
CANADA / JUDGMENT

S. M. S. v. S. M. U.

2021 BCSC 933

COURT

Supreme Court of British Columbia

DECIDED

17 May 2021

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2021 BCSC 933 S. M. S. v. S. M. U.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

S. M. S. v. S. M. U.,

2021 BCSC 933

Date: 20210517

Docket: 141020

Registry: Victoria

Between:

S. M. S.

Claimant

And

S. M. U.

Respondent

Before: The Honourable Mr. Justice Punnett

Reasons for Judgment

Counsel for the Claimant:

S. Tucker

Respondent on his own behalf:

S. M. U.

Place and Date(s) of Hearing:

Victoria, B.C.

September 8, 2020

February 22, 2021

Written Submissions of Claimant:

February 25, 2021

Supplementary Written Submissions of Claimant:

March 11, 2021

Written Submissions/Affidavit of Respondent:

March 16, 2021

Place and Date of Judgment:

Victoria, B.C.

May 17, 2021

Introduction

- [1] This matter is a consolidation of several applications filed in 2016 and 2019 relating to parenting and the support of a 15-year-old girl turning 16 on August 6, 2021. Parenting in the past was shared. However, the child left the respondent's home on August 21, 2019, refuses to return and has resided with the claimant since then, with little meaningful contact with the respondent.
- [2] The parties married on April 12, 2002. Their daughter, A.U., was born on August 6, 2005. They separated on December 1, 2006 but co-parented while living in the same home until 2013. They were divorced on April 25, 2014. They have each remarried, the claimant to C.S. and the respondent to E.L.
- [3] As parenting issues first arose in 2015 and there have been several applications and orders, I first summarize the procedural history.

Procedural History

- [4] The parties entered into a separation agreement in February 2014 (the "Separation Agreement"). Many of its provisions were incorporated into the divorce order pronounced on April 25, 2014 (the "Divorce Order"). The provisions relevant to the current application are those relating to parenting and child support and are in both the Separation Agreement and the Divorce Order:

- a) The parties have joint guardianship and custody of A.U.;
 - b) They were to have shared equal parenting time on an alternating weekly basis;
 - c) They were to consult one another regarding important decisions affecting the child and, failing agreement, to attend mediation;
 - d) The respondent was to pay retroactive child support;
 - e) The respondent was to pay prospective child support after set-off of \$75.00 per month based on Guideline income of \$48,000 for him and \$40,000 for the claimant;
 - f) Special or extraordinary expenses were to be shared proportionate to their incomes;
 - g) There was to be an annual review of child support and exchange of financial information; and
 - h) The respondent was to maintain the child on his medical and dental extended health plan.
- [5] The parties co-parented without significant problems for a year.
- [6] Unfortunately, matters deteriorated after the respondent commenced residing with his present wife in 2015 and the parties disagreed on a number of issues relating to parenting and child support. Those include matters such as which middle school A.U. should attend, whether she should take the bus to school alone, whether after-school care was necessary and whether she could take her personal possessions including clothing from the respondent's home to the claimant's. These lead to the notice of application of April 20, 2016. The notice of application also alleged the respondent was under-paying child support at that time and requested disclosure of financial information by the respondent.
- [7] On June 6, 2016, Warren J. adjourned some of the relief sought pending production of additional financial information, dismissed some of the relief sought, made several other orders addressing areas of dispute and ordered that the child support of \$75.00 per month continue. The shared parenting also continued as it was not in issue on the hearing.
- [8] However, later in June 2016 the parenting schedule broke down and the child remained with the claimant. The child refused to have parenting time with her father over the summer. In September 2016, both parties filed notices of application regarding parenting arrangements. From December 2016 to September 2017, with the intervention of a psychologist, A.U.'s parenting time with the respondent was "stepped back up" to equal shared parenting time. This failed, and in August 2019 the child once again left the respondent's home and commenced living full-time with the claimant.
- [9] There have now been numerous applications to the court and a series of orders. The primary issue has been the parenting of their daughter.

- [10] On November 22, 2016, the respondent filed an application seeking a finding of contempt against the claimant and compensating parenting time. In response, on November 25, 2016 the claimant also filed a notice of application.
- [11] The hearing of the outstanding matters contained in the claimant's applications filed April 20, 2016, November 25, 2016 and September 18, 2019, and the respondent's November 22, 2016 application commenced on September 8, 2020.
- [12] The respondent filed a response to the September 2020 hearing in which he relied on previously filed affidavits. He did not file new material. He did not seek an adjournment, stating he was present because he wanted his daughter back and that she had been alienated from him by the claimant. He requested that counselling be ordered.
- [13] The hearing commenced, however, after the lunch adjournment the Court was advised by the Sheriff that the respondent was in the hallway having an apparent panic attack. Court was recalled and the situation with the respondent was explained by the Sheriff. As the respondent could not continue with the hearing it was adjourned generally. It continued before the Court on February 22, 2021. At that time the respondent had not filed any additional material, choosing to rely on previously filed affidavits although copies of those materials were not provided by him at the hearing. He did not seek an adjournment to file additional information.
- [14] At the conclusion of the hearing the lack of financial disclosure by the respondent was addressed. He was ordered to produce his 2017, 2018 and 2019 personal tax returns and Notices of Assessment by 4:00 p.m. March 2, 2021 and his 2020 T-4 as well if received by then, but if not then he was to produce his December 31, 2020 paystub showing his 2020 gross income.
- [15] Counsel for the claimant was given leave to make written submissions thereafter within 10 days including updated DivorceMate calculations with the respondent to file his response five days thereafter along with such DivorceMate calculations as he wished to provide.
- [16] Instead, on March 2, 2021 the respondent filed his 11th affidavit in this proceeding. It purports to be his response to the orders sought by the claimant. While it does contain the ordered income information, it also includes additional evidence and submissions regarding parenting arrangements and the claimant's income. The respondent did not have leave to file such additional evidence or submissions.
- [17] The disclosure and the submissions of the claimant have now been received. On March 16, 2021, the respondent filed affidavit number 12 with attached exhibits instead of submissions. Counsel for the claimant was invited to provide their position on receipt of such.

- [18] In his 12th affidavit the respondent submits he did not know he needed leave of the Court saying he had provided affidavits in prior hearings without having to request to do so. That is his only explanation for his failure to file material in response to the application in September and its continuation in February.
- [19] The portions of his affidavits number 11 and 12 that address parenting and the income or income to be imputed to the claimant are inadmissible. The respondent had clearly chosen not to file material before the hearing despite ample time to do so. The portions that attach the financial information ordered to be produced and his comments on such are admissible. The claimant does not object on the basis the Court should have actual financial information when addressing child support.
- [20] I note that even had affidavits number 11 and 12 been properly before the Court, they would not have changed the outcome of the applications.

Background

- [21] As is all too common in family litigation, there has been a substantial volume of material filed throughout the history of this matter. That material contains numerous allegations and counter-allegations with each side disputing what the other has to say. Navigating the thicket of such allegations does little to address the fact that the child is now almost 16 and has chosen to remain with her mother and refuses to reside with her father.
- [22] There has been a mediation. It was unsuccessful. The mediator interviewed the child. The child has also been interviewed by Mr. Justice Funt. Mr. Justice Funt, in several orders, sought to gradually re-introduce parenting time with the respondent. That has failed. On August 21, 2019, the child took her pet cat and moved from the respondent's home to her mother's. She has refused to spend time with the respondent since then. They have had limited contact other than on a couple of occasions and limited text communications.
- [23] The child has expressed her concerns in particular regarding the conduct of the respondent and his current wife and the stress she felt in their home. When she wrote about such in school in grade 10 the school contacted the Ministry of Children and Family Development who became involved. Her respirologist, Dr. Cameron had expressed a concern the child's anxiety may have reached a clinical level. As a result, Dr. Mills became involved. She has provided a Views of the Child dated April 16, 2017 and an updated Views of the Child dated January 31, 2020.
- [24] Dr. Mills interviewed the parties and the child. In her initial report dated April 16, 2017 she stated:

Before the request for the Views of the Child Report, the parents were provided with a letter dated 16 February 2017, from [A.U.]'s pediatrician. Dr. Scott Cameron. In this letter to the parents, Dr. Cameron indicated concerns about [A.U.]'s mental health and ability to cope with their family discord. Dr. Cameron noted that [A.U.] seemed anxious. He noted there were reports of some

symptoms that are typical of somatization (physical symptoms of stress and anxiety) such as abdominal pain and headache. Dr. Cameron recommended that [A.U.] would benefit from a professional assessment of her needs and urgent/rapid access to a psychologist.

...

[A.U.] presented on both occasions as a bright, friendly, thoughtful, sensitive and articulate eleven year old girl, age appropriate in dress and manner of interaction, capable of presenting her views and life experiences. She separated easily from either parent at her interviews and appeared comfortable and at ease.

...

It is recommended that [A.U.] receive counseling support to develop more effective coping strategies for anxiety, particular to manage stressors she sees as external to herself. In addition to helping [A.U.] manage her feelings more effectively, it may be helpful for a therapist working with [A.U.] to consider helping parents work toward a parenting style that is an adaptive fit to [A.U.]'s sensitive and anxious temperament. Children with sensitive and anxious temperaments appear to respond best to calm, consistent and organized parenting with minimal intensity and the perception of anger. Helping parents develop consistent methods between homes could be an important support to [A.U.]'s emotional well-being (Emphasis added).

[25] In her Views of the Child report update dated January 31, 2020 she states:

[The claimant] noted that [A.U.] has been seeing a counselor at Mary Manning Centre since 2019 which she felt has been helpful and supportive for [A.U.]. [The claimant] claimed that currently the biggest concerns for [A.U.] was wanting some assurance that she does not have to return to her father's home for parenting time and wanting the freedom to travel which is not available to her since [the respondent] was holding [A.U.]'s passport.

For the current report, [A.U.] was interviewed individually at the Langford Public Library on 25 January 2020, brought by her mother, and on 26 January 2020 at her mother's home. She was not brought to an appointment by her father since she is not currently in contact with [the respondent] or receiving parenting time from him. [A.U.] presented on both occasions as an articulate, insightful, thoughtful and sensitive 14 year old girl, age appropriate in dress and manner of interaction capable of presenting her views and life experiences. She appeared friendly and relaxed in our interviews.

When asked about her current parenting situation, [A.U.] recalled that the morning she went to her dad's, she felt she couldn't take it anymore. She claimed she had been planning on leaving his home and had trained her cat to go in a carrier

[A.U.] was asked for her reasons for leaving her father's home. She noted she felt there was a lack of care for her and a lack of respect for her and her mother. She recalled her father and step mother had been trying for years to get her to hate her mother but she felt this has backfired. She felt it was too much to hear negative statements about her mother. She claimed her father has called her mother a "terrorist[\"]. [A.U.] also claimed that her father has called her a "mutt", a mixed breed, which [A.U.] found offensive.

Opinion

[A.U.] presented in the interviews as an articulate, competent adolescent capable of communicating her feelings and experiences. Interviews focused on her current family situation and her feelings that led to her making the decision to terminate her parenting time with her father. Her comments suggested that she had been feeling discouraged about feeling comfortable about her father's parenting time. Her comments suggested that the decision to leave was the culmination of feelings about her view of her paternal parental experiences that she summarized as relating to health care and respect of her feelings.

Through several methods to help her talk about her feelings relating to her family situation, [A.U.] expressed sadness and frustration that her father did not support her needs and feelings. In terms of health, she cited being distressed about her view that her father did not take her to the hospital after she had an asthma attack, feeling hurt that her father did not protect her when [G.L.] was hitting her head and then feeling concerned that it felt that her father minimized her symptoms that her doctor thought could be a concussion. She noted feeling hurt and frustrated that her father did not support the lice treatment, claiming that her father asserted that her mother was poisoning her and also frustrated that her father did not support pinworm treatment.

[A.U.] cited feeling disturbed and upset by feeling her father made negative comments about her mother. She reasoned that if her father really loved her, he would realize that it hurt her feelings to hear his negative comments about her mother. She claimed feeling that her father was trying to influence her against her mother but that his negativity about her mother actually made her feel more distant from him. [A.U.]'s comments suggested her decision to withdraw from parenting time with her father was the result of being tired of feeling stress and tension due to feeling caught in the middle of conflict between her parents and feeling hopeless that her parents would ever resolve their differences.

She noted feeling upset and overcontrolled when her father took pictures of her clothes before she returned to her mother's home. [A.U.] noted feeling embarrassed, stressed and disturbed that her parents have had such long-standing animosity. She expressed the wish that this had never happened to her family and the wish that her parents had not separated. She expressed feeling saddened by the realization that this negative relationship will likely never resolve. [A.U.] also expressed guilt and regret that she has directed some of her frustrations to her mother, which she worried could affect their relationship.

It is likely that the ongoing supportive counseling that [A.U.] is receiving at the Mary Manning Centre has helped her articulate and explore her feelings. It is hoped that she will be able to continue with this counseling. It will no doubt be an important contributor to helping [A.U.] develop self-image, personality and identity qualities that are strong and positive.

Position of the Claimant

[26] The claimant seeks an order varying parenting including variation of the Separation Agreement, the Divorce Order and the orders of Funt J. such that the child shall reside with the claimant and have reasonable parenting time with the respondent at dates and times to be agreed upon after consideration of the child's views. She also seeks orders addressing decision making, travel, the child's possessions, parental conduct, arrears of child support and special or extraordinary expenses and prospective child support including prospective special and extraordinary expenses.

Position of the Respondent

[27] The respondent alleges the claimant has alienated their daughter from him and seeks an order that shared equal parenting be restored and that counselling be ordered to address any differences he and his daughter have.

[28] Regarding child support he states if it is owed, he will pay it plus agreed upon special and extraordinary expenses. He disputes the amount of the retroactive claim.

Law and Analysis

[29] I will first address the parenting issues and then the matter of retroactive and prospective child support.

Parenting

[30] The child has chosen to change the ordered parenting arrangement from shared parenting to residing full time with her mother, the claimant, by leaving her father's home and refusing to return.

Section 47 of the Family Law Act, S.B.C. 2011, c. 25 (the "FLA") states:

On application, a court may change, suspend or terminate an order respecting parenting arrangements if satisfied that, since the making of the order, there has been a change in the needs or circumstances of the child...

[31] Where a child's relationship has deteriorated with a parent, and a child refuses to spend time with them, that is a change in circumstances warranting a change in parenting arrangements in an agreement or court order: L.(D.N.) v. S.(C.N.), 2014 BCSC 1417 at para. 67; D.A.F. v. R.D.F., 2017 BCSC 873 at para. 41. Such a material change has occurred here.

[32] If an order is made to set aside or vary a parenting order or agreement, s. 37 of the FLA applies, and the appropriate parenting arrangement is determined by the best interests of the child. Section 44(4) of the FLA is also applicable:

On application by a party, the court must set aside or replace with an order made under this Division all or part of an agreement respecting parenting arrangements if satisfied that the agreement is not in the best interests of the child.

[33] The child is almost 16 years of age. The views of a child of that age are to be given significant weight. As noted by the British Columbia Court of Appeal in *O'Connell v. McIndoe*, 1998 CarswellBC 2223:

13 In order for custody orders relating to children in their teens to be practical, they must reasonably conform with the wishes of the child. See *Shapiro v. Shapiro* (1973), 33 D.L.R. (3d) 764 (B.C.C.A.) and *Alexander v. Alexander* (1988), 15 R.F.L. (3d) 363 (B.C.C.A.).

...

15 This decision will be profoundly disappointing to the mother. It may appear to her that the father has triumphed in his program to alienate her sons from her and that a 13-year-old is allowed to make decisions about his own life which are not in his best interests. It must be recognized, however, that the damage to the relationship with her sons, however it has been caused, cannot be repaired, and indeed will probably be exacerbated, by forcing teenagers to act against their will.

[34] See also *L.(D.N.) v. S.(C.N.)*, 2014 BCSC 1417 at para. 69; *B.J.G. v. D.L.G.*, 2010 YKSC 44 at paras. 23-24; *D.A.F. v. R.D.F.*, 2017 BCSC 873 at para. 34.

[35] Section 37(2)(b) of the FLA requires the court to consider the child's views. The child's views are linked to other s. 37(2) factors such as:

- (a) the child's health and emotional well-being;
- (c) the nature and strength of the relationships between the child and significant persons in the child's life;
- (d) the history of the child's care;
- (e) the child's need for stability, given the child's age and stage of development;
- (f) the ability of each person who is a guardian or seeks guardianship of the child, or who has or seeks parental responsibilities, parenting time or contact with the child, to exercise his or her responsibilities;

[36] The history of this litigation reveals the parties have been engaged in ongoing disputes over the parenting of their daughter for many years. It is clear and not surprising that their daughter is well aware of the conflict and that it has been a source of stress and anxiety for her.

- [37] Dr. Mills stated in 2017 that A.U. has a sensitive and anxious temperament and that such children "appear to respond best to calm, consistent and organized parenting with minimal intensity and the perception of anger. Helping parents develop consistent methods between homes could be an important support to [A.U.]'s emotional well-being".
- [38] Unfortunately, that has not occurred. The behavior of the respondent in court reveals he is highly emotional about the matter. While that is understandable, it appears to have contributed to the level of conflict between the parties. He blames the claimant for his daughter's actions and does not take responsibility for the breakdown of his relationship with his daughter. For example, in an email to claimant's counsel dated August 30, 2019 he stated "[A.U.] has been happy, content, comfortable, and appreciative of everything in our household". His view does not bode well for showing sufficient flexibility to restore his relationship with his daughter and reduce his conflict with the claimant.
- [39] A.U.'s concerns have included the respondent and his spouse criticizing the claimant, that she is ignored in his home, that he fails to respond to her health needs and personal preferences and has failed to protect her sufficiently from the respondent's spouse's son.
- [40] The allegations of the respondent blaming the claimant for that conflict are not resolvable on this application. What is at issue is that the co-parenting has had significant negative effects on their daughter. She has chosen to cope with that by residing with the claimant.
- [41] It is telling that despite his professed concerns for his daughter's well-being he has failed to meet his financial obligations for her support. During submissions he stated that he believed the claimant had set out to destroy his relationship with their daughter in order to control the financial situation and to financially benefit by receiving child support. The issue of support, his efforts to impute income to the claimant and related financial issues remain a source of conflict.
- [42] Indicative of his contentious approach is that in 2019 the respondent's employer inadvertently deposited a total \$2,221.96 to the claimant's bank account over a period of time consisting of small expense repayments. When discovered, the claimant intended to have counsel hold the funds pending resolution of the child support claim. However, the respondent instead commenced a small claims court proceeding against the claimant who repaid the funds directly to the respondent to avoid a judgment against her. This despite the respondent being aware of the outstanding support claim and his failure to pay child support.
- [43] That is not in the best interests of their child. His view of the claimant is hostile and he considers her malicious and the cause of their daughter's problems. The parties have been able to cooperate such that the stress on their child is alleviated.

- [44] This is not a situation where it has been established the child has been alienated from her parent. There has been no expert evidence tendered supportive of such an allegation: para. 47 of *Williamson v. Williamson* 2016 BCCA 87. Rather, the child is estranged from her father. In *Williamson* the difference was explained:
- [41] Barrow J. also observed that parental alienation must be distinguished from estrangement: D.S.W. at para. 28. Courts have said that the difference between estrangement and alienation lies in the cause; estrangement occurs when the child understandably refuses contact with a parent because of that parent's behaviour, and there is a logical and rational reason for the child's rejection of the parent. In the case of alienation, it is said there is little or no objectively reasonable cause for the child's rejection of the parent: *N.R.G. v. G.R.G.*, 2015 BCSC 1062 at paras. 277-278.
- [45] By all accounts the child is intelligent and gives rational and understandable reasons for her choice of residence. There is no indication in Dr. Mill's report that A.U. has been alienated from her father by her mother. She is now 15 years of age and according to Dr. Mills is an articulate and competent adolescent capable of expressing her feelings and experiences.
- [46] A.U. is currently doing well in school and appears happy residing with the claimant.
- [47] I am satisfied that it is in the best interests of the child that her choice to reside with the claimant be respected. As noted by Pearlman J. in *Lee v. Lee*, 2011 BCSC 286, where children were not seeing their father very often and he alleged unsupported alienation of them by their mother:
- [20] Michael, who is 15, and Breanna who is 12, are both of an age where their preferences respecting contact with their father deserve weight. The reality is that they will make their own decisions about the frequency of their contact with their father. I am satisfied that the terms of access proposed by the respondent and consented to by the claimant are in these children's best interest.
- [21] There will be an order, by consent, that the claimant will have reasonable and generous access to the children, at the children's discretion.
- [48] Given her age and maturity, A.U. and the respondent will have to restore their relationship. I decline the respondent's request that A.U. be required to reside with him as primary caregiver.
- [49] As a result, the parenting arrangements in the Separation Agreement dated February 12, 2014, the Divorce Order of April 25, 2014 except paragraphs 5, 7 and 13, the orders of Funt J. pronounced on June 28, 2017 and June 29, 2018 are set aside and replaced with the parenting orders at the conclusion of these reasons.

Conduct

- [50] The claimant seeks conduct orders prohibiting the respondent from disseminating allegedly false information about her and her family to third parties pursuant to ss. 222, 225 and 227 of the FLA.
- [51] The claimant states the respondent has provided notice of court applications to third parties, repeated to others allegations she is manipulating the child and is solely responsible for the conflict between them, coupled with unilaterally terminating payment of child support. In emails from the respondent to third parties he accuses the claimant of kidnapping A.U. and having destroyed his relationship with their child. The child informs her that the respondent and his spouse speak badly of the claimant to her including allegations she had cheated on him and was a terrorist. She submits such behavior negatively affects the psychological, physical and emotional well-being of the child and constitutes family violence.
- [52] The communications of the respondent to counsel for the claimant after A.U. returned to live with the claimant place the blame on the claimant, alleges she lies, that she seeks to impose "chaos" on him and his family, and that he "will continue to fight against" it. He acknowledged that he had been in touch with the claimant's friends and families regarding his views. His rigid views and placing all of the blame on the claimant has been consistent over the years in this proceeding. He has displayed an inability to acknowledge any responsibility for the breakdown of his relationship with his daughter.
- [53] In support of her application for conduct orders the claimant relies on *Primeau v. L'Heurux*, 2018 BCSC 740, where Winteringham J. referred to *R.W. v. P.C.*, 2017 BCSC 998 and Gerow J.'s summary of conduct that may constitute family violence:

80 It is clear from the definition and the cases interpreting this provision, that family violence does not necessarily mean physical violence. Rather, the provision is to be interpreted broadly. Gerow J., in *R.W. v. P.C.*, 2017 BCSC 998 at paras. 36-41, provides a useful summary of conduct that may constitute family violence:

In *Fyfe v. Fyfe*, 2014 BCSC 1999, Chief Justice Hinkson considered family violence in the context of an application for a protection order. He noted at para. 36 that the claimant mother provided notice of her applications, and sometimes the application materials, to school principals, teachers, politicians, police officers, former hockey coaches of her sons, and individuals associated with minor hockey teams. She also sent emails to the hockey coach and others who interact regularly with the children on a daily basis. She expanded the list of recipients. The Chief Justice considered that emails to third parties constituted "family violence" in those circumstances, as they fell within psychological and emotional abuse including intimidation and harassment.

In *D.N.L. v. C.N.S.*, 2014 BCSC 1417, Mr. Justice Pearlman found that the respondent's demeaning remarks about the claimant, his repeated assertions to the child that she was being manipulated by her mother and that her mother was responsible for the conflict that divided the family as well as his threats to use physical force to compel her to accompany him constituted emotional abuse which undermined the child's emotional safety, security and well-being (see at para. 72).

In *Hokhold v. Gerbrandt*, 2014 BCSC 1875, Mr. Justice Cole determined that behaviour that caused financial hardship and stress and threats to cause financial hardship qualified as family violence.

In *M.W.B. v. A.R.B.*, 2013 BCSC 885, Mr. Justice N. Brown found that, by delaying and refusing to cooperate with reasonable requests or provide information necessary to dispose of the parties' business in a mutually beneficial way, the claimant's conduct in that litigation was a form of emotional abuse and harassment that constituted family violence.

In *L.A.R. v. E.J.R.*, 2014 BCSC 966, Mr. Justice Schultes addressed the allegations of family violence at paras. 148-150. He determined that serious acts of violence that occurred during the marriage did not appear to be repeated or threatened in the post separation period despite often volatile circumstances. The children did not appear to be to have been exposed to any of the incidents. Schultes, J. found, however, that the father's comments to the mother in the presence of the children went beyond the "all-too-familiar nastiness that spouses often inflict on each other during disintegrating relationships, and amounted to actual "emotional abuse".

In *A.B.Z. v. A.L.F.A.*, 2014 BCSC 1453, Madam Justice Warren considered circumstances where there were allegations of violence by both parties. The father alleged that during the marriage and after separation the mother acted aggressively with physical violence toward him. The mother alleged that the father was violent during arguments. She said he hit and broke things, pushed her and on one occasion threw coffee at her. There was evidence concerning violence involving the grandparents. At para. 192 the court states:

192 In considering the impact of this violence on A.'s [the child] well-being, it is important to note that there were no allegations of violence directed towards A. However, it is obvious that exposing A. to this kind of behavior cannot be anything but detrimental to his interests. None of the parties takes responsibility for any of this conduct -- to the contrary, they all blame each other. In these circumstances, it is my view that it is important to minimize the interaction between the plaintiff and the defendant and discourage any contact between the defendant, on the one hand, and the plaintiff's parents, on the other.

90 Consistent with 38(d), I accept the Claimant's submission that the Respondent's conduct demonstrates a pattern of coercive and controlling behavior. In particular, his various failures to communicate, including his refusal to respond to requests that should not be contentious, and the accusatory manner in which he responds has caused the Claimant the sort of psychological harm that these provisions are directed at.

[54] The conduct of the respondent has clearly negatively affected A.U.'s psychological and emotional well-being. His attacks on the claimant and his dissemination of information about the claimant and her family to third parties has contributed to the breakdown of his relationship with his daughter. Such behavior exacerbates the level of conflict between the parties and is not justifiable. It must cease.

Child Support

[55] The claimant seeks retroactive child support including both table support and special or extraordinary expenses from March 2013 to date, and prospective child support including special or extraordinary expenses for so long as A.U. is a child of the marriage.

[56] In the Separation Agreement the guideline income of the claimant was \$40,000 and that of the respondent \$48,000. Given the agreement regarding shared parenting, the respondent was to pay child support of \$75.00 per month each month commencing March 18, 2014. It also provided that special and extraordinary expenses would be paid proportionate to their incomes. At that time the claimant's share was 45.5%, and the respondents was 54.5%. The Separation Agreement also provided that:

11.2 Neither party shall incur an expense for which they wish the other party to contribute without the express consent of the other party, such consent not to be unreasonably withheld.

11.3 Should either party incur a special or extraordinary expense for [A.U.] without the consent of the other party, that expense shall be the responsibility of the party who incurred the expense, without contribution by the other party.

11.4 For convenience, the categories of [A.U.]'s special and extraordinary expenses, as set out in Section 7 of the Federal Child Support Guidelines, is duplicated here:

11.4.1 child care expenses incurred as a result of the custodial parent's employment, illness, disability or education or training for employment,

11.4.2 that portion of the medical and dental insurance premiums attributable to the child,

11.4.3 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,

11.4.4 extraordinary expenses for primary or secondary school education or for any other educational programs that meet the child's particular needs;

11.4.5 expenses for post-secondary education, subject to the terms of this Agreement; and

11.4.6 extraordinary expenses for extracurricular activities.

11.5. The parties agree that the following expenses foreseeable at the signing of this Agreement are reasonable and necessary, and as such, shall be shared by the parties proportionately to their incomes:

11.5.1 Health/ dental plan care premiums,

11.5.2 Extended health care premiums,

11.5.3 Medical / dental / orthodontic expenses not covered by benefits,

11.5.4. School fees for [A.U.] including yearbook, pictures, and travel costs for school programs and field trips,

11.5.5 Memberships and fees for clubs and programs during school breaks,

11.5.6 Musical instruction, instruments and supplies,

11.5.7 [A.U.]'s cell phone,

11.5.8 Tutoring, if required by a child,

11.5.9 Counselling, if required by a child,

11.5.10. Sports lessons, including group and private lessons, and

11.5.11. Sports equipment, including safety gear.

11.6. [The respondent] shall maintain [A.U.] on his medical and dental benefit plans available to him through his employer. The parties shall utilize all available medical and dental benefits prior to sharing the cost of [A.U.]'s medical and dental expenses.

[57] As well the Separation Agreement provided for the exchange of financial information by June 30 of each year and that child support could be reviewed either upon a material change of circumstances or upon the exchange of financial information.

[58] The terms of the Separation Agreement were incorporated in the Divorce Order.

[59] In July of 2014 and again in 2015, the claimant sought, in writing, a review of child support from the respondent. No response was received to the 2014 requested review and in 2015 the respondent provided his 2013 and 2014 Notices of Assessment but no information respecting his pension income.

[60] In August 2015, the parties attempted mediation at the Victoria Justice Access Centre, but it failed. However, the claimant deposes she did learn there that the income attributed to the respondent in the Separation Agreement did not include his pension income and that such income is not taxable.

- [61] As mediation failed, the claimant in her notice of application filed April 20, 2016 sought orders related to child support and other relief. That application was heard on June 6, 2016. Warren J. adjourned the child support application and made orders requiring further income disclosure by both parties including that the respondent provide documentation concerning his US Navy Pension to be exchanged every year. Meanwhile, the payments of \$75.00 per month were to continue without deductions.
- [62] The respondent has paid no child support, nor has he contributed to special or extraordinary expenses since unilaterally ceasing payments in June of 2018.
- [63] The claimant seeks a retroactive order from 2013 given the failure of the respondent to disclose his pension income. The respondent disputes that his US Navy Pension is income, that it should be grossed up and that retroactive support should be ordered.
- [64] I will first address the pension income.

Pension Income

- [65] The claimant is in receipt of a US Navy Pension because of an injury suffered during his service. He receives it tax-free and it is not reported on his Personal Income Tax Return.
- [66] Section 19(1)(b) of the Child Support Guidelines, SOR/97-175 permits income to be imputed where an income source is tax exempt. In *McKenzie v. Perestrelo*, 2014 BCCA 161, Kirkpatrick J. for the court stated:

90 Section 19 of the CSG states that where a person is exempt from income tax a court may impute additional income to reflect what that person would have otherwise earned through employment. In *S.C.E. v. W.C.K.*, 2010 BCSC 1592, Joyce J. considered whether a party's non-taxable disability benefits should be grossed-up for the purpose of calculating support. Justice Joyce, relying on an Alberta Court of Appeal decision, *Dahlgren v. Hodgson*, 1999 ABCA 23, said the following:

- [28] Section 19(1)(b) of the Guidelines permits the court to impute income to the paying spouse where he or she is exempt from paying federal or provincial income tax. The authorities hold the court may exercise its discretion under this section in the case of pension benefits which are received free of income tax and impute additional income to bring the pension amounts up to the equivalent gross taxable amount: see *Dedosenco*, [2005] B.C.J. No. 1053; *Peterson*, [2006] S.J. No. 333; and *Dahlgren*.
- [29] The rationale for grossing up tax-exempt income was stated by Fraser C.J. in *Dahlgren* at para. 5 in the following way:

5... when dealing with any form of benefits or attributed benefits received by a parent that are not taxable for income tax purposes, it is essential that any such amount be grossed-up to take into account what it would have been had it been taxed. The purpose in doing so is to ensure that the apportionment of responsibility between the parents for child support is based on the same

approach for both parents. The guidelines are premised on division of financial responsibility based on gross before tax income. Therefore, to properly apportion that responsibility for child support between the parents, the same foundation must be used. In this regard, it would be wrong to equate non-taxable income in the hands of one parent with taxable income in the hands of the other without the appropriate gross-up.

91 I am satisfied that the same rationale applies in this case and that the amount of disability payments should be grossed-up to \$15,206.

[67] The same reasoning applies in this case. The respondent's pension payments are income and, as they are tax exempt, are to be grossed-up. While the respondent disputes they are income, ss. 15-20 of the Child Support Guidelines determine what is defined as income.

[68] While the respondent was ordered to disclose his Naval Pension plan his compliance has been insufficient. As of February 22, 2021, he provided only limited indirect disclosure regarding his pension for the years 2013, 2014, 2015 and 2016. That disclosure consisted of statements of account for a US chequing account showing the amount deposited in the account for one month in each year. After the hearing he produced more recent print outs of the US chequing account. No annual statement or confirmatory document has been produced.

[69] Without supporting documentation from his pension provider, the respondent states his pension income dropped from \$12,096.77 in 2018 to \$10,123.52 in 2019 to \$8,159.29 in 2020 based on the bank statements provided. While the conversion rate from US dollars to Canadian may account for some of the difference, proper evidence of the change and the reason for it has not been produced. The records recently produced records show deposits to a US Bank account for 2019 and 2020. There is no explanation from the pension provider explaining the alleged decrease in the pension, nor that explains the inconsistent amounts deposited from one month to the next.

[70] Absent adequate evidence and given the history of his pension payments, I conclude the respondent's pension provides approximately \$12,000 a year and has continued to do so until this year (Rule 5-1 of Supreme Court Family Rules, B.C. Reg. 169/2009, and s. 19(1)(f) of the Child Support Guidelines). This finding however will be open for review if the June 30, 2021 disclosure addresses the lack of information.

[71] The financial information available from the respondent follows, but leaving the pension without reduction.

Year

Employment Income

US Navy Pension

Employment expenses and union dues

Guideline Income (calculated with DivorceMate)

2013

\$47,089.39

\$9,617.50

\$6,296.45

\$54,197.00

2014

\$47,639.73

\$10,465.06

\$5,949.27

\$56,351.00

2015

\$48,846.00

\$12,315.26

\$8,186.08

\$57,800.00

2016

\$47,911.52

\$12,910.72

\$7,413.25

\$58,111.00

2017

\$49,765.91

\$12,574.05

\$3,161.70

\$64,115.00

2018

\$53,270.55

\$12,788.05

\$4,019.57

\$67,062.00

2019

\$58,609.05

\$12,096.77

\$1,031.01

\$74,425.00

2020

\$69,037.73

\$12,096.77

\$1,106.46

\$84,826.00

2021

\$69,037.73

\$12,096.77

\$1,106.46

\$84,826.00

[72] The parties disagree on the respondent's Guideline income for the years 2013 to 2019. The respondent however fails to recognize that DivorceMate grosses up his income because of the non-taxable pension he receives. I therefore accept that the respondent's Guideline income for the years 2013 to 2019 is correctly calculated in the above table.

[73] Regarding the year 2020, the claimant calculates the respondent's line 150 income based on two 2020 T4's provided by the respondent of \$69,037.73 and \$1,500.76 for \$69,037.73. The respondent however states the line 150 income as \$67,487.73 but does not explain that figure. The respondent states his pension income for 2020 has decreased from \$12,096.77 to \$10,515.74. However, he provides no direct evidence of such. Given the T4's provided and the lack of disclosure I rely on his 2019 pension income of \$12,096.77, his T-4 income for 2020 of \$69,037.73 and his deductible expenses of \$1,031.01, and the resulting Guideline income is \$84,826.00.

- [74] The claimant has calculated the respondent's 2021 income; however disclosure is required in June of this year. Hence, final calculation of the respondent's 2021 income must await the required disclosure which must include updated pension information.
- [75] The respondent submits income should be imputed to the claimant. However, it was not until his affidavit number 11 that that he submitted income should be imputed to the claimant beyond minimum wage. He did not have leave to file the information nor would it have been granted given his failure to provide it in a timely manner before the hearing. The claimant also had no opportunity to respond as it was filed after the conclusion of the hearing. In any event, the information filed in an attempt to impute income to the claimant is of no weight. He has provided insufficient evidence of suitable employment being available for the claimant in Victoria, nor what such would pay.
- [76] I therefore find the parties' Guideline incomes for the years 2013 to 2020 after imputing minimum wage income to the claimant as follows:

Year

Respondent's Guideline Income

Claimant's Guideline Income

Claimant's Actual Income

2013

\$54,197.00

\$40,000.00

\$36,748.00

2014

\$56,351.00

\$21,730.00

\$1,441.00

2015

\$57,800.00

\$21,857.20

\$3,124.00

2016

\$58,111.00

\$22,406.40

\$1,375.09

2017

\$64,115.00

\$23,320.00

\$2,679 UCCB, \$1,324 RRSP

(\$1378) SUM

2018

\$67,062.00

\$25,660.48

(\$5,256) from SUM; \$2,154.46 from RRSP

2019

\$74,425.00

\$28,293.52

\$2,612.00

2020

\$84,826.00

\$30,284.20

\$2,612.00

[77] The claimant seeks retroactive child support for those years taking into account periods of sole parenting to the claimant and shared parenting by the parties as follows:

Year

Total Annual Child Support Obligation

Total Paid

Arrears

2013

\$1,620 (\$135 X 12)

\$705.50

\$914.50

2014

\$3,996 (\$333 X 12)

\$900.00

\$3,096.00

2015

\$4,152 (\$346 X 12)

\$900.00

\$3,252.00

2016 (6 months shared parenting)

\$2,070 (\$345 x 6)

\$450.00

\$1,620.00

2016 (6 months primary parenting)

\$3,228 (\$538 x 6)

\$375.00

\$2,853.00

2017 (5 months shared parenting)

\$2,065 (\$413 x 5)

\$375.00

\$1,690.00

2017 (7 months primary parenting)

\$4,256 (\$608 x 7)

\$525.00

\$3,731.00

2018 (12 months primary parenting)

\$5,040 (\$420 x 12)

\$450.00

\$4,590.00

2019 (8 months shared parenting)

\$3,616 (452 x 8)

\$0.00

\$3,616.00

2019 (4 months primary parenting)

\$2,840 (\$710 x 4)

\$0.00

\$2,840.00

2020 (12 months primary parenting)

\$9,732 (\$811 x 12)

\$0.00

\$9,732.00

Total

\$37,934.50

[78] Regarding s. 7 special or extraordinary expenses, the claimant seeks \$5,706.63 consisting of child care, bus pass, musical instrument rentals and the child's cellphone, all of which were agreed to and remain outstanding.

[79] The issue becomes should such arrears be paid in full.

Law on Retroactive Support

[80] In *E.D.A. v. M.A.A.*, 2014 BCSC 1084 Pearlman J., citing *D.B.S. v. S.R.G.*, 2006 SCC 37, summarized the law on the principles to be applied when making an order for retroactive support:

[115] The leading authority on the exercise of the court's discretion to make an order for retroactive child support is *D.B.S. v. S.R.G.*, 2006 SCC 37.

[116] The principles stated by the Supreme Court of Canada in *D.B.S. v. S.R.G.* include the following:

- (a) Parents have an obligation to pay child support that is commensurate with their income. This obligation, like the child's corresponding right to support, exists independently of any statute or court order. A payor parent who does not increase child support payments to correspond with income will not have fulfilled his or her obligation to the children (para.

58).

- (b) If the payor's income rises and the amount of child support paid does not, there remains an unfulfilled obligation that could later merit court enforcement (para. 60);
- (c) A payor parent always has the obligation to pay and the dependent child always the right to receive child support in an amount that is commensurate with the payor's income (para. 68);
- (d) While it will not always be appropriate for the court to order retroactive child support, such orders should not be seen as exceptional (paras. 95 and 97).

[117] The factors which the court is required to consider in determining whether to exercise its discretion to award retroactive child support include the following:

- (a) whether the parent claiming child support has a reasonable excuse for why support was not sought earlier;
- (b) the conduct of the payor parent;
- (c) the circumstances of the children;
- (d) any hardship that may be caused to the payor parent by the retroactive award (see D.B.S., *supra*, at paras. 99 to 116).

[118] In determining the amount of any award of retroactive child support, the court must determine a date for the retroactive award and quantum. The date for the retroactive award will usually be the date on which the payor parent received effective notice of the claim: D.B.S. at para. 121.

[119] It will usually not be appropriate to make an award retroactive to a date more than three years before formal notice of the claim for retroactive support is given: D.B.S. at para. 123.

[120] While quantum should be considered in an amount consistent with the applicable statutory scheme, blind adherence to the Guidelines table amount is not required. Among other reasons, this is because retroactive awards may give rise to undue hardship: D.B.S. at paras. 126 to 130.

[81] Retroactive child support recognizes the existing obligation of the payor to pay support based on their income. A failure to make such payments breaches their obligation to support their child. Here, the respondent did not disclose his pension income at the time of the separation, did not comply with the claimant's 2014 request for a review of child support and, while responding to her 2015 request, mediation was unsuccessful. The claimant then filed her application on April 20, 2016. The claimant clearly sought review of child support in accordance with the Separation Agreement and Divorce Order and when mediation failed applied in a timely way.

- [82] It is appropriate for the retroactive order to commence at the date when increased support should have been paid in situations where the payor parent engages in blameworthy conduct. Such conduct occurs in cases where the payor parent lies to the recipient parent or withholds information (D.B.S. at para. 124). The respondent deposes that he disclosed his pension information to the mediator when the parties agreed to the Separation Agreement. The claimant does not respond to this claim. Paragraph 7 of the Separation Agreement recitals states that the parties "have chosen to rely on the information which has been provided to them by the other rather than pursue formal disclosure processes. Each is satisfied with the information provided".
- [83] As it is unclear on the evidence whether the respondent intentionally withheld information at the time of the Separation Agreement, the retroactive order ought to commence on the date of effective notice. Effective notice of the claim occurred in 2014 when the claimant indicated to the respondent that she was seeking a review of child support. As a result, I am satisfied the claim for retroactive support appropriately commences with the year 2014.
- [84] Following the effective notice given to the respondent in 2014, the conduct of the respondent has been reprehensible. He simply failed to pay, ignored his obligations and did so after repeated notice and after he had agreed in the Separation Agreement to annual reviews.
- [85] As for hardship, the respondent has not established the retroactive order will cause such.
- [86] The respondent shall pay the retroactive child support of \$37,020 as of December 31, 2020 plus retroactive support from January 1, 2021 to May, 2021 of $\$811.00 \times 5 = \$4,055$. In addition, the s. 7 arrears of \$5,706.63 are to be paid. As a result, the arrears total \$46,781.63.

Ongoing Support

- [87] As the child is now residing primarily with the claimant, the Guideline amount payable by the respondent on the basis of his 2020 income of \$84,826 is \$811.00 per month commencing June 1, 2021 and continuing on the first of each month thereafter.
- [88] Regarding Special or Extraordinary expenses, 72% are payable by the respondent and 28% by the claimant.
- [89] The remaining issues concern the child's personal possessions and travel related matters.

Personal Possessions

- [90] There have been issues regarding the child's personal possession. She is entitled to take them with her when leaving either parent's home.

Travel

- [91] Travel with A.U. and use of her passport and Nexus card has been another area of conflict between the parties. The claimant seeks an order permitting travel with A.U. and control of her passport and Nexus card with the authority to renew each without the written authorization of the respondent.
- [92] I am satisfied that it is in the best interests of the child that as many areas of conflict between her parents be reduced or eliminated as possible. Disputes over travel and her Nexus card have involved her directly. For that reason, neither party shall require the written consent of the other before travelling with A.U. The requested order giving the claimant control over the passport and Nexus card is granted.

Orders

- [93] Pursuant to ss. 44(4), 47, 149 and 152 of the Family Law Act, S.B.C. 2011, c. 25, the parenting arrangements in any previous order of this Court or agreement of the parties are set aside and replaced with this order. Without limiting the foregoing, the parenting arrangements in the following are replaced:
- i. the Separation Agreement between the parties made February 12, 2014;
 - ii. the Divorce (and corollary relief) Order pronounced April 25, 2014;
 - iii. the Order of Mr. Justice Funt pronounced June 28, 2017; and
 - iv. the Order of Mr. Justice Funt pronounced June 29, 2018.
- [94] The claimant, S.M.S. and the respondent, S.M.U. shall remain the guardians of A.U., born August 6, 2005, under s. 39(1) of the FLA.
- [95] Pursuant to ss. 45 and 47 of the FLA, A.U. will reside primarily with S.M.S. and have reasonable parenting time with S.M.U. at dates and times agreed between the parties, after consideration of A.U.'s views.
- [96] Pursuant to ss. 40, 41, and 47 of the FLA, each of the parties is entitled to receive any notice that a parent or guardian is entitled to receive, and request and receive from third parties any health, education or other information concerning A.U.
- [97] Pursuant to ss. 40, 45 and 47 of the FLA, S.M.S. will be A.U.'s sole decision-maker and make all decisions affecting and, subject to the terms of this order, have all of the parenting responsibilities under s. 41 of the FLA concerning A.U.
- [98] S.M.S. will inform the respondent, S.M.U., about significant decisions made affecting A.U.
- [99] S.M.S. will retain A.U.'s passport and Nexus card.

- [100] Mr. Jon Stewart, former counsel for S.M.U. is directed to provide A.U.'s passport to Ms. Shauna Tucker, counsel for S.M.S., within 3 business days of receipt of this order.
- [101] S.M.S. will release A.U.'s passport to S.M.U. for any agreed or ordered international travel A.U. takes with S.M.U. S.M.U. shall return A.U.'s passport and Nexus card to S.M.S. within 48 hours of returning to Victoria.
- [102] Either party may travel with A.U., including international travel, without the written consent of the other party.
- [103] S.M.S. is at liberty to renew A.U.'s passport and Nexus card without the written authorization of S.M.U.
- [104] A.U.'s cat, Jinjy, shall reside where A.U. resides.
- [105] A.U. is entitled to have her personal possessions with her regardless of where she resides. She may take them between her parents' homes as she reasonably sees fit.
- [106] Pursuant to ss. 222 and 227 of the FLA, S.M.U. will:
- a) refrain from using disparaging or disrespectful language to or about S.M.S. and will encourage his family members to refrain from making any negative comments about S.M.S. and her extended family;
 - b) refrain from putting friends, family members or A.U.'s third party service providers in the middle of family law matters between him and S.M.S.;
 - c) not provide any information disclosed in the course of this family law proceeding to any third party without the agreement of S.M.S.
- [107] Except in cases of emergency involving A.U., all communications between the parties will be in writing, by email.
- [108] S.M.U. will pay S.M.S. child support arrears of \$46,781.63 (the "Arrears").
- [109] S.M.U., having been determined to have a Guideline Income of \$84,826 will pay S.M.S. child support of \$811.11 per month for the support of A.U., commencing June 1, 2021, and continuing on the first day of each month thereafter until A.U. is no longer a child under the FLA.
- [110] Effective the date of this order, the parties will pay A.U.'s special and extraordinary expenses proportionately to their respective incomes. S.M.S. having been determined to have a Guideline Income of \$30,282.00, S.M.U.'s proportionate share of special and extraordinary expenses is 72% and S.M.S.'s proportionate share is 28%.
- [111] A.U.'s special or extraordinary expenses include:
- a) Child care expense incurred as a result of the custodial parent's employment, illness, disability or education or training for employment;

- b) That portion of the medical and dental insurance premiums attributable to the child;
- 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;
- e) Expenses for post-secondary education, subject to the terms of this order;
- f) Extraordinary expenses for extracurricular activities;
- g) Health/dental plan care premiums;
- h) Extended health care premiums;
- i) Medical/dental/orthodontic expenses not covered by benefits;
- j) School fees for A.U. including yearbook, pictures, and travel costs for school programs and field trips;
- k) Memberships and fees for clubs and programs during school breaks;
- l) Musical instruction, instruments and supplies;
- m) A.U.'s cell phone;
- n) Tutoring, if required;
- o) Counselling, if required;
- p) Sports lessons, including group and private lessons; and
- q) Sports equipment, including safety gear.

[112] S.M.U. shall maintain A.U. on his medical and dental benefit plans available to him through his employer. The parties shall utilize all medical and dental benefits before sharing the cost of A.U.'s medical and dental expenses.

[113] The parties shall exchange their Income Tax and Benefit Returns, Notices of Assessment or Reassessment, and any other information required to determine their income under the Federal Child Support Guidelines, by June 30 of each year.

[114] The parties shall review and, if appropriate, adjust, child support annually within 30 days of the exchange of the income information required by this order.

[115] The signature of S.M.U. on this order is dispensed with.

[116] S.M.U. will pay S.M.S. her costs of this application within 30 days of the date of this order or within 30 days of their taxation if not agreed to.

"The Honourable Mr. Justice Punnett"

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Prepared on 27 October 2026 · Esheria