

CANADA / JUDGMENT

Saujani v. Saujani

2021 BCSC 1550

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Supreme Court of British Columbia

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2021 BCSC 1550 Saujani v. Saujani

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Saujani v. Saujani,

2021 BCSC 1550

Date: 20210810

Docket: E103838

Registry: Vancouver

Between:

Andrea Elizabeth Saujani also known as

Andrea Elizabeth Matus

Claimant

And

Sheynal Saujani

Respondent

Before: The Honourable Madam Justice E. McDonald

Reasons for Judgment

(In Chambers)

Counsel for the Claimant:

L.T. Self

Counsel for Respondent:

J. Macdonnell

Place and Date of Hearing:

Vancouver, B.C.

January 19, 20, February 12 and April 28, 2021

Place and Date of Judgment:

Vancouver, B.C.

August 10, 2021

Table of Contents

Overview.. 3

Background. 3

Preliminary Matter. 7

Alleged Agreement. 8

Retroactive Decrease of Child Support. 13

Cancellation of Child Support Arrears. 27

Section 7 Expenses and RESP. 28

Tuition Costs. 29

Other s. 7 Expenses. 31

Children of the Marriage. 34

Summary. 35

Overview

- [1] Each party to this family law dispute seeks relief related to the final order made, by consent, on May 16, 2011 (the "Final Order"). Their requests arise from a number of circumstances including alleged reductions to Mr. Saujani's earnings, significant arrears of child support, unpaid section 7 expenses, and the current ages of the children.
- [2] Ms. Matus seeks to enforce payment of arrears of child support. She also requests contribution from Mr. Saujani towards s. 7 special and extraordinary expenses.

- [3] Mr. Saujani claims that his income never matched the amount determined in the Final Order. He also claims that Ms. Matus agreed to reduce the child support payable. Mr. Saujani also applies to cancel the child support arrears and to vary the Final Order so that it reflects his actual income in the years following the Final Order.
- [4] The parties have filed a five-volume joint application record that contains more than a dozen affidavits made by the parties since 2019. While I have reviewed that material, and considered the parties' submissions, I will not address every item of evidence, factual dispute or argument raised.

Background

- [5] The parties were married in 1995 and separated in 2009. Mr. Saujani is currently 54 years old and Ms. Matus is 52 years old. The parties have three children, as follows:
- a) S.K.S., born on XX 1996;
 - b) I.S.S., born XX 1999; and
 - c) R.A.S., born XX 2002.
- [6] Mr. Saujani is a university graduate with a degree in mathematics and economics. During the marriage, he worked as a sales representative for a number of software companies, including Oracle, and earned a substantial income. During the marriage, Ms. Matus devoted herself to full-time homemaking and raising their children.
- [7] Ms. Matus commenced this family law litigation in December 2010.
- [8] On May 16, 2011, Mr. Saujani and Ms. Matus signed a separation agreement. The separation agreement required the parties to consent to an order incorporating the terms of the agreement and stating that it may only be "varied by written agreement executed in the same manner as this agreement". The separation agreement also provided that it would survive, and not merge with, any subsequent court order.
- [9] On May 16, 2011, the parties and their counsel attended a Judicial Case Conference during which they consented to the Final Order.
- [10] The relevant parts of the Final Order are as follows:

AND UPON THE COURT finding that, for the purposes of the Federal Child Support Guidelines, the Respondent has a Guideline income of \$200,000 per year and the Claimant, commencing January 1, 2012, has an imputed minimum Guideline income of \$30,000 per year.

THIS COURT ORDERS that

4. BY CONSENT the parties acknowledge the Respondent's income shall be fixed at a maximum of \$200,000 per annum as a consequence of the following:

- (1) Pursuant to s. 15.1(5) of the Divorce Act the property division and payment provisions of paragraph 25-38 of this Order are special provisions respecting the financial obligations of the parties and the division and transfer of their property which directly and indirectly benefit the Children and the Claimant, and the application of the applicable monthly amount of support pursuant to the spousal and child support guidelines would result in an amount of child and spousal support that is inequitable given those special provisions.
- (2) Pursuant to s. 15.1(7) and (8) of the Divorce Act, the lump sum payment and RRSP transfer to the Claimant, the parties' compromise on the amount of income imputed to the Claimant, the child support amount, and the income consequently retained by the Respondent, which are provided for in this Order, which arrangements are consented to by the parties, are reasonable arrangements which do, and will in the future, fully satisfy the parties' obligations to support the Children, allow the Children to enjoy a standard of living with each party that is comparable to their standard of living prior to the parties' separation, meet the Children's financial needs and allow the Children to benefit from having two comfortable homes, one with each party.
- (3) Pursuant to s. 1 of the Federal Child Support Guidelines, the child support provisions of this agreement establish a fair standard of support for Children that ensures that they continue to benefit from the financial means of both the Claimant and the Respondent after separation;
- (4) Pursuant to s. 4 of the Federal Child Support Guidelines,
 - (a) The amount of child support payable by the Respondent on income over \$150,000 under the guidelines is inappropriate given the conditions, means, and needs of the Children that the parties have jointly considered and provided for by the terms of this Order, the Children's pre-separation lifestyle, the reasonable standard of living which the parties agree that the Children should have, the co- parenting objectives of the parties, and the financial ability of each of the Claimant and the Respondent to contribute to those needs.
 - (b) The Respondent shall pay table support based on the first \$200,000 of his income and shall not pay table support on any income over \$200,000 that he may earn in the future, as support of \$3448 per month is appropriate, having regard to the conditions, means, needs and other circumstances of the Children and the financial ability of each spouse to contribute to the support of the Children;
5. BY CONSENT until adjusted under the terms of this order or the Children cease to be children of the marriage as defined by the Divorce Act, the Respondent shall pay child support of \$3448 per month to the Claimant, payable in biweekly instalments of \$1591, with the first payment commencing November 19, 2010 and continuing biweekly thereafter.
6. BY CONSENT child support shall not, regardless of any change in the Respondent's income, exceed \$3448 per month.

7. BY CONSENT if the parenting schedule/plan becomes a shared custody regime as contemplated by section 9 of the Federal Child Support Guidelines the Respondent shall pay to the Claimant child support of \$3448 per month and the Claimant shall pay to the Respondent child support of \$624 per month for a new amount of base child support payable by the Respondent to the Claimant of \$2824 per month, which amount is payable in biweekly instalments by the Respondent to the Claimant in instalments of \$1303 until the Children cease to be children of the marriage as defined by the Divorce Act.
- [11] On January 11, 2021, Mr. Saujani filed a notice of application seeking:
- 1) An order pursuant to s. 17(4.1) of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) [DA] and s. 167 of the Family Law Act, S.B.C. 2011, c. 25 [FLA] that the Order of the Supreme Court of British Columbia made by the Honourable Justice Russell, on May 16, 2011 (the "Order"), be varied such that:
 - a) any and all arrears of child support accumulated under the Order be cancelled;
 - b) any and all special and extraordinary expenses be determined and shared on an equal basis and that any overpayments made by the Respondent to the Claimant be reimbursed to the Respondent;
 - c) the income of the Respondent be determined and that the Order for child support be varied such that the Respondent shall henceforth pay child support to the Claimant in accordance with the Federal Child Support Guidelines [Guidelines] SOR/97-175 such as the Respondent's income shall be determined; and
 - d) a declaration that S.K.S. and I.S.S. are no longer children of the marriage.
- [12] On January 14, 2021, Ms. Matus filed a notice of application seeking:
- a) an order to enforce any and all arrears of child support;
 - b) an order for immediate payment of all arrears of child support;
 - c) an order varying the order of Russell J. of May 16, 2011, for the determination and payment of s. 7 special and extraordinary expenses, including retroactive special and extraordinary expenses, retroactive to 2012; and
 - d) an order that income be imputed to the Respondent for the purposes of determination of payment of child support and s. 7 special and extraordinary expenses.
- [13] Ms. Matus' counsel advised me during the hearing that Ms. Matus only seeks to impute income to Mr. Saujani as an alternative. Her main position is the child support as stated in the Final Order is enforceable and the arrears are payable immediately.
- [14] Each has filed responses to the applications, opposing the relief sought by the other.

Preliminary Matter

- [15] Neither party's application relied on the summary trial provisions in Supreme Court Family Rules [SCFR] 10-11 or 11-3. Rather, each party's application relied on the ordinary application rules.
- [16] In *C.M.R. v. L.F.R.*, 2019 BCCA 371, the Court of Appeal appears to require that, in a defended family case commenced by notice of family claim, where a triable issue is raised and a party seeks to vary a final order, the application must be referred to the trial list. I invited the parties to make submissions regarding the decision in *C.M.R.*
- [17] The parties submitted that *C.M.R.* is factually distinguishable, that the present applications raised no triable issues; and, that referring the matter to the trial list would prejudice the parties by increasing their costs and causing unnecessary delay.
- [18] The parties also submitted that they had provided the material necessary to decide the issues raised and to resolve any potential conflicts in the evidence. If the matter was referred to the trial list, the parties advised they would rely on the same material that was before me.
- [19] In my view, there is disputed evidence on the issues raised, including whether the parties entered into a binding oral agreement to vary the written separation agreement regarding child support. I find there is "sufficiently contested evidence and allegations on essential matters" to satisfy the low threshold of a triable issue: *Franco v. Ceolin*, 2021 BCSC 345 at para. 1.
- [20] The parties' counsel agreed that if I determined there is a triable issue, then it would be appropriate, on a nunc pro tunc basis, to order that:
- a) the notice of application filed by Mr. Saujani on January 11, 2021 stand as a notice of family claim seeking the same relief referred to in that application;
 - b) the application response filed by Ms. Matus on January 15, 2021 stand as the response to family claim;
 - c) the notice of application filed by Ms. Matus on January 15, 2021 stand as a counterclaim seeking the same relief referred to in that application;
 - d) the application response filed by Mr. Saujani on September 25, 2020, stand as the response to counterclaim; and
 - e) the applications are deemed to have been converted into summary trial applications on exactly the same material that came before me on January 19 and 20, February 12 and April 28, 2021.
- [21] As the parties agree that the applications are appropriate for determination by way of a summary trial, I make the nunc pro tunc order set out immediately above.

Alleged Agreement

- [22] I will first address Mr. Saujani's allegation that he entered into a binding agreement with Ms. Matus to reduce the child support that he was required to pay in the Final Order. Mr. Saujani submits the issue is whether Ms. Matus' "historical pattern of, and regularly agreeing to reductions in child support paid by the respondent to correspond with his reduced income conclusively vary the terms of the parties' separation agreement".
- [23] The Supreme Court of Canada has recognized important policy and practical reasons for according considerable weight to agreements entered into by parties in the family law litigation context: *D.B.S. v. S.R.G.*, 2006 SCC 37 at para. 78. In *Colucci v. Colucci*, 2021 S.C.C. 24, at para. 69, the Supreme Court of Canada expressed support for the current culture shift in family law litigation away from adversarial litigation and towards a "culture of negotiation" between the parties.
- [24] These parties, with the benefit of counsel, negotiated and entered into a comprehensive written separation agreement which was incorporated into the Final Order on May 16, 2011.
- [25] Mr. Saujani set out his understanding of the terms of the parties' oral agreement to vary child support in his affidavit of February 20, 2020:
60. The agreement by the Claimant to accept reduced child support payments was not on the basis that I would at a later date make up the difference between those payments and the amounts that had been set out in the May 2011 Order, unless I was earning the same amount again, which didn't happen. It was my understanding from that time on that we would follow the child support guidelines based on my actual income.
- [26] Ms. Matus explained in her Affidavit #1 made September 14, 2020, how negotiations with Mr. Saujani led to the separation agreement. She pointed out that Mr. Saujani negotiated a provision to cap his annual income at \$200,000 a year for the purposes of child support. Despite the cap he negotiated, he now argues that their bargain was varied to include a term authorizing him to unilaterally recalculate child support at any time he believed that his income had decreased.
- [27] Mr. Saujani submitted that beginning in 2012 onwards, Ms. Matus expressly agreed to reduce the amount of his child support. Ms. Matus denied that she agreed to reduce child support or to forgive arrears of child support. According to Ms. Matus, Mr. Saujani continually assured her that the reductions in his income were temporary and he was working diligently to increase his income so that he could pay the amount of child support agreed to in the Final Order.

[28] There is no evidence that the parties entered into a written agreement to vary the separation agreement or the Final Order. I note that "oral variation of a contract subsequent to its execution is not subject to the parol evidence rule": *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 15, *aff'd* 2012 BCCA 296. Therefore, evidence concerning whether the parties entered into an oral agreement for the express purpose of modifying their earlier written agreement is admissible.

[29] Mr. Saujani stated that between 2012 and 2017, he kept Ms. Matus informed of his "employment difficulties" and "on several occasions, [she] agreed to a reduction in child support to be paid by [him] as a result of [his] reduced income". With respect to the agreement, he stated in his Affidavit #3 made February 20, 2020:

57. In our discussions in 2012, [Ms. Matus] and I specifically discussed and mutually agreed not to go to the expense of having the 2011 arrangements formally changed in order to save money.

[30] Mr. Saujani attached various email exchanges between himself and Ms. Matus. For example, on August 30, 2012, Ms. Matus emailed Mr. Saujani to ask him what he was "proposing with regards to child support" and she wrote:

I am aware of your change in job status, but I still need to know what to expect and what your plan is going forward I really need to know what you are going to provide by way of child support If you want to tell me how much you can afford to pay right now, and perhaps suggest a plan for making up the difference later (once you have re-established employment) then please let me know and we'll see if we can arrive at something that can work for both of us.

[Emphasis added.]

[31] On September 4, 2012, Mr. Saujani replied to Ms. Matus and he wrote, in part:

As you can imagine, I have no income coming in currently. I would really like to know three things:

Are you open to having a meeting with a mediator and avoid involving the Family Enforcement Agency?

What are you willing to accept in the interim until I find additional work?

I am applying for jobs daily and hopefully will find something soon.

[Emphasis added.]

[32] On September 10, 2012, Mr. Saujani emailed Ms. Matus and wrote, in part:

Today I spoke with Christine Bileski at the family child maintenance office. She said she is willing to help us mediate our court order. My income to date is 140K. My child support payments according to the tables would be \$2,591 per month. I will be applying for EI and should receive about \$1,300 per month.

Based on this income my annual child support for 2012 should be \$31,092.

Currently, I can pay for September at \$1,591 times 2 by drawing on my savings. I will to drop that to about \$2,000 per month in October - December. I hope this situation is temporary and something comes through for me soon. The minute my situation changes, I will let you know.

Please let me know if this is acceptable and we can work with Christine to update our paperwork in order to reflect our current situation.

[33] On September 30, 2012, Ms. Matus emailed Mr. Saujani and wrote, in part:

I felt that I needed to consult with a lawyer before getting back to you to understand exactly what it is that we should be doing going forward.

Here is my position on the child support - I sympathize with your current situation, and at the same time the amount of the reduction in child support that you are suggesting makes it extremely difficult for me to afford to live in Westwood Plateau where we are now. My lease expires (without the possibility of renewing) as of November 30th, and with the uncertainty of your situation there is a considerable amount [of] additional pressure on me. You have been out of the workforce for two months and are having challenges finding new employment. I have been out of the workforce for fifteen years, and without having spent time developing a career path (by my choice when we had children) I have found it extremely difficult to find satisfactory employment myself. As much as I would like to say that I am not reliant on the child support, that simply isn't the case.

I don't agree to changing our court ordered agreement without legal counsel and I don't agree with the amount you suggested of \$2,000. I would however agree to accept \$2,591/month (based on your current ytd earnings) as a temporary measure while you are unemployed - to be reevaluated if necessary in the new year. I am also requesting that the child support payments be made on time.

As I understand things from my lawyer, there is no reason to change the court ordered agreement for a temporary measure - if you feel it's necessary to do so then you can certainly let me know and then I would definitely suggest that we need the assistance of a mediator, and independent legal advice before filing the new document.

[Emphasis added.]

[34] Mr. Saujani also provided an February 18, 2015 email from Ms. Matus where she wrote:

I have consulted with a counsellor with regards to the child support and your current job situation. The conclusion of that meeting was that a fair result would be to modify the child support payments as though you were earning \$100,000/year. The logic behind the calculation is based on the following facts:

-in the last 20 years (even in years when you have had a loss/change of employment) your annual income was never below \$100,000 and in fact was usually substantially higher than that.

-my income has not increased to past \$30,000 annually

According to the support tables that would be a decrease in your payments of approximately \$950/month to \$1923.

If your situation doesn't change within 4 months, then obviously we would need to recalculate. Likewise if my situation changes substantially I will let you know.

Let me know your thoughts.

[35] After considering all of the evidence, I conclude that the parties did not enter into an oral agreement to vary the separation agreement or the Final Order with respect to child support. I accept the evidence of Ms. Matus that she told Mr. Saujani, both during conversations and in writing, that while she would agree to temporary reductions in support payments, she would not agree to a permanent variation of the separation agreement or the Final Order without obtaining legal advice and without further negotiation.

[36] Based on my assessment of the totality of the evidence, I find that Ms. Matus understood that the reductions in child support were temporary. If there was to be a permanent change, Ms. Matus made it clear to Mr. Saujani that such change would have to be reduced to writing and she would require independent legal advice.

[37] On the record, it is not apparent how Mr. Saujani could have believed that he and Ms. Matus engaged in good faith negotiations to reach an oral variation of the agreement regarding child support when full and frank financial disclosure is a clear precondition to such negotiation: "Without it, the parties cannot stand on the equal footing required to make informed decisions and resolve child support disputes outside of court": Colucci at para. 51.

[38] I do not agree with Mr. Saujani's assertion that the parties undertook good faith negotiations regarding determining Mr. Saujani's income or agreeing to vary the child support. I disagree with that assertion because of the financial disclosure provided by Mr. Saujani, which I will discuss in greater detail later in these reasons.

[39] Ms. Matus accepted Mr. Saujani's assurances that the reductions in child support were temporary and that he was working to increase his income. While she was generally cooperative when Mr. Saujani told her that his income had decreased, I do not find that she entered into a binding oral agreement to vary the Final Order as claimed by Mr. Saujani.

[40] I will now turn to the other relief sought.

Retroactive Decrease of Child Support

[41] Mr. Saujani seeks to vary the Final Order as it relates to child support pursuant to either the DA or the FLA. However, in my view, such a request must be determined pursuant to the DA. That is because the Final Order, at para. 4 dealing with child support, provides that the Final Order is pursuant to subsections 15.1(5), (7) and (8) of the DA.

- [42] While this matter was under reserve, the Supreme Court of Canada released Colucci. In Colucci, at para. 3, the Court clarifies the applicable framework for applications under s. 17 of the DA to retroactively reduce or rescind arrears and the principles which should guide the exercise of judicial discretion " where a payor seeks to retroactively decrease support to reflect a past reduction in income".
- [43] Given the potential significance of Colucci, I invited the parties to make additional written submissions with respect to that decision. They did so and I have considered the parties' submissions.
- [44] Mr. Saujani's counsel submitted that Colucci is distinguishable because, Mr. Saujani has always paid child support, disclosed information about his financial circumstances, and engaged in regular ongoing discussions with Ms. Matus' about material changes in his income. Mr. Saujani submitted that he relied on Ms. Matus' failure to enforce the alleged child support arrears for many years. In his view, there are no arrears because Ms. Matus accepted the reduced child support payments.
- [45] Counsel for Mr. Saujani also submitted that, had Mr. Saujani known that he could not rely on Ms. Matus' apparent agreement about reduced child support, Mr. Saujani would have brought an earlier application to vary the Final Order.
- [46] Ms. Matus' counsel submitted that Colucci supports Ms. Matus' position that Mr. Saujani failed to provide effective notice by not providing complete and accurate financial information. Her counsel also submits that Mr. Saujani engaged in blameworthy conduct by failing to provide prompt and accurate financial information and by prioritizing his financial self-interest, such as by making RRSP contributions and business investments, over his child support payment obligations.
- [47] Section 17(4) of the DA, which applies to the application, provides:
- (4) Before the court makes a variation order in respect of a child support order, the court shall satisfy itself that a change of circumstances as provided for in the applicable guidelines has occurred since the making of the child support order or the last variation order made in respect of that order.
- [48] Section 14 of the Guidelines, provides:
14. Circumstances for variation
- For the purposes of subsection 17(4) of the Act, any one of the following constitutes a change of circumstances that gives rise to the making of a variation order in respect of a child support order:
- (a) in the case where the amount of child support includes a determination made in accordance with the applicable table, any change in circumstances that would result in a different child support order or any provision thereof;

- (b) in the case where the amount of child support does not include a determination made in accordance with a table, any change in the condition, means, needs or other circumstances of either spouse or of any child who is entitled to support; and
 - (c) in the case of an order made before May 1, 1997, the coming into force of section 15.1 of the Act, enacted by section 2 of chapter 1 of the Statutes of Canada, (1997).
- [49] In Colucci, at para. 55, the Court stated that judicial discretion to vary child support and cancel arrears must be exercised sensitively to the paramount interest of safeguarding a child's interest in receiving the support to which they are entitled. In addition, the court must fairly balance certainty and flexibility to reach a just result that recognizes fluctuations in the payor's income, the particular circumstances of a case, as well as the promotion of timely and full disclosure.
- [50] To succeed, Mr. Saujani must first satisfy the threshold requirement of establishing a "past change in circumstances" pursuant to s. 17(4) of the DA. In Colucci, at paras. 61-62, the Court addressed the threshold for claims, such as the one in this case, based on a material change in income:
- [61] Most commonly, the retroactive variation claim will be based on a material change in income. To meet the threshold, a decrease in income must be significant and have some degree of continuity, and it must be real and not one of choice (Willick, at pp. 687-88; Earle v. Earle, 1999 CanLII 6914 (B.C.S.C.), at para. 27; MacCarthy v. MacCarthy, 2015 BCCA 496, 380 B.C.A.C. 102, at para. 58, citing Earle; L.M.P. v. L.S., 2011 SCC 64, [2011] 3 S.C.R. 775, at para. 33; Gray, at para. 39; Brown v. Brown, 2010 NBCA 5, 353 N.B.R. (2d) 323 ("Brown"), at para. 2; Templeton, at para. 35). Trivial or short-lived changes are insufficient to justify a variation (Templeton, at para. 35). In this way, the threshold inquiry preserves some sense of certainty and predictability for the parties and the child, while allowing some flexibility in response to changes in the payor's income.
- [62] The payor must have disclosed sufficient reliable evidence for the court to determine when and how far their income fell, and to ascertain whether the change was significant, long lasting, and not one of choice. A decision to retroactively decrease support can only be made based on "reliable, accurate and complete information" (Earle, at para. 28). The payor cannot ask the court to make findings on income that are contrary to the recipient's interests "while at the same time shielding information that is relevant to the determination of their income behind a protective wall" (Templeton, at para. 67; see also Tougher v. Tougher, 1999 ABQB 552, at paras. 14-15 (CanLII); Terry, at para. 9).
- [51] At the time of the Final Order, and in the years leading up to it, Mr. Saujani's gross income was close to, or in excess of, \$200,000 per year.
- [52] Since the Final Order, Mr. Saujani's line 150 (now line 15000) income has steadily declined. For 2017 to 2019, Mr. Saujani has not reported income over \$39,000 per year.

- [53] On its face, Mr. Saujani's decrease in income since 2011 appears to be significant and continuous. However, I must also consider whether Mr. Saujani's decrease in income is real and not a matter of choice.
- [54] As I already noted, there is evidence that Mr. Saujani periodically informed Ms. Matus that he was earning less. He also often stated that he hoped the decrease was temporary and he would take steps to increase his earnings.
- [55] To decide whether Mr. Saujani's decrease in income is significant, long lasting and not of choice, he must have disclosed sufficient reliable evidence to allow the court to make this determination.
- [56] In *M.A.M. v. D.L.L.*, 2018 BCSC 2114, Justice Ker summarized the law applicable in determining income pursuant to the Guidelines at paras. 73-78:
- [73] The legislative scheme for determining guideline income requires a consideration of ss. 16 to 20 of the Guidelines. This was succinctly described by Mr. Justice Groberman in *Brown v. Brown*, 2014 BCCA 152 at para. 16:
- [16] The legislative scheme for determining Guideline income is fairly straightforward. A court begins, under s. 16 of the Guidelines, with the "total income" from the payor parent's tax return and then makes specified adjustments. Next, the court is entitled to take further specific considerations into account under ss. 17-20 of the Guidelines to determine Guideline income. This Court outlined the steps in *Vincent v. Vincent*, 2012 BCCA 186:
- [35] All determinations of child support begin with finding the spouse's Line 150 income, a relatively straight-forward step one. The second step is to make whatever adjustments to that amount are required by Schedule III. Once these two steps are completed, the court must look to sections 17 to 20, to determine whether any of the exceptions set down in those provisions applies, and, if so, what effect they should be given on the facts of the case.
- [77] Vincent discusses the application of the exceptions listed in ss. 17-19 of the Guidelines and how they may further apply to determine a parent's Guidelines income:
- [36] Section 17 gives the court discretion to deal with the problem of an income which fluctuates from year to year and with non-recurring income or losses such that the determination of a spouse's income under s. 16 is not the fairest determination of that income. As it relates to this case, this provision permits the inclusion of non-recurring capital gains and the exclusion of non-recurring dividends.
- [37] Section 18 provides discretion to deal with the situation where a spouse is in a position to manipulate income in his or her capacity as shareholder, director or officer of a corporation, such that a person's income under s. 16 does not fairly reflect all the money available to that spouse for the payment of child support. It permits the inclusion of pre-tax corporate income and benefits paid to non-arm's length persons.

- [38] Section 19 addresses situations where the spouse's disclosed income does not fairly reflect what should be paid in child support by permitting imputation of income. It permits the imputation of income in a variety of situations, including income which is tax exempt, under-utilized capital investments, and when there is a failure to provide income information.
- [78] These comments illustrate the need to focus on the substance of any transaction or mode of receiving income rather than the form of any payments to a corporation. The objective of this approach is to ensure that a payor's Guidelines income reflects the money reasonably available for child support purposes: *Richardson v. Richardson*, 2013 BCCA 378 at paras. 54-55; *Andreassen v. Andreassen*, 2016 BCSC 1196 at para. 62.
- [57] Mr. Saujani tendered a variety of financial records to support his application. For example, he has provided a number of individual and corporate tax documents such as his 2015 to 2019 T1 Individual Returns, and some T2 Corporate Returns, with certain pages from financial statements, for RSK Strata Advisors Corp. ("RSK") - a company which he incorporated. He submits that this information satisfies his obligation to disclose financial information and it demonstrates that he earned far less than \$200,000 each year since the Final Order.
- [58] In his Affidavit #8, made January 15, 2021, Mr. Saujani stated that until Ms. Matus unilaterally and without warning registered with the Family Maintenance Enforcement Program ("FMEP") to enforce child support arrears, the parties had worked cooperatively to "share [their] income annually" and he paid support according to the tables for seven years. As I understand Mr. Saujani's view of his arrangement with Ms. Matus, it was effectively, that the amount of child support payable was subject to annual or more frequent review, just depending on when and whether his income changed.
- [59] Mr. Saujani submitted that when he advised Ms. Matus that his income had decreased, and he made reduced child support payments, she often accepted the amount without question and she did not ask for back up documents. When she infrequently asked for financial information, such as in 2017, Ms. Matus stated that Mr. Saujani provided her with incomplete copies of his 2015 and 2016 tax returns.
- [60] Ms. Matus' evidence is that she objected to Mr. Saujani continually reducing his child support payments and they had heated arguments about reduced child support which are not reflected in the emails. Whenever she mentioned involving FMEP, Mr. Saujani would threaten to cash the RESPs and use the money to pay child support. In her Affidavit #1, Ms. Matus described feeling that she had no other choice but to carry on accepting whatever Mr. Saujani would agree to pay.
- [61] Despite her generally cooperative pattern, there are examples of Ms. Matus objecting to what Mr. Saujani was doing. For example, in an email dated September 23, 2015, Mr. Saujani advised Ms. Matus that since he had only earned \$5,000 per month from February, he would reduce his monthly child support from \$1,923 to \$1,095. On September 24, 2015, Ms. Matus

replied stating that Mr. Saujani was putting her in a difficult position by unilaterally changing and reducing the child support when she had "been more than fair in taking [his] economic situation into account every time it changed".

- [62] Further, in her September 24, 2015 email, Ms. Matus said: " As you know, we have a written agreement that differs substantially from the amount that you've been paying. I did not ask you to jump through the numerous hoops, provide T4's and proof of income or anything else each time you told me your situation changed." She goes on to point out that she has been paying for, and Mr. Saujani has been ignoring her requests to contribute towards the children's medical, dental and other extraordinary expenses.
- [63] Ms. Matus submitted that there are significant gaps in the financial information provided to her by Mr. Saujani. Even though she generally took him at his word, she stated that he never provided timely, accurate and complete information about his finances to back up his claim that his income had decreased.
- [64] Ms. Matus submitted that she only realized that Mr. Saujani was misrepresenting his finances when she received the financial information that he disclosed for these applications. For example, Mr. Saujani emailed Ms. Matus on December 10, 2012 stating, among other things, that he believed he had overpaid child support. Ms. Matus submitted that his recently disclosed financial information, including his "unadjusted income tables", demonstrated that Mr. Saujani was in fact substantially underpaying child support.
- [65] According to Ms. Matus, Mr. Saujani owns, or is a partner or shareholder in, numerous businesses for which he provides inadequate or non-existent financial information. These businesses include S2S Consulting, S2S Properties LLP and 1842003 Ontario Inc.
- [66] Ms. Matus pointed out that there is no information to shed any light on Mr. Saujani's income from, or interest in, S2S Properties LLP. From my review of Mr. Saujani's individual tax returns, it appears he sometimes received a T5013 slip from S2S Properties LLP for partnership income or loss. However, there is no information as to the income or expenses of S2S Properties LLP, nor anything to explain how the partnership income or loss is determined.
- [67] In late 2015, Mr. Saujani incorporated RSK to provide consulting services on strata corporation depreciation reports. Mr. Saujani states that he funded this new business with a loan from his parents.
- [68] Ms. Matus noted that there is no current T2 Corporate Return for RSK, nor any disclosure of Mr. Saujani's interest in or earnings from 1842003 Ontario Ltd. Mr. Saujani did supply RSK's T2 return for the tax year ended July 31, 2020, with his Affidavit #9 made January 15, 2021. He submitted that the details of his business income are fully set out in the income tax returns.

- [69] By July 2016, Mr. Saujani left the last corporate employment position that he held. At this point, he stated that his "corporate sales career was effectively over" since his age, combined with a trail of short-term jobs, had made it impossible to find further opportunities in software sales. Mr. Saujani supplied information showing that he had applied without success for various jobs in the software sales industry.
- [70] In his Affidavit #8 made January 15, 2021, Mr. Saujani explains that in 2016, he decided to work full time as a "property manager, consultant and investor" advising strata corporations and looking after investment properties that he owns in Canada and the United States.
- [71] According to Mr. Saujani, he kept Ms. Matus informed of all of these changes, and by September 2016 he was forced to sell his townhouse for financial reasons. At that point, he moved in with his romantic partner, although he denies that he has ever had a common-law relationship with his new partner.
- [72] Mr. Saujani understood that his income from RSK would be much lower than what he had earned in software sales. However, he stated that there was "a real business opportunity available in advising strata corporations about capital planning".
- [73] Mr. Saujani stated that RSK's sales have gradually increased and this has allowed him to rebuild his financial position. Mr. Saujani projected that he will "significantly increase his income" as RSK becomes more established. Mr. Saujani stated that RSK's gross revenues are as follows:
- 2016 - \$7,600
- 2017 - \$30,300
- 2018 - \$26,650
- 2019 - \$50,485
- [74] In his Affidavit #8 made January 15, 2021 at para. 62, Mr. Saujani agreed that RSK continues to grow, and he explained that growth as follows:
- I, along with my two business partners, am reinvesting revenue into the company to ensure its long-term growth. All RSK taxes have been disclosed, and any income I have gained from RSK has been claimed on my relevant tax documents.
- [75] Mr. Saujani reported that he currently derives his income from "dividends from the company, rental income and business income". It is unclear whether he is referring to dividends from RSK or from another company or both.
- [76] In 2018, Mr. Saujani reported earning a total income of \$35,133 made up of dividend income of \$7,818, net rental income of \$1,472 and net business income of \$13,478. In 2018, he reported net self-employment income of \$13,478. He reported self-employment income including through an entity he described on his return as "S2S Consulting".

- [77] I see nothing to show whether, or how, Mr. Saujani earns income from RSK. There is no employment or consulting agreement with RSK, nor a statement of wages paid to him.
- [78] According to excerpts from RSK's financial statements for 2019 and 2020, such as the balance sheets and statements of profit and loss, as of July 31, 2019, RSK's net income was \$10,094 and as of February 20, 2020, its net income was (\$4,957). Nothing in these excerpts explains what, if anything, RSK paid to Mr. Saujani or how payments to Mr. Saujani are determined.
- [79] For 2019, Mr. Saujani stated that he anticipated earning \$35,000 from "business income from investments" and from RSK. He provided no information on his future partnership income prospects and nothing to explain how the partnership income is determined.
- [80] In his Affidavit #8, Mr. Saujani summarized his current financial situation as follows:
158. Essentially, I have five assets that I manage to generate income and future wealth. RSK Strata Advisors started in 2015, S2SP [sic] Properties started in 2014, personal real-estate (2 properties, family real-estate (3 properties) and Investments). All of this was disclosed. Anyone [who] thinks that I don't work hard or am semi-retired does not understand how I work. We may joke about "working hard" or "hardly working" but I assure you it has not been easy. This could not have happened without the support and care of my partner and my children.
- [81] Ms. Matus submitted that the financial information tendered by Mr. Saujani does not represent the kind of full and frank disclosure that would be required to allow her to independently assess the information and respond. Ms. Matus pointed out that Mr. Saujani did not provide her with most of this information until she registered with FMFP and Mr. Saujani filed an application to vary the Final Order.
- [82] Mr. Saujani acknowledged that sometime in 2017, he decided to further reduce his child support payment to \$793 per month to reflect an annual income of \$39,000. He stated he did this because \$39,000 was the amount he reported for tax purposes in 2016.
- [83] Mr. Saujani acknowledged that he meant to, but he inadvertently failed to send Ms. Matus an explanation for reducing his child support payments in 2017. However, he justified his actions, noting that except for when Ms. Matus went to FMFP, "the revised amount was accepted by [Ms. Matus] without complaint or comment for over an entire year". In my view, this is a telling example of how Mr. Saujani approached his obligation to provide financial information and pay child support.
- [84] Ms. Matus lacked access to the financial details of Mr. Saujani's various businesses, including information about his involvement with non-arm's length companies and partnerships. One such example related to "New Earth Marketing", a company owned by Mr. Saujani's romantic partner. Through her on-line research, Ms. Matus located material that indicated to her that Mr. Saujani and New Earth Marketing were doing business together.

- [85] Ms. Matus still attempted to conduct an analysis of Mr. Saujani's disclosed financial information. In that analysis, Ms. Matus raised numerous issues and questions regarding Mr. Saujani's business interests and income. In my view, many of the issues and questions she raised are relevant to the issue of determining Mr. Saujani's income and, on the record, they appear to be largely unanswered.
- [86] For Mr. Saujani's 2017 tax year, Ms. Matus noted that Mr. Saujani's reported line 150 income of \$38,840, again comprising business and rental income, taxable Canadian dividends, interest and taxable capital gains. She stated that she could not tell, based on the information disclosed, whether he had claimed the same expenses in all or some of his businesses. She also noted that in 2017, while he further reduced child support payments, he managed to contribute, but not claim, RRSP contributions totalling \$13,323.
- [87] For Mr. Saujani's 2019 tax year, Ms. Matus questioned why Mr. Saujani reported no business income while he stated that RSK's sales increased each year. She also questioned various expenses claimed, such as substantial increases to advertising and travel expenses. Ms. Matus wondered whether the increased advertising expenses were due to business dealings with New Earth Marketing.
- [88] In light of Ms. Matus' research and questions regarding Mr. Saujani's involvement with New Earth Marketing, Mr. Saujani responded that in 2017 he earned income from New Earth Marketing. He also admitted that his romantic partner looks after the RSK website. However, he stated his earnings from New Earth Marketing were properly reported and he has never tried to conceal sources of income from Ms. Matus.
- [89] After reviewing the evidence and hearing the submissions, I have concluded that Mr. Saujani has not disclosed sufficient financial information to allow Ms. Matus to reasonably assess the information and make decisions accordingly. The obligations related to disclosure of financial information are a main feature of the child support regime and failure to disclose has been described as the "Achilles heel" of family law litigation: *Wu v. Sun*, 2011 B.C.C.A. 239 at para. 41.
- [90] Disclosure provides recipients of support with accurate and reliable information to make an informed evaluation of a payor's ability to pay child support. In the absence of "reliable, accurate and complete information", neither Ms. Matus, nor the court, is able to assess Mr. Saujani's income, how it changed, or to determine whether his reported decreased income is real and substantial or a matter of choice.
- [91] The information which Mr. Saujani disclosed in support of his application is not sufficient to satisfy the disclosure requirements as recently explained in *Colucci*. Provision of tax returns, notices of assessment and T4 slips may provide reasonable proof of income for a payor who earns income exclusively as a T-4 employee. However, for a payor such as Mr. Saujani, it falls well short of what is required in the circumstances.

- [92] Mr. Saujani earned and continues to earn income through partnerships, companies, investments and potentially through non-arm's length business relationships. He also appears to earn income from properties or a business located in the United States. In my view, the disclosure obligations are more extensive in this case because the informational asymmetry between the parties is greater where a co-parent, such as Mr. Saujani, derives income from a variety of closely held and non-arm's length businesses.
- [93] Section 21 of the Guidelines sets out the kind of information that must be provided depending on how spouses earn income or engage in business. On my review of the evidence submitted by the parties, Mr. Saujani's financial disclosure lacks detailed information about his corporate, personal and partnership interests and income.
- [94] Missing are full financial statements with details of expenses, salary, wages, shareholder loan debits/credits and management or other fees paid by persons or corporations with whom Mr. Saujani does not deal with at arm's length. Missing are documents showing information about partnership income and draws from partnership capital. Missing are invoices, contracts, agreements or other documents to explain how and why money flows between Mr. Saujani and these entities.
- [95] There is no real dispute between the parties that Ms. Matus often took Mr. Saujani at his word when he told her that his income had dropped. She generally cooperated with his numerous, often unpredictable, requests to recalculate and reduce child support payments. However, Ms. Matus disputed the assertion that she did not object. Sometimes she sought information to verify his earnings and sometimes, but not usually, Mr. Saujani would respond with minimal information such as with select pages from his tax returns.
- [96] In Colucci, the Supreme Court of Canada discussed the importance of full and accurate disclosure of financial information. For example, at para. 48, the Court referred to adequate, accurate and timely financial disclosure as the "linchpin on which fair child support depends". The Court acknowledges that, due to the structure of the Guidelines, an "informational asymmetry" exists between the parties for purposes of determining child support. The asymmetry arises because it is the payor, not the recipient, who knows and controls the relevant information.
- [97] At para. 82, the Court in Colucci notes that where a payor has not provided "proper communication and disclosure" to demonstrate a decrease in income, the recipient is entitled to rely on the agreement or the court order. At para. 110, the Court reiterates that an adverse inference may be drawn against a payor who fails to provide all relevant evidence necessary to determine the payor's "true income during any part of the period of retroactivity".

- [98] After considering all of the evidence and the circumstances, I am not satisfied that Mr. Saujani has established a change in circumstances as required by s. 17(4) of the DA. I have reached this conclusion because Mr. Saujani has failed to provide Ms. Matus and the court with sufficient information to allow a determination of whether the decreased income he reported is the result of a real change in circumstances or whether it is a matter of choice.
- [99] In my view, Mr. Saujani failed to observe his duty to "voluntarily disclose pertinent information" to allow Ms. Matus to independently assess the situation and to react appropriately: Colucci at para. 90. The fact that Ms. Matus did not always question him or ask for documents to verify his income does not alter Mr. Saujani's legal obligations.
- [100] Ms. Matus explained why she did not challenge Mr. Saujani's repeated advice that his income had decreased and why she did not ask him for proof. I accept her explanation and I am mindful that recipient spouses may be impacted by other factors, such as a desire to keep the peace between former spouses or to protect their children from conflict, adding to the challenge of analysing the financial details of a co-parent.
- [101] In *Michel v. Graydon*, 2020 SCC 24, the Supreme Court of Canada discussed the informational and analytical gaps that may exist for female co-parents as they try to evaluate the finances of the other co-parent:
- [96] Given these circumstances, women will often face financial, occupational, temporal, and emotional disadvantages. Moreover, access to justice in family law is not always possible due to the high costs of litigation. In this larger social context, women who obtain custody are often badly placed to evaluate their co-parent's financial situation and to take action against it.
- [Emphasis added.]
- [102] In my view, Ms. Matus' failure to take immediate steps to enforce the Final Order of the arrears is not indicative of bad faith. As the Court in Colucci explained (at para. 100), delayed enforcement action by a recipient of child support is irrelevant. In any event, Ms. Matus' explained her reasons for accepting Mr. Saujani's assurances that the reduced payments were temporary and the circumstances that led her to realize that he did not ever intend to pay the "proper" amount of support or to catch up. I accept her explanations for her actions.
- [103] I am unable to find that by cooperating with repeated payment reductions and not policing Mr. Saujani's compliance with his child support obligations, Ms. Matus has somehow displaced Mr. Saujani's onus to provide timely, frank and full disclosure of his income. As noted in Colucci at para. 49, the payor, not the recipient, is the person "who knows and controls the information needed".

[104] I have already noted many gaps and questions related to the financial information disclosed by Mr. Saujani. However, I also note that much of the financial information disclosed was provided to Ms. Matus only after Ms. Matus involved FMEP and Mr. Saujani filed his application to vary the Final Order. In Colucci, the Court speaks unfavourably about delaying disclosure in such circumstances.

[105] For the reasons set out above, I decline to vary the Final Order.

Cancellation of Child Support Arrears

[106] Mr. Saujani relies on s. 17(4.1) of the DA and s. 174 of the FLA in seeking to cancel his child support arrears. Mr. Saujani submits that he currently owes \$171,389 in child support arrears according to the FMEP. I have already determined that the Final Order is founded in the DA. It follows that the DA, not the FLA, governs his request to cancel support arrears.

[107] Mr. Saujani submitted that he was led to believe that he and Ms. Matus had a binding agreement to vary child support and therefore, he submits that the arrears are caused by Ms. Matus' delay in seeking enforcement.

[108] Payors must commence proceedings in a timely fashion and not wait until an enforcement agency has taken steps against them: Colucci at para. 93. Ms. Matus' delay in seeking enforcement of the child support arrears is not a relevant consideration: Colucci at para. 100.

[109] Ms. Matus submitted that Mr. Saujani's F8 financial statements reveal that he has now accumulated assets worth nearly \$2,000,000. She questioned his ability to accumulate these assets while also claiming ongoing financial distress and reduced income.

[110] Mr. Saujani stated that in 2016, he could no longer afford all of his expenses so he decided to sell his townhouse and move in with his romantic partner. Mr. Saujani's counsel submitted that Mr. Saujani could not get a mortgage in 2016 so he changed his living arrangements to allow him to build up his business.

[111] In Colucci, the Court at paras. 133-141, clarified the test for cancellation of child support arrears where the prior order corresponds with the payor's income. In this case, I have declined to vary the Final Order for the reasons already explained. Therefore, I am proceeding on the basis that the Final Order correctly determined Mr. Saujani's income.

[112] Where rescission is sought based solely on inability to pay, the court is to take a highly restrictive approach and discretion is to be narrowly construed. The payor's ongoing financial capacity is the only relevant consideration.

[113] Mr. Saujani must overcome "a presumption against rescinding any part of the arrears": Colucci at para. 138. To overcome this presumption, he must establish that it is more likely than not that, even with a flexible payment plan, he cannot now, or in the future, repay the arrears.

[114] In light of Mr. Saujani's stated assets, including the encouraging picture he described regarding RSK's future earning prospects, I do not find that he has rebutted the presumption against cancelling arrears. I am unable, on the whole of the evidence, to conclude that Mr. Saujani's ongoing financial capacity is such that he will be unable to pay the arrears now or in the future.

[115] I therefore dismiss Mr. Saujani's application for cancellation of his child support arrears.

Section 7 Expenses and RESP

[116] The Final Order provided as follows regarding s. 7 expenses:

9. BY CONSENT the Children's dance and piano expenses of \$500 per month, are not additional special or extraordinary expenses as defined in section 7 of the Federal Child Support Guidelines.
10. BY CONSENT the parties agree that in the future, the Children's special or extraordinary expenses are:
 - (a) expenses for post-secondary education agreed upon between the parties in advance of the expenditure;
 - (b) any health-related expenses that exceed insurance reimbursement, including uninsured dental, orthodontic treatment, professional counseling 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 agreed by the parties in advance of the expenditure; and
 - (c) extraordinary extra curricular activities that are agreed upon by the parties in advance of the expenditure.
11. BY CONSENT the parties shall share the Children's special or extraordinary expense as defined above in proportion to their guidelines income as determined under this Order. The Claimant's proportionate [share] will be 15% and the Respondent's, 85% after January 1, 2012. Prior to January 1, 2012, the Respondent shall be responsible for 100% of the Children's special or extraordinary expenses.

[117] Ms. Matus' notice of application seeks to vary the Final Order in respect of the payment of s. 7 expenses. However, based on her counsel's submissions, I understand that she seeks an order determining the s. 7 expenses and requiring Mr. Saujani to contribute his share. If the request to rescind the arrears of child support is denied, then I understand that Ms. Matus seeks no contribution from Mr. Saujani for dance and piano costs because the Final Order required her to pay for those expenses.

- [118] As I understand Mr. Saujani's position, it is that he has already contributed his share towards s. 7 expenses. Mr. Saujani disagreed that there are additional s. 7 expenses that he must contribute towards because he overpaid child support. He also submitted that Ms. Matus failed to obtain his advance approval or provide receipts for expenses.

Tuition Costs

- [119] One area of dispute involves the RESP investments and monies drawn down to date to pay for post-secondary tuition expenses.
- [120] When the parties were married, they jointly contributed to RESP investment accounts. Ms. Matus tendered evidence showing that around the time of the Final Order, the value of the parties' investments in RESP account numbers ending in XX950 and XX157 amounted to approximately \$50,000 and, over time, the value has increased to approximately \$64,000.
- [121] Mr. Saujani tendered evidence showing that after separation, he contributed amounts to an RESP for the children. For example, in 2014 and 2016, he contributed \$12,000 and \$6,800, respectively, to an RESP investment account ending in XX162.
- [122] Mr. Saujani claimed that he paid almost \$36,000 for post-secondary tuition mainly using money withdrawn from the RESP "that we had set up and which I contributed almost all of the money to". Ms. Matus disputed that assertion and submitted that the payment of tuition expenses has come entirely from jointly contributed funds invested in the RESP.
- [123] According to Mr. Saujani, \$57,660 has been withdrawn to date from the RESP to pay for the children's post-secondary tuition expenses. There is approximately \$37,000 remaining.
- [124] Mr. Saujani submitted that, based on their joint contributions versus the amount he contributed independently, he has funded 83 percent of the post-secondary tuition costs paid to date. Whether or not that is the case, I note that the parties' obligation to contribute to the childrens' educational or other s. 7 expenses is not necessarily satisfied simply by making contributions to RESP accounts.
- [125] On the evidence before me, I am unable to determine what portion of funds drawn from the RESP to date have come from jointly contributed, versus individually contributed, funds. If the parties seek a determination of that issue, they must provide evidence, such as, detailed records of contributions and withdrawals from the RESPs investments and records showing the payment, and source of payment, of post-secondary tuition costs for the children.

Other s. 7 Expenses

- [126] Ms. Matus claimed that in addition to post-secondary tuition costs, there are other s. 7 expenses that she has paid for the children and she seeks Mr. Saujani's contribution towards these expenses. I will now address her claim for contribution towards other s. 7 expenses.

- [127] Ms. Matus prepared detailed spreadsheets listing s. 7 expenses for the years 2012 to 2020 that she paid and has receipts for. Excluding post-secondary tuition, dance and piano costs, she claimed \$31,719 as the total expenses she paid for. She requests Mr. Saujani's 85 percent contribution towards these expenses.
- [128] According to Ms. Matus, she frequently communicated with Mr. Saujani to request his contribution but he often failed to respond and he did not reimburse her. For example, on July 17, 2017 and August 30, 2017, Ms. Matus emailed Mr. Saujani to ask him to contribute towards the special expenses, but he did not respond.
- [129] When Mr. Saujani did respond to her requests for contribution, Ms. Matus stated that he often stated that his contribution had been made through overpayment of child support or by taking money out of the RESPs to pay for tuition expenses.
- [130] Ms. Matus stated that although she supplied Mr. Saujani with advance information about s. 7 expenses and she requested his contribution, she paid for all of their children's dental work, corrective eyewear and prescriptions. On the one occasion that Mr. Saujani paid for dental work, he had taken the children to see a dentist in Mexico.
- [131] Mr. Saujani provided lists of s. 7 expenses setting out items and amounts that he stated he paid. For example, in his Affidavit #5, Mr. Saujani provided a list of the s. 7 expenses that he paid dating back to 2011. Among other things, he claimed amounts paid for trips, braces, tuition and a computer. Ms. Matus pointed out that he has provided no receipts to back up these expenses.
- [132] Regarding the other s. 7 expenses paid for by Mr. Saujani, I have concluded, after considering all of the evidence, that Mr. Saujani did pay \$3,025 towards additional s. 7 expenses. Namely, he paid \$2,027 for a computer, \$102 for a nutrition course and \$896 for an air purifier. Ms. Matus is responsible for \$454 of the total representing her 15 percent share of the s. 7 expenses.
- [133] The other items listed by Mr. Saujani are either post-secondary tuition costs, which I have already addressed, or they are for things like painting services, insurance costs, or trips that he took with the children. In my view, these items are not proper special or extraordinary expenses.
- [134] Regarding the cost of braces, Ms. Matus' evidence is that, except for a \$675 reimbursement she received from Mr. Saujani's extended benefit plan, she paid for the entirety of this cost.
- [135] According to Ms. Matus' s. 7 expense spreadsheet, orthodontic expenses totalled \$5,600, less \$675 extended health reimbursement. She deducted from the orthodontic cost, \$2,300 which was offset against her part of the parties' joint tax debt. I accept that Mr. Saujani did not contribute any additional amounts for the cost of orthodontics that are not recorded in Ms. Matus' spreadsheet and this is an expense that is properly included as part of the s. 7 expenses.

[136] In his Affidavit #8, Mr. Saujani addressed the s. 7 expenses for dental work for the children:

161. [Ms. Matus] may be correct that I have not paid 50% of the dental, but other than emails with numbers, I have not been provided with proper dental receipts. If they were shared with me, I am sure we would come to an agreement. This issue is happening now. [I.S.S.] is 20 and needed her wisdom teeth out. She has a part time job and I said I would cover 33% of the cost. She had the work done in August for \$2,000 and has still not provided me with the receipt. If I see the expense was made and the work done, I would be happy to contribute

[137] As I already stated, Mr. Saujani justified not contributing towards s. 7 expenses because Ms. Matus did not give him receipts and he did not agree to the expenses in advance.

[138] On July 17, 2017, Ms. Matus emailed Mr. Saujani about s. 7 expenses and she provided receipts. In his Affidavit #8 (at para. 163), Mr. Saujani stated that he responded to her, "albeit a year late". He disliked her request to pay "invoices over a seven-month span in one e-mail." He objected to Ms. Matus asking for approval of the treatment and then going ahead on the expense without his prior approval. It appears the "treatment course" he objected to involved urgent treatment for a child's infected tooth. Mr. Saujani stated that he was willing to pay for "extra expenses" as long as they are "communicated correctly and in a timely fashion".

[139] Overall, I prefer Ms. Matus' evidence regarding the s. 7 expenses (except for the amounts identified below) because, for example, I find her accounting of outstanding expenses to be generally supported by emails between the parties, detailed descriptions and/or receipts.

[140] I also prefer Ms. Matus' evidence regarding s. 7 expenses because, in my view, Mr. Saujani's evidence demonstrated that:

- a) he failed to respond promptly, or at all, to many of Ms. Matus' communications to him regarding s. 7 expenses for the children;
- b) he unreasonably objected to and refused to contribute to s. 7 expenses related to matters such as emergency dental work;
- c) he appeared to expect Ms. Matus to pay and carry the cost of s. 7 expenses;
- d) he unreasonably refused to contribute to expenses, for example, for the cost of I.S.S.'s wisdom teeth extraction, on grounds that he never received proof of services while also acknowledging that the work was indeed done for a cost of \$2,000; and
- e) he appeared to regard his obligation to contribute 85 percent towards the cost of s. 7 expenses as negotiable, as demonstrated by his offer to pay 33 percent of the cost of extracting I.S.S.'s wisdom teeth.

[141] Based on the evidence as a whole, I find that \$34,744 is the total amount incurred for s. 7 expenses for the parties' children from 2012 to the date of the hearing, which is made up of the following:

- a) \$31,719 of expenses incurred and paid for by Ms. Matus; and
- b) \$3,025 of expenses incurred and paid for by Mr. Saujani.

[142] I find that Mr. Saujani owes Ms. Matus \$26,961 for his 85 percent contribution towards the s. 7 expenses that she paid. I find that Ms. Matus owes Mr. Saujani \$454 for her 15 percent contribution towards the s. 7 expenses that he paid.

[143] Setting one amount off against the other, I order Mr. Saujani to pay Ms. Matus \$26,507 for his proportionate share of the special and extraordinary s. 7 expenses to date.

Children of the Marriage

[144] Mr. Saujani requests a declaration that S.K.S. and I.S.S. are no longer children of the marriage.

[145] Section 2(1) of the DA, provides the following definition for children of the marriage:

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

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

or

(b) is the age of majority or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessities of life;

[146] The relevant portion of the Final Order provides as follows:

5. BY CONSENT until adjusted under the terms of this order or the Children cease to be children of the marriage as defined by the Divorce Act, the Respondent shall pay child support of \$3448 per month to the Claimant, payable in biweekly instalments of \$1591, with the first payment commencing November 19, 2010 and continuing biweekly thereafter.

[Emphasis added.]

[147] Ms. Matus agreed that S.K.S is no longer a child of the marriage because she graduated from post-secondary education in May 2020, she is able to withdraw from parental care and support herself.

[148] Ms. Matus submitted that I.S.S. remains a child of the marriage because she currently attends post-secondary education on a full-time basis. Ms. Matus stated that I.S.S. took a gap year after graduating from secondary school. During the gap year, I.S.S. worked part-time and she lived with Ms. Matus.

- [149] After assessing the evidence as a whole, I am satisfied that I.S.S. continues to be a child of the marriage. The fact that she took a gap year while she was between the ages of 17 and 18 does not alter my finding. She is presently attending post-secondary education. While I.S.S. has pursued some part-time work, I find that she cannot meaningfully contribute to her own costs at this stage of her life.
- [150] Based on the Guidelines and the Federal Child Support Tables that came into effect on November 22, 2017, and based on the payor's annual income of \$200,000 (i.e. as determined by the Final Order), Mr. Saujani's child support payment applicable in British Columbia for two children is \$2,749 per month.
- [151] To be clear, \$2,749 is the monthly child support payment (in relation to the parties' children, I.S.S. and R.A.S.) required from Mr. Saujani effective as of June 2020, which is the month following S.K.S.'s graduation from post-secondary education.

Summary

- [152] In her notice of application, Ms. Matus seeks an order to enforce any and all arrears of child support and an order for immediate payment of all arrears of child support. I decline to make such orders as I understand that FMEP is already involved in collecting the arrears.
- [153] However, if there are additional facts or circumstances of which I am not aware regarding the enforcement and payment of the arrears, the parties may contact Scheduling within 45 days of the date of this Judgment to request a date to appear before me to speak to those additional facts or circumstances.
- [154] In summary, in addition to the nunc pro tunc order made above, I make the following orders:
- a) Mr. Saujani's request to vary the Final Order, and to henceforth pay reduced child support based on his allegedly reduced income, is dismissed;
 - b) Mr. Saujani's request to cancel the child support arrears is dismissed;
 - c) Ms. Matus' request for the determination and payment of s. 7 special and extraordinary expenses is granted and Mr. Saujani shall make a net payment to Ms. Matus totaling \$26,507 for his share of the s. 7 expenses;
 - d) Mr. Saujani's request that the parties share the cost of s. 7 special and extraordinary expenses equally is dismissed;
 - e) Mr. Saujani's request for a declaration that I.S.S. is no longer a child of the marriage is dismissed and that S.K.S. is no longer a child of the marriage is granted. Therefore, effective June 1, 2020, Mr. Saujani shall make monthly child support payments to Ms. Matus in the amount of \$2,749;

- f) Ms. Matus' requests for orders enforcing any and all arrears of child support and for immediate payment of all arrears of child support are dismissed; and
- g) Ms. Matus' request that income be imputed to Mr. Saujani is dismissed.

[155] Each party sought costs against the other party. In my view, Ms. Matus has largely prevailed in her application and in her response to Mr. Saujani's application and she is entitled to costs.

"E. McDonald J."

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