
CANADA / JUDGMENT

Struck v. Struck

2018 BCSC 44

COURT

Supreme Court of British Columbia

DECIDED

15 January 2018

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2018 BCSC 44 Struck v. Struck

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Struck v. Struck,

2018 BCSC 44

Date: 20180115

Docket: E015843

Registry: Victoria

Between:

Bernd Struck

Claimant

And

Lisa Audrey Struck

Respondent

Before: The Honourable Madam Justice Forth

Reasons for Judgment

Claimant Bernd Struck:

Appearing in Person

Counsel for the Respondent:

Fiona M. McQueen

Place and Date of Hearing:

Victoria, B.C.

November 30, 2017

Place and Date of Judgment:

Victoria, B.C.

January 15, 2018

[1] There were two applications filed and heard. The first brought by the respondent, Lisa Audrey Struck (now known as Lisa Audrey Morris), seeks to vary paras. 2 and 3 of the order of Mr. Justice Metzger dated March 22, 2005 (the "2005 Order"), specifically that:

- a. the claimant, Bernd Struck, pay to the respondent child support in the amount of \$921 per month, retroactive to July 1, 2013, for the support of their child, Sydney, based on a Guideline income for the claimant of \$100,000;
- b. extraordinary expenses be shared between the parties in proportion to their incomes; and
- c. the claimant pay to the respondent the amount of \$3,939 to reflect child support paid to him from July 1, 2013 to June 15, 2014 by the respondent when their daughter, Sydney, was residing primarily with the respondent.

[2] The second application is brought by the claimant, who seeks to have the respondent's application stayed until the respondent pays two Certificates of Costs, including incurred interest, and until the appeal of *Sullivan v. Struck*, 2017 BCSC 816, has been determined.

[3] The issues are:

- a. Should there be a stay of the respondent's application and an adjournment granted until the respondent pays the Certificates of Costs and the appeal in the *Sullivan v. Struck* matter has been resolved?
- b. Should the 2005 Order of Mr. Justice Metzger be varied?
- c. Should retroactive child support be ordered?
- d. Should there be a sharing of extraordinary expenses?
- e. Should awards in favour of the respondent be set-off against the amounts currently owed to the claimant?
- f. Costs.

Background Facts

[4] The parties were married on October 7, 2000. They separated on September 21, 2001 and were divorced on June 30, 2004.

- [5] There is one child of the marriage, Sydney, born on November 19, 2001. She is currently 16 years old. The parties separated shortly before she was born.
- [6] The parties have engaged in lengthy and costly litigation that has already taken up a great deal of judicial resources. In addition to this Supreme Court action, the parties have parallel Provincial Court proceedings, which between 2002 and 2014 generated approximately 24 orders relating to issues of parenting, access, guardianship, and child support.
- [7] In addition, a Federal Tax Court proceeding was commenced in 2015 to determine which party was entitled to the Canada Child Tax Benefit and the Goods and Services Tax Credit for the period from July 2013 to July 2014. On October 8, 2015, the Federal Tax Court found that Sydney had lived with the respondent at least 75% of the time during the relevant period, so the respondent was eligible for the tax credits.
- [8] There have also been proceedings in both the Supreme Court and Court of Appeal concerning the claimant and his second wife, Korin Sullivan.

Initial Proceedings between the Respondent and Claimant

- [9] The initial trial between the respondent and claimant proceeded in Provincial Court (Victoria Court File No. F-11258) on April 9, 10, 11, and 23, 2003, following which, Judge Kay ordered that the claimant have sole custody of Sydney, that there be joint guardianship, and that the respondent have generous access to Sydney, including every second weekend (the "2003 Order").
- [10] This custody order was later set aside in the Supreme Court on July 11, 2003 [2003 BCSC 1106], but restored by the Court of Appeal on November 18, 2003, which awarded the claimant sole custody of Sydney [2003 BCCA 623].
- [11] The claimant was awarded costs in both the Court of Appeal and Supreme Court, and the following Certificates of Costs were filed:
- Certificate of Costs in Court of Appeal dated June 8, 2004 - \$10,001.00
 - Certificate of Costs in Supreme Court dated July 6, 2004 - \$3,318.71
- [12] The claimant has made requests to the respondent to pay these Certificates of Costs, but the respondent has not paid them.
- [13] The respondent and claimant were divorced on June 30, 2004 by order of Mr. Justice Rice. At that time, the respondent resided in Parksville, BC, and the claimant resided in Sidney, BC. The respondent had a house-cleaning business and the claimant was a businessman. The divorce order also provided that the respondent pay child support to the claimant in the amount of \$100 per month, with leave to apply for a variation after two months.

- [14] On March 22, 2005, the claimant applied for a variation, and Mr. Justice Metzger ordered that the respondent's income be imputed at \$35,000 per annum and that she pay child support to the claimant in the amount of \$303 per month. The respondent was not in attendance in court that day and asserts that she understood that the application would be adjourned. The order also provided that the respondent was at liberty to apply to have it set aside on seven days' notice to the claimant. The respondent did not seek to vary the order.
- [15] The respondent's child support payments pursuant to the 2005 Order were enforced through the Family Maintenance Enforcement Program ("FMEP"). Between 2008 and 2013, counsel for the Director of Maintenance took the respondent to court on seven different occasions to enforce the order.
- [16] From 2003 to 2011, the claimant also paid for all of the extracurricular activities that Sydney participated in. The respondent has not contributed any amount to these costs.
- [17] In March 2012, the respondent filed a Notice of Application in the Provincial Court (VI F-11258) seeking to change the daily care and control of Sydney. Judge Quantz seized himself of the matter and between March 2012 and May 2014 made several interim orders respecting access, ordered two views of the child reports, and interviewed Sydney.

The Claimant's Second Marriage

- [18] In 2003, the claimant began a relationship with Korin Sullivan. Later that year, Ms. Sullivan and her daughter Hannah moved in with the claimant and Sydney. On August 25, 2007, the claimant and Ms. Sullivan were married.
- [19] In 2011, the claimant and Ms. Sullivan separated and commenced divorce proceedings (VI E113291). Ms. Sullivan filed a Notice of Civil Claim (the "Sullivan Action") in which she claimed that there was only one child of the marriage, her daughter Hannah. The claimant, in his Response, claimed that there were two children of the marriage, Sydney and Hannah. He admitted that he had a duty to support Hannah and asserted that Ms. Sullivan owed a duty to support Sydney.
- [20] In August 2012, Ms. Sullivan and the claimant entered into a separation agreement settling all issues except child support.

Change in Sydney's Living Arrangements

- [21] In April 2013, the respondent relocated from Parksville to Brentwood Bay. At that time, Sydney was 11 years old and until then had lived primarily with the claimant, but as a result of the respondent's relocation to the same community as the claimant, Judge Quantz ordered on April 23, 2013 - after many court applications regarding the residence of Sydney - that Sydney could decide which parent she would live with (the "2013 Order").

[22] From July 2013 to the date of the current application, Sydney has lived primarily - between 80 to 90% of the time - with the respondent.

[23] Following this change in living arrangements, the respondent applied to change the daily care and control of Sydney. On May 23, 2014, Judge Quantz denied the application and made the following order at para. 2 (the "2014 Order"):

No application shall be made by Bernd Struck and Lisa Struck regarding parenting time until parties have attended mediation.

[24] As of the date of this current application, the parties have not attended any mediation.

[25] The FMEP continued to enforce child support payments pursuant to the 2005 Order until June 15, 2014, after which time it stopped enforcing the monthly payments. A history of amounts due, paid, and outstanding is detailed in an FMEP account statement dated June 6, 2016 (the "FMEP Statement").

[26] The respondent deposes that following the change in living arrangements, she requested child support contributions from the claimant on many occasions, but the claimant refused to make any child support payments.

Proceedings Related to the Claimant's Second Marriage -

the Sullivan Action

[27] On December 8, 9 and 10, 2014, Ms. Sullivan and the claimant appeared before Mr. Justice Bracken in order to determine their respective income levels and support obligations to Hannah and Sydney.

[28] On December 19, 2014, Bracken J. imputed the claimant's income to be \$100,000. His Lordship set out the claimant's support obligations for Hannah and determined that Ms. Sullivan had no support obligation to Sydney.

[29] The claimant appealed this order, and on December 22, 2015, the Court of Appeal in *Sullivan v. Struck*, indexed as 2015 BCCA 521, allowed the appeal in part, substituting an order that Ms. Sullivan did stand as a parent to Sydney and accordingly had a duty to support her. The Court of Appeal remitted the matter back to the Supreme Court for the determination of Ms. Sullivan's support obligations. With respect to the claimant's income, the Court of Appeal commented at para. 79:

Clearly the judge was not making a finding that income should be imputed at \$100,000 only for the current year.

- [30] On October 31, November 1 and 2, 2016, the trial to determine Ms. Sullivan's support obligations to Sydney was heard by Mr. Justice Kelleher. On May 17, 2017, Kelleher J. gave his decision, indexed as 2017 BCSC 816, in which His Lordship held that Ms. Sullivan's support obligation for the period from January 2012 to June 2013 was \$3,570. His Lordship made no further determinations of support. With respect to the residency of Sydney, His Lordship wrote:
- [25] I prefer the evidence of Ms. Morris. I conclude that Sydney now spends 80 to 90% of her time with Ms. Morris.
- [26] The fact that Sydney spends more time with her mother is consistent with the decision of the Tax Court of Canada. In 2013, Ms. Morris asked for the child tax benefit on the basis that Sydney was principally living with her, not Mr. Struck. She was successful. Mr. Struck's appeal to the Tax Court of Canada was dismissed on October 8, 2015.
- [27] From the end of June 2016 until late October, the two biological mothers and their daughters lived together: Ms. Morris, Ms. Struck, Sydney and Hannah.
- [28] I find that, as of July 1, 2013, Sydney was spending the vast majority of her time living with her mother. There is no obligation on Ms. Struck to pay Mr. Struck child support after that time.
- [31] On June 15, 2017, the claimant filed a Notice of Appeal from that decision, claiming that Kelleher J. erred in not determining prospective and retroactive support owed to Sydney by Ms. Sullivan. Of great significance in my view is that Sydney does not currently live with Ms. Sullivan nor does she receive care from her.

Recent Financial Details of the Respondent and Claimant

- [32] In 2015, the respondent's line 150 income was \$5,329, and in 2016 it was \$15,634.11. The respondent deposed that she did not bring an application to vary the 2005 Order or to seek child support on the basis that she did not have the funds to allow her to hire a lawyer until she received some money from her father's estate in 2016. She further claims that it was reasonable for her to wait while the related proceedings in the Sullivan Action were resolved.
- [33] As of June 2016, the respondent was in arrears for child support in the amount of \$17,069.33 as documented by the FMEP Statement. At some point before October 2017, the FMEP attached the respondent's father's estate, which resulted in this amount being collected.
- [34] On November 3, 2016, counsel for the respondent sent a demand letter to the claimant seeking the payment of \$38,682 for retroactive child support dating back to June 2013, plus a reimbursement of \$3,939 for the amount that the respondent paid to the claimant between July 2013 and June 2014 while Sydney was living primarily with the claimant.

- [35] The respondent is currently paying \$200 per month for Sydney's math tutor. The respondent also claims that when Sydney was living with the claimant, she purchased most of Sydney's clothes.

Respondent's Position

- [36] With respect to her application to vary child support, the respondent submits that Sydney's change in living arrangements in July 2013 is a circumstance that justifies a variation to the 2005 Order. She also submits that although she delayed in making the application, her financial-based excuse was reasonable.
- [37] With respect to the claimant's application for a stay and adjournment, the respondent submits that Sydney's right to support is primary and that it is inappropriate for the Certificates of Costs to be used as means to block the determination of the appropriate child support.

Claimant's Position

- [38] The claimant's initial position is that the respondent's application for child support should not proceed until the Certificates of Costs have been paid and the appeal in the Sullivan Action has been resolved.
- [39] The claimant also contends that the 2014 Order of Judge Quantz restored the 2003 Order of Judge Kay, and therefore the claimant has custody of Sydney. He claims that as a result, the majority of the parenting time and corresponding responsibilities fall upon his shoulders. He claims that he makes the day-to-day decisions affecting Sydney and exercises day-to-day care, control and supervision of her.
- [40] He further claims that he makes the decisions respecting where Sydney resides and with whom she lives and associates. He submits that accommodating Sydney's wishes to spend more time with the respondent does not constitute a change in circumstances and does not undermine his responsibility to determine where Sydney resides. He claims that he is exercising his parental responsibilities under s. 41(c) of the Family Law Act, S.B.C. 2011, c. 25 [FLA].
- [41] With respect to child support, the claimant submits that the 2005 Order remains valid as no application had been made to vary it: see *D.B.S. v. S.R.G.*, 2006 SCC 37 at para. 65 [D.B.S.]. He contends that the respondent is required to pay child support despite the fact that he has voluntarily suspended the collection of it.
- [42] He further asserts that if a change in support is made, it should not be retroactive, as the respondent failed to bring a timely application to vary the 2005 Order. He asserts that the respondent chose not to apply for support early and as such a retroactive award is not justified: see *D.B.S.* at paras. 100 and 103.

[43] Finally he asserts that the respondent has refused to pay the Certificates of Costs and as such any award in favour of her should be used to offset the amounts owed to him under the Certificates, plus incurred costs. He notes that despite the respondent receiving a \$250,000 advance from her father's estate in early 2016, she did not pay the outstanding Certificates of Costs.

Applicable Law

[44] It is of assistance to remind these parties of the objectives of the Federal Child Support Guidelines, S.O.R./97-175 [Guidelines], which are set out in s. 1:

- (a) to establish a fair standard of support for children that ensures that they continue to benefit from the financial means of both spouses after separation;
- (b) to reduce conflict and tension between spouses by making the calculation of child support orders more objective;
- (c) to improve the efficiency of the legal process by giving courts and spouses guidance in setting the levels of child support orders and encouraging settlement; and
- (d) to ensure consistent treatment of spouses and children who are in similar circumstances.

[45] The respondent's application is brought pursuant to s. 17 of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), which provides:

Order for variation, rescission or suspension

17 (1) A court of competent jurisdiction may make an order varying, rescinding or suspending, prospectively or retroactively,

- (a) a support order or any provision thereof on application by either or both former spouses; or
- (b) a custody order or any provision thereof on application by either or both former spouses or by any other person.

[46] A thorough and helpful analysis of the law in respect to variation and arrears of child support was provided by Madam Justice Martinson in *Earle v. Earle*, 1999 BCSC 283 at paras. 19-22:

2. VARIATION - BASIC PRINCIPLES

[19] Before a judge can change a maintenance order that has already been made, there has to be a material change of circumstances since the original order was made. That is, the change must be of the kind that, if known by the judge when the last order was made, would have resulted in a different order. The change must be significant and long lasting. Otherwise, there will be uncertainty, which is not in the best interests of children.

[20] A judge does not have to change an order granted before the Guidelines came into force, to conform with the Guidelines just because a parent asks. Instead, an order will only be changed where the arrangements the parents or a previous court made are seen as unreasonable when compared with the arrangements that would result from the application of the Guidelines after taking into account all the relevant factors.

3. ARREARS - BASIC PRINCIPLES

[21] The cancellation or reduction of arrears of maintenance is a form of variation. There are two points that have to do with arrears that should be kept in mind.

a. Significant Change

[22] Because cancellation or reduction of arrears is a form of variation, there is a substantial onus (a heavy duty) on the person asking for a reduction or a cancellation of arrears to show that there has been a significant and long lasting change in circumstances.

[47] The circumstances in which retroactive child support may be awarded were addressed in D.B.S. The Supreme Court of Canada directed that trial judges adopt a broad and holistic approach in the application of four factors, summarized at paras. 99-116, none of which are determinative on their own:

- a) Is there a reasonable excuse for why support was not sought earlier by the recipient parent?
- b) Was there any blameworthy conduct on the part of the payor parent?
- c) Is a retroactive award appropriate in light of the child's past and present circumstances?
- d) Will a retroactive award cause hardship to the payor parent or to his or her other children?

[48] At paras. 120-125, the Court stated that the commencement date for an award of retroactive child support should not be restricted to the date upon which an application to a court or formal notice is given, but rather should be the date of effective notice by the recipient parent to the payor parent. Effective notice was defined as "any indication by the recipient parent that child support should be paid, or if it already is, that the current amount of child support needs to be re-negotiated" (at para. 121). The Court suggested that this is generally when the topic is broached.

[49] Both parents have a legal obligation to contribute to the support of their child after separation. This legal obligation was addressed by the Court of Appeal in *Hartshorne v. Hartshorne*, 2010 BCCA 327 at paras. 73 and 74:

[73] The appellant takes the position that he had no legal obligation to increase child support where the respondent failed to obtain a court order that he do so. In my view, that position is misguided. Child support is for the benefit of the children. The appellant had an obligation to pay his proportionate share of the children's support. The fact that he chose not to increase his child support in the absence of a court order when the respondent had given him notice in 2002 of her request for increased child support constitutes blameworthy

conduct as characterized in *D.B.S. v. S.R.G.*:

106 Courts should not hesitate to take into account a payor parent's blameworthy conduct in considering the propriety of a retroactive award. Further, I believe courts should take an expansive view of what constitutes blameworthy conduct in this context. I would characterize as blameworthy conduct anything that privileges the payor parent's own interests over his/her children's right to an appropriate amount of support. ... And a payor parent cannot mislead a recipient parent into believing that his/her child support obligations are being met when (s)he knows that they are not.

107 No level of blameworthy behaviour by payor parents should be encouraged. Even where a payor parent does nothing active to avoid his/her obligations, (s)he might still be acting in a blameworthy manner if (s)he consciously chooses to ignore them. Put simply, a payor parent who knowingly avoids or diminishes his/her support obligation to his/her children should not be allowed to profit from such conduct: [citation omitted].

[74] Before the trial judge, the respondent asked only for retroactive child support back to 2006 even though she had assumed a disproportionate share of the children's support between 2002 and 2006. The appellant's failure to pay Guidelines support until the Order was made financially penalized the children, who lost the benefit of a higher standard of living had the appellant paid Guidelines support over that period.

Analysis

(a) Stay and Adjournment

[50] Rule 22-1 of the Supreme Court Family Rules provides that:

Court may adjourn trial, hearing or conference

(1) Whether or not the parties consent, the court may adjourn a trial, hearing or conference to a specific date or without setting a date.

[51] Section 223(1)(b)(ii) of the FLA also provides that

Orders respecting case management

223 (1) A court may make an order to do one or more of the following:

(b) adjourn a proceeding while

(ii) a party complies with an order made under this Division;

[52] The claimant submits that I should exercise my discretion to adjourn the respondent's application. I made an oral ruling on November 30, 2017 that the application for child support for Sydney should not be adjourned since it would be in the best interests of the child to have the issue of child support addressed. The respondent's application for a stay was dismissed.

(b) Variation in the Amount of Child Support

- [53] The threshold issue is whether there has been a material change in circumstances since the 2005 Order, and I think the answer is yes, as Sydney has changed her primary residence and since July 2013 has spent the majority of her time with the respondent. This change has been significant and long-lasting, and therefore it would be inconsistent with both Sydney's best interests and the Guidelines' objectives to not vary the amount of child support.
- [54] The claimant submits that despite the change in living arrangements, the majority of parenting time and parental responsibilities pursuant to s. 41 of the FLA fall upon him. He submits that by accommodating Sydney's wishes to spend more time with the respondent, it is he who is still exercising the majority of parental responsibilities, and therefore no change in circumstance has occurred.
- [55] I must reject this argument on its face. The facts clearly demonstrate a change in circumstances as contemplated by the legislation, Guidelines, and case law. Sydney primarily lives with the respondent, spending between 80 to 90% of the time with her. This arrangement is significantly different than the situation at the time of the previous child support order and therefore it would be unreasonable to leave the 2005 Order unchanged.

(c) Retroactive Child Support

Appropriateness of a retroactive award

- [56] In respect to the four factors in D.B.S. for awarding retroactive child support, I note the following.
- [57] First, the respondent did not send the claimant a formal demand for child support until November 3, 2016 and did not bring this application for a variation in child support until September 14, 2017. Her explanation for the delay in seeking variation is that she did not have any money and she was waiting to find out what would happen in the Sullivan Action. In my view, the delay between 2013 and 2016 was reasonable in light of the respondent's financial circumstances and in light of her evidence about informal requests to the claimant that were not met.
- [58] The claimant submits that it was not reasonable for the respondent to wait until late 2016 to make a formal request because she received a substantial advance from her father's estate in early 2016. I accept that, however, the respondent has also needed to fund litigation relating to that estate and therefore was still financially strained. As a result, I am not persuaded that the delay in 2016 weighs significantly against a retroactive award.
- [59] Second, blameworthy conduct of the payor parent is a subjective question in which courts should take an expansive view. A payor parent who does not increase support payments automatically is not necessarily engaging in blameworthy behaviour; however, a payor parent may be acting in a blameworthy manner if (s)he consciously chooses to ignore support obligations even if there are no active measures of avoidance.

- [60] In my view, the claimant has engaged in blameworthy conduct in this case, as he has not made child support contributions since the change in Sydney's living arrangements, and moreover, he collected support payments from the respondent for a period in which Sydney was living primarily with her. This conduct favours a retroactive award.
- [61] I must again emphasize that the children should be the focus of a child support analysis. As commented by the Supreme Court of Canada in *Kerr v. Baranow*, 2011 SCC 10 at para. 208:
- [208] Spousal support has a different legal foundation than child support. A parent-child relationship is a fiduciary relationship of presumed dependency and the obligation of both parents to support the child arises at birth. In that sense, the entitlement to child support is "automatic" and both parents must put their child's interests ahead of their own in negotiating and litigating child support. Child support is the right of the child, not of the parent seeking support on the child's behalf, and the basic amount of child support under the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp), (as well as many provincial child support statutes) now depends on the income of the payor and not on a highly discretionary balancing of means and needs. These aspects of child support reduce somewhat the strength of concerns about lack of notice and lack of diligence in seeking child support. With respect to notice, the payor parent is or should be aware of the obligation to provide support commensurate with his or her income. As for delay, the right to support is the child's and therefore it is the child's, not the other parent's position that is prejudiced by lack of diligence on the part of the parent seeking child support: see *D.B.S.*, at paras. 36-39, 47-48, 59, 80 and 100-104.
- [62] Third, although a retroactive award is a poor substitute for an obligation that was unfulfilled at an earlier time, it is worth considering the child's needs at the time the support should have been paid as well as the child's current circumstances. The evidence is that the respondent's income has historically been much lower than the claimant's. She deposed that the money advanced from her father's estate has been used primarily to fund the estate litigation and the remainder to supplement her daily living expenses. The evidence also supports that before the change in Sydney's living arrangement, the claimant consistently paid for several of her needs, whereas for the past four years he has not contributed with the same consistency. In my view, Sydney's circumstances weigh in favour of a retroactive award of child support.
- [63] Lastly, there will be some hardship on the claimant to pay child support arrears in this case. This is particularly so as he is under a court order to pay support for his stepdaughter Hannah. Nevertheless, he still has a positive duty to ensure that his biological child's needs are met, and this includes an obligation to pay the appropriate amount of child support. This obligation is clear from both the Guidelines and cited authorities. Moreover, the evidence and the claimant's submissions do not persuade me that the degree of hardship suffered by the claimant would overwhelm the other factors from *D.B.S.*

- [64] In the circumstances of this case, the overall weighing of the factors from D.B.S. justifies a retroactive award of child support.

Date of retroactive award

- [65] The date to which the retroactive award will commence is November 1, 2013. Although Sydney began spending the majority of her time living with the respondent on July 1, 2013, it is unclear exactly when the respondent first broached the topic of child support with the claimant. She deposed that she made several informal requests but she did not provide an exact date. The claimant had extensive litigation experience and knew or ought to have known of his obligation to pay child support. He stated in his Application Response that he had voluntarily suspended the order requiring child support from the respondent, from August 2013 to December 2013, to reflect the fact that Sydney was now in a shared parenting situation. This statement is not correct in respect to the timing since the FMEP continued to seek the payment of child support from the respondent until June 15, 2014. The statement does support that the claimant was aware of the need for child support to be paid.
- [66] It is clear that the claimant was well aware of new circumstances that justified a change in support obligations. In 2011 he was involved in proceedings brought by Ms. Sullivan in which the issue of child support was being addressed. I find that these circumstances are sufficient to set the date of effective notice at November 1, 2013. I am satisfied that by that date the claimant was aware of his responsibility to pay child support to his daughter.
- [67] The Court in D.B.S. wrote at para. 123 that "it will usually be inappropriate to make a support award retroactive to a date more than three years before formal notice was given to the payor parent". As the respondent's first formal notice was the demand letter on November 3, 2016, the retroactive award in this case will be at the three-year guideline outlined in D.B.S.

Income levels

- [68] To calculate the retroactive award for child support, I have set the claimant's income at \$100,000 for 2013 to 2017. I find this to be an accurate figure based on the reasons of Bracken J. in 2014, and the Court of Appeal in 2015. The claimant has not submitted that this amount is inaccurate.
- [69] The respondent's income was imputed at \$35,000 in the 2005 Order. The respondent was not in attendance when that Order was made and she did not apply to vary it. In 2015 her line 150 income was \$5,329 and in 2016 it was \$15,634.11. She deposed that her 2017 income was in line with her 2016 earnings. In this application to vary, the respondent did not seek to vary the income imputed to her in the 2005 Order. As such I find that the respondent's income is imputed at \$35,000.
- [70] I also find that the claimant owes the respondent reimbursement for the amount previously paid to the claimant for the period of July 1, 2013 to June 15, 2014.

(d) Special or Extraordinary Expenses

[71] Special or extraordinary expenses are addressed in s. 7 of the Guidelines:

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

- (a) child care expenses incurred as a result of the custodial parent's employment, illness, disability or education or training for employment;
- (b) that portion of the medical and dental insurance premiums attributable to the child;
- (c) health-related expenses that exceed insurance reimbursement by at least \$100 annually, including orthodontic treatment, professional counselling provided by a psychologist, social worker, psychiatrist or any other person, physiotherapy, occupational therapy, speech therapy and prescription drugs, hearing aids, glasses and contact lenses;
- (d) extraordinary expenses for primary or secondary school education or for any other educational programs that meet the child's particular needs;
- (e) expenses for post-secondary education; and
- (f) extraordinary expenses for extracurricular activities.

[72] Per subsection (2), the guiding principle in determining the amount of an expense referred to in subsection (1) is that the expense is shared by the spouses in proportion to their respective incomes after deducting from the expense the contribution, if any, from the child.

[73] These parents should also remember that although they are no longer involved in a spousal relationship, their relationship does continue in a parental context. The focus of this continuing parent relationship must be the best interests of their child. I therefore urge the parents to do all they can to minimize the animosity caused by the breakdown of their marriage, and to make their greatest efforts to focus on positive communications to ensure that their child is not affected by their past or ongoing financial concerns.

(e) Set-off Issue

[74] The claimant seeks to have any amount awarded in favour of the respondent set off against the Certificate of Costs already owing to him. He submits that the respondent's refusal to pay the Certificates has frustrated the court system and to ignore the respondent's conduct would be a miscarriage of justice.

- [75] The issue of equitable set-offs in the context of child support was discussed by the Court of Appeal in *Jamieson v. Loureiro*, 2010 BCCA 52 [Jamieson]. The central issue was whether a payor parent was entitled to set off a costs award in his favour against orders for past and future child support. Madam Justice Kirkpatrick writing for the Court emphasized that "child support is the right of the child" and then wrote that:
- [76] First I am unable to conceive of a case in which set-off would be allowed against future child support, and consider that it would be a very rare case in which one would consider set-off against arrears of child support. The support is for the benefit of the child and should not be lost because the person to whom the support is paid may owe, in another capacity, amounts to the payor. There is simply an insufficient connection and an absence of manifest injustice in requiring the payor to pay the full amount of support.
- [Emphasis added.]
- [76] Kirkpatrick J.A. noted that the non-payor parent, who owed the costs, had limited financial resources which would cause the children to suffer a diminished lifestyle in the event of a set-off. Further, Her Ladyship found that the costs were insufficiently connected to the payor parent's legal and moral obligations to the children, and therefore there was not the necessary nexus between the costs and child support to give rise to an equitable set-off (at paras. 58-60).
- [77] In my view, the circumstances before me do not constitute the "very rare case" in which a child support set-off is appropriate. I acknowledge that the Certificates of Costs in this case have been owed to the claimant for much longer than was the case in *Jamieson*, where the set-off request related to costs from current proceedings. However, I am of the view that Sydney's right to support and the respondent's financial circumstances outweigh the injustice of the respondent's non-payment of costs. As mentioned, child support obligations stem from a fiduciary parent-child relationship based on dependency. The parental obligation creates an entitlement to the child. This right to support is primarily the child's; it arises from birth and is said to be automatic.
- [78] Furthermore, the costs in this case relate to proceedings that took place over 14 years ago and therefore have a tenuous nexus to the claimant's child support obligations that arose in 2013. For these reasons, I deny the claimant's request for a set-off of the child support arrears.
- [79] I find, however, that it is appropriate in the circumstances to set off the amount owing by the claimant to the respondent for the payment of child support from July 2013 to June 2014 as a credit against the Certificates of Costs. Therefore the claimant need not reimburse that amount to the respondent.
- (f) Costs

[80] I order that the claimant pay the costs of this application, as he has refused to pay child support for Sydney despite his obligation to do so. This will be for a lump sum of \$2,000, and it may also be set-off against the Certificates of Costs already owed to him by the respondent.

Ongoing Financial Disclosure

[81] It should not be necessary for these parties to return to court in order to assess child support. The purpose of the Guidelines is to assist in the calculation of the child support amounts that parents should be paying. Therefore I order that the parties provide ongoing disclosure of their annual income statements to each other.

Summary of Orders

[82] I make the following orders:

1. The order of Mr. Justice Metzger dated March 22, 2005 is varied as set out below.
2. The claimant, Bernd Struck, is found to be a resident of British Columbia and is found to have a gross income of \$100,000.
3. The respondent, Lisa Audrey Struck, is found to be a resident of British Columbia and is imputed to have a gross annual income of \$35,000.
4. Bernd Struck will pay to Lisa Struck the amount of \$921 per month for the support of Sydney Autumn Gayle Struck retroactive from November 1, 2013 to November 22, 2017.
5. Bernd Struck will pay to Lisa Struck the amount of \$946 per month commencing on December 1, 2017 and continuing on the first day of each month thereafter for so long as Sydney is eligible for support under the Divorce Act or until further agreement of the parties or court order.
6. Bernd Struck will pay to Lisa Struck his proportional share of Sydney's special or extraordinary expenses. The parties' respective proportional shares are the claimant at 75% and the respondent at 25%.
7. The party incurring a special or extraordinary expense shall provide the other party with a receipt for reimbursement.
8. The arrears owing from Bernd Struck to Lisa Struck as of the date of this judgment are \$47,021. This amount cannot be set off against the Certificates of Costs owed to him by Lisa Struck.
9. Bernd Struck owes to Lisa Struck the amount of \$3,939 to reflect the child support paid to him from July 1, 2013 to June 15, 2014 by Lisa Struck.
10. Bernd Struck is entitled to set off the amount of \$3,939 from the Certificates of Costs owed to him by Lisa Struck.

11. For so long as Sydney is eligible for child support, the parties will exchange:
 - a) copies of their respective income tax returns for the previous year, including all attachments, not later than June 1 of each year; and
 - b) copies of any Notice of Assessment or Reassessment provided to them by Canada Revenue Agency, immediately upon receipt.
12. Lisa Struck is entitled to costs of this application in the lump sum amount of \$2,000 from Bernd Struck. Bernd Struck is entitled to set off this amount from the Certificates of Costs owed to him by Lisa Struck.
- [83] The order will be drafted by counsel for the respondent and will be sent to the claimant. The claimant will have seven days in which to provide comments on the draft. If no comments are received, the respondent may submit the order without the signature of the claimant.

"C. Forth, J."

The Honourable Madam Justice Forth

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