

CANADA / JUDGMENT

Sawyer v. Sawyer

2025 BCSC 1207

COURT

Supreme Court of British Columbia

DECIDED

27 June 2025

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2025 BCSC 1207 Sawyer v. Sawyer

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Sawyer v. Sawyer,

2025 BCSC 1207

Date: 20250627

Docket: E48308

Registry: Penticton

Between:

Oraphan Sawyer

Claimant

And

Michael Alan Sawyer

Respondent

Before: The Honourable Justice Hardwick

Reasons for Judgment

Counsel for the Claimant:

P.S. Boles

Counsel for the Respondent:

P.F. Moore

Place and Date of Trial/Hearing:

Kelowna, B.C.

June 3, 2025

Place and Date of Judgment:

Penticton, B.C.

June 27, 2025

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- [1] These reasons for judgment address the remaining relief sought in two notices of application filed in what I previously described in earlier, very brief, oral reasons as a "high-conflict family law action". Those reasons for judgment, delivered on March 27, 2025, are indexed at 2025 BCSC 695 (the "March Reasons").
- [2] At the time of the March Reasons, the matter was set for a nine-day trial in Kelowna on the assize list for the week commencing June 2, 2025. The trial has since been adjourned, peremptory on the respondent, for 9 days on the assize list in Penticton commencing the week of December 1, 2025.
- [3] Very close to every possible issue in this action currently still remains in dispute: determination of family debt, division of family property and family debt, determination of Guideline income, entitlement to support, quantum of support, lump sum support, occupational rent, parenting responsibilities and possibly, even parenting time.
- [4] Within this context, in her notice of application filed April 28, 2025 (the "Claimant's Application"), the claimant seeks the following orders:

- a) the respondent shall pay a fine pursuant to s. 230(2)(b) of the Family Law Act [FLA] in the amount of \$5,000 for failure to comply with court orders, or the respondent pay the sum of \$10,000 to the claimant for his breaches of said orders or, in the further alternative, the respondent forthwith pay the expenses reasonably and necessarily incurred by the claimant as a result of the respondent's conduct (paras. 2, 3 and 5);
 - b) a ruling by the court on the propriety and correctness of objections taken at the examination for discovery of the respondent conducted on December 30, 2024 (para. 6);
 - c) the respondent be imputed a Guideline income of \$200,000 for 2024 and that the child and spousal support payable by the respondent be retroactively adjusted accordingly effective January 1, 2024 and continuing prospectively on the 1st of each month until further order of the court or agreement, and the arrears be paid to the claimant forthwith on a without prejudice basis (para. 10);
 - d) The respondent produce copies of all correspondence and communications regarding the F8 sworn in October 2024 as to the quantum of his income to be included therein given the waiver of solicitor and client privilege in relation to the same (para. 11); and
 - e) Costs, including special costs payable forthwith after taxation thereof, including the special costs of the assessment by the respondent to the claimant (para. 12).
- [5] This relief is generally opposed by the respondent with the exception, somewhat, of the issue of the examination for discovery objections.
- [6] In his notice of application filed May 1, 2025 (the "Respondent's Application"), the respondent seeks the following orders:
- a) Pursuant to s. 89 of the FLA, an interim distribution of family property in the sum of \$40,649.75 to be paid to Zaseybedia Bonga, Barristers and Solicitors in full payment of the outstanding account (para. 4);
 - b) Pursuant to s. 89 of the FLA, an interim distribution of family property in the sum of \$75,000 to the respondent from the funds held in trust with Pamela Boles Law Corporation (the "Trust Funds") to be used for his legal expenses (para. 5);
 - c) Leave to apply for additional interim distributions pursuant to s. 89 of the FLA (para. 6); and
 - d) Cost of this application, including special costs, in any event of the cause (para. 7).
- [7] The claimant vigorously opposes any interim distribution to the respondent.
- [8] I am going to deal with the relief sought in what I consider to be the level of significance to the litigation as opposed to numerically.
- [9] Before turning to the facts and subsequent analysis, I stated in the March Reasons when addressing the issue of costs that the respondent "left me woefully unimpressed with his conduct as a litigant": see para. 24. At that time, the respondent was self-represented as his

prior counsel had recently withdrawn. Whilst somewhat blunt, the comment was accurate based on the record before me. Since that time, the respondent has retained Ms. Moore. To her credit, Ms. Moore has brought the respondent significantly more in compliance with the Supreme Court Family Rules [Rules] and the relevant court orders in this proceeding. While there are still various issues in dispute, some of which I address herein, the file is far more manageable than it was 2.5 months ago.

Background

- [10] The claimant was born in 1984. The respondent was born in 1980. The parties' relationship commenced in or about 2002. They began cohabitating in a marriage-like relationship in May of 2005.
- [11] The respondent has a child from a previous relationship who the claimant helped raise but is now an independent adult. There is one biological "child of the marriage", a son, who was born in July of 2009 ("S."). S. turns 16 this summer. S. resides with the claimant and has done so since the fall of 2023.
- [12] The parties were married on June 30, 2012, in Penticton, British Columbia.
- [13] The parties' separation date is in dispute. In the March Reasons I found, for the purposes of that application, that the parties separated in August 2022 and that proceedings were commenced on January 16, 2023. I expressly did not make a formal determination with respect to the date of separation on the basis that I "gathered" this might be a triable issue. I gathered correctly and this issue remains in dispute. It is also possibly relevant when considering the quantum of any possible retroactive support claim in relation to the claimant's arguments opposing the respondent's request for an interim distribution. The evidence before me on this issue was the same as it was at the time of the March Reasons and so for consistency, I am going to again find, simply for the purposes of this application, that the parties separated in August 2022.
- [14] The respondent is a journeyman boilermaker. He is a member of the Boilermaker's Union Local 359. His work regularly sees him working out of town for weeks at a time. The respondent's "on/off" schedule has clearly varied depending on the particular job/project he was working on based the material before me, but there is nothing which indicates that the respondent has held employment locally in the Okanagan in quite a few years.
- [15] The claimant operates a cleaning company known as Thai Dee All The Time Ltd. ("Thai Dee"). Thai Dee was incorporated in 2017. It operates in the south Okanagan.
- [16] For a period of time after separation, the respondent remained in the former family home in Penticton with S. and was not working. During this time, the respondent was not paying support to the claimant.

- [17] This resulted in the claimant bringing on an application for interim support. That application was heard by (then) Master Schwartz in October of 2023. The claimant sought to have the respondent imputed an income of \$200,000 whereas the respondent asserted that that he was only earning between \$46,000 and \$48,000. Master Schwartz dealt with that issue in his oral reasons for judgment delivered October 5, 2023 as follows starting at para. 20:
- [20] Dealing now with the income of the respondent. The claimant says that the respondent is intentionally underemployed and takes issue with his allegation that he earns only \$48,000 or \$46,000. The claimant states that the respondent has advised her that he plans not to work in order to reduce his income. She brought me to the last few years of his tax returns. His 2020 T1 showed an income of \$196,000; 2021 was \$187,000; and 2022 it was \$114,000, although apparently in that year he did not work for several months.
- [21] In his counterclaim filed May 30, 2023, he claims to make an income of \$100,000.
- [22] The claimant says that the respondent also fails to disclose a living-out allowance that was received by him. She says it should have been included on his tax return and that it was not. The claimant feels that she is in a somewhat difficult position to know his true income, as the respondent has traditionally, in her view, been very secretive about his finances and has not given her access to financial records. She does point to a mortgage application signed by the respondent on August 31, 2020, where he asserts that he earned \$200,000 a year, although I note that is more than three years old and may not have been the most accurate assessment of his income, given that he was seeking financing from a bank.
- [23] The respondent is a member of the boilermakers' union, has historically earned a good wage, but she says he has chosen not to work in any meaningful way since February of this year.
- [24] The respondent says he has been unable to work full-time as he has previously, particularly out of town, because he is now caring full-time for [S.]. He denies that the claimant sees [S.] anywhere close to half-time, which is effectively what she is alleging. He has placed into evidence a summary of his income from 2015 through to the present, referencing his NOA's up until 2019 and tax returns thereafter. He has never earned \$200,000, as is now sought by the claimant. He says his highest earning years were while he worked on the Site C dam project in Northern B.C. That was between 2019 and 2021. He says he has never had a job that paid that much before or since, and that he was ultimately laid off from that work, as is shown in his record of employment.
- [25] The respondent further states that the claimant has failed to put three years of her full financial information before the court in order to properly determine her income for the purposes of the spousal support application.

- [26] In my view, having reviewed the respondent's historic earnings back to 2015, I do find that he is able to earn more than the \$46,000 he now claims, although I do not accept that \$200,000 is a reasonable figure. That income suggested by the claimant is even higher than his high-water mark, so to speak, during the time he was working with the Site C project, and I do not expect that that is a realistic income now.
- [27] I do expect though, given his experience and training, he should have no trouble earning an income of \$120,000 and I will impute his income at that.
- [18] Originally the quantum of support payable was based on a shared parenting arrangement for S. That did not last and so a consent order was entered into which set the "interim without prejudice" child support in the amount of \$1,113 per month payable the respondent for S. commencing November 1, 2023 (the "Consent Order"). Of some significance to a point I make later, the Consent Order was not actually entered until June 26, 2024. Further, although not stated in the Consent Order, I conclude the support was ordered pursuant to the FLA as the original application before (then) Master Schwartz sought interim support under that legislation versus the Divorce Act.
- [19] Pursuant to the Consent Order, the interim without prejudice spousal support payable by the respondent to the claimant was also adjusted to \$710.00 per month. This is the mid-range of support based upon the imputed income of \$120,000 to the respondent and an imputed income of \$55,000 to the claimant. Again, I similarly conclude this order was made pursuant to the FLA.
- [20] At the time of the March Reasons, I found that the respondent did not pay his support on time on a fairly regular basis: see para. 11. That was based on the evidentiary record up to and including the December 2024 payment.
- [21] Given that timely payment of support was identified as a significant issue by the claimant, particularly because of the impact delayed receipt has on her ability to pay her monthly rent, I was puzzled as to why the claimant did not enroll the Consent Order with BCFMA. This failure to enroll certainly does not justify the respondent's prior tardiness in paying but might, it would appear, assist the claimant because the respondent is a T4'd employee who earns a significant income. Enforcement measures are generally not that difficult as against a payor in his circumstances.
- [22] Importantly, counsel for the respondent has taken me through certain banking records which show a more diligent effort by the respondent to pay support on time in recent months. This is at least progress in the right direction.
- [23] Further, effective June 1, 2025, the respondent has voluntarily increased his child support payable in accordance with a Guideline income of \$202,130 per annum as set out in his Form F8 Financial Statement affirmed May 13, 2025 (the "May F8"). The amount of child support that the respondent is now paying is \$1,763 per month. Further progress in the right direction.

Imputation of Guideline Income and Adjustment of Support

- [24] As set forth above, when the claimant initially applied for interim support in August of 2023, the respondent was not actually working and was not forthcoming with income information. The result was a rough and ready imputation of income to the respondent and an "interim without prejudice" support order.
- [25] The respondent's disinclination to provide financial disclosure accurately setting out his income in this proceeding continued. It was not until the eve of the hearing before me on March 27, 2025 that the respondent disclosed a T4 slip from his former employer Group LAR. That T4 slip disclosed the respondent had earned income of \$180,875.56 from Group LAR in 2024 even though his employment with that entity ended in August of 2024.
- [26] It also appears that the respondent filed his T1 Personal Income Tax Return on March 22, 2025 at 6:10 p.m. (see p. 31 of the May F8) but that had also not been disclosed to the claimant in advance of the hearing before me on March 27, 2025. The respondent's Line 15000 income for 2024 was \$213,352.91.
- [27] In the result, the respondent was significantly underpaying child support in 2024 and did nothing to voluntarily adjust this. This is notwithstanding the fact that he had counsel and there was clearly an obvious opportunity presented when the Consent Order was signed and submitted for entry in June 2024.
- [28] By virtue of the fact that the Schwartz Order was made on an "interim without prejudice" basis, I do not need to address the line of authorities which generally stands for the proposition that the court should be reluctant to vary interim support orders pending trial, particularly retroactively, under s. 216(3) of the FLA. However, in my view this would be one of the few cases where same is appropriate as I conclude that there was a material change in circumstances which directly flows from the blameworthy conduct on the part of the respondent in refusing and/or delaying to provide financial disclosure which would the respondent knew would confirm that he was significantly underpaying child support.
- [29] Despite the respondent having a 2024 Line 15000 income of \$213,352.91, I accept that his current Guideline income for the purposes of paying interim child support is \$202,130 per annum. This reflects the appropriate deduction of the respondent's union and professional dues, as set forth at Line 21200, in accordance with Schedule III of the Guidelines.
- [30] Based upon the respondent having a Guideline income of \$202,130 the respondent should have been paying child support of \$1,763 per month as he has since recently commenced paying effective June 1, 2025.
- [31] The difference between the \$1,763 per month owing and the \$1,113 per month actually paid over the 17 months between January 2024 and May 2025 is \$11,050.

- [32] I accordingly order that the sum of \$11,050 be forthwith released from the Trust Funds to the claimant. This sum shall be deducted from the respondent's entitlement to family property in this action as determined by the trial judge or by written agreement of the parties.
- [33] Prospectively, I will simply make an order that confirms the voluntary adjustment already in place. Specifically, commencing June 1, 2025 and continuing on the 1st of each month thereafter pending further court order or written agreement, the respondent shall pay to the claimant interim child support for S. in the amount of \$1,763 per month. This support is interim but not "without prejudice" and the order is made pursuant to the FLA.
- [34] Unlike with child support, I am not prepared to vary the spousal support either retroactively or prospectively. Rather, I am going to leave that issue for trial. My reason for doing so relates to the increased complexity of that issue and its lack of suitability for determination on the evidentiary record before the Court. Specifically, unlike child support which merely requires inputting the respondent's income into the Guidelines based upon the S. being primarily resident with the claimant, spousal support involves, inter alia:
- a) consideration of any possible material change to the claimant's Guideline income;
 - b) consideration of the placement of support on the range provided for under the Spousal Support Advisory Guidelines, including a consideration of the parties' respective net disposable incomes; and
 - c) taxation issues (or at least potential taxation issues) given that that the respondent has already filed his 2024 T1 Personal Income Tax Return, the claimant presumably has similarly filed and trial is set to commence during the 2025 personal taxation year for both parties.

The Respondent's Interim Distribution Application

- [35] The primary asset acquired by the parties during their relationship was the former matrimonial home located in Penticton, British Columbia. It was sold pursuant to a court order on or about March 9, 2024.
- [36] The net sale proceeds amounted to some \$355,022.47 and were deposited into trust with the claimant's counsel. These represent the Trust Funds.
- [37] On or about April 18, 2024 a payment of \$4,838.00 was made to the claimant on account of arrears of support that had accrued to that date.
- [38] Between March 28, 2025 and April 1, 2025, the sum of \$79,750.00 was released to the claimant in two tranches in accordance with my March 27, 2025 order. The two tranches consisted of:
- a) \$75,000 interim distribution to the claimant pursuant to s. 89 of the FLA;

- b) \$1,250 on account of the respondent's sale of the Quad;
 - c) \$1,250 on account of the fine imposed pursuant to s. 230(2) of the FLA; and
 - d) \$2,250 on account of costs payable in any event of the cause.
- [39] Subject to any modest adjustment for interest, the current balance of the Trust Funds is \$270,434.47.
- [40] After the payment of the \$11,050 in retroactive child support to the claimant in accordance with this order, the balance of the trust funds will be \$259,384.47.
- [41] From the Trust Funds, the respondent seeks the interim distribution of \$75,000 to fund his ongoing legal expenses with Ms. Moore and a separate distribution of \$40,649.75 to pay his former counsel, Ms. Bonga. The total amount sought by the respondent is \$115,649.75.
- [42] Section 89 of the FLA provides the court with the authority, if satisfied that it would not be harmful to the interests of a spouse and is necessary, to make an order for an interim distribution of family property that is at issue under part 5 of the FLA to provide money to fund:
- a) family dispute resolution;
 - b) all or part of a proceeding under the FLA; or
 - c) the obtaining of information or evidence in support of family dispute resolution or an application to a court.
- [43] A party may apply for such distribution "at any time before a final agreement or final order is made in relation to a family law dispute relating to property division": see s. 88.
- [44] The law regarding the circumstances under which interim distributions under s. 89 of the FLA shall be ordered is now quite well settled.
- [45] The primary purpose of an interim distribution made pursuant to s. 89 of the FLA is to "promote balanced participation". The assessment of the amount of the interim distribution, as well as the need for one, needs to be approached with caution: see *Etemadi v. Maali*, 2021 BCCA 298 at para 70.
- [46] When considering whether to make an interim distribution pursuant to s. 89 of the FLA, Justice Butler in *Etemadi* set out the following helpful principles for this court to apply at paras. 50-54:
- a) Is the applicant economically disadvantaged in relation to the prosecution of the litigation or otherwise in pursuit of dispute resolution? If so, then it may be appropriate to make an order that "levels the playing field" or provides for "balanced participation" in dispute resolution;

- b) A judge must go through a preliminary assessment of the circumstances that considers both of the s.89 requirements -- namely, whether the applicant can show that it would not be harmful to the interests of the other spouse and it is necessary for the purpose of funding dispute resolution. A preliminary assessment means determining whether the applicant can establish a "prima facie case of sufficient merit to warrant pursuit.";
- c) Whether an interim distribution is necessary involves careful consideration of the quantum required. A judge should not order distribution in an amount greater than what is necessary; and
- d) A judge must always exercise the discretion conferred by s. 89 on the basis of whether it is in the interests of justice to grant the order sought.

See also *Jadavji v. Khadjieva*, 2021 BCSC 2267 at paras. 9 and 10.

[47] Orders under s. 89 of the FLA are discretionary and depend on the unique facts of each case. The court must therefore weigh the parties' financial circumstances, the impact on the respondent and the necessity of the requested funds: see *C.M.P. v. D.J.P.*, 2025 BCSC 97 at para. 20.

[48] As a starting point, I do not agree with the claimant's submission that legal fees incurred but not paid to date are irrelevant when considering an application for an interim distribution.

[49] Firstly, based on simple fairness, the claimant made the opposition submission in seeking an interim advance on behalf of the claimant. As set out at para. 10 of the March Reasons:

With respect to the request for an interim distribution under s. 89 of the FLA, the claimant has not provided a comprehensive litigation budget in the application materials. The claimant has, however, provided evidence that she owes her counsel approximately \$10,000 in disbursements alone. Counsel also has not billed the claimant for a number of months, including for the preparation and attendance at two days of examinations for discovery and the herein application, which does have considerable supporting materials.

[50] Secondly, I take judicial notice of the fact that it is not uncommon practice for family law practitioners to effectively extend credit to a client pending an application for an interim distribution as it is sometimes not practicable and even potentially prejudicial to a client to "down tools" in the face of, for example, case management deadlines for certain interim steps in the litigation. That practice comes with risk but ignoring that reality would not be, in my view, consistent with the purposive interpretation of s. 89 where need and potential harm are evaluated contextually: see *I.F. v. R.J.R.*, 2015 BCSC 793 at para. 192.

[51] The above said, and as I have already calculated above, what the respondent really seeks is a total interim distribution of \$115,649.75. That is not happening. I expressly declined to grant the claimant an interim distribution of \$100,000 despite the considerably greater strength of the claimant's claim for an interim distribution: see paragraph 13 of the March Reasons.

[52] As to whether an interim distribution in a lower amount should be ordered, I have considered the following in applying the Etemadi analysis set out above:

- a) The respondent has not been economically disadvantaged by the breakdown of the relationship. The respondent is a comparatively high-income earner who appears, based on the bank records I was taken to by the claimant's counsel, to have significant difficulty budgeting. Instead of allocating an appropriate portion of his income to paying for professional fees, the respondent favours spending his income on quite extensive travel and other discretionary items such as dining out, alcohol and online gaming;
- b) The respondent's argument that he is spending some approximately \$3,100 per month servicing family debt is tenuous. Without weighing into the much larger legal question of "what is family debt", the records before me show the respondent paying down credit facilities significantly and then racking them back up, often for the travel related expenses I referred to above;
- c) On the other hand, the respondent is very clearly not well equipped to be self-represented. Particularly in the face of the vigorous advocacy by claimant's counsel on her behalf in this litigation. In contrast, I made a point of acknowledging at the outset of these reasons the significant improvement in the overall manageability of the action since Ms. Moore was retained by the respondent. Accordingly, the respondent having counsel actually does materially help "level the playing field" and allow for balanced participation in the litigation process;
- d) The starting point under s. 81 of the FLA is, of course, that family property is presumptively equally divisible. The Trust Funds are not disputed to be family property and neither party has advanced an excluded property claim under s. 85 of the FLA in their respective pleadings. There are competing claims for unequal division of family property and a dispute about what constitutes family debt but from the starting point remains that the Trust Funds are presumptively equally divisible and, in addition, substantially all of the alleged family debt is in the respondent's sole name at first instance;
- e) Consistent with the foregoing, I find that the respondent has claims and/or defences on the issues of family debt determination and family property/family debt division that have sufficient merit to warrant pursuit;
- f) Combined with this, all distributions from the Trust Funds to date have been to the benefit of the claimant. The amounts which will fall to the respondent's side of the ledger regardless of the outcome of the proceedings currently totals just \$20,630. This mitigates against the claimant's argument as to the risk of harm arising from an interim distribution to the benefit of the respondent;

- g) With respect to spousal support, while the respondent has not conceded entitlement, the respondent has paid all the support owing by him to date in this proceeding. Timing of payment has been an issue and I am not going to belabour that point further. There is, however, an important distinction, in my view, between been a sometimes-tardy payor and a true non-payor when it comes to whether the rather extraordinary remedy of lump sum support will be ordered versus the typical order for periodic support; and
- h) I have substantially dealt with any retroactive child support claim because S. was residing with the respondent until the fall of 2023. There is clearly a retroactive spousal support claim which remains outstanding for the reasons I set forth above. However, that claim has to very importantly be balanced against the fact the current balance of the Trust Funds is, subject to interest and any further distributions ordered herein, \$259,384.47.
- [53] Ultimately, I consider it an appropriate exercise of my discretion and in the interests of justice to grant an order for an interim distribution provided that I carefully consider the quantum required.
- [54] Specifically, in the circumstances, I am going to make an order pursuant to s. 89 of the FLA that the Respondent receive an interim distribution in the amount of \$45,000. I have decided upon the sum of \$45,000 on the basis that:
- a) examinations for discovery have been substantially completed;
 - b) document disclosure, while an ongoing obligation, is quite well in hand at this point;
 - c) there are no expert fees contemplated;
 - d) interim support has effectively been dealt with until the time of trial;
 - e) nine days for trial may no longer be necessary if the litigation continues to move along in a more organized fashion. However, the trial, given the number of matters in issue and my knowledge of some background facts, will still very likely exceed 5 days; and
 - f) even with this interim distribution, the balance of the Trust Funds will remain excess of \$210,000.
- [55] In order to facilitate the interim distribution to the respondent, the \$45,000 must be paid out of the Trust Funds to another law firm who will hold those funds and remit them to Ms. Moore once her bills are approved in accordance with the arrangements she has made with the Law Society. I am going to give counsel leave to include language in the terms of this order which addresses these mechanics as they were just in the process of being finalized at the time of the oral hearing before me and not included as part of the actual application record. If counsel cannot agree on those terms, I am including a provision that either party is at liberty to seek directions from me on this narrow issue.

- [56] Lastly, I did not address the issue of the right to apply for further interim distributions in the March Reasons as that issue was not put before me. In the interests of fairness, it is appropriate that I confirm that both the claimant and respondent have the same right to apply for further distributions under s. 89.

Fines and/or Other Penalties

- [57] In the March Reasons, I outlined the basis for imposing a fine of \$1,250 pursuant to s. 230(2)(b)(iii) of the FLA for the respondent's conduct in selling the Quad (as defined therein) contrary to the s. 91 property restraining order in place in this action. This was in addition to compensating the claimant, from the respondent's future entitlement to any of the Trust Funds, the sum of \$1,250 for her share of Quad proceeds.
- [58] As it turns out, the Quad apparently only sold for \$2,000 according to the now produced legible copy of the bill of sale. The result being that the respondent, excluding costs, has paid the claimant \$1,500 of the \$2,000 he received for the Quad.
- [59] The claimant is correct though that the respondent did not provide the legible copy of the bill of sale within seven days in accordance with my Order. Accordingly, I do consider it appropriate to impose a further fine to reinforce the importance of compliance with court orders to the respondent. The fine must be proportional to the gravity of the non-compliance, however. In the circumstances, I impose a fine of \$200 pursuant to s. 230(2)(b)(iii) of the FLA.
- [60] The other basis for seeking a fine or other penalty is the respondent's failure to comply with the Order of (then) Master Schwartz that he only communicate with the claimant's counsel, Ms. Boles, through a general office email account of assistant@[omitted].bc.ca (the "Office Email").
- [61] The above order is quite extraordinary and there clearly must have been a sufficient evidentiary basis for it to have been made at first instance by (then) Master Schwartz. The respondent has, however, never sought to vary it since that time and it was a "non-issue" when the respondent was represented by prior counsel.
- [62] While the respondent was self-represented briefly in between the withdrawal of prior counsel and the appointment of Ms. Moore, the respondent did exchange certain email correspondence with Ms. Boles. In so doing, the respondent sent emails to both Ms. Boles' personal email address and Office Email.
- [63] From my review of the emails included in the evidentiary record, it appears that on all such occasions when the respondent sent an email to Ms. Boles personally the respondent was replying to an email sent to him by Ms. Boles from said personal account. So, in order to respond in compliance with the court order, the respondent would have had forward his reply to the Office Email and then the administrator of the Office Email (who I understand is not Ms. Boles) would then have to forward the respondent's email to Ms. Bole's personal

account. If Ms. Boles wished to reply to the email, she would then email the respondent directly from her personal email and the circle of communication repeated.

- [64] In these circumstances, I am not satisfied that it is appropriate to impose any fine or penalty for the respondent's technical non-compliance with the Schwartz Order. The matter was, at that time, proceeding towards a June trial date and there were issues to be dealt with. If Ms. Boles wanted timely responses from the respondent and compliance with the Schwartz Order, there needed to be some more efficient process put in place.
- [65] My conclusion would have been different if the respondent had been sending inappropriate, abusive or rude emails to Ms. Boles during this particular time frame. Whilst I did not read every line of every email exchange included in the record, I do not find that to be the case from the ones I did review and Ms. Boles did not bring any such communications to my attention.
- [66] I also do not think specific deterrence is a significant concern in the present circumstances as this provision of the Schwartz Order only applies when the respondent is self-represented and he now has counsel of record again with Ms. Moore.

Waiver of Privilege and Disclosure

- [67] The claimant's request for order for production of "all correspondence and communications regarding the F8 sworn in October 2024 as to the quantum of his income" arises out of an exchange that I had with the respondent during the course of the court hearing on March 27, 2025.
- [68] I initiated my dialogue with the respondent on the basis of a quite obvious discrepancy between the disclosure I had before me (which the respondent himself ultimately had provided to the claimant's counsel) and the respondent's October 2024 Form F8 Financial Statement.
- [69] Specifically, I queried the respondent about a Form 8 Financial Statement he swore in October 2024 wherein declared his annual income to be approximately \$102,000 when he was aware that he had earned some \$180,756 just from his employment though to August of that year.
- [70] When the respondent provided his explanation to the court, however, he said that "I believe I put that affidavit together with my counsel, and I just referred to her expertise. I submitted all my documents to her, and we - we put it together. I - as far as I know it was accurate and complete up to that point ".

- [71] The discussion between the respondent and myself then moves on to discussing a more recent Form F8 Financial Statement affirmed by the respondent. As a result, I did not stop the respondent and caution him that in answering my earlier inquiry in that manner he was potentially opening up an argument as to waiver of solicitor client privilege and what the consequences of such a waiver can be.
- [72] In the circumstances, I am not satisfied that there was an informed waiver of privilege by the respondent warranting the disclosure sought by the claimant. In reaching this conclusion, I am guided by the overarching importance of solicitor client privilege: see *R. v. McClure*, 2001 SCC 14.
- [73] In reaching this conclusion I also recognize the claimant's counsel may elect to cross examine the respondent on the very issue(s) I probed in court on March 27, 2025 at trial. Nothing in this ruling obviously purports to curtail this line of inquiry and the respondent may elect in advance thereof to make an informed decision as to any waiver of solicitor/client privilege. I am simply not prepared to order disclosure at this time based upon a response to my inquiry from the bench in the course of submissions.

Examination for Discovery Objections

- [74] As set forth in the introduction section of these reasons for judgment, paragraph 6 of the Claimant's Application seeks "a ruling by the court on the propriety and correctness of objections taken at the examination for discovery of the respondent conducted on December 30, 2024".
- [75] It is not in this Court's usual practice to make rulings on propriety in this context. There are various dictionary definitions of "propriety" available upon a keyword search of reported decisions but they all generally speak to the state or quality of conforming to conventionally accepted standards of behaviour.
- [76] What the claimant presumably wants is an order pursuant to r. 9-2(21) of the Rules which provides that:
- (21) If a person under examination objects to answering a question put to the person, the question and the objection must be taken down by the official reporter and the court may
- (a) decide the validity of the objection, and
- (b) order the person to submit to further examination and set a maximum duration for that further examination.
- [77] As I have articulated previously, albeit not in the form of written reasons for judgment, counsel may have fundamentally different but equally effective styles of conducting examinations for discovery. Subject to the Rules and having regard to the importance of the principle of proportionality, the court's role is not to interfere with counsel's individual discovery strategy: see *Nwachukwu v. Ferreira*, 2011 BCSC 1755 at para. 33.

- [78] There are, however, universally important principles to successfully conducting an examination for discovery from my judicial perspective. Those include:
- a) Counsel refraining from speak over the witness and being diligent in correcting the witness about speaking over counsel. Equally important is counsel refraining from speaking over each other. The examination for transcript loses much of its efficacy for use at trial where it becomes a somewhat indecipherable "speaker jumble"; and
 - b) If there are objections made during the course of a discovery, it is important to make the transcript clear for any future application to compel a response(s). If necessary, counsel may restate the question and have opposing counsel or self-represented litigant state the basis for the objection. It is very difficult to deal with these applications where the question and objection and inevitable subsequent quarrelling spans several pages of the transcript.
- [79] Unfortunately, the excerpts of the respondent's discovery transcript before me run afoul of both directions at times. I have appended as Schedule 1 to these reasons a few examples of the objections identified in the supporting materials as being incorrect and without propriety which I find clearly illustrate the basis for my conclusion that I simply cannot determine the validity of the objections in accordance with R. 9-2(21)(a).
- [80] In the circumstances, I was initially inclined to dismiss entirely relief sought by the claimant in respect of the objections made at the respondent's examination for discovery.
- [81] However, upon reflection, I think Ms. Moore's suggestion that the parties each attend for a further time limited examination for discovery makes practical sense and is entirely consistent with the Rules. A few effective hours of examination for discovery could potentially save substantial trial time.
- [82] I will not make such an order at this juncture, however, on the basis that:
- a) I have not been able to make a specific determination of the validity of the objections given the state of the discovery transcript as required by R. 9-2(21)(a); and
 - b) I think doing as a standalone order improperly stretches the bounds of the basket prayer for relief at para. 8 of the Respondent's Application, particularly if the right to additional discovery is mutual.
- [83] Rather, what I am going to do is adjourn para. 6 of the Claimant's Application generally. In the event that counsel cannot simply agree on further time limited continuations of examination for discoveries of both parties, the claimant is at liberty to bring that relief back on for hearing in accordance with the Rules provided it is supported by a further affidavit that outlines the specific questions and the specific objections which form the basis of the R. 9-2(21) application.

Costs

- [84] Costs are always in the discretion of the presiding justice.

[85] Pursuant to R. 16-1(7) of the Rules, the general principle is that costs are awarded to the successful party:

Costs to follow event

(7) Subject to subrule (9), costs of a family law case must be awarded to the successful party unless the court otherwise orders.

[86] The standard of "success" required to be awarded costs of an action under R. 16-1(7) is "substantial success". The Court of Appeal in *Harras v. Lhotka*, 2016 BCCA 246 describes the substantial success standard as follows:

[48] "Success" for the purposes of costs means substantial success. The "substantial success" standard was described by Bouck J. in *Fotheringham v. Fotheringham*, 2001 BCSC 1321 at para. 45, endorsed by this Court in *Marquez v. Zapiola*, 2014 BCCA 35 at para. 16:

Success in the event has been interpreted as "substantial success": see *Fotheringham v. Fotheringham*, 2001 BCSC 1321, 13 C.P.C. (5th) 302, leave to appeal ref'd 2002 BCCA 454. In *Fotheringham*, Mr. Justice Bouck described this standard as follows:

[45] Gold now seems to say that substantial success in an action should be decided by the trial judge looking at the various matters in dispute and weighing their relative importance. The words "substantial success" are not defined. For want of a better measure, since success, a passing grade, is around 50% or better, substantial success is about 75% or better. That does not mean a court must descend into a meticulous mathematical examination of the matters in dispute and assign a percentage to each matter. Rather, it is meant to serve as a rough and ready guide when [looking] at all the disputed matters globally.

[87] Given the amount of relief sought in both the Claimant's Application and the Respondent's Application, the weighing of substantial success is more challenging than in other circumstances. Further complicating this analysis is the fact that certain of the relief sought by both parties was not pursued by virtue of intervening events or, importantly, other court order.

[88] Ultimately, I conclude the claimant was the substantially successful party notwithstanding my decision to make an interim distribution to the respondent.

[89] The deciding factor in the exercise of my discretion is the fact claimant was successful in obtaining a retroactive adjustment to the child support for S. as a result of her diligent pursuit of income information from the respondent which he has been disinclined to provide over the course of this proceeding. It is also not lost on me that the income that the claimant sought to be imputed to the respondent at the time of the hearing before (then) Master Schwartz was in fact slightly lower than the respondent now concedes his actual Guideline income is.

[90] On this basis, the claimant is entitled to her costs in any event of the cause but not payable forthwith. Those are costs shall be assessed as ordinary difficulty costs in accordance with the tariff set forth in the Rules on the basis that the Claimant's Application and the Respondent's Application collectively took one full day of hearing. The very high threshold required to make order for special costs is clearly not met here.

"Hardwick J."

Schedule 1

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