

CANADA / JUDGMENT

Sullivan v. Struck

2015 BCCA 521

COURT

British Columbia Court of Appeal

DECIDED

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2015 BCCA 521 Sullivan v. Struck

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Sullivan v. Struck,

2015 BCCA 521

Date: 20151222

Docket: CA42503

Between:

Korin Raina Sullivan, also

known as Korin Raina Struck

Respondent

(Claimant)

And

Bernd Struck

Appellant

(Respondent)

Before:

The Honourable Madam Justice Bennett

The Honourable Mr. Justice Harris

The Honourable Madam Justice Fenlon

On appeal from: An order of the Supreme Court of British Columbia,
dated December 19, 2014 (Sullivan v. Struck, Victoria Registry 113291).

Counsel for the Appellant:

D.F. Tracy

Counsel for the Respondent:

E. Raponi, Q.C.

Place and Date of Hearing:

Victoria, British Columbia

October 21, 2015

Place and Date of Judgment:

Vancouver, British Columbia

December 22, 2015

Written Reasons by:

The Honourable Mr. Justice Harris

Concurred in by:

The Honourable Madam Justice Bennett

The Honourable Madam Justice Fenlon

Summary:

This appeal is from a family law trial that focused on the child support obligations of the parties. Each spouse brought a young daughter into the relationship. The primary issues at trial were: the Guideline income of each party; whether the respondent stood in the place of a parent to the appellant's daughter; and, the parties' respective child support obligations. The trial judge found that the respondent did not stand in the place of a parent to the appellant's daughter and thus the respondent did not have any child support obligations. With respect to the appellant, the judge imputed his income at \$100,000, and assessed his child support obligations by using the table amount for \$100,000 and deducting the amount of the biological father's child support order. The judge made this order retroactive for three years. Held: appeal allowed in part. The judge erred in his application of the Chartier test to the evidence. He did not give any weight to the fact that the parties formed a new family and treated both children as members of that family. The judge also made errors in principle by referring to several irrelevant factors and misapprehending certain aspects of the respondent's evidence. The judge's decision to impute \$100,000 as the appellant's Guideline income was reasonable in the circumstances. So was his decision to use the \$100,000 figure in calculating the retroactive award. The judge did not err in principle in fixing the child

support obligation of the appellant. The determination of the respondent's prospective and retroactive child support obligations, including any potential set-off against those of the appellant, is remitted to the Supreme Court.

Reasons for Judgment of the Honourable Mr. Justice Harris:

Introduction

- [1] This appeal is from a family law trial that focused principally on the child support obligations of former spouses in respect of two children. The issue was complicated by the fact that each spouse brought one child to the relationship. The parties' respective child support obligations, if any, derived, in the first instance, from a determination of whether each stood in place of a parent under the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.). Mr. Struck acknowledged that he stood in the place of a parent with respect to Ms. Struck's daughter and, accordingly, had child support obligations in respect of her. Ms. Struck disputed, however, that she stood in the place of a parent with respect to Mr. Struck's daughter.
- [2] The trial judge found that Ms. Struck did not stand in the place of a parent and that she had no child support obligations either under the Divorce Act or provincial legislation towards Mr. Struck's daughter. Mr. Struck appeals that finding.
- [3] The trial judge went on to impute income to Mr. Struck and, after recognizing some child support obligations owed by the biological father, determined Mr. Struck's child support obligations, including an obligation to pay retroactive child support. Mr. Struck appeals, alleging errors in the imputation of his income, the manner in which the trial judge took into account the obligations of the biological father, and the quantum of the retroactive award.
- [4] Mr. Struck also alleges that the trial judge erred in his assessment of Ms. Struck's income. As I understand it, this issue assumes relevance only if we find Ms. Struck to have child support obligations to Mr. Struck's daughter.

Background

- [5] Mr. Struck and Ms. Sullivan (who, we were told, continues to use her married name, Ms. Struck), met in late 2002 and began living together in April 2003. Each had a young daughter from a previous relationship. Ms. Struck's daughter, Hannah, was three and a half years old and Mr. Struck's daughter, Sydney, was one and a half when they moved in together. The parties married on August 25, 2007.
- [6] Mr. Struck had sole custody of Sydney. Sydney's biological mother, Ms. Morris, had access to Sydney on holidays and alternate weekends. In 2005, Ms. Morris was ordered to pay child support for Sydney of \$300 per month, but she has only made a few voluntary payments despite frequent enforcement proceedings.

- [7] Ms. Struck had de facto custody of Hannah. Hannah's biological father, Mr. Gauthier, had consented to pay \$104 per month in child support for Hannah. He saw Hannah occasionally until she was around one and a half. At that time his contact with Hannah ceased. Mr. Gauthier has not paid child support since. There was some evidence that Mr. Gauthier had resurfaced shortly before trial. Ms. Struck registered the child support order with the Family Maintenance Enforcement Program ("FMEP"), but she has not received any payments.
- [8] Ms. Struck worked as a residential care aide during the day.
- [9] Mr. Struck operated a number of businesses in both British Columbia and Arizona. He worked mainly in the evenings and on weekends.
- [10] At trial, both Mr. Struck and Ms. Struck gave evidence about the nature of their family life and the division of responsibilities between them. To avoid unnecessary repetition, I will discuss that evidence when I analyse whether the trial judge misapplied the test to determine whether, under the Divorce Act, Ms. Struck stood in the place of a parent to Sydney.
- [11] I will also defer a discussion of the evidence relating to Mr. Struck's income.
- [12] Mr. and Ms. Struck lived together with Hannah and Sydney for eight years. It is common ground that Hannah and Sydney grew up as step-sisters and slept in the same bedroom.
- [13] In August 2011, while Mr. Struck was away on business in Phoenix and Sydney was with Ms. Morris, Ms. Struck moved out of the family residence.
- [14] In August 2011, Ms. Struck filed her notice of family claim under both the Divorce Act and the Family Relations Act, R.S.B.C. 1996, c. 128 [FRA].
- [15] In mid-August 2012, the parties signed a separation agreement. They settled all of the issues between them except for the issue of child support for both Hannah and Sydney.
- [16] In November 2012, Mr. Struck filed a response to family claim and a counterclaim seeking child support for Sydney. In December 2012, Ms. Struck filed a response to counterclaim pleading that Sydney was not a child of the marriage.

Standing in the Place of a Parent

The parties' positions at trial and the trial judgment

- [17] At trial, Ms. Struck sought child support for Hannah. Mr. Struck agreed that he stood in the place of a parent to Hannah.
- [18] Mr. Struck claimed that Ms. Struck stood in the place of a parent to Sydney and sought child support from her under both the Divorce Act and the FRA. Ms. Struck argued that Mr. Struck and Ms. Morris made all the parental decisions about Sydney and that she had no control over discipline. She also contended that while she treated Sydney kindly, she never acted as a parent to her.

- [19] The trial judge concluded that Ms. Struck did not stand in the place of a parent. He noted that "as a matter of first impression" it appeared that each party would stand in the place of a parent to the other's child. However, he reasoned that this "first impression" was not the test to apply. He proceeded to examine some of the factors set out in *Chartier v. Chartier*, [1999] 1 S.C.R. 242. While Sydney was included in family life in the same way as Hannah, the trial judge relied on Ms. Struck's evidence that she had no control over Sydney's discipline, did not contribute financially to Sydney (except for the odd purchase of clothes), and only Mr. Struck dealt with Ms. Morris regarding Sydney's parenting arrangements.
- [20] The trial judge also relied on the fact that Sydney did not seem to be living with Mr. Struck at the time of the trial and that anytime Ms. Struck wanted to see Sydney post-separation, it had to come out of Ms. Morris' time with Sydney.
- [21] He concluded that, although Ms. Struck acted with kindness to Sydney, she did not stand in the place of a parent. The trial judge also reached the same conclusion under both of the FRA and the Family Law Act, S.B.C. 2011, c. 25 [FLA].

Did the trial judge err in finding that Ms. Struck did not stand in place of a parent to Sydney?

- [22] Mr. Struck argues that the trial judge incorrectly applied the test from *Chartier*. First, he submits that the trial judge relied on irrelevant post-separation facts. The *Chartier* test requires courts to examine the circumstances at the time the family functioned as a unit, not after separation. Mr. Struck also alleges that the trial judge made the following errors: he ignored material evidence about how the family functioned at the relevant time; he failed to grasp that forming a new family is a key factor in the analysis; and, he limited his consideration to certain evidence, the implications of which he misconceived.
- [23] Ms. Struck argues that the trial judge properly applied the law to the facts in determining that she did not stand in the place of a parent to Sydney. She emphasizes that there is a difference between treating a child with kindness, like a nanny, and standing in the place of a parent, which carries permanent obligations. She claims that Ms. Morris and Mr. Struck "occupied [the] field" of parenting Sydney. In support of this claim, Ms. Struck argues she had no authority to make decisions on Sydney's behalf or to provide discipline, she had no say in making parenting arrangements with Ms. Morris, Mr. Struck's income was used to support the family and her income was discretionary, and that Sydney called her 'Korin', not 'mom'.
- [24] As for Ms. Struck's obligations under the provincial legislation, Mr. Struck argues that the trial judge did not provide adequate reasons for dismissing his claim. He contends that the trial judge failed to appreciate that the basis for a step-parent's support obligation is different under the provincial legislation than it is under the Divorce Act.

- [25] Ms. Struck argues that Mr. Struck's claim under the provincial legislation is statute barred. Even if the claim were not statute barred, Ms. Struck argues that her "trivial and sporadic contributions to Sydney's care" could not form a basis for imposing a child support obligation.

Standard of review

- [26] An appellate court should not overturn a support order unless the trial judge erred in principle, significantly misapprehended the evidence, or made an award that is clearly wrong. Determining whether to order child support, and if so, the quantum of the order, involves weighing the objectives and factors set out in the legislation and related case law. An appellate court will not intervene merely because it would have balanced the factors differently or reached a different decision: *Hickey v. Hickey*, [1999] 2 S.C.R. 518 at paras. 10-11.
- [27] This deferential standard of review avoids giving parties an incentive to appeal trial judgments in the hope that an appellate court will take a different view of the evidence than did the trial judge. It also promotes finality in family law litigation: *Hickey* at para. 12.

Discussion

- [28] For the reasons that follow, I agree that the trial judge fell into error in applying the *Chartier* test and in concluding that Ms. Struck did not stand in the place of a parent to Sydney. It is evident, based on Ms. Struck's evidence, supplemented by the uncontradicted evidence of Mr. Struck, that she stood in the place of a parent to Sydney. Accordingly, it is unnecessary to consider the issues arising under provincial legislation; namely, whether Ms. Struck owed child support under either the FRA or the FLA or whether Mr. Struck's claim for child support was out of time.
- [29] I turn first to the test for deciding whether a person stands in place of a parent under s. 2 of the *Divorce Act*. It is worthwhile to set out the key passages from *Chartier* with emphasis added:

32 I do not agree with the reasoning in *Carignan*. As noted above, the words "in the place of a parent" must be given a meaning that is independent of the common law concept and reflective of the purposive and contextual approach to statutory interpretation advocated by this Court. Once a person is found to stand in the place of a parent, that relationship cannot be unilaterally withdrawn by the adult. The interpretation of the provisions of the *Divorce Act* relating to "child[ren] of the marriage" should be "given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects": see *Interpretation Act*, R.S.C., 1985, c. I-21, s. 12. The reasoning in *Carignan* ignores one of the fundamental objectives of the *Divorce Act* as it relates to children. The provisions of the *Divorce Act* that deal with children aim to ensure that a divorce will affect the children as little as possible. Spouses are entitled to divorce each other, but not the children who were part of the marriage. The interpretation that will best

serve children is one that recognizes that when people act as parents toward them, the children can count on that relationship continuing and that these persons will continue to act as parents toward them.

36 It is clear that the court must address the needs of the child as of the date of the hearing or order. The existence of the parental relationship under s. 2(2)(b) of the Divorce Act must however be determined as of the time the family functioned as a unit. See Julien D. Payne, *Payne on Divorce* (4th ed. 1996), at p. 148. If the "material time" was to be interpreted as in Hock, *supra*, it would be difficult to find a parental relationship in situations where the step-parent has little contact with the child between the separation and the divorce proceedings. This is inconsistent with the purpose of the Divorce Act.

38 What then is the proper test for determining whether a person stands in the place of a parent within the meaning of the Divorce Act? The appellant argued that the test for whether or not a person stands in the place of a parent should be determined exclusively from the perspective of the child. I cannot accept this test. In many cases, a child will be very young and it will be difficult to determine whether that child considers the person as a parental figure. Further, an older child may resent his or her step-parent and reject the authority of that person as a parent, even though, objectively, that person effectively provides for the child and stands in the place of a parent. The opinion of the child regarding the relationship with the step-parent is important, but it constitutes only one of many factors to be considered. In particular, attention must be given to the representations of the step-parent, independently of the child's response.

39 Whether a person stands in the place of a parent must take into account all factors relevant to that determination, viewed objectively. What must be determined is the nature of the relationship. The Divorce Act makes no mention of formal expressions of intent. The focus on voluntariness and intention in *Carignan* was dependent on the common law approach discussed earlier. It was wrong. The court must determine the nature of the relationship by looking at a number of factors, among which is intention. Intention will not only be expressed formally. The court must also infer intention from actions, and take into consideration that even expressed intentions may sometimes change. The actual fact of forming a new family is a key factor in drawing an inference that the step-parent treats the child as a member of his or her family, i.e., a child of the marriage. The relevant factors in defining the parental relationship include, but are not limited to, whether the child participates in the extended family in the same way as would a biological child; whether the person provides financially for the child (depending on ability to pay); whether the person disciplines the child as a parent; whether the person represents to the child, the family, the world, either explicitly or implicitly, that he or she is responsible as a parent to the child; the nature or existence of the child's relationship with the absent biological parent. The manifestation of the intention of the step-parent cannot be qualified as to duration, or be otherwise made conditional or qualified, even if this intention is manifested expressly. Once it is shown that the child is to be considered, in fact, a "child of the marriage", the obligations of the step-parent towards him or her are the same as those relative to a child born of the marriage with regard to the application of the Divorce Act. The step-parent, at this point, does not only incur

obligations. He or she also acquires certain rights, such as the right to apply eventually for custody or access under s. 16(1) of the Divorce Act.

40 Nevertheless, not every adult-child relationship will be determined to be one where the adult stands in the place of a parent. Every case must be determined on its own facts and it must be established from the evidence that the adult acted so as to stand in the place of a parent to the child.

[Emphasis added.]

[30] I turn now to consider the evidence at trial.

[31] In her first affidavit, Ms. Struck deposed that her "role in the family was to care for the children and earn income as a nurses' aide". She also said that her routine was to work during the day and then after work "to tend to the children, make meals, and generally look after the matrimonial home". She said "I have been the primary caregiver for our children, while Bernd Struck has been absent working on the houses or travelling to Phoenix".

[32] In her evidence, Ms. Struck described her role within the family. She worked during the day, while Mr. Struck remained at home. While Mr. Struck was working in the evenings she was at home with the children and would run them to appointments or to activities. Ms. Struck described cooking, cleaning and taking Sydney to school, but disputed that she was ever doing so in place of a parent. She said Sydney always had her biological mother as her mother. She also said that she had no say in the decisions and arrangements involved in Sydney seeing her biological mother. Ms. Struck said she had no say in terms of discipline. She also testified that after separation any opportunity she had to see Sydney had to come out of Ms. Morris' time and that she regarded herself as an aunt to Sydney on those visits.

[33] She agreed in cross-examination that she always treated Sydney and Hannah the same or equally, that she attended parent/teacher interviews for both girls, provided meals and clothes for them, took part in all family vacations with both girls, did not differentiate in any way in her affection to either Sydney or Hannah, that both Hannah and Sydney grew up as step-sisters, and that she told Hannah that she had a step-sister.

[34] Moreover, she agreed she put Sydney and Mr. Struck on her dental and medical benefits plan and that she used her income for family purposes. She indicated, however, that her financial contribution was limited to buying groceries and meals and occasionally clothes for Sydney. Ms. Struck confirmed the accuracy of her affidavit statement that she had been the children's primary caregiver when Mr. Struck was at work. She agreed that the family had not hired nannies or caretakers to look after Hannah or Sydney because one or other of them was available to the children. She agreed that since she and Mr. Struck were working roughly full time, they shared the roles of raising the children.

- [35] Ms. Struck said that she could not recall whether she explained to Sydney the difference between her biological mother and Ms. Struck as her step-mother at some point during the first years that she and Mr. Struck cohabited.
- [36] Mr. Struck in his evidence described Hannah and Sydney sleeping in the same bed when his relationship with Ms. Struck first began. He described living as a family, vacationing together, eating together, and playing together. He said "[w]e went to parent/teacher interviews together. We did everything together that you expect a family to do". He also said that he and Ms. Struck explained to Sydney that she had two mothers, her biological mother and her step-mother. He says they explained that both loved her, both cared for her, and both treated her as their own child. He said they acted as equal parents towards Sydney and Sydney and Hannah view themselves as step-sisters. Mr. Struck was not cross-examined on this evidence.
- [37] The cross-examination was limited to two primary topics. The first was Ms. Struck's financial contribution to the family and whether her expenditures were discretionary. The second related to arrangements involved in Sydney's relationship with her biological mother, including parenting time, when the family functioned as a unit and post-separation. Mr. Struck acknowledged that he controlled the relationship between Sydney and her biological mother.
- [38] In my opinion, the trial judge erred in his application of the Chartier test to this evidence. He made errors of principle and also significantly misapprehended certain aspects of Ms. Struck's evidence.
- [39] Although the trial judge found that Sydney certainly was included in the family in the same way that Hannah was, and that as a matter of first impression it seemed logical that each of the parties would stand as parents to the other's child, he concluded that that was not the test to apply. He then turned to some of the specific considerations identified by the Supreme Court of Canada in Chartier. He did not, however, refer to or give any weight to the Court's comment that the "actual fact of forming a new family is a key factor in drawing an inference that the step-parent treats the child as a member of his or her family, i.e., a child of the marriage": Chartier at para. 39. Here it was evident that the Strucks formed a new family and each treated each child as a member of that family.
- [40] In my opinion, the failure to recognize the formation of a new family led the judge to give no or insufficient weight to Ms. Struck's evidence of the role she played within the family as a primary caregiver to each of Sydney and Hannah. Ms. Struck cared equally without differentiation for both of the girls during the evenings and weekends when Mr. Struck was working. She did so from the time that Sydney was one and a half years old until she was about 10 years old. From her own description of her role during all those young years, the only reasonable inference is that Ms. Struck must be taken to have nurtured Sydney, prepared meals for her, bathed her, comforted her, managed her relationship with her step-sister, dealt with the exigencies of day-to-day family life including dealing with any

behavioural problems, read her stories and put her to bed. Ms. Struck agreed that she ferried Sydney around to her activities. The evidence that the family vacationed together, ate together and played together, and did all those things that one would expect a family to do is not in dispute. From all of this, the only conclusion I can reach when setting the facts against the test in *Chartier* is that when Mr. and Ms. Struck began to cohabit and then subsequently marry, they formed a new family. The trial judge gave no weight in his analysis to this key factor.

- [41] Of particular importance too is the fact that Ms. Struck attended parent/teacher interviews concerning Sydney. Objectively, this is exactly what one would expect someone to do who is parenting a child. This amounts to a representation to the world that one is acting as a parent concerned about a child's social and educational development.
- [42] The trial judge does not explain what Ms. Struck's role was within the family unit when she was acting as the primary caregiver to Sydney, beyond acknowledging that she treated Sydney with kindness. One might ask rhetorically, if Ms. Struck was not standing in the place of a parent, what was her role? Ms. Struck argued on appeal that her relationship to Sydney should be analogized to that of a nanny or a governess. I see no merit in that analogy. Ms. Struck admitted that she treated Sydney in the same way that she treated her own daughter. She was not paid for her services. She was not Mr. Struck's employee.
- [43] The judge focused on a number of factors that underlay his conclusion that Ms. Struck did not stand in the place of a parent to Sydney. Three of these factors are, in the circumstances of this case, irrelevant to this analysis and in respect of two potentially relevant factors I think the judge misapprehended the import of the evidence.
- [44] Turning to the consideration of irrelevant factors. First, the judge pointed to the evidence that Mr. Struck required Ms. Morris to go through him when dealing with Ms. Morris' parenting time before separation. The judge does not explain why this is a significant fact. The evidence may be relevant to the relationship between Ms. Morris and Mr. Struck or Sydney. I do not think that it has any clear relevance to characterizing the nature of the relationship between Sydney and Ms. Struck at those times when that family was together and functioning as a family unit. In my view, it is unsurprising that Mr. Struck would assume responsibility for making arrangements with Ms. Morris. In any event, Mr. Struck gave a reasonable explanation of why he took charge of the relationship between Sydney and her biological mother. His explanation did not detract from the parental role occupied by Ms. Struck.
- [45] Second, the trial judge appears, at para. 51 of the reasons for judgment, to have placed weight on the fact that Sydney had two biological parents in her life as a factor displacing a parental role for Ms. Struck. He does not explain how, in the circumstances of this case, that is a relevant factor. Certainly, the Supreme Court of Canada identified the nature and existence of a child's relationship with a biological parent as a consideration to be taken into account. But here, the evidence was only that Sydney spent time every other weekend and in

vacations with Ms. Morris. It went no further. There was, for example, no evidence that Ms. Morris attended parent/teacher interviews or would otherwise assume parental responsibilities while Sydney was with her new family. It is common for children to live in new families with a step-parent and continue to have an important relationship with a biological parent. The issue is not whether the step-parent has replaced or excluded the biological parent as a parent; it is whether within the new family the step-parent is standing in place of a parent when that family functions as a unit.

- [46] Third, the trial judge referred to and relied on the fact that Sydney appeared to be living with Ms. Morris rather than Mr. Struck at the time of trial (a fact he described as further weakening Mr. Struck's claim) and also the way in which Mr. Struck had dealt with time for Sydney with Ms. Struck post-separation. At para. 49 of his reasons, the judge relied on the evidence that:

The claimant naturally wanted to see Sydney from time to time, but Mr. Struck said that any time Sydney spent with the claimant had to come through the time that Ms. Morris had with Sydney. That is not consistent with the view that the claimant was in the position of a parent to Sydney.

- [47] With respect, where and with whom Sydney was living post-separation is irrelevant to whether Ms. Struck stood in place of a parent at the material time. As the Supreme Court of Canada made clear, the material time is when the family functioned as a unit. Similarly, issues connected to contact between Ms. Struck and Sydney post-separation are equally irrelevant unless in some way they can be shown to relate to Ms. Struck's role within the family when it functioned as a unit. I see nothing in the evidence connecting these post-separation facts to Ms. Struck's status at that time. I am satisfied that the judge fell into error by relying on post-separation facts in support of his conclusion and consequently erred in principle in his application of the Chartier test.
- [48] I turn now to what I would characterize as the trial judge's misapprehension of the import of the evidence. The first involves the issue of discipline. The second, the financial contribution Ms. Struck made to Sydney.
- [49] Ms. Struck made a bald statement in evidence that she had no say in disciplining Sydney. The statement is ambiguous. It arose in the context of evidence about Ms. Struck's involvement (or lack thereof) in arrangements with Ms. Morris regarding Sydney. It is not apparent to me that the evidence amounted to a clear claim that Ms. Struck had no role in discipline within the family unit when it was functioning as such. If the evidence should be taken as such a claim, it is inconsistent with Ms. Struck's acknowledgment of her role as "the primary caregiver for our children" when Mr. Struck was away from the home. In my view, the only reasonable inference on the evidence was that when Ms. Struck was playing that role, it encompassed controlling Sydney's behaviour. The role necessarily must have included discipline of a child of such young age. Given the emphasis placed by the Supreme Court of Canada on examining the totality of the circumstances, it is my view that the judge erred in principle by giving too much weight to this evidence and drawing from it a

conclusion it did not support and that was inconsistent with other evidence about the role Ms. Struck played within the family.

- [50] Much the same may be said about Ms. Struck's financial contribution to Sydney. There is no doubt that Mr. Struck provided the bulk of the financial support to the family. Ms. Struck earned substantially less than he did. Her use of her income was said to be discretionary, but it is clear that her income was used largely for family purposes, in which I include such matters as the cost of car insurance and other similar expenses. There is nothing to suggest that Ms. Struck used her income differently when it came to the cost of raising Hannah as compared to the cost of raising Sydney. The evidence supports the conclusion that Ms. Struck's income was used for the benefit of the family as a whole and, more importantly, did not differentially benefit Hannah at the expense of Sydney. Respectfully, I think the trial judge misconceived the evidence respecting Ms. Struck's income. It did not support an inference that Ms. Struck did not stand in place of a parent to Sydney. Certainly the Supreme Court of Canada identified a step-parent's financial contribution to a child as a relevant consideration, but one that depends on the step-parent's ability to pay. Here, Ms. Struck's ability to pay was limited (certainly relative to Mr. Struck's) but her money was used for family purposes, even if her use of it was "discretionary".
- [51] In my respectful opinion, the trial judge failed to give effect to many of the factors identified by the Supreme Court of Canada as relevant to the question of whether objectively a person stands in the place of a parent. The trial judge gave undue weight to the following considerations: the apparently relatively limited financial contribution Ms. Struck was able to make to the family given her income; the fact that Mr. Struck assumed control of dealing with Sydney's biological mother on issues that involved Sydney in relation to her biological mother; and, post-separation facts. This was an error in the application of the test and an error in principle.
- [52] In my opinion, Ms. Struck's evidence standing alone is sufficient to demonstrate, on an application of the correct test, that she stood in place of a parent to Sydney. Mr. Struck's evidence that he and Ms. Struck explained to Sydney that she had two mothers, her biological mother and her step-mother, that both loved and cared for her, and both treated her as their own child was not directly challenged. Nor was his evidence that he and Ms. Struck acted as equal parents towards Sydney and that Sydney and Hannah viewed themselves as step-sisters directly challenged. The trial judge did not expressly refer to this evidence in his analysis. I do not think that Ms. Struck laid any basis in the evidence to reject what Mr. Struck had to say. This evidence confirms what Ms. Struck's own evidence establishes; namely, that she stood in place of a parent to Sydney. In these circumstances, I think we are entitled to make that finding rather than refer the matter back to trial and to proceed to deal with the remaining issues on appeal.

Did the trial judge err in imputing income of \$100,000 to Mr. Struck?

- [53] Mr. Struck made his living through property management and construction. He managed several rental properties in Central Saanich, owned through a numbered company. Mr. Struck would do construction and renovation work to improve the properties and then rent them out. Mr. Struck provided his services to the numbered company through another company, Cardinal Forestry Consulting Ltd. In 2009, he expanded his residential rental business to Phoenix, Arizona. He purchased and operated his properties there through Kool Holding Corporation. He also attempted to earn money by day-trading stocks and bonds through a Turks and Caicos company that he incorporated.
- [54] Mr. Struck claimed a Guideline income of \$30,000. He claimed that he earned around \$20,000 in income and approximately \$10,000 in in-kind benefits from his companies. Ms. Struck argued that the trial judge should impute income to Mr. Struck in the range of \$100,000.
- [55] Determining Mr. Struck's income was a difficult task. The trial judge noted that Mr. Struck received most of his declared income for his labour through Cardinal. Kool Holding and the numbered company also earned income from collecting rents, from proceeds from the sale of real estate, and from loans secured by mortgages on the properties. He examined the financial statements that Mr. Struck prepared for those companies and found that they did not provide a reliable indication of the income the companies actually earned. He placed no reliance on them. He reached this conclusion for the following reasons: Mr. Struck only provided the balance sheet for each company as opposed to full financial statements; he did not provide documents to confirm the numbers in the statements; and, at least one of the statements contained an obvious error.
- [56] Next, the trial judge examined Mr. Struck's bank records and credit card statements that counsel for Ms. Struck had compiled into tables. He found them to be a more reliable source of determining Mr. Struck's income. The spending pattern revealed by the tables suggested an income well beyond the amount he declared, even though they contained a mix of personal and business expenses. The trial judge also noted that Mr. Struck took trips to Hawaii with his family, visited Phoenix several times a year, golfed, operated a 22-foot boat owned by one of the companies, often traveled to Tofino to surf, and ate out frequently.
- [57] The trial judge found that Mr. Struck created an "unreasonably complex system of moving money from one corporation to another and then to himself." This complexity and the lack of understandable financial information led the trial judge to conclude that "it is next to impossible to determine what he actually earns." He noted that since Mr. Struck claimed to earn a low income, but his spending pattern suggested a higher income, the onus was on Mr. Struck to present his affairs in an understandable manner.
- [58] The trial judge reasoned that even if the companies were not earning a large amount of income, proceeds from the sale or mortgage of real estate passing through Mr. Struck's bank accounts were funds available to him.

- [59] The trial judge concluded that Mr. Struck was reporting his income at a reduced rate. He set his income at \$100,000 based on his lifestyle and spending patterns.
- [60] Mr. Struck argues that the trial judge erred in several ways. First, he claims he provided proper disclosure under the Federal Child Support Guidelines, SOR/97-175 and explained in detail how he earned his income and structured his financial affairs. He provided financial statements in the same form that he had been using for 15 years. Also, the parties settled their property and spousal support issues in 2012 based on mutual financial disclosure.
- [61] Second, Mr. Struck argues that the trial judge should not have relied on the information compiled in the tables provided by counsel. This information was presented at the beginning of counsel's closing submissions, and Mr. Struck claims that he did not have an opportunity to review it for accuracy or to respond to it in a meaningful way.
- [62] Third, Mr. Struck argues that the trial judge should have assessed his income by valuing the personal benefits he received from his companies instead of looking at his spending pattern. Mr. Struck valued these benefits at \$10,000 and contends that the trial judge was bound to accept that number because it was not refuted at trial. He claims that his estimate was more accurate than the tables, because the tables contained both business and personal transactions.
- [63] Fourth, Mr. Struck contends that he adequately explained why his companies were operating at a loss. His companies were struggling because of stagnant housing prices in the Victoria area. He was meeting personal and business expenses using capital funding; he did not have corporate income that was available to be distributed to him. Mr. Struck testified that the sources of the capital funds were proceeds from the mortgage or sale of real estate. He also says that it was reasonable to operate the properties at a loss in the short term, because they had future development potential.
- [64] Fifth, Mr. Struck claims that the trial judge erred by considering the options that he had for regular, salaried employment. Mr. Struck says that his best prospect for earning income was to continue with his current business activities because he had significant success with his business in the past. Also, his other training was out-of-date.
- [65] I am unable to accede to these arguments. I see no error in the judge referring to counsel submissions which act as an aid to the analysis of the evidence, nor did the judge err in relying on evidence of spending patterns. The judge was entitled in principle to assess the reliability of the evidence of personal benefits conferred on Mr. Struck and was not bound to accept them. Finally on these preliminary alleged errors, I do not think it a fair reading of the reasons that the judge imputed income on the basis of alternative opportunities to earn income. I turn then to consider the more substantial grounds of appeal.
- [66] The first issue revolves around the question of the implications of the adequacy of financial disclosure. At the outset, one should recall that the issue of disclosure is a question of fact for the trial judge and entitled to deference: *Motyka v. Motyka*, 2001 BCCA 18 at para. 11. In

my view, the judge was entitled to conclude that Mr. Struck's financial disclosure was incomplete and virtually incomprehensible, as it clearly was. Mr. Struck bore the risk that the judge would impute income to him if he failed to make proper financial disclosure that laid an adequate basis for a reasoned assessment of his Guideline income.

[67] Section 15 of the Guidelines provides that the income of a spouse is determined in accordance with ss. 16-20. A court should begin with finding the spouse's line 150 income from his or her tax return. The next step is to determine whether any of the specific considerations in the subsequent sections apply. In *Vincent v. Vincent*, 2012 BCCA 186, Madam Justice Huddart summarized the process for determining income. Starting at para. 35 she wrote:

[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.

...

[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.

[68] Section 21 of the Guidelines lists the financial information that a spouse must provide on an application for child support. Section 21(2) imposes the same disclosure obligation on a spouse who is responding to a child support obligation as that imposed on the applicant by s. 21(1). Here, the material obligation imposed on Mr. Struck is the following:

21. (1) A spouse who is applying for a child support order and whose income information is necessary to determine the amount of the order must include the following with the application:
 - (a) a copy of every personal income tax return filed by the spouse for each of the three most recent taxation years;
 - (b) a copy of every notice of assessment and reassessment issued to the spouse for each of the three most recent taxation years;

- (f) where the spouse controls a corporation, for its three most recent taxation years
- (i) the financial statements of the corporation and its subsidiaries, and
- (ii) a statement showing a breakdown of all salaries, wages, management fees or other payments or benefits paid to, or on behalf of, persons or corporations with whom the corporation, and every related corporation, does not deal at arm's length;

[69] Mr. Struck, in my opinion, failed to provide any reasonable foundation for his claim to have an income of \$30,000. That income does not correspond to his income declared on his tax returns, nor the amount asserted in his "financial" statements. Clearly, the trial judge could not have assessed Mr. Struck's income simply under s. 16 as it is evident that Mr. Struck's pattern of spending was dramatically inconsistent with the income declared in his tax returns.

[70] Mr. Struck has not demonstrated that the judge erred in his assessment that Mr. Struck's financial disclosure was inaccurate and incomplete. For example, in addition to providing incomplete financial statements for his companies, Mr. Struck did not provide a statement breaking down the wages, payments and benefits flowing between Cardinal, the numbered company and himself as was required by s. 21(1)(f)(ii) of the Guidelines. Therefore, the judge could not have determined Mr. Struck's income under s. 18 because he was effectively unable to value the non-arm's length benefits that Mr. Struck received from Cardinal or the non-arm's length wages that the numbered company paid Cardinal for Mr. Struck's services.

[71] The trial judge had no alternative but to do the best that he could to impute an appropriate amount of income under s. 19. Section 19(f) of the Guidelines gives a court the discretion to impute "such amount of income to a spouse as it considers appropriate" when a party has failed to make the required financial disclosure.

[72] Mr. Struck has not demonstrated that the judge erred in his discretion to impute income under this section or to impute income at \$100,000. Because Mr. Struck failed to disclose all of the information stipulated by s. 21, it was reasonable for the judge to examine evidence of his lifestyle and spending patterns: *Motyka* at paras. 16, 19; *Poursadeghian v. Hashemi-Dahaj*, 2010 BCCA 453 at paras. 23-25. It was also reasonable for the trial judge to infer from this evidence that Mr. Struck was under-reporting his income: *Bak v. Dobell*, 2007 ONCA 304 at paras. 40-43. In these circumstances, Mr. Struck had the burden of demonstrating that his lifestyle and spending patterns were not indicative of his Guideline income. In effect, the trial judge concluded, and I agree, that Mr. Struck did not discharge that burden. In my view, assessing Mr. Struck's income at \$100,000 is not demonstrably unreasonable in light of the consumption pattern Mr. Struck enjoyed.

[73] This Court in *Motyka* considered a similar argument to the one Mr. Struck advanced before us. The father in *Motyka* argued that the trial judge erred in imputing income based on his lifestyle and monthly living expenses as his business was operating at a loss and he was paying his expenses from capital and shareholder loans. The Court rejected those

arguments. It was the father's choice to "work for future rewards"; however, this choice did not relieve him of the obligation to meet the present needs and expenses of his children based on the resources reasonably available to him for those purposes: *Motyka* at paras. 17-18. The reasoning in *Motyka* applies with equal force to the present case.

[74] On appeal, Mr. Struck's argument evolved to a complaint that the judge had not adequately explained his findings or why he rejected Mr. Struck's purported explanations of how he managed his business affairs. In my view, the trial judge's reasons more than adequately explain the basis of his decision and are supportable on the evidence.

[75] I would not accede to this ground of appeal.

Did the trial judge err in determining the quantum of retroactive child support payable by Mr. Struck based on imputing an income of \$100,000?

[76] The trial judge ordered that Mr. Struck's child support obligations be retroactive to January 1, 2012 based on an imputed income of \$100,000.

[77] On appeal, Mr. Struck does not dispute that a retroactive award against him was appropriate. Nor does he dispute the date of retroactivity. He contends that the trial judge erred in fixing the quantum of the award, because the judge did not make a year-by-year determination of his income. This approach, Mr. Struck says, led the judge to ignore potential variations in his income in this period.

[78] I accept that in calculating a retrospective support order, the correct approach is to use the payor's actual income for the relevant period, if it is readily ascertainable: *Cornelissen v. Cornelissen*, 2003 BCCA 666 at paras. 39-41. This approach is consistent with what the Supreme Court of Canada had to say in *D.B.S. v. S.R.G.*, 2006 SCC 37.

[79] The premise of Mr. Struck's argument is that the trial judge failed to determine what his Guideline income was year-by-year through the period of retroactive entitlement. In my opinion that premise is in error. At para. 55 of the reasons for judgment, the trial judge made a finding that Mr. Struck's income should be imputed at "\$100,000 per year". Clearly the judge was not making a finding that income should be imputed at \$100,000 only for the current year. His finding must be taken to encompass those years to which the retroactive award of child support applies. I take the finding to be that income should be imputed for each year at \$100,000. This is consistent with the trial judge's analysis of the evidence of Mr. Struck's financial circumstances since separation. The trial judge did not fail, therefore, to undertake an appropriate analysis of Mr. Struck's Guideline income in each year. Moreover, his conclusion is supported by the evidence. I would not accede to this ground of appeal.

Did the judge err in his assessment of Mr. Struck's child support obligations to Hannah?

[80] The trial judge first determined that the table amount based on Mr. Struck's income was \$921. From this amount he deducted the \$104 that Mr. Gauthier had been ordered to pay for Hannah to arrive at child support payable by Mr. Struck of \$817.

- [81] Mr. Struck argues the trial judge erred because he failed to correctly follow the steps set out by this Court in *H.(U.V.) v. H.(M.W.)*, 2008 BCCA 177. *H.(U.V.)* dealt with the principles governing the determination of the child support obligations of a step-parent when a biological parent simultaneously has child support obligations. Mr. Struck says that the child support obligations of the biological parent remain primary, whereas the child support obligations of a step-parent are secondary. As a result, the trial judge should have first quantified Mr. Gauthier's current support obligation on a proper evidentiary basis. Instead, the trial judge merely used the table amount for Mr. Struck's income and deducted the 14-year-old child support obligation of Mr. Gauthier. He notes that Ms. Struck had the contact information of Mr. Gauthier before the trial, and could have added Mr. Gauthier as a party or tendered evidence of his circumstances for the purpose of apportioning child support.
- [82] I agree that the principles explained in *H.(U.V.)* govern in this case but I do not think that in the circumstances of this case the judge erred in making his order. The evidence before the trial judge was that Mr. Gauthier had not paid child support, notwithstanding the consent order. As well, enforcement proceedings under the FMEP had not produced any money. Mr. Gauthier's whereabouts were known to both parties and either could have called him at trial if his evidence was likely to assist either party. The trial judge was faced with the evidence at trial that tended to show that Mr. Gauthier was not paying child support and there was no clear indication that he had the capacity to do so, given the failure of the FMEP enforcement proceedings.
- [83] In the circumstances, given the evidence, the judge had to do the best that he could to fashion an appropriate order. There was nothing to suggest that Mr. Gauthier was capable of contributing more than the amount he was obliged to pay by the order. On the evidence Mr. Gauthier probably could not contribute more than that amount. I do not think the judge erred in principle in fashioning an order that reflected Mr. Gauthier's existing obligation to support his daughter as a primary obligation with Mr. Struck's being secondary.

Did the trial judge err in his assessment of Ms. Struck's Guideline income?

- [84] The trial judge accepted that Ms. Struck earned approximately \$40,000 to \$45,000 from her employment. She also operated her own business, but because it was still in its early stages, she only earned a small amount of income from it. Ms. Struck had a rental suite in her house and she earned approximately \$1,500 of rental income from that suite. She also had been receiving between \$700 and \$900 per month in rent from a roommate. The trial judge set Ms. Struck's income from employment at \$45,000 and added an additional \$10,000 as her estimated net rental income. He assessed her total Guideline income as \$55,000.

- [85] Mr. Struck argues that the trial judge erred in fixing Ms. Struck's income at \$55,000. Instead, he says it should be fixed at approximately \$76,000, an amount she earned in the previous year. He claims that Ms. Struck failed to disclose around \$10,000 of rental income in her tax return and also failed to disclose, in the financial statements she prepared for trial, her income from two of her three jobs. Because of this lack of disclosure, the judge should have set Ms. Struck's 2014 income at 2013 levels.
- [86] Ms. Struck argues that the trial judge's findings were clearly supported by the evidence. At the time of trial, she was only working at one job, at which she earned about \$40,000. She left her other jobs because she was working 16 hours a day and could not spend much time with her daughter. She had started her own business providing care services, but it was not earning any income at the time. The \$10,000 of rental income was from her ex-boyfriend. He moved out in 2014 and stopped paying her rent.
- [87] Having reviewed the evidence, it is my view that the trial judge did not err in finding that Ms. Struck's income at the time of trial was \$55,000. That conclusion was clearly supportable on the evidence and recognized the reality that her rental income had fallen and that attempting to work at several jobs was unsustainable. The trial judge did not make any findings about what her Guideline income was between 2011 and 2014. In my opinion, we are not in a position to make those findings. To the extent that such findings may need to be made, they will have to be made in the Supreme Court.

Summary and Disposition

- [88] I have concluded that the trial judge erred in concluding that Ms. Struck did not stand in place of a parent to Sydney. I would substitute an order that Ms. Struck did stand in the place of a parent and accordingly has a duty to support Sydney. Accordingly, I would set aside the term of the order dismissing Mr. Struck's application for child support for Sydney.
- [89] In my opinion, this Court is not in a position, on the record before us, to quantify the amount of child support, if any, owed prospectively or retroactively by Ms. Struck in respect of Sydney. I would remit to the Supreme Court the determination of Ms. Struck's child support obligations to Sydney based on our finding that Ms. Struck stands in the place of a parent to her. Encompassed in the question of Ms. Struck's retroactive support obligation, if any, would be a determination of her Guideline income for the years preceding 2014. The issue obviously also includes Ms. Struck's prospective child support obligations.
- [90] I would anticipate that conclusions on those questions may depend in part on an analysis of the relative obligations of Sydney's biological parents taking into account Sydney's current living arrangements, about which much is unclear, and any other relevant matters, including, for example, Sydney's biological mother's Guideline income over the period during which it may be determined that Ms. Struck owes child support. It may also be the case that the obligations that Mr. Struck owes in respect of Hannah and those of Ms. Struck in respect of Sydney may need to be set off against each other.

- [91] I would allow the appeal to the extent set out above. I would not accede to any other alleged errors and would not, therefore, interfere with those terms of the order relating to Mr. Struck's Guideline income and support obligations in respect of Hannah.
- [92] As success on this appeal has been divided, I would order each party to bear their own costs. Mr. Struck has also requested an order that, in such an event, Ms. Struck pay one-half of the disbursements incurred by him incidental to the appeal including the costs of the preparation of transcripts, appeal books and the appeal record. On my review of those materials, it is clear that the vast majority of them relate to the income issues on which Mr. Struck was not successful. I would decline to order Ms. Struck to pay one-half of those disbursements.

"The Honourable Mr. Justice Harris"

I agree:

"The Honourable Madam Justice Bennett"

I agree:

"The Honourable Madam Justice Fenlon"

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