

CANADA / JUDGMENT

Szeto v. Szeto

2025 BCSC 914

COURT

Supreme Court of British Columbia

DECIDED

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2025 BCSC 914 Szeto v. Szeto IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Szeto v. Szeto, 2025 BCSC 914 Date: 20250515 Docket: E030287 Registry: Vancouver Between: Wendy Wai-Yee Szeto Claimant And Christopher Kwong Chung Szeto Respondent Before: The Honourable Justice Kirchner Reasons for Judgment Counsel for the Claimant: N. Chen Counsel for Respondent: G.K. Yu Place and Date of Hearing: Vancouver, B.C. March 3, 2025 Written Submissions from Claimant: March 28, 2025 Written Submissions from Respondent: March 24, 2025 Place and Date of Judgment: Vancouver, B.C. May 15, 2025 Table of Contents Introduction.. 3 Background.. 3 The Parties and the Children. 3 History of Support 4 Michael's Circumstances. 8 Christian's Circumstances. 8 Issues. 9 Analysis. 9 Is Michael still a child of the marriage?. 9 Should there be any adjustment to the amount of child support for Christian and, if so, what amounts should it now be set at?. 11 Application of the Kollmuss Approach. 12 Housing. 12 Food and Clothing. 13 Cell Phone. 13 Transportation. 13 Life and Critical Injury Insurance. 13 Health Expenses. 14 Swimming and Gym Fees. 14 Streaming Subscriptions, Games, Toys, and Gifts. 14 Supervision and Living Assistance. 15 Summary of Christian's Monthly Budget 21 Is Mr. Szeto entitled to be credited or repaid for any past child support payments for Michael or overpayments for Christian?. 22 Summary and Conclusion.. 28 Appendix - Assessment of Potential Overpayment of Child Support. 29

Introduction

- [1] The respondent, Christopher Szeto, applies under s. 17(1)(a) of the Divorce Act, R.S.C. 1985, c. 3 to cancel his child support obligations for the parties' eldest child, Michael, and to vary the support for the parties' second child, Christian. He also seeks an order to recover past overpayments for Michael's child support dating back to 2017. The respondent, Wendy Lee (as she now goes by), opposes the application. She accepts that child support for Michael should be suspended for the time being but argues the Court should refrain from finding he is no longer a child of the marriage. She opposes the order for recovery of past payments. She argues that if any adjustment is made to support for Christian, it should be increased to account for the extraordinary costs of supporting him.

- [2] For the reasons that follow, I find that Michael is no longer a child of the marriage and thus child support for him should be terminated. I would order that Ms. Lee repay \$6,568 to Mr. Szeto for child support payments made for Michael after the date of effective notice of his intention to seek the variation. I would dismiss Mr. Szeto's application to reduce child support for Christian such that he is to continue paying support for Christian at the Guidelines amount of \$1,792 per month.

Background

The Parties and the Children

- [3] The parties were married in 1990 and divorced on October 20, 2003 by a consent order made by Justice Hood. Michael was born in 1995 and is now 29 years old. Christian was born in 1997 and is now 27. Both have autism diagnoses but Christian requires more support than Michael. Both live with Ms. Lee who states they require ongoing care from her. Christian is not employable. He receives a Persons with Disability ("PWD") pension from the provincial government in the amount of \$1,435 per month. Michael also applied for disability benefits some years ago but did not qualify. He has worked in a warehouse as a forklift operator and general labourer since, it appears, 2017, and contributes to the household expenses.
- [4] Mr. Szeto has not had meaningful contact with either Christian or Michael since 2016. He attributes this in part to two confrontations in which Michael threatened him with violence. He states this has also interfered with his ability to see Christian. He remarried in 2008 and has two children from that marriage, one of whom has a disability. He deposed that he earns \$160,000 annually as a physiotherapist but his income for 2023 increased to \$209,177 which, after permissible deductions, generates an income of \$205,888 under the Federal Child Support Guidelines, SOR/97-175 [Guidelines].
- [5] After the parties separated, Ms. Lee worked part-time while the children were in school but she had to stop after Michael completed high school. She felt that Michael could not stay at home alone and she could not offer a potential employer any stability as an employee because of the unpredictable care needs of the children. Christian finished high school two years later and Ms. Lee remained at home to care for both children.
- [6] Ms. Lee also developed a social anxiety and depression that worsened over time. In 2018, she was hospitalized and treated by a psychiatrist whom she continued to see after her release from hospital. She still struggles with anxiety and depression but finds she is better able to manage these conditions with medication. History of Support

- [7] Under Hood J.'s 2003 consent order, Mr. Szeto was required to pay \$784 per month in child support, adjustable annually with a mutual exchange of tax documents. Mr. Szeto has fully complied with this order, including making annual adjustments to support to account for his growing income. As of July 1, 2024, he ceased paying support for Michael after learning more about Michael's work. He has continued paying support for Christian in the amount prescribed by the Guidelines, but he now seeks to vary that.
- [8] According to Ms. Lee, Mr. Szeto did not always provide his tax returns and she would just accept his report of his income and recalculated child support for each year. She stated she was too overwhelmed by depression and anxiety to dispute or question the amount. However, she has not asserted in this application that Mr. Szeto underpaid child support in the past or otherwise failed to fully comply with the child support orders. The evidence shows that he regularly provided his tax documents to Ms. Lee and I can find no error in his calculation of child support.
- [9] In September 2014, Mr. Szeto applied to vary Hood J.'s order on the basis that Michael had turned 19 and was no longer a child of the marriage. Justice Sewell dismissed that application in reasons for judgment dated November 27, 2014. He accepted that Michael had been diagnosed with autism spectrum disorder which had a significant impact on his ability to learn, communicate, and obtain employment. He took note of Ms. Lee's undisputed evidence that she needed to assist Michael in regular tasks and responsibilities, that Michael was easily distracted from tasks and avoided completing them, that he was unable to drive, and that he needed assistance with most transit use other than a familiar SkyTrain trip. He noted that Michael was working part-time as a bus boy and had tried to join the armed forces but twice failed the required aptitude test. He found that Michael was unable at that time to withdraw from Ms. Lee's charge because of his autism. He further stated: It may well be that in time he will develop the skills and ability to make his own way in the world; however, at present, it is quite clear that he will require further training and interventions and the assistance of his mother to reach that state.
- [10] Justice Sewell found that since Michael was not receiving social assistance benefits, child support in the Guidelines amount should continue. However, he directed that Ms. Lee was to keep Mr. Szeto informed of Michael's progress in applying for financial assistance and his efforts to obtain skills to become self-sufficient. That direction was incorporated into the order as a formal direction.
- [11] On June 20, 2017, about two-and-a-half years after Sewell J.'s order, Ms. Lee notified Mr. Szeto that Michael has started to work but suggested the job, while full time, was only temporary. She emailed him as follows: Subject: Michael job search Hello Christopher FYI Michael has found a seasonal full time job which will be ending in August. He's several interviews of other jobs and just successfully got a forklift driver's license.

- [12] There was no response to this email and Ms. Lee did not provide any further updates of Michael's work. Nor did Mr. Szeto make any inquiries about it. Evidently, Michael's work did not end in August 2017 or, if it did, he was later rehired or hired elsewhere because he is presently working as a warehouse labourer and forklift operator.
- [13] In 2023, Mr. Szeto inquired about Michael's efforts to find work. This was the first time he made such in inquiry since Ms. Lee's June 20, 2017 email. In an email dated May 15, 2023 to Ms. Lee, Mr. Szeto wrote: How are Michael and Christian doing? It has been a while since I talked to them. Could I ask you how is Michael doing? Does he have a girlfriend or a partner? What kind of job is he doing now? I hope that he likes his job and is able to earn a living. How about Christian? Is he doing any job or volunteer anywhere? I hope that he is still happy.
- [14] It appears Ms. Lee did not respond to this inquiry. On June 3, 2023 Mr. Szeto wrote again: How are the kids doing? Michael is going to be 28 years old. I hope he has a job and is able to support himself to pursue a life of his desire. Could you tell me what job he is doing? Is his income able to support himself? How about Christian? Is he doing any volunteering or having a job?
- [15] Ms. Lee responded to this on June 5, 2023 as follows (as it appears throughout): Michael is a labour in a cement company and learnt to cook himself to pack to work. He's good habit of saving up his income. He's learnt to diet right and eat for his own health with exercising. Christian is still going on with his life skill learning and to do things on his own under the advice from his behavioral consultant which get update through regular meetings.
- [16] In July and September 2023, Mr. Szeto evidently contacted Ms. Lee asking for employment and income information for Michael. It seems he also tried contacting Michael directly but received what Mr. Szeto's counsel described as "an extremely vulgar and unacceptable" response. On October 4, 2023, counsel for Mr. Szeto wrote to Ms. Lee suggesting that Michael may now be self-sufficient such that Mr. Szeto's child support obligations should end. He also suggested that Mr. Szeto may be entitled to repayment of past support payments. He stated: under the terms of the November 27, 2014 Supreme Court Order, you were ordered and therefore obligated to keep [Mr. Szeto], and we quote, "informed of Michael's application for financial assistance, and attempts to attain the skills necessary to become self-sufficient." It appears you have failed to fulfill those terms of the court order.
- [17] Counsel asked for a response to the email by October 11, 2023. The following day he sent another email asking for specific information about Christian's health and financial circumstances.

- [18] After some delay, Ms. Lee eventually retained counsel who responded to Mr. Szeto's counsel on December 7, 2023 essentially advising that Michael has refused to provide employment and income documents to Ms. Lee. She also advised that Christian is not employed and is unable to work due to his severe autism but is participating in programs at the Pivot Point Family Growth Centre.
- [19] On April 2, 2024, counsel for Mr. Szeto sought dates from counsel for Ms. Lee for an application to vary support. After some attempt by the parties to resolve the matter, Mr. Szeto's application was filed on November 19, 2024 and set down for hearing on December 19, 2024. The hearing did not proceed that day and was put over to March 3, 2025.
- [20] Ms. Lee does not seek to restore child support for Michael but wishes to reserve her ability to do so in the future should his circumstances change. Mr. Szeto continues to pay support for Christian. As of July 1, 2024, he has been paying \$1,792 per month which is the Guidelines table amount for his 2023 of \$205,888. Michael's Circumstances
- [21] Michael is presently working as a warehouse labourer and a forklift operator but there is no evidence of where or how much he is earning. Ms. Lee claims Michael will not discuss his employment with her but her counsel believes he is working at the same place he was in 2017.
- [22] Ms. Lee has not produced any employment or financial information for Michael. She states Michael refuses to share this information with her. She believes he is working three days a week but says he gets angry when she asks him for details about his work and income. In 2021, he began contributing to household expenses and currently gives Ms. Lee \$600 a month for this. He also pays for some of his own food and buys his own clothing, electronic devices, and other personal items. He deals with his own banking as Ms. Lee taught him to do this shortly after high school. Ms. Lee still prepares dinner for him, does his laundry, and manages other household tasks for him. Christian's Circumstances
- [23] Christian's autism is more limiting for him than Michael's. Ms. Lee deposed that Christian functions with a mental capacity of a seven or eight-year-old. He is not able to work and qualifies for a PWD pension in the amount of \$1,435 a month.
- [24] Ms. Lee deposed that Christian requires 24/7 monitoring. While this does not require constant direct supervision and engagement, she must be present in the home when Christian is there and monitor his activities. He attends two programs outside of the home that are run and funded by Community Living B.C. One is called Pathfinders which is a once-weekly meeting of two hours and includes HandyDart transportation to and from the meetings. The other is Pivot Point Family Growth which provides up to three outings a week with an interventionalist for a targeted 12 hours a week, but due to demands on the interventionalist's time, it is often less than this. There is also some inconsistency in when these outings happen. While Christian has had the same interventionalist for seven years, there are days when an outing must be cancelled or rescheduled. When that happens, the interventionalist messages Christian early in the morning so Ms. Lee needs to be available

each morning in the event of a change. The outings typically include going to the gym or a swimming pool, having lunch at a mall and visiting stores where Christian often buys toys or video games.

[25] When Christian is not with his interventionist, he stays at home and usually plays video games or with Lego or similar toys.

[26] Ms. Lee cannot leave Christian alone at home. While he has some ability to prepare food for himself, he is not able to assess when food is properly cooked and Ms. Lee needs to supervise his use of the stove and other appliances. Ms. Lee must do most of the household tasks and shopping for Christian.

Issues

[27] The application raises the following issues:

- a) Is Michael still a child of the marriage for the purposes of child support?
- b) Should there be any adjustment to the amount of child support for Christian and, if so, what amount should it now be set at?
- c) Is Mr. Szeto entitled to be credited or repaid for any past child support payments for Michael or overpayments for Christian?

Analysis

Is Michael still a child of the marriage?

[28] Each parent and guardian of a child has a duty to provide support for their child so long as they remain a "child of the marriage" which is defined in the Divorce Act as follows: child of the marriage means a child of two spouses or former spouses who, at the material time,

- (a) is under the age of majority and who has not withdrawn from their charge, or
- (b) is the age of majority or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessities of life;

[29] There is a presumption that a child is no longer a child of the marriage once they reach 19. However, an adult child may remain a child of the marriage for support purposes if they are unable to withdraw from the parents' charge or obtain the necessities of life because of illness, disability or other reason: Divorce Act, s. 2(1) ("Child of the marriage"); Guidelines, s. 3(2); Dring v. Gheyle, 2018 BCCA 435 at para. 49. Once a child reaches the age of 19, the party applying for or seeking to continue the child support bears the onus of proving that the child is still a child of the marriage: Dring at para. 49.

[30] I find that Michael is no longer a child of the marriage. He is working close to full time if not full time and he contributes to Ms. Lee's household expenses. The onus falls to Ms. Lee to prove that Michael is no longer a child of the marriage, which means it is incumbent on her

to show that he is unable to withdraw from his parents' care. It is clear that Michael is capable of earning an income as he has done so apparently for the last several years. While Michael may refuse to share his income information with Ms. Lee, I am doubtful that she cannot provide further information about where and how often Michael works given that they live in the same house.

- [31] Ms. Lee suggests that even if child support for Michael is suspended, the Court should not declare that Michael is no longer a child of the marriage because his circumstances remain precarious due to his autism. I am not persuaded that is the case. It appears that Michael has sustained employment for some eight years now and his autism does not appear to be an impediment to that employment. Should that change in the future, it is possible that Michael might re-qualify as a child of the marriage with a material change of circumstances: *Jonasson v. Jonasson*, 37 R.F.L. (4th) 266, 1998 CanLII 3619 at para. 5 (B.C.S.C.); *N.D.S. v. J.A.S.*, 2020 BCSC 1034 at para. 116. However, given his long track record of employment, I am compelled to find that he is not a child of the marriage. Should there be any adjustment to the amount of child support for Christian and, if so, what amounts should it now be set at?
- [32] Mr. Szeto does not dispute that Christian is still a child of the marriage in that his autism prevents him from withdrawing from his parents' charge. However, he argues that the amount of child support must now account for the fact Christian is receiving PWD benefits.
- [33] It is well settled that when an adult child begins receiving PWD benefits, there is a material change of circumstances that merits a potential variation of child support: *Neuman v. Neuman*, 2021 BCSC 873 at para. 66; *James v. James*, 2022 BCSC 1402 at para. 26. In this Court, it has largely been accepted that support for adult children who collect PWD benefits should generally be determined under s. 3(2)(b) of the Guidelines: *Kollmuss v. Kollmuss*, 2015 BCSC 1101; *James* at para. 27; *Willms v. Willms*, 2019 BCSC 1944 at para. 30. That section provides that if the court considers it to be inappropriate to use the Guidelines table amount for an adult child, it may set an amount that it considers appropriate "having regard to the condition, means, needs and other circumstances of the child and the financial ability of each spouse to contribute to the support of the child."
- [34] In *Kollmuss*, which is the leading authority on this point, Justice Voith (then of this Court) outlined an approach for assessing child support for an adult child receiving PWD benefits:
- [40] In considering an appropriate amount or level of support, the court engages in the usual condition, means, needs and other circumstances analysis; however, in these cases, the reasonable ability of the child to contribute to those needs is also incorporated, or factored, into the analysis. Ultimately, a court will calculate a child's reasonable costs and deduct the amount of the disability benefit in order to quantify the relevant shortfall. The court will then consider the parents' incomes and the usual table amount. The child's shortfall is then often divided in proportion to the parents' respective incomes. This approach has been followed in several cases: *James*; *Willms*; *Neuman*; *Jensen v. Jensen*, 2018 BCSC 283, *aff'd* 2019 BCCA 117; *Martin v. Martin*, 2021 BCSC 2015; *C.L.C. v. B.T.C.*, 2012 BCSC 736; and

Hausmann v. Klukas, 2016 BCSC 853.

- [35] As I explain below, I find that using the Kollmuss approach in this case, with one significant change that builds on more recent case law, would result in an amount of child support for Christian that is higher than the Guidelines amount. However, since Ms. Lee has not brought an application to increase Christian's child support but has opposed Mr. Szeto's application to reduce it, I find it would be unfair to Mr. Szeto to increase the support above the Guidelines amount that he currently pays without proper notice of that application. However, since my analysis based on the Kollmuss approach has led me to conclude that child support for Christian should not be reduced from the current Guidelines amount, it is necessary for me to set out that analysis, which I turn to now. Application of the Kollmuss Approach
- [36] An adult child's reasonable living costs are typically assessed under the Kollmuss approach from a budget provided by the child's primary caregiver. Ms. Lee has not provided a specific budget for Christian. Rather, her counsel points to items in Ms. Lee's Financial Disclosure Statement as indicating expenses for Christian. As recognized in Kollmuss at para. 41, "courts have generally been prepared to work with rough budget amounts, or budgets lacking significant detail, so long as they were able to determine the reasonable costs of the child." I find the evidence presented by Ms. Lee is sufficient to construct a monthly budget for Christian. Housing
- [37] Ms. Lee's financial statement does not identify a specific housing expense for Christian. He lives with her and Michael in the former family home which she received under Hood J.'s 2003 consent order. That order also provided for a \$28,000 equalization payment from Ms. Lee to Mr. Szeto to satisfy the property division claims, less a \$6,000 one-time lump sum spousal support payment to Ms. Lee. Ms. Lee assumed responsibility for the mortgage, taxes, and expenses but there is no evidence of the value of the home or the balance on the mortgage at the time. Presently, the home is valued at \$783,000 and there is no mortgage. Ms. Lee pays \$720 a month in taxes, municipal services, insurance, and strata fees and about \$200 in utilities and internet service. In Jensen and Martin, the Court attributed 40% of the caregiving parent's housing costs to the child. Here, since Michael still lives in the home and can contribute to the cost, I attribute approximately 30% of the monthly housing cost, or \$300, to Christian. Food and Clothing
- [38] Ms. Lee states that she spends \$1,200 per month on food plus \$200 for meals outside the home. She shops for herself, Michael, and Christian so notionally this should be divided in thirds, although it is likely that Michael and Christian eat more than she does. She also identifies an expense for food costs for Christian while he is with his interventionist. Overall, I attribute \$550 to Christian's food costs.
- [39] Ms. Lee's Financial Statement identifies a clothing expense of \$100 a month for children. Since she states in her affidavit that Michael buys all his own clothing I infer this \$100 is only for Christian. That amount is certainly not unreasonable. Cell Phone

- [40] Ms. Lee pays \$96.32 for a cell phone plan for her and Christian. I attribute half of this to Christian. Transportation
- [41] Ms. Lee drives both Christian and Michael to medical appointments and other things. Her overall vehicle expense is just under \$200 a month but it is likely she would incur much of this expense even without caring for Christian. I attribute \$50 of this expense to Christian. I also accept the \$50 per month HandyDart expense. Life and Critical Injury Insurance
- [42] Ms. Lee's financial statement identifies a monthly expense of \$202 for life insurance for her, Michael, and Christian and \$95 for critical illness insurance for her alone. I accept that life and critical illness insurance for Ms. Lee, with Christian as one of the beneficiaries, is a worthy expense. As I will discuss in a moment, Ms. Lee provides essential care for Christian and should anything happen to her, Christian would require care from a third-party provider. The life insurance policy provides a safety net for this possible expense. Since Michael would benefit from this insurance, I would assign \$150 of this expense to Christian's budget. Health Expenses
- [43] Ms. Lee identifies \$204 in monthly health expenses for her, Christian, and Michael. Of this amount, \$93 is for medications but she does not specify whose those are. She also claims \$15 per month in dental expense which seems very low but I assume that is a monthly average of an annual cost. She claims \$96 for supplements. I will attribute \$105 (one third) of this total monthly expense to Christian. Swimming and Gym Fees
- [44] Ms. Lee claims \$25 a month for gym and swimming fees for Christian's outings with his interventionalist. This modest cost is reasonable. Streaming Subscriptions, Games, Toys, and Gifts
- [45] Ms. Lee claims a \$1,000 monthly expense for Christian for iTunes and Steam games, GameStop and Play Station gift cards, DVD movies, and toys. It seems much of the monthly cost is for in-app or in-game purchases. This is in addition to subscriptions for streaming services and PlayStation which total approximately \$53 per month. Ms. Lee puts money into a PlayStation Wallet for Christian for some of these purchasers and tries to control his online gaming purchases by limiting the money she puts in. She also states in her financial statement that she spends \$75 a month on printer ink and stationary for Christian and \$50 for gifts but she does not explain either of these expenses in her evidence.
- [46] Ms. Lee deposed that Christian needs these gaming and play activities to keep his mind busy when he is at home, particularly when he becomes agitated and overwhelmed. Having Christian occupied with games, movies, and toys allows her some personal time to shower or use the washroom. It also prevents Christian from interacting with Michael which typically results in them fighting.
- [47] Given that Christian functions at the level of a seven or eight-year-old, I accept that some expense is reasonable for new game and toys purchases but, while Ms. Lee states that Christian needs his video games to regulate his behavior and keep him engaged, the

evidence does not explain why in-app or in-game purchases, beyond the basic gaming subscriptions or game purchases, are a necessary part of Christian's activity, especially at such a substantial cost. Without any evidence that speaks to that point, I am not able to conclude that an amount more than around \$250 per month is a reasonable amount for toy and game purchases, streaming services, and other items to engage Christian. Supervision and Living Assistance

- [48] Ms. Lee seeks to include an amount in Christian's budget to account (to some extent) for the time she must devote to supervising and caring for him. She argues that Christian requires full-time supervision which she provides with only some amount of respite during the 12 or 14 hours a week he is with his interventionist and at the Pathfinders program. She alone bears this responsibility since Mr. Szeto does not see the children. She points out that if it was necessary to hire a third-party care provider to do even some of the work that she does to care for and supervise Christian, this would be a special or extraordinary expense under the Guidelines that would be prohibitively expensive for both parties. Ms. Lee points to Martin and James where the Court included at least a notional amount in the budget for an adult child with a disability to provide some financial recognition of the caregiving parent's time looking after the adult child and the corresponding benefit to the other parent of being relieved of this obligation.
- [49] Since Kollmus, courts have begun to recognize that in cases where the primary caregiving parent is required to provide a level of care or supervision for an adult child with a disability, the child support order should account for that to ensure that justice is done between the parties: C.G. v. M.G., 2023 BCSC 1355 at paras. 58-59; James at paras. 32-33, 41-42; Martin at para. 53; J.D. v. W.D.T., 2019 BCPC 21. In each of these cases, the adult child required constant or near constant supervision which was provided largely by the primary caregiving parent. In J.D., Judge Gouge of the Provincial Court explained the problem as follows:
- [10] The budget is deficient in one respect. It makes no allowance for the cost of full-time supervision and care for J. Ms. D. says, and I accept, that he cannot be left unsupervised. Ms. D. is therefore faced with a choice. She can provide the requisite supervision herself, as she has been doing. If she does that, she could not return to work even if her own health were to permit. Or, she can return to work and hire a caregiver for J. I think it likely that, if Ms. D. were otherwise able to work, it would be possible for J. to attend some form of adult day care during her working hours, but there is no evidence of the cost of such programs.
- [50] Judge Gouge therefore added \$500 per month as a "modest allowance" in the child's living expense budget. He rationalized the cost in these terms:
- [20] One might value Ms. D.'s caregiving services in either of two ways: (i) lost opportunity cost; i.e. the net income which Ms. D. would be able to earn if she were not caring for J. full-time; or (ii) fair market value; i.e. the cost of those services if purchased from an arms-length caregiver. I do not think it possible to articulate a rule which would govern that question in

all cases. I think that each case must be decided by reference to its own particular circumstances. In this case: (i) Ms. D.'s opportunity cost is zero; and (ii) there is no evidence of the market value of the services which she provides. In those circumstances, I think that a modest allowance of \$500 per month is appropriate. If that allowance is added to the budget figure of \$1500, the total budget is \$2000.

- [51] In an earlier case, *A.M.P. v. T.W.P.*, 2017 BCPC 335, Judge Gouge suggested the fair market value of care provided to an adult child with Down Syndrome was in the range of \$2,400 to \$3,200 per month. That was based on "a gross underestimate" of the parent giving 40 hours per week of loving, attentive care to the adult child. In that case, though, Judge Gouge ultimately found that the Guidelines amount of support, which was in the range of \$2,063 to \$3,433 per month depending on the payor's fluctuating business income, was appropriate.
- [52] In *Martin*, the primary caregiving parent (the mother) had an especially difficult burden due to the adult child's complex medical condition which included epilepsy with frequent seizures. The child attended adult day programs in the community which allowed the mother to work at least part of the day but otherwise she had to provide constant care and supervision in the mornings, after work, on much of the weekend, and on days when the child could not attend the day program. She had to provide full-time care in July and August when the community program was not available. Following *J.D.*, the Court in *Martin* added \$700 to the child's budget for July and August and \$350 per month for the other 10 months when the day program was available. This was the amount calculated and sought by Ms. Martin, although the Court observed it was less than minimum wage and undervalued the care Ms. Martin provided. In *C.G.*, Justice Walkem followed this same approach.
- [53] In *James*, the adult child lived on the autism spectrum and required regular supervision when at home, but required less care than the child in *Martin*. He could not live independently but was able to work part-time (15 hours a week) with his mother's support: *James* at para. 39. Justice Burke added \$500 per month to the child's budget to account for the mother's time devoted to caring for the child. She found this amount was reasonable "considering the minimum wage is over \$15.00/hr and the fact that [the adult child] is able to work outside the house on a part-time basis." She stated that this was "no doubt disproportionate to the amount of time and effort the claimant actually expends on [the adult child's] care."
- [54] Thus, *J.D.*, *Martin*, *James*, and *C.G.* have advanced the Kollmuss approach by recognizing at least some monetary value for the time and sacrifices that the caregiving parent devotes to an adult child with a disability and the benefit that brings to the other parent. These cases rightly recognize this as a cost of the child's care. However, I find it difficult to rationalize the allocation of only a "modest allowance" to the child's budget to account for that care. In my view, something more than token acknowledgement of the value of the services is required. I say that for at least three reasons.

- [55] First, if the primary caregiving parent in all of these cases - invariably the mother - did not provide the care, the cost for replacement care from a third-party provider would dwarf the modest allowances thus far allocated in the jurisprudence. Ms. Lee has led evidence of the cost of some third-party care options. Nurse Next Door offers home respite care for adults with disabilities in the range of \$45 to \$75 per hour with a three-hour minimum. Qualicare Home Care provides those services in the range of \$42 to \$45 per hour with a two-hour minimum. Autism BC provides a respite program where the cost is essentially based on what the client is able to pay and believes the provider's time is worth. It suggests a range of \$20 to \$30 per hour. There appears to be a wait list for this and it is not clear on the evidence that this is a regular service.
- [56] Second, while a key factor in all these cases is that the child starts receiving an income in the form of PWD benefits when they reach adulthood, they are also no longer enrolled in public school which, in most cases (and certainly this one), had allowed the caregiving parent to work at least part time while the child was in school. Thus, the value of the PWD benefit is offset or cancelled out altogether by the loss to the caregiving parent of having to reduce or give up paid work to look after the child during what used to be the child's school hours. As stated in *Senos v. Karcz*, 2014 ONCA 459 at para. 73: The support, care and treatment of a 24-year-old with a serious psychiatric disability may require a greater financial contribution from his parents than the support of a young child or a teenager without a disability. Recipients of [disability benefits] may have special or extraordinary expenses which go beyond what either the table amount or income support may cover
- [57] Third, the caregiving parent in most if not all these cases was compelled to make a life-long sacrifice to care for the child. In *A.M.P.* at para. 18, Jude Gouge observed: Most parents look forward to the day when their children will become responsible, self-sufficient adults, allowing the parents to lay down some burdens and move gracefully toward retirement. H. will remain dependent on her parents for her entire life.
- [58] In *Martin*, I stated:
- [51] while most parents reach a point in their lives when they no longer need to provide the most basic levels of care for their children, or share their home with them, Ms. Martin will never reach that point
- [59] Nor, it appears, will Ms. Lee.
- [60] Nevertheless, Ms. Lee does not seek dollar-for-dollar compensation for her time given to caring for Christian. She seeks a nominal recognition, as has been done in previous cases. At the hearing, her counsel submitted that the amount should be at least \$1,200 per month or potentially higher when examined in the context of the minimum wage. In supplemental written submissions, she suggested that the amount should be between the current minimum wage and the market replacement costs of \$42 per hour. She does not specify a number of hours by which to calculate the amount but offered an illustration based on 28 hours per week, which is a 40-hour work week less the 12 hours that Christian is with his

interventionalist. That undoubtedly undercounts the actual time that Ms. Lee gives to caring for Christian once mornings, evenings, weekends, and holidays are factored in. Twenty-eight hours a week at the current minimum wage would generate \$2,111 a month and at the midrange between minimum wage and professional care costs (\$30/hr) would be around \$3,600 per month. All of these amounts, and particularly the minimum \$1,200 suggested by counsel for Ms. Lee and the \$2,111 based 28 hours a week at minimum wage, fall far short of the true monetary value of Ms. Lee's time caring for Christian and for the corresponding benefit to Mr. Szeto of being relieved of the cost of a third-party care provider.

- [61] Although not addressed by the parties, it may be that a parent's time given to caring for an adult disabled child should be addressed through spousal support rather than child support. That approach might more appropriately account for the caregiving parent's sacrifice given to caring for the adult child and the corresponding benefit to the payor parent who is relieved of that obligation than does the somewhat rough approach taken in J.D., Martin, James, and C.G. When a parent, like Ms. Lee, is compelled to leave the paid workforce to care for an adult child of the marriage, that is a financial consequence "arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage": Divorce Act, s. 15.2(6)(b). It is also an economic hardship and disadvantage for the spouse arising from the marriage and its breakdown: Divorce Act, s. 15.2(6)(a) and (c). The stated objectives of a spousal support order under the Divorce Act include addressing these disadvantages.
- [62] However, it seems that Ms. Lee and Mr. Szeto did not turn their minds to this future for Ms. Lee when they settled the issue of spousal support more than 20 years ago when the children were just six and eight years old. Ms. Lee received a lump sum of \$6,000 in spousal support under Hood J.'s 2003 consent order. That seems grossly inadequate to address a potential lifetime of care for one of the children. That also seems to have been a problem in other cases I have discussed, such that it became necessary in those cases to address the matter through child support "to ensure justice is done between parties and to account for the unique circumstances of the child of the marriage": James at para. 33; Martin at para. 53.
- [63] Since I ultimately conclude that that Mr. Szeto's application to reduce Christian's child support should be dismissed, with the effect that he will continue to pay support at the Guidelines amount under existing orders, it is not necessary for me to settle on a firm number in Christian's budget to account for the value of the care he receives from Ms. Lee. However, considering the evidence respecting the cost of a third-party care provider, Mr. Szeto's annual income, his obligations to his other children, and the fact that the jurisprudence to date has included only a "modest allowance" to recognize some value to the child and to the payor parent for the caregiving parent's time, albeit at a "a gross underestimate" of the actual time spent by that parent, it is my view that an amount in the range of \$3,000 per month would be appropriate in this case. This is considerably more than has been assessed in J.D., Martin, James, and C.G. but still represents a modest amount that falls well below what the parties would have to pay for professional care.

- [64] I also find \$3,000 is suitable because it roughly accords with an amount Mr. Szeto might be expected to pay if this been addressed through spousal support. By my assessment, a monthly spousal support payment in these circumstances would be in the range of \$6,000 based on Mr. Szeto's 2023 income and \$4,500 based on his 2022 income. The monthly cost to Mr. Szeto after considering the applicable tax credit would be in the range of \$3,500 for 2023 and to \$3,000 for 2022. Summary of Christian's Monthly Budget
- [65] The following table summarizes the monthly budget amounts I have just outlined: Item Amount Housing \$300 Food \$550 Clothing \$100 Cell phone \$48 HandyDart \$50 Gas and vehicle expense for driving Christian to appointments \$50 Life and critical injury insurance \$150 Health \$105 Swimming and gym fees \$25 Streaming subscriptions; games, movies, toys; printer ink; stationary \$250 Living assistance and supervision \$3,000 Total \$4,628 Less PWD Benefits (\$1,435) Net Shortfall \$3,193
- [66] Kollmus suggests that the net shortfall in Christian's budget after accounting for the PWD benefits is to be divided between the parties in proportion to their respective incomes. Ms. Lee has no income of any significance. Her most recent tax return shows a Guidelines income of \$288 for 2023. Thus, I find that under the Kollmus approach, Mr. Szeto's child support obligation for Christian would be set at \$3,193 per month.
- [67] However, since Ms. Lee has not made an application to vary the amount of support for Christian, I find it would be unfair to Mr. Szeto to now set child support for Christian above the Guidelines table amount that he is currently required to pay under the existing order. Mr. Szeto is entitled to notice of an application to increase the amount he is required to pay and there has been no such notice. Ms. Lee's application response simply opposes his application to reduce the amount of support. Since the amount of support I would assess under s. 3(2)(b) of the Guidelines is more than what Mr. Szeto would continue paying under the table amount, I would simply dismiss Mr. Szeto's application to reduce the amount of support payable for Christian which will leave in place his existing obligation to continue paying \$1,792 per month.
- [68] I would add that I recognize that child support is the right of the child which might suggest it should be fixed at a higher amount despite the fact Ms. Szeto has not made an application. However, since the value of the care Ms. Lee provides for Christian is such a large component of that higher amount under the Kollmus approach to s. 3(2)(b), and since there is no suggestion that care will not be withdrawn, I conclude that Christian's interests are not presently affected by dismissing Mr. Szeto's application to reduce the current amount of support. Further, as we shall see in the next section of these reasons, Ms. Lee and the children have had the benefit for some 8 years of Mr. Szeto paying child support for Michael after he was able to support himself. Is Mr. Szeto entitled to be credited or repaid for any past child support payments for Michael or overpayments for Christian?

- [69] Mr. Szeto seeks an order cancelling his child support obligations for Michael retroactive to July 1, 2017 which is soon after Ms. Lee confirmed he was working in the warehouse at a job he has seemingly held ever since. Mr. Szeto argues Michael has not been a child of the marriage since that date. The evidence does not provide a complete record of the child support payments Mr. Szeto made since then or of his Guidelines income for each year since 2017 but using the available evidence, I have estimated the potential retroactive overpayment to be just over \$60,000. That estimate is detailed in the table attached as Appendix 1 to these Reasons for Judgment.
- [70] Mr. Szeto also argues that he should receive a credit for any overpayments of support for Christian after any variation but since I have made no variation to Christian's support, I will only consider whether credit should be given for overpayments for Michael.
- [71] In *Colucci v. Colucci*, 2021 SCC 24, the Supreme Court of Canada discussed the approach for applications by payor parents to retroactively reduce their child support payments due to a past change of circumstances. First, the court must be satisfied there has been a material change in circumstances that justifies a variation. Second, the court must determine the appropriate effective date for a retroactive variation. While that is ultimately a discretionary decision, the retroactive date is presumptively the date on which the payor parent gave effective notice to the recipient parent of an intention to seek a change but not more than three years before formal notice is given by serving a court application seeking the change.
- [72] In this case, Mr. Szeto gave effective notice on October 4, 2023 when his counsel emailed Ms. Lee. That is less than three years before the date of actual notice so it is presumptively the retroactive date for a variation in child support.
- [73] However, this is only a presumptive date and the court retains a discretion to order a different retroactive date if it would be unfair in the circumstances to hold the payor parent to the date of effective notice. Unfairness is guided by four factors set out in *D.B.S. v. S.R.G.*, 2006 SCC 37 as modified in *Colucci*. These are:
- a) Whether there is an understandable reason for the delay;
 - b) The payor's conduct;
 - c) The child's circumstances; and
 - d) Hardship to the payor if the period of retroactivity is not lengthened beyond the presumptive date. These factors serve to balance the interests of the child receiving an appropriate amount of support, certainty and predictability, and flexibility to ensure a just result in light of income fluctuations. The court is afforded a wide discretion "to respond to the multiplicity of factual situations produced by human behavior": *Colucci* at para. 29.

- [74] Colucci was decided in the context of a past reduction in the payor parent's income that would have reduced the Guidelines amount for his child support payments. The child support order was made in 1996 and the reduction in income began around 1998 but he did not apply to vary support until 2016. He had paid no support between 1998 and 2016 other than relatively small amounts collected by enforcement agencies and arrears of \$170,000 had accumulated.
- [75] Colucci does not deal directly with a case like the present one where the payor parent continued to pay child support long past the date on which the child ceased to be a child of the marriage. Nevertheless, it appears the court intended the same framework would apply since it used that very scenario as an example of a material change of circumstances that would satisfy the first step of the Colucci analysis:
- [60] The onus is on the party seeking a retroactive decrease to show a change in circumstances (Punzo v. Punzo, 2016 ONCA 957, 90 R.F.L. (7th) 304, at para. 26; Templeton, at para. 33). In some cases that may be relatively straightforward: for example, establishing that the children are no longer legally entitled to support because they are no longer children of the marriage. [Emphasis added]
- [76] Mr. Szeto has cited no other authority that might suggest Colucci does not apply in this case.
- [77] That said, much of the court's analysis and commentary in Colucci on retroactive child support variations was driven by the importance of the payor parent making ongoing disclosure of changes to income. Justice Martin said at para. 41 that a payor parent's failure to disclose an increase in income is "blameworthy conduct" that will typically move the presumptive date of retroactivity back to the date of the increase in income. She spoke of the importance of timely and complete disclosure as follows:
- [48] After applying the Guidelines and D.B.S. for many years, it has become clear just how much the child support system, including s. 17 variations, depends upon adequate, accurate and timely financial disclosure. [] Simply stated, disclosure is the linchpin on which fair child support depends and the relevant legal tests must encourage the timely provision of necessary information.
- [49] The pivotal role of disclosure comes as no surprise since the premise underlying the Guidelines "is that the support obligation itself should fluctuate with the payor parent's income" (D.B.S., at para. 45). The structure of the Guidelines thus creates an informational asymmetry between the parties. In a system that ties support to payor income, it is the payor who knows and controls the information needed to calculate the appropriate amount of support. The recipient does not have access to this information, except to the extent that the payor chooses or is made to share it. It would thus be illogical, unfair and contrary to the child's best interests to make the recipient solely responsible for policing the payor's ongoing compliance with their support obligation.

- [78] This type of "informational asymmetry" does not exist in the present case. Mr. Szeto has disclosed his notice of assessment annually to Ms. Lee along with an updated calculation of the monthly child support payment. If there is any informational asymmetry, it is Ms. Lee's knowledge of Michael's work circumstances that was not fully disclosed to Mr. Szeto. Under Sewell J.'s order of November 27, 2017, Ms. Lee was obligated to keep Mr. Szeto informed of Michael's attempts to attain the skills necessary to become self-sufficient.
- [79] Mr. Szeto argues that Ms. Lee failure to fully disclose Michael's circumstances is blameworthy conduct. He suggests it is on par with a payor parent failing to disclose an increase in income because it caused Mr. Szeto to continue making child support payments for Michael after he was able to withdraw from his parents' care.
- [80] Ms. Lee informed Mr. Szeto in her June 20, 2017 email that Michael had obtained his forklift operator's licence and that he was working in a warehouse at the time. This appears to be precisely the kind of information Sewell J. directed that she provide. However, her email also stated that the job was expected to come to an end in August of that year. Ms. Lee did not inform Mr. Szeto that Michael continued to work in that job (or perhaps a similar job for another employer) after August 2017 and Mr. Szeto did not make any inquiries about Michael's work status until May 15, 2023.
- [81] There is merit to Mr. Szeto's argument that Michael ceased to be a child of the marriage by July 1, 2017 since it appears he continued working at that job or a similar job after August 2017. There is also merit to Mr. Szeto's argument that Ms. Lee's failure to fully disclose this is blameworthy conduct. As stated in Colucci at paras. 50-51, the "failure to make timely, proactive, and full disclosure undermines the policies underlying the family law regime" and impairs good faith negotiations between the parties by putting them on an unequal footing.
- [82] With these points in mind, I turn to the four D.B.S./Colucci factors to assess whether it would be unfair to the parties to apply the presumptive date of retroactivity, being the date of effective notice on October 4, 2023.
- [83] I agree that Ms. Lee's failure to fully disclose Michael's circumstances on an ongoing basis while continuing to receive child support payments is blameworthy conduct that provides an understandable reason for Mr. Szeto's delay in applying for a retroactive variation in support. That said, Mr. Szeto should bear some responsibility for making no inquiries about Michael's circumstances for some six years. He knew Michael had worked at least for a period of time in 2017 and had obtained a forklift operator's licence. It is unreasonable for him to have made no inquiries about Michael until 2023, even if Ms. Lee had an obligation to keep him informed. Ms. Lee was struggling with anxiety and depression during this period and caring for two grown children with autism on her own with no help, other than child support, from Mr. Szeto who had no contact or interaction with either child. Mr. Szeto's conduct in maintaining child support payments is unimpeachable but his lack of proactive efforts to keep apprised of his children's circumstances cannot be overlooked. Thus, despite

Ms. Lee's duty to keep Mr. Szeto informed about Michael, I find it would not be just to place all the blame on her for the failure of communications between the parties.

- [84] In my view, the most compelling of the DBS/Colucci factors in this case is the circumstances of the child, or, in this case, the children. As stated in Colucci at para. 105, where "the retroactive decrease in child support payments would result in an order requiring the recipient to repay support to remedy an overpayment", both the recipient and the child may suffer hardship. That would certainly be the case here, albeit that it is Christian who would suffer the hardship for remedying an overpayment in respect of Michael. Child support is fundamental to Ms. Lee's income since she cannot work in the paid workforce. If she were compelled to repay some \$60,000 in past child support payments for Michael, that will necessarily come out of future child support payments for Christian, and he will suffer for that.
- [85] By contrast, Mr. Szeto has led no evidence of hardship to him if he were unable to recover the overpayment. It is incumbent on the payor to produce evidence to "establish real facts" of hardship and not merely assert it: Colucci at para. 107. Here there is no such evidence. Mr. Szeto speaks of his obligations to support his other children but he does not identify any specific hardship he will suffer if he is not reimbursed for past overpayments. All the hardship will fall to Christian.
- [86] Finally, another relevant consideration is that Ms. Lee has alone carried the burden of caring for Christian since he completed high school and will do so in the future. She had to sacrifice her own work and career to care for him. The child support that she has received, including the overpayments for Michael, do not come close to compensating her for the financial sacrifices she has made over the years and will continue to make in the future to provide the necessary care for Christian. As I have outlined above, the current amount of child support at \$1,792 is much less than what I consider appropriate under the Kollmuss approach. The overpayment of child support for Michael since 2017 goes some distance to equalizing the financial disparity between the parties that arose from the need for someone to care for Christian into his adult years.
- [87] For all these reasons, I conclude it would not be unfair to the parties to apply the presumptive date of retroactivity, being the date of effective notice, which was given on October 4, 2023. By my assessment, Mr. Szeto overpaid child support at \$827 per month for five months (November 2023 to June 2024) since giving effective notice for a total of \$6,568 in overpayments. I would order that Ms. Lee repay Mr. Szeto this amount and I would be prepared to set a payment schedule if the parties cannot agree on one. Summary and Conclusion
- [88] In summary, I find that Michael has ceased to be a child of the marriage and I will make a declaration to that effect. I find Christian is still a child of the marriage. I find that Mr. Szeto has not shown there should be a reduction in child support for Christian. In fact, an application of s. 3(2)(b) of the Guidelines suggests an increase in child support for Christian

above the Guidelines table amount. However, since Ms. Lee has not applied to increase Christian's support, I find it would be unfair to make that order without proper notice to Mr. Szeto. Thus, I simply dismiss Mr. Szeto's application to reduce Christian's support which leaves in place the order that he pay the Guidelines table amount, presently \$1,792 per month.

[89] I order that Ms. Lee repay \$6,568 to Mr. Szeto for overpayments for child support for Michael dating back to October 7, 2023, which is the date of effective notice. I decline to order repayment of any amounts before that date. The parties have leave to make written submissions for a repayment schedule if they cannot agree on one.

[90] In my view, success on this application is divided. Further, in the circumstances of this case, and particularly considering that I have declined to order repayment of child support from before October 7, 2023 despite the fact Michael has not been a child of the marriage for many years, I consider it just that the parties bear their own costs. "Kirchner J." Appendix - Assessment of Potential Overpayment of Child Support Tax Year Guidelines Income Year of Payment (July 1-June 30) Amount Paid Amount Due Overpayment 2016 Unknown 2017-2018 Unknown Unknown \$7,500* 2017 \$117,908 2018-2019 \$1,755/mo \$ 21,060/yr \$1,096/mo \$13,152/yr \$7,908 2018 \$129,443** 2019-2020 \$1,902/mo \$22,824/yr \$1,190/mo \$14,280/yr \$8,544 2019 \$133,245** 2020-2021 \$1,951/mo \$23,412/yr (2020-2021) \$1,222/mo \$14,664 \$8,748 2020 \$155,869** 2021-2022 \$2,228/mo \$26,736/yr (2021-2022) \$1,402/mo \$16,824/yr \$9,912 2021 \$158,447 2022-2023 \$2,258/mo \$27,096/yr (2022-2023) \$1,421/mo \$17,052/yr \$10,044 2022 \$155,973 2023-2024 \$2,229/mo \$26,748/yr \$1,402/mo \$16,824/mo \$9,924 Total Potential Overpayment \$62,580 *Estimated based on the pattern of overpayment in the following years **Assumes \$2,750 deduction for union dues/professional fees

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