsel when negotiating the COA, and it appeared that they had worked hard to try to find a solution to their continual disputes. Setting aside the offending provisions and replacing them with orders results in an agreement that can still be enforced. The policy grounds which encourage parties to come to agreements in family law matters as well as the policy grounds which protect the rights of children to reasonable support, are both respected by setting aside only the impugned terms, and entering the remainder of the COA as an order, as originally agreed to by the parties.

Issue 3: Should the child support terms of the COA be set aside and new orders made?

- [73] The respondent applies under s. 148(3) of the FLA to set aside the offending child support terms of the COA and replace them with orders. As the claimant's application to set aside the entirety of the COA was dismissed, in the alternative she also applies under s. 148(3) to set aside the child support terms of the COA, but she seeks that all of the child support terms be set aside and replaced with orders, not just the offending terms that I identified in the 2024 Reasons. This appears to be based on her belief that the respondent has underpaid monthly child support. However, she still wishes the court to fix monthly child support for up to three years in the future so that she does not have to return to court to argue over incomes and support. For the same reason, the respondent would be content with such a future order. This is what the parties already had already agreed to in the COA to try to avoid their yearly disputes over incomes.
- [74] Pursuant to s. 148(3), on application by a party, the court may set aside or replace with an order all or part of an agreement respecting child support "if the court would make a different order on consideration of the matters set out in section 150". This may be done retroactively: Hinz at para. 63.
- [75] The test for setting aside a child support agreement and replacing it with an order approximates the test for varying a child support order: Hinz at para. 54.
- [76] Since the COA varies existing child support orders, both the thresholds in s. 148(3) and s. 17 of the Divorce Act, R.S.C. 1985, c. 3 [DA] must be met, as the existing orders were made under the DA. In the 2024 Reasons, I held that the threshold in s. 17 for variation of the child support orders was met: at paras. 64-65. I also find that the threshold in s. 148(3) has been met because some of the child support terms of the COA do not make reasonable

arrangements for the support of the children. I conclude that I have concurrent jurisdiction to make orders under s. 148(3) of the FLA to set aside the child support terms and to make replacement orders, as well as under s. 17 of the DA to vary the existing child support orders with a revised COA, which the parties intended to be entered as an order of the court.

[77] Section 150 of the FLA restricts the child support orders that a court may make. There is very similar wording in ss. 17(6.1) to (6.5) of the DA, discussed at para. 46 of the 2024 Reasons. Child support must be determined in accordance with the Guidelines unless: (a) the parties have an agreement that the court is satisfied makes reasonable arrangements for the support of the child; or (b) there are "special provisions" in an agreement or order that benefit the child and applying the Guidelines would be inequitable. In the 2024 Reasons, I found that there were no special provisions: at paras. 84-86. I therefore must be satisfied that the COA, with the impugned terms set aside and replaced with orders, are reasonable arrangements for the support of the children.

[78] I turn to the specific child support terms.

Monthly Child Support

[79] In the 2024 Reasons, I summarized the monthly child support provisions of the COA:

[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".

[80] At para. 89 in table form, I made calculations of potential child support payable on the two scenarios mentioned earlier in these reasons, regarding the respondent's income:

[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:

- [81] The calculations under the two scenarios resulted in total monthly child support payable of \$331,506 and 316,862 respectively. The COA provides for a total of \$313,500 in monthly support, quite close to the second scenario.
- [82] However, after discussing the benefits and risks of this term in the COA, I found that the fixed monthly amounts were not a reasonable arrangement for the following reasons:
- [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.
- [83] The respondent is content with the monthly payment amounts in the COA and seeks to address these concerns with a term that the COA terms relating to monthly child support are varied by the addition of the following terms:
- a) The monthly child support terms shall be reviewable in the event that the claimant has all three children living with her, or if a child past the age of majority is living with her up to March 2028, provided the child or children are dependent children of the marriage as defined by the Divorce Act.
 - b) The monthly child support terms of the COA shall be reviewable in the event that a dependent child of the marriage is living with her past March 2028.
 - c) The monthly child support terms of the COA shall be reviewable if there is a material change in circumstances.
- [84] The claimant seeks that the Court set aside the child support terms, and then make orders as follows:
- a) The respondent forthwith pay arrears of child support and/or retroactive child support to the claimant retroactive to a date the court considers just and reasonable in the circumstances and based upon the court's determination of the respondent's Guidelines income for the years 2020 to the present, or an average of the same.

- b) The respondent pay to the claimant ongoing child support pursuant to the Guidelines for the support of the children, commencing either January 1, 2025 or such later date as this court determines just and reasonable and continuing thereafter on the first day of each month until further order of the court or agreement of the parties.

[85] I set out below in table form the amount of monthly child support that would be payable by the respondent assuming that each child becomes independent at age 19, which appeared to be the assumption the parties had used for the monthly child support in the COA. For the oldest MW who has become an adult that has held true. The other two children are not yet adults. I have used the determination of Guidelines income, being \$354,000 to and including 2024, and estimated \$283,000 thereafter:

\$354,000 to 2024; \$283,000 to March 2028

COA

Dec. 2021 to April 2023: three children with claimant

$\$5,984 \times 17 = \$101,728$

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

May 2023 to July 2024: two children with claimant; one with respondent (no set off)

$\$4,566 \times 15 = \$68,490$

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

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

$\$4,566 \times 5 + \$3,728 \times 11 = \$63,838$

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

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

$\$2,393 \times 28 = 67,004$

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

Total:

\$301,060

\$313,500

[86] For the following reasons, I dismiss the claimant's application to set aside the monthly child support terms and replace them with an order for retroactive and prospective child support. I vary the child support terms of the COA as proposed by the respondent.

- [87] The table above shows that the COA provides for reasonable monthly support up to the age of 19 for each child on the assumption that: (1) each child becomes independent at age 19; (2) each child no longer lives with the claimant once they turn 19; and (3) the respondent's annual income for the next three years up to March 2028 when the last child turns 19 is about \$283,000. It is unlikely that assumptions (1) and (2) will remain true for the two youngest children, but the respondent's proposals appropriately address if any of those assumptions turn out not to be correct, and provides for a review.
- [88] As for assumption (3), the respondent does not owe the claimant retroactive child support. What the parties agreed to in the COA has turned out to be remarkably close to the table amounts based on the respondent's Guidelines income to date. Even if the \$283,000 estimate of future income is low, the respondent's income could be considerably more without affecting the above conclusion. I have made the calculations, and if the respondent's Guidelines income is up to \$320,000 each year from 2025 to 2028, the total child support payable would be just under \$314,000, within a few hundred dollars of the total payable under the COA.
- [89] In coming to the above conclusions, I make clear that once a child becomes 19 and if that child remains a child of the marriage, the monthly amounts in the COA do not provide for any monthly support for that child. For example, if MC is attending university when she turns 19 later this year and remains a child of the marriage, the respondent will be obligated to pay an additional amount for her support beyond the set amounts in the COA. Similarly, if NW attends university and is a child of the marriage after age 19, the respondent will be obligated to pay child support. If a child remains a child of the marriage after turning 19, a review will have to take place if the parties cannot agree on the support payable. Given the history of this litigation, there is a legitimate apprehension on the part of both parties that they will not be able to agree and be in court again.
- [90] I have considered the parties' request to fix amounts in the future for children after age 19, but am not able to do so. While I am satisfied that there is a reasonable arrangement for monthly child support in the future for each child up until that child turns 19, it is not possible to set amounts after that because child support after the age of majority is not always simply the table amount. Section 3(2) of the Guidelines provides that child support payable for a child who is the age of majority or over is:
- (a) the amount determined by applying these Guidelines as if the child were under the age of majority; or
 - (b) if the court considers that approach to be inappropriate, the amount that it considers appropriate, having regard to the condition, means, needs and other circumstances of the child and the financial ability of each spouse to contribute to the support of the child.
- [91] The determination of what, if anything, should be contributed to the support of a child attending post-secondary education can be complex and value-laden: *Nordeen v. Nordeen*, 2013 BCCA 178 at para. 16. There are many circumstances that affect that determination,

including where the child is living, and what the child can contribute: *Farden v. Farden* (1993), 48 R.F.L. (3d) 60, 1993 CanLII 2570 (B.C.S.C.). Generally, if a child is not living at a parent's home, it is more likely the court will determine support under s. 3(2)(b) rather than s. 3(2)(a): *Nordeen* at paras. 16-17; *W.P.N. v. B.J.N.*, 2005 BCCA 7 at paras. 40-42.

Section 7 Post-Secondary Expenses

[92] At para. 106 of the 2024 Reasons, I summarized the provisions of the COA regarding 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.

[93] At para. 108 I stated the following regarding the RESP in the respondent's possession:

[108] 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.

[94] After discussion of the parties' positions, and the risks and benefits of the COA terms, at para. 111 of the Reasons, I concluded:

[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.

[95] The respondent agrees to the child support provisions of the COA being set aside and varied prospectively in accordance with the court's findings in the 2024 Reasons, but opposes it be done retroactively so that no order is made for expenses claimed by the claimant for this past year while MC was attending university. The respondent seeks orders that the COA terms relating to post-secondary s. 7 expenses are varied as follows:

- a) The Respondent shall continue to pay up to \$5,000 per year, to a cap of \$20,000, towards each child's post-secondary expenses.

- b) In the event that any child's post-secondary expenses exceed \$5,000 per year, or \$20,000 in total, these expenses shall be shared between the parties on the 70/30 basis set out in the COA.
- c) The post-secondary section 7 expense terms of the COA shall be reviewable if there is a material change in circumstances.

[96] The claimant seeks orders that the COA include:

- a) Post-secondary education expenses including tuition, books, parking fees, and room and board costs if those are not included in basic child support;
- b) Travel expenses for MC to travel to/from Kamloops and Langley at least 6 times per year, including airfare when such travel is necessary; and
- c) Any other expenses that the parties agree are special and extraordinary expenses, with agreement not to be unreasonably withheld;

[97] The claimant disputes the respondent's position that the first \$5,000 is being paid by him. The claimant also seeks orders for reimbursement of what she claims are s. 7 post-secondary expenses paid by her for MC to date.

[98] In my view, both parties have made reasonable proposals for how to address the impugned portions of the post-secondary s. 7 expenses, and I adopt portions of each of their suggestions in the orders I will make, in accordance with the discussion below. The parties' arguments raise four issues.

Is the RESP family property?

[99] The respondent states that he has paid for all of MC's tuition this past year, which was about \$5,600. The claimant disputes this; she states that the amount the respondent paid came from the RESP which was in existence during their marriage, and it is family property. The claimant does not believe that the respondent has deposited any further funds to the RESP since the parties separated in 2012. The respondent's position is that the division of property was addressed by Justice Harvey at the trial, and the RESP is his separate funds.

[100] The claimant's argument is essentially that to the extent funds come first from the RESP account, she is presumptively paying one half. The trial reasons of Justice Harvey do not indicate whether the RESP is family property. It is impossible to determine which party is correct on the material filed on this application. In my view, I do not need to determine this. If the RESP is family property, the first \$5,000 of post-secondary educational expenses will come from this account, and the respondent and claimant are effectively each paying 50%, as opposed to the claimant paying only 30% of that amount. This is a difference of \$1,000 for the claimant. If the RESP is not family property, then the respondent has agreed to pay 100% of this, and the claimant has no reason to complain. Either situation provides reasonable support for the children. On the proposals, any expenses above \$5,000 per year are shared 70/30, which on the parties' current incomes is reasonable and very close to the

current proportionate sharing of expenses.

Should the COA terms regarding s. 7 post-secondary expenses be set aside retroactively, or only prospectively such that no retroactive award is made?

[101] The respondent submits that the COA should only be varied prospectively. I disagree. Some of the s. 7 post-secondary terms in the COA are not enforceable because they do not provide for the reasonable support of the children. The respondent has known of this conclusion since well before MC started attending university in September 2024. There is nothing unfair in requiring the respondent to pay s. 7 post-secondary expenses for up to eight months ago, and as little as last month. He was aware of his obligation to support MC, and her corresponding right to support, the claimant's claim, and the payment of the proper s. 7 post-secondary expenses claimed will not cause him hardship.

Which of the expenses claimed are properly shareable s. 7 post-secondary expenses for MC?

[102] The claimant states that to date she has spent much more than the respondent to support MC at university. In Exhibit A of her 49th affidavit sworn January 15, 2025 ("Exhibit A") she claims \$9,909 in expenses up to January 9, 2025. This includes three payments of \$1,200 to her mother for room and board for MC, winter tires for MC's car, flights home for MC as she did not want MC driving on winter roads, and expenses billed by MC to the claimant's credit card for living expenses. The claimant accepts that some of this may be covered by the monthly support payments she received under the COA, and will receive until MC turns 19.

[103] The respondent has not reimbursed the claimant for these other claimed expenses. The respondent disputes the \$1,200 per month is a shareable s. 7 expense. The respondent states that the \$1,200 per month was not disclosed to him until these application materials were exchanged. He submits that e-transfers from the claimant to her mother do not prove the expense. He was not consulted and understood there would be no room and board costs associated with MC staying with her grandmother. He was given no opportunity to look into alternative accommodations, or to financially plan for this, or to discuss with MC whether an equivalent program could be completed in the Lower Mainland. The claimant responds that it is not her mother's responsibility to support MC.

[104] Further, pursuant to the COA, he is already paying monthly support to the claimant on the basis of two children living with her. The respondent submits that when a child resides away from either parent while attending post-secondary, typically s. 3.2(b) of the Guidelines is applied, and if university residence or accommodation costs are shareable s. 7 expenses, that monthly child support would not be paid for that child: see for example *L.H.M.K. v. B.P.K.*, 2012 BCSC 435 at paras 160-183. He submits that if the \$1,200 per month is a shareable s. 7 expense, the monthly payment of support for MC should be decreased.

- [105] The respondent consents to MC's airfare to and from Kamloops up to three times per year as being a shareable s. 7 expense, provided the flights are in economy class and booked at least a month in advance to avoid unnecessary fees. The claimant states that with variability in airfares, it is not always cheaper to book economy or a month in advance, but agrees the airfare should be reasonable.
- [106] Pursuant to s. 7(1)(e) of the Guidelines, the court may order an amount to cover all or a portion of expenses for post-secondary education, taking into account the necessity of the expense in relation to the child's best interests and the reasonableness of the expense in relation to the means of the spouses and those of the child and to the family's spending pattern prior to the separation.
- [107] MC is not yet 19 years old, so the interplay between s. 3(2) and s. 7 expenses does not apply. As the respondent is already paying monthly child support for MC until age 19, he should receive credit for this. There is overlap between this monthly amount and MC's living expenses in Kamloops, but as both parties acknowledge, it is not on a dollar for dollar basis because there is an extra cost in having two homes for MC. The issue is what portion of the expenses claimed are reasonable s. 7 expenses?
- [108] I do not accede to the respondent's argument that the claimant has not proven the \$1,200 per month expense. It is a reasonable amount, and she has shown the transfers to her mother. In my view, it was unreasonable for the respondent to assume that MC would be provided with free room and board at her grandmother's home. It is his and the claimant's responsibility to support MC, not her grandmother's responsibility. However, the monthly child support that the claimant receives should cover this expense.
- [109] The difference in Guidelines monthly child support between one child and two children at an income of \$354,000 is \$1,619 per month. At an income of \$283,000, the difference is \$1,335 per month. The average is about \$1,500 per month. That is some measure of the monthly support attributable to MC. The total costs claimed by the claimant in Exhibit A are about \$2,500 per month for MC to attend university, not including tuition. This includes time that MC is home at reading break or winter break. Those short periods do not justify a different calculation. Thus, there is about a \$1,000 difference between the cost the claimant claims, and what she is receiving in support for MC (\$2,500 less \$1,500).
- [110] Reviewing the credit card statements that have been produced, about \$500 per month is for items that would be covered by monthly child support. This includes groceries, clothing, toiletries, and eating out, and these should be deducted. This reduces the extra cost to about \$500 per month which includes some of the flights and car expenses. I determine that for this past university year to April 2025, the respondent should pay another \$350 per month (70% of \$500 per month), toward MC's expenses. Neither party suggests that MC should have contributed to her support this past university year. To avoid the parties having to exchange receipts and argue further about expenses for the spring term ending in April 2025, I am fixing that amount for the spring term as well.

[111] Therefore, the total s. 7 post-secondary expenses owing by the respondent to the claimant from September 2024 to April 2025 is \$2,800 being eight months at \$350 per month.

What s. 7 expenses and/or monthly support are payable in the future?

[112] Once MC and NW each become adults, the claimant will no longer receive monthly child support for them under the COA, and as a result, if they remain children of the marriage, the parties will need to come to an agreement as to the monthly amount of child support and s. 7 expenses payable for them.

[113] I cannot fix amounts in the future because the factors are too variable. The most that can be done is identifying categories of expenses that will be considered in determining the amount of support, but the means of the child will also be considered. The parties will have to agree on an amount for MC once she turns 19, or unfortunately return to court. I have referenced s. 3(2) of the Guidelines. To reduce conflict, I would suggest that well before MC starts her next term of studies, that both parties and MC draw up a budget and that the parties try to agree on a monthly amount payable by the respondent that will cover all reasonable anticipated support and expenses for the school year and during the summer breaks. This would avoid the parties having to submit receipts and invoices to each other.

Section 7 Expenses other than Post-Secondary

[114] At para. 92 of the 2024 Reasons, I summarized the pertinent terms of the COA concerning s. 7 expenses other than post-secondary expenses:

- 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.

[115] After reviewing various aspects of the orders and the parties' positions, I concluded as follows:

[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.

[116] The respondent seeks that the non-post-secondary s. 7 expense terms of the COA be prospectively set aside and replaced with the following orders:

- a) Upon NW turning 19 years of age, if he remains a dependent child of the marriage, his reasonable and agreed upon section 7 expenses shall be shared between the parties on the 70/30 basis set out in the COA, with consent not to be unreasonably withheld by either party.
- b) Irrespective of the section 7 expense fund, the parties shall continue to share the dependent children of the marriage's reasonable and agreed upon health-related section 7 expenses on the 70/30 basis set out in the COA, with consent not to be unreasonably withheld by either party.
- c) The non-post-secondary section 7 expense terms of the COA shall be reviewable if there is a material change in circumstances.

[117] The claimant seeks that the non-post-secondary s. 7 expense terms of the COA be set aside retroactively and replaced with the following orders:

- a) An order that the parties shall share the following special and extraordinary expenses for the children in accordance with s. 7 of the Guidelines in proportion to their incomes, or in the alternative, with the claimant paying 30% and the respondent paying 70% of the same, subject to any adjustments that the court may make both retroactively and on an ongoing basis:
 - i) Any medical and dental expenses not covered by insurance, including, but not limited to:
 - (1) counselling for NW;
 - (2) counselling for MC with Brian O'Neill or any other counselor or health-care provider of MC's choosing whose services are not covered by any MCFD funding that MC receives.
 - (3) orthodontic fees; and
 - (4) prescriptions and necessary medical costs.

Ii Private school tuition;

iii. Extracurricular activities including but not limited to:

- (1) school related activities at the private school the NC attends;
 - (2) soccer; and
 - (3) programs/groups related to NW's goals for post-secondary education.
- b) An order specifying s. 7 expenses for enforcement purposes moving forward, and an order that the respondent pay to the claimant the sum of \$30,940 on account of s. 7 expenses that the claimant has solely incurred on behalf of the children from June 2020 to September 19, 2023 as evidenced in her 43th affidavit, which represents 70 percent of the \$44,200 paid by the claimant for counseling, orthodontic, bus, private school tuition, psychological testing, and miscellaneous school fees.
 - c) An order that any arrears or overdue amounts ordered pursuant to the above paragraphs be paid by the respondent forthwith or upon terms and conditions this court determines just.
 - d) An order that, within 30 days from the date of an order, the respondent provide documents and/or particulars to the claimant regarding any reimbursement received by him from his insurance company for any of the children's expenses paid by the claimant since 2017, including any expenses paid by the claimant for the children and that the respondent thereafter pay to the claimant the total sum of any such reimbursement he received within 60 days from the date of an order.

[118] The amounts in b) above were revised by the time of this hearing. In total, the claimant claims \$49,477 in s. 7 expenses (see Exhibit A). As this includes \$9,909 in post-secondary expenses for MC, the total non-post-secondary s. 7 expenses is \$39,538. This sum includes amounts prior to November 30, 2021.

[119] For the reasons below, I adopt portions of each of the parties proposed orders, and reject other orders. The parties' arguments raise four issues.

Should the term of the COA settling any claim for contribution to s. 7 expenses prior to November 30, 2021, be set aside?

[120] The respondent states that any claim for s. 7 expenses incurred up to November 30, 2021 was settled as part of the \$260,000 lump sum paid to the claimant upon signing of the COA.

[121] 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

[122] In the 2024 Reasons, I found that \$225,000 of the lump sum payment was attributable to future spousal support, and \$35,000 was attributable to the settlement of the other mentioned claims. With respect to these other claims, the claimant alleged what I estimated 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 (not yet adjudicated) costs and fines. The respondent alleged that there was no child or spousal support owing as of November 30, 2021 under the 2021 Order, very little s. 7 expenses owing, and that the claimant owed him spousal support for a reduction of 2014 to 2017 spousal support which had not taken place as ordered in the 2017 variation application: at paras. 73-74. I concluded that the \$35,000 was a compromise of the parties' positions on these other issues: at para. 75.

[123] In my view, there is no basis upon which to set aside the settlement of s. 7 expenses up to November 30, 2021. The \$35,000 settlement was a compromise of disputed claims between the parties who both were well-represented by experienced counsel. Given the amounts involved, and the time and expense that had been spent on these issues, for years, this was a reasonable settlement.

[124] I therefore find that any s. 7 expenses on Exhibit A which were incurred prior to November 30, 2021 cannot now be claimed. These are: (a) \$398 claimed under the heading School Expenses; and (b) \$10,385 claimed under the heading Assessment and Counselling.

Should the COA terms regarding s. 7 expenses other than post-secondary be set aside retroactively, or only prospectively such that no retroactive award is made?

[125] The respondent submits that the claimant's lack of consultation with him, the terms of the COA, and the respondent's good faith efforts to follow the COA support that no retroactive award should be made for s. 7 expenses, or in the alternative, that they be reduced significantly in quantum.

- [126] The respondent states he is agreeable to sharing reasonable s. 7 expenses on an ongoing basis, but he should be notified of these before they are incurred to allow him to explore whether the expenses can be covered by insurance. He argues that it is unreasonable for the claimant to periodically present him with unexpected receipts totalling \$5,000 or more. He argues that many expenses would have been covered by his extended health plan, such as physiotherapy and chiropractic, had he been notified. Although the respondent acknowledges that he has more assets and income than the claimant, his argues that his income is not so high as to automatically make unilaterally incurred s. 7 expenses reasonable and shareable.
- [127] In my view, the terms of the COA regarding the limits on s. 7 expenses other than post-secondary expenses must be set aside retroactively, and not just prospectively. The primary reason for this, as I will discuss below, is that I find that the children needed this funding, and the expenses for health care which form the vast majority of the expenses claimed were reasonable and necessary.
- [128] While I agree that the respondent should be consulted regarding major health care expenses, and the claimant has not been diligent at doing this, I do not agree with all his arguments. Having now dealt with these parties for several years, I conclude that the respondent has not acted in good faith when it comes to s. 7 expenses. For example, there was a one-year delay before he paid \$6,497 in s. 7 expenses after the COA was signed, and it was only paid on the eve of the 2023/24 Applications. He misrepresented that he had paid private school tuition, or did not know about amounts outstanding, and he again only paid a large lump sum (several years owing) on the eve of the 2023/24 Applications. As another example, in the past he has cancelled appointments with health care providers because he did not approve of them despite long-term or other therapeutic relationships with the children, and he has refused to allow a chiropractor treating one of the children to bill to his extended health plan.

Which of the expenses incurred after November 30, 2021 are properly shareable s. 7 expenses?

- [129] The relevant portions of s. 7 of the Guidelines state:

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

- (a) child care expenses incurred as a result of the employment, illness, disability or education or training for employment of the spouse who has the majority of parenting time;

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

[130] Section 7(1.1) defines the criteria for an expense to be extraordinary. Those which are relevant here are expenses that exceed those that the requesting spouse can reasonably cover, taking into account that spouse's income and the amount that the spouse would receive under the applicable table, or where the court has determined that the table amount is inappropriate, the amount that the court has otherwise determined is appropriate.

[131] In *Bodine-Shah v. Shah*, 2014 BCCA 191 at para. 66, the court outlined the differences between special and extraordinary expenses:

[66] Special expenses listed in ss. 7(1)(a)-(c) and (e) are distinct from extraordinary expenses referred to in ss. 7(1)(d) and (f). Special expenses are defined as relating to child care, medical or dental insurance premiums, health-related costs, and post-secondary education. They must be found to be reasonable and necessary. Extraordinary expenses are not defined. Their extraordinariness is determined in the context of the combined income of the spouses, as well as other considerations, including the nature and amount of the individual expense, the nature and number of the activities, any special needs or talents of the child, and the overall cost of the activities. They also must be found to be reasonable and necessary. Relevant considerations for the tests of necessity and reasonableness include whether the expenses are necessary in relation to the child's best interests, and reasonable having regard to the means of the spouses, the child, and to the family's spending pattern prior to separation. See *McLaughlin v. McLaughlin* (1998), 57 B.C.L.R. (3d) 186 at paras. 81-82 (C.A.). In assessing "means", the court may consider the parties' capital assets, income distribution, debts, third-party resources, access costs, support obligations, receipt of support, and any other relevant factor: *Delichte v. Rogers*, 37 R.F.L. (7th) 81 at para. 38. Courts may consider whether the non-custodial parent was consulted regarding the expense, though a lack of consultation does not automatically preclude a finding that the expense is reasonable and necessary: *Delichte* at paras. 39, 44.

- [132] I will first address the expenses incurred after November 30, 2021, under the heading School Expenses in Exhibit A. The claimant claims \$670 in fees for items such as books, taking an exam, a soccer banquet, a field trip, a graduation cruise, and what are called "tuition non-receiptable" which are not explained, and are small amounts in addition to the regular tuition. Except for the graduation fee and cruise which were a total of \$150, they are all in the range of \$12 to \$60.
- [133] These are not properly claimable s. 7 expenses. They are ordinary expenses, and are covered by monthly support payments. Expenses such as school supplies, school or extracurricular recreational sports fees, and activities such as field trips are not extraordinary expenses. To be extraordinary, the participation would have to be beyond that of the average child: *Clarke v. Clarke*, 2014 BCSC 824 at paras. 47-58.
- [134] The claimant also claims \$2,015 for bus fees for the two youngest children to attend school for the 2022/2023 school year. The payment history from the private school shows that the total was actually \$1,842, as two months were at \$115 per month.
- [135] The bus fees are reasonable and necessary. The expense is in the children's best interests. The expense could be considered as a form of child care cost as otherwise the claimant would have to drive the children to school, or they could be considered an extraordinary expense of education. If they are the latter, I find that considering the means of the parties and the amount the claimant receives as monthly support, that this expense should be shared by the parties.
- [136] The next category of expenses in Exhibit A is Assessment and Counselling after November 30, 2021. This is for MC and MW. The claimant claims a total of \$16,190 from December 1, 2021 to January 9, 2025. The claimant states that she is the primary care provider and she has tried to involve the respondent in the health care decisions for the children, but he has not participated nor made himself knowledgeable, and that these were necessary and reasonable expenses to support the children's mental health.
- [137] The respondent states he supports the children's mental health, but does not agree that all counselling costs claimed are reasonable or necessary. He also alleges that the claimant does not consult him, and he could have arranged for the children to see psychologists (which are covered under his health plan) rather than counsellors which are uninsured.
- [138] Health care costs are special s. 7 expenses, and they are shareable if they are reasonable and necessary. The conflict over this, and other health care costs, which has now gone on for years, has to end. I conclude on a balance of probabilities that the claimant's claimed costs are necessary in relation to the children's best interests, and reasonable in relation to the means of the spouses. In my view, there is no question that both MC and MW needed at least some mental health supports. MC's mental health struggles were identified by school counsellors when MC was in high school to the extent that a counsellor recommended support during the summer school break, MC was admitted to hospital for mental health issues, she has been diagnosed by a psychologist, and she has been approved for the last

two years for approximately \$6,000 in government funding each year for counselling. Although there is much less information regarding MW, there is evidence that he did not attend the private school in his last year due to issues that arose, and that he had a somewhat tumultuous time moving back and forth between his parents' residences.

- [139] The conflict between the parties has prevented them from having any reasonable conversation regarding their children's health care. The claimant did not always consult with the respondent in a timely way regarding the costs she was incurring, and she should have done so. On the other hand, the respondent has been less than cooperative at times, and has interrupted the therapeutic relationship between counsellors and MC. Both parties are to blame for this state of affairs. The children's health care cannot be compromised because of their parent's disputes. The children are entitled to this support.
- [140] I am ordering the respondent to pay for his share of these expenses. It was not reasonable to limit the children's necessary and reasonable health expenses to a certain amount. I will make provision for such additional expenses. I note that the amount of counselling claimed by the claimant covers a period of more than three years. In the COA, the respondent agreed to pay counselling for MC and MW of once every two weeks for the year of December 1, 2021 to December 1, 2022. At \$140 per session that was being charged, that would have been a maximum of \$7,280 for one year. I do not consider the \$16,190 over a much longer period to be out of line with that. The respondent will pay 70% of \$16,910 in counselling expenses from December 1, 2021 to December 31, 2024 for MC and MW.
- [141] The final category in Exhibit A is under the heading "Misc. Medical" and includes chiropractic, a small amount of counselling for NC, orthodontic expenses, and physiotherapy expenses. The total is \$9,192. The orthodontic expenses of \$6,500 is the largest expense. The respondent agreed to contribute to the orthodontic costs, as he should. In my view, these are reasonable and necessary expenses. The respondent will pay 70% of \$9,192.
- [142] Shortly before the 2023/2024 Applications, the respondent paid the claimant \$6,496. This must be deducted from the amount he owes.
- [143] In summary, I determine the amount owing by the respondent for s. 7 expenses other than post-secondary, to be 70% of \$1,842 in bus fees, plus \$16,910 for assessment and counselling, plus \$9,192 miscellaneous medical, for a total of \$27,944 = \$19,561. From this must be deducted the \$6,496 he has already paid, with the net amount owing of \$13,065 to December 31, 2024.

Has the respondent been reimbursed by his insurer for expenses paid by the claimant?

- [144] The claimant states that she has paid for expenses out of pocket, and sent them to the respondent for reimbursement, and believes that he has been reimbursed for those expenses, but that he has not reimbursed her. She seeks an order to review these expenses back to 2017.

- [145] The respondent states that he has not improperly taken reimbursement for s. 7 expenses paid by the claimant. The respondent states that at times the claimant has sent receipts, but they were not incurred with his consent, and she did not provide him with both original invoices and proof of payment, which are required for him to submit the expenses to his extended health plan. The respondent has produced print-outs from his insurer showing the amounts that have been submitted and paid. The claimant believes that these only provide detail of direct billing instances and do not show any expenses submitted by the account holder. She states that she is the person who took the children and paid the out of pocket expenses.
- [146] I dismiss the application for this order. In the 2023/2024 Applications the claimant made the same arguments. At para. 94 of the 2024 Reasons, I discussed that I had compared the amounts she said she had paid and the insurer's statements (see Ex. A of the respondent's 41st affidavit) and there is no overlap. I have reviewed these again, and come to the same conclusion. There is nothing to indicate that the print-out is direct billing only.
- [147] Finally, I remind the parties that the COA, which they are bound to follow, provides an appropriate mechanism for the parties to consult on, present, and share the cost of s. 7 expenses. The COA includes terms to address the submission of expenses to each other and the insurer, including the timing of this and the reasonable proof of payment required by the insurer, and the respondent being required to facilitate direct reimbursement to the claimant.

Issue 4: What other orders should be made as requested by the claimant?

- [148] The other orders sought by the claimant concern: (a) declarations as to where the children have lived since 2020 in connection with the Canada Child Benefit ("CCB") and BC Family Benefit ("BCFB"); and (b) reimbursement of expenses, a fine and special costs. I will address them in that order.

CCB and BCFB

- [149] The claimant seeks orders that:

- a) the claimant may claim the Canada Child Benefit (CCB) for all years the children resided with her in 2020, 2021, 2022, 2023, 2024 and all future years so long as the children continue to be eligible and to reside primarily with the claimant.
- b) the claimant may claim the Disability Tax Credit for MC for the years in which the respondent claimed the children wrongly and that she is eligible mainly 2020 - 2024 and all future years so long as MC continues to be eligible for same.

- [150] This court does not have the jurisdiction to determine who is eligible for the CCB. That is done by the Canada Revenue Agency ("CRA"): S.A.H. v. J.J.G.V., 2019 BCSC 2438 at paras. 33-38. By the time of this hearing, the claimant sought in the alternative that the court make a declaration as to where the children were living to assist her in dealing with the CRA. The respondent does not oppose this, and I will make the order.
- [151] The genesis of the claimant's request for these orders is that on the respondent's tax returns for 2020 to 2023, he answered "yes" to the question of whether he was eligible to receive CCB, and represented that the children were not in a shared parenting situation (i.e. which implies they were living with him). The three children did not reside with him. In fact, only MW lived with him, and it was for a very short period of time between October 2020 and March 2021. Otherwise, the three children lived solely with the claimant.
- [152] This information resulted in the CRA denying the claimant's claim for the CCB and BCFB, and her ability to apply for the Disability Tax Credit for MC. The claimant was reassessed for the periods July 2020 to June 2023, with the CRA stating that she was "no longer eligible". The CRA claimed she owed nearly \$15,000 in CCB overpayments and another about \$3,000 in BCFB overpayments. The CRA deducted these claimed amounts from the tax refund owing to the claimant - funds she needed. The claimant has just recently been able to have this issue resolved with the CRA, no doubt after stress and aggravation.
- [153] In his affidavit made November 9, 2023 the respondent states that he has "not attempted to mislead the government" with respect to the CCB or BCFB or attempted to improperly obtain a benefit to the detriment of the claimant. However, he attaches a notice from the CRA dated April 20, 2023 which states that the CRA has determined that he is "no longer eligible to receive CCB payments". The CRA has applied the overpayment to him against his tax refund. In his latest affidavit, the respondent states that he does wish to interfere with the claimant obtaining CCB credits to which she is entitled and the CRA has accurate information. He attaches an email from his accountant dated December 12, 2024 which states that they "confirm that [he] did not apply for CCB for 2022 and 2023." I do not accept this hearsay evidence. The tax returns speak for themselves.

Reimbursement of expenses, fine, and special costs

[154] The claimant seeks:

- a) An order pursuant to section 213 of the Family Law Act, that the respondent shall forthwith pay to the claimant for all expenses she has reasonably incurred as a result of the respondent's conduct, or alternatively a fine not exceeding \$5,000 for the respondent's intentional non-compliance with Rule 5-1 and 9-1 of the Supreme Court Family Rules as to financial disclosure, including his failure to produce an updated and complete Form 8 Financial Statement and failure to produce full and accurate disclosure relating to his rental income.
- b) Costs, including special costs, against the Respondent.

[155] The claimant argues that the respondent's Form F8 financial statements have been incomplete as they do not provide details of his bank accounts, investment accounts, RRSP's, and the children's RESP, nor his other property. She also refers to the 2023/24 Applications and the respondent's failure to disclose to the court that X obtained a tenant for the commercial property.

[156] The respondent argues that appropriate financial disclosure has been provided to the claimant, through his 2023 and 2024 Financial Statements, and other affidavits.

[157] The relevant portions of s. 213 of the FLA state:

213(1) This section applies if a person

(a) fails to comply with

(i) an order for disclosure made under section 212 [orders respecting disclosure], or

(ii) a requirement to disclose information in accordance with the Supreme Court Family Rules or the Provincial Court Family Rules,

within the time or in the manner required by the order or Rules, or

(b) provides information that is incomplete, false or misleading.

(2) In the circumstances set out in subsection (1), the court may do one or more of the following:

(a) make an order under section 212;

(b) draw an inference that is adverse to the person, including attributing income to that person in an amount that the court considers appropriate, and make an order based on the inference;

(d) make an order requiring the person described in subsection (1) to pay

(i) a party for all or part of the expenses reasonably and necessarily incurred as a result of the non-disclosure of information or the incomplete, false or misleading disclosure, including fees and expenses related to family dispute resolution,

(iii) a fine not exceeding \$5 000;

(e) make any other order the court considers appropriate.

[158] The COA contains a term that the lump sum payment includes settlement of any claims for costs or fines up to November 30, 2021. As a result, I only consider events after that date.

[159] I have considered the following:

- a) As discussed previously, the respondent's financial disclosure does not include disposal of assets. Rather than a fine, the more effective remedy is to order under s. 212 that more fulsome disclosure be made, and as I have already done, impute investment income on the unexplained disposal of assets. If it appears that the respondent has misrepresented his financial status, then the claimant can address that through an application if she feels it is material. I will make an order for more fulsome disclosure;
- b) I do not accept the respondent's explanation for not disclosing that X obtained a tenant for the commercial property. The order for parties to exchange material for the 2023/24 Application by a certain date did not prevent him from providing the court with this evidence. His counsel filed further affidavit evidence after this date, and there would have been a strong argument that this new evidence should be admitted as it was material and was not available prior to then. The respondent is correct that he would have also disclosed that the mortgage interest rate increased, significantly increasing costs, and decreasing the profitability of X, but it would not have been a loss of the magnitude he was predicting without a tenant. However, I cannot conclude that this failure resulted in any extra costs to the claimant. This hearing would have been required regardless as the parties could not agree on revised terms for the COA, and the information would have been disclosed then. I therefore decline to make an order on this basis; and
- c) The respondent's actions concerning the CCB and BCFB are outside the litigation and do not concern disclosure of financial information within this litigation. If there is a remedy for this, it is not in this action.

[160] I have concluded that all of these, like many other instances, are part and parcel of the parties' dysfunctional relationship. Ordering a fine or that the claimant be reimbursed expenses will not assist in decreasing the parties' conflicts, and would only embark on a costly exercise of opening of other areas requiring assessment of blame for a myriad of events and circumstances, where both have contributed to the situations. I do not find the matters complained of rise to the level of reprehensible conduct justifying special costs. I decline to make such orders.

Orders

[161] Pursuant to s. 148(3) of the FLA, the terms of the COA [which shall be attached to the entered order] are incorporated into this order, subject to the following:

[162] Clause 5 of the COA as it relates to s. 3(1) monthly child support, is set aside and replaced with the following orders:

- a) Despite clause 4 of the COA,

- i) the monthly child support terms shall be reviewable in the event that the claimant has all three children living with her, or if a child past the age of majority is living with her up to March 2028, provided the child or children are dependent children of the marriage as defined by the DA;
- ii) the monthly child support terms of the COA shall be reviewable in the event that a dependent child of the marriage is living with the claimant past March 2028; and
- iii) the monthly child support terms of the COA shall be reviewable if there is a material change in circumstances.

[163] Clause 9 of the COA relating to post-secondary s. 7 expenses is set aside and replaced with the following orders:

- a) Despite clause 8 of the COA, in the event that any child's post-secondary expenses exceed \$5,000 per year, or \$20,000 in total, the expenses above either of these amounts shall be shared between the parties, with the respondent paying 70% and the claimant paying 30%;
- b) The post-secondary support and expenses payable by the parties shall include the parties' reasonable contribution to:
 - i) tuition, books, parking fees, and room and board costs if those are not included in the monthly s. 3 child support;
 - ii) reasonable travel expenses for the child to travel to the post-secondary institution and his or her regular home, if that is different. For MC, this shall include her reasonable travel expenses between Kamloops and Langley at least three times per school year, including airfare when such travel is reasonable; and
 - iii) any other expenses that the parties agree are special and extraordinary post-secondary expenses, with agreement not to be unreasonably withheld.
- c) The post-secondary s. 7 expense terms of the COA shall be reviewable if there is a material change in circumstances.

[164] Clauses 11(d), 15 and 16 of the COA relating to non-post-secondary s. 7 expenses are set aside and replaced with the following orders:

- a) In addition to the s. 7 expenses listed in clause 12 of the COA, the parties shall pay additional special or extraordinary expenses of the children, with the respondent paying 70% and the claimant paying 30%, such expenses to include:
 - i) reasonable and necessary medical and dental expenses above those listed in Clause 12 of the COA, above any amounts not covered by insurance, including, but not limited to: counselling, orthodontic fees, and prescriptions. Provided however, that prior to incurring any significant expense, the parties consult with each other regarding the expense, with agreement in writing regarding the expense not to be unreasonably withheld;

- ii) extraordinary secondary school expenses for NW;
- iii) any other expenses that the parties agree in writing are special or extraordinary non-post-secondary expenses, with agreement not to be unreasonably withheld;

b) the non-post-secondary s. 7 expense terms of the COA shall be reviewable if there is a material change in circumstances.

[165] Within two weeks of this order, the respondent shall pay to the claimant \$2,800 for all of MC's s. 7 post-secondary expenses owing up to April 30, 2025.

[166] Within two weeks of this order, the respondent shall pay to the claimant \$13,065 as special and extraordinary non- post-secondary expenses owing up to December 31, 2024.

[167] Upon payment of the above amounts by the respondent, there are no further arrears of s. 7 expenses owing to the claimant.

[168] I declare that:

1. MW lived primarily with the claimant between October 2019 and January 2020, March 2020 and May 2020, and March 2021 to May 2023. MW lived primarily with the respondent between October 2020 and March 2021; and
2. MC and NW have lived primarily with the claimant from July 2020 to the present, although MC temporarily lives in Kamloops while attending university as of September 2024.

[169] Except as set out in this order, the orders sought by the respondent in his notice of application filed December 20, 2024, and the orders sought by the claimant in her notice of application filed December 30, 2024, are dismissed. The claimant did not pursue the order sought in para. 6 of her notice of application, and no order is made with respect to that matter.

[170] By June 30, 2025, the respondent will file and deliver an updated Form F8 financial statement to the claimant, with such form to be completed fully, including a listing of all assets, whether excluded or not by the pre-nuptial agreement, and including a listing of the disposition of all assets since 2020.

[171] For so long as there is a child of the marriage as defined by the DA, by June 30 each year, the parties will provide to each other, a copy of their previous year's filed tax return along with any notice of assessment or reassessment, and the respondent will provide to the claimant a copy of the financial statements of Connor Industries and X for the prior year.

[172] Each party will bear their own costs of these applications, including for the 2023/2024 Applications.

"Norell J."

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