

CANADA / JUDGMENT

Vanderstelt v. Musselman

2025 BCSC 442

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Supreme Court of British Columbia

DECIDED

13 March 2025

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2025 BCSC 442 Vanderstelt v. Musselman

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Vanderstelt v. Musselman,

2025 BCSC 442

Date: 20250313

Docket: E42224

Registry: New Westminster

Between:

William David Vanderstelt

Claimant

And

D'arcey Michelle Musselman

Respondent

Before: The Honourable Madam Justice W.A. Baker

Reasons for Judgment

Counsel for Claimant:

R.S. Tretiak, K.C.

The Respondent, appearing in person:

D. Musselman

Place and Date of Hearing:

New Westminster, B.C.

March 6, 2025

Place and Date of Judgment:

New Westminster, B.C.

March 13, 2025

- [1] The respondent mother brought three applications before me. Not all the relief in all the applications was pursued in this hearing. Some orders were made on an earlier hearing. Some orders were not pursued at all.
- [2] With respect to her application filed March 7, 2024, the respondent pursued the orders sought at para. 4; the relief sought at para. 3 is no longer in issue and the relief sought at paras. 1 and 2 was amended and replaced with her application filed August 29, 2024. With respect to her application filed April 15, 2024, the respondent pursued the orders sought at para. 2, 3, and 4; the relief sought at para. 1 was addressed in an order made April 30, 2024. With respect to her application filed August 29, 2024, the respondent pursued the orders sought at paras. 1, 2, and 3.
- [3] In 2013 the parties consented to a final order, and the court made an order for divorce. The final order addressed support and parenting arrangements. In 2015, the court made further orders regarding child support, spousal support, and s. 7 expenses. In 2016 two more orders were made, clarifying certain items such as s. 7 expenses. The child was just shy of four years old when the first order was made, and was 6 years old when the 2016 orders were made. In 2021, the parties agreed to a change in child support payments, and set a date for the end of Montessori school fees.
- [4] There is no dispute between the parties that, as it relates to their child, the passage of time represents a material change in circumstances. The issues for and needs of their child have changed over time. In addition, the claimant father has retired from the navy, and has taken on a new career, which has affected his support obligations.
- [5] The orders sought on the applications before me relate to the following issues:
 - a) What obligation does the claimant have to provide the respondent with information regarding the child's extended health coverage under his plan?
 - b) Is the claimant obligated to contribute to the cost of the child's private school expenses during his attendance in grades 7, 8, and 9?
 - c) Should the claimant's income be imputed to an annual income of \$190,000 for the period August 2021 to September 2023?

- d) Does the claimant owe any retroactive child support for the period August 2021 to September 2023?
- e) How should s. 7 expenses be shared?
- f) Should there be additions to the defined s. 7 expenses, as set out in an earlier court order dated September 2, 2016?
- g) Should the respondent have sole parenting responsibilities under the Family Law Act, SBC 2011, c. 25 [FLA] s. 41?

Extended health coverage

- [6] Both the claimant and the respondent have extended health plans. The plans operate together, such that the child must first claim under the claimant's plan, and once that has been covered, the child may apply to the respondent's plan. The respondent submits that the claimant does not provide her with information in a timely way regarding coverage under his plan, and this creates an obstacle to her claiming coverage under her plan. As she must pay for things such as orthodontics in advance, and then seek recovery under the plans, she is left unable to obtain coverage in a timely way.
- [7] The respondent seeks an order that she be granted access to the child's extended health benefits under the claimant's provider. She was able to access the child's benefits with the claimant's former provider, but has not been able to do so with his current provider. The respondent did not provide any evidence that the current provider would permit her to access the child's benefits, or how such access could be provided.
- [8] In submissions, the claimant objected to providing the respondent with direct access to his health care provider, as he felt that she would gain access to information regarding his own benefits should he grant her such permission.
- [9] I agree that the claimant has been unnecessarily difficult in providing the respondent with the information she requires. His recalcitrance has led to the respondent's current application.
- [10] However, I am not satisfied that the respondent has established that there is a process available with the claimant's current provider to allow the respondent to have access to the child's benefits, without also disclosing personal information related to the respondent. In submissions, the claimant's counsel suggested that an order should go requiring the claimant to provide the requested information.
- [11] I order the claimant to provide to the respondent all information regarding the child's insurance coverage within 7 days of request from the respondent.

Private school expenses

- [12] Their child began grade 7 in public school. Prior to grade 7 he attended a Montessori school, which was paid for by the claimant and the respondent. Up until the end of grade 6, the Montessori fees were shared pursuant to court order and a later agreement between the parties.
- [13] The respondent first raised the possibility of private school with the claimant in the summer of 2020, before the child entered grade 6. The claimant was very clear that he did not support sending their child to private school. He felt the cost would be too high.
- [14] In the fall of 2020, the parties continued to exchange their thoughts on private school. The respondent was very committed to looking at private school, and at that time felt Brockton School would be the best choice. She expressed that she had the best understanding of the child's unique learning styles, and felt he needed to be supported in the kind of environment provided by Brockton, and not any of the public schools in her area. The claimant continued to oppose an application to Brockton, and supported sending the child to a local school.
- [15] In January 2021, the respondent advised that she applied to Brockton school without the claimant's consent, and stated:

I believe so strongly in the school and [the child's] academics that I am willing to take full responsibility for the tuition to Brockton. I understand that we do not see things the same way and probably never will, so I am willing to take on the costs and the final decision if I can make it happen or not. Would you be willing to allow [the child's] Brockton application to continue, and should he attend Brockton, you will have no obligations to his tuition costs?

- [16] In March 2021, the respondent realized that the child may not be able to be enrolled in Brockton, and she began pursuing Island Pacific School (IPS). She wrote to the claimant and, after advising him of her intention to pursue IPS, stated "I do not want any unnecessary interference with [the child's] application and chances of getting into the school. Again, I will be responsible for the tuition costs associated with the school."
- [17] In October of 2021, in the child's grade 7 year, he was offered a spot at IPS, located on Bowen Island. The respondent felt that the child was struggling in public school, and she took the opportunity to enroll him in IPS. The total cost for the grade 7 year was \$17,997.80.
- [18] The respondent informed the claimant after she had enrolled their son in IPS. The respondent wrote to the claimant asking "I would also like you to consider helping me pay for [the child's] school fees."
- [19] The claimant replied to the respondent on October 19, 2021:

I have reviewed my financial position and have considered all available options. Unfortunately, and as I have previously mentioned to you in emails, I do not have the financial means or capabilities to undertake such a large commitment in addition to current expenses. I therefore cannot help with contributions towards his school fees.

- [20] The respondent replied "You mentioned you are not able to make a large contribution to school fees, but does that also include a small contribution? Are you saying you are unable to make any contribution? It does not need to be 50% of the fee." The claimant provided no response.
- [21] Knowing that the claimant did not agree to contribute to the costs of IPS, the respondent continued the child's enrolment at IPS for grades 8 and 9. The respondent was able to obtain financial aid for grades 8 and 9. The total cost to her of IPS for the grade 8 year was \$13,240, and for grade 9 the total cost was \$14,765.
- [22] There appears to be no dispute that the child thrived at IPS, and thoroughly enjoyed the schooling experience IPS provided.
- [23] The only issue before me is whether I should order the claimant to contribute, retroactively, to the costs of IPS.
- [24] Claims for retroactive child support may be made pursuant to s. 152 of the FLA or s. 17 of the Divorce Act, RSC 1985, c. 3 (2nd Supp). The leading case on a payor's obligation to pay retroactive child support is D.B.S. v. S.R.G., 2006 SCC 37 [D.B.S.]. In D.B.S., the court considered a payor's obligation to pay regular monthly child support. That obligation is set out in the Divorce Act and the federal child support guidelines, and is described as a "free-standing obligation for parents to support their children commensurate with their income" (para 48).
- [25] In D.B.S., the court identified situations where retroactive support may be ordered. The first is where there is in place a court order for child support, which has been inadequate for some time. The court balanced the payor's interest in certainty where they had followed an existing court order, against the right of the child to receive the appropriate amount of support. The court was clear that the underlying free-standing obligation to pay child support in accordance with a payor's income is such that a retroactive award cannot be seen as arbitrary for the payor:
68. Accordingly, even where the payor parent has made payments consistent with an existing court order, (s)he would not have been fulfilling his/her obligation to his/her children if those payments did not increase when they should have, according to the applicable law at the time. Thus, the support obligation of a payor parent, while presumed to be the amount ordered by a court, will not necessarily be frozen to the amount ordered by a court. It is the responsibility of both parents to ensure that the payor parent fulfills his/her actual obligation, tailored to the circumstances at the relevant time. Where they fail in this obligation, a court may order an award that recognizes and corrects this failure. Such an

award is in no way arbitrary for the payor parent. To the contrary, it serves to enforce an obligation that should have been fulfilled already.

[26] The second situation is where there is an agreement between the parents. The court emphasized that agreements between the parents should be given considerable weight, but the court may still order a retroactive award where the actual support obligations have not been met.

[27] In addressing the factors for the court in considering whether to make a retroactive order, the court stated:

96 Unlike prospective awards, retroactive awards can impair the delicate balance between certainty and flexibility in this area of the law. As situations evolve, fairness demands that obligations change to meet them. Yet, when obligations appear to be settled, fairness also demands that they not be gratuitously disrupted. Prospective and retroactive awards are thus very different in this regard. Prospective awards serve to define a new and predictable status quo; retroactive awards serve to supplant it.

97 Lest I be interpreted as discouraging retroactive awards, I also want to emphasize that they need not be seen as exceptional. It cannot only be exceptional that children are returned the support they were rightly due. Retroactive awards may result in unpredictability, but this unpredictability is often justified by the fact that the payor parent chose to bring that unpredictability upon him/herself. A retroactive award can always be avoided by appropriate action at the time the obligation to pay the increased amounts of support first arose.

[28] The court is required to consider a number of factors, including:

- a) the conduct of the recipient parent, and whether they acted unreasonably in delaying the application for retroactive support,
- b) the conduct of the payor parent, and whether they have privileged their own interests over those of their children,
- c) the needs of the child at the time the support should have been paid, and
- d) hardship on the part of the payor in being required to make a retroactive payment.

[29] In the case before me, the application is brought in relation to s. 7 expenses. Section 7 expenses are different in every case and, unless a support order or agreement between the parties identifies an expense as a s. 7 expense, there is no free-standing obligation on a payor to make a payment towards an expense. Section 7 expenses are different from monthly child support obligations, which are calculated in accordance with the guidelines. The monthly child support obligations are intended to provide the child with support commensurate with their parents' incomes, and to provide the daily necessities of life. Section 7 expenses are expenses over and above the day to day expenses of life.

- [30] In the case before me, the order of September 2, 2016 defined the s. 7 expenses which the parties were required to share. This order expressly included the costs of Montessori school fees. On April 27, 2021, the parties agreed that the Montessori fees would end on June 1, 2021 (when the child completed grade 6). There is no order or agreement in place to require the claimant to share in the cost of private school after grade 6.
- [31] In the absence of a court order or agreement between the parties requiring the claimant to contribute to private school fees after grade 6, the claimant cannot be said to have an ongoing obligation to contribute to such expenses. In this sense, the obligation to contribute to the IPS expenses is quite different from his obligation to pay monthly child support in accordance with the guidelines and his income.
- [32] Had the respondent come to court seeking a contribution to the IPS expenses in 2020 or 2021, the court would have been in a position to consider the relative economic positions of the parents, the benefits of IPS as against public schools, and the best interests of the child, taking into account the facts available at that time. However, the respondent did not do so. She made the decision to enrol the child in IPS advising the claimant that he would have no obligation for the tuition costs associated with that decision.
- [33] Had the respondent advised the claimant that she intended to pursue a claim against him for contribution to school expenses at the time or before she enrolled the child, the claimant could have ordered his affairs accordingly, and could have brought his own application to the court in advance of the fees being incurred. This is not a case where the claimant was unavailable to provide his opinion on schooling, or was non-responsive on the question of schooling. Rather, the claimant clearly informed the respondent that he did not agree with her decision, and would not contribute financially. The respondent accepted the claimant's position, and assured him that she would not seek contribution from him. This assurance is not one that should be overridden lightly.
- [34] I note that before me the respondent argued that she only agreed to pay the tuition costs, and not the other expenses associated with IPS. I reject this argument and find that the assurances given by the respondent at the time can only be reasonably understood as assuring the claimant that he would have no financial obligation associated with the child's attendance at IPS.
- [35] In the circumstances of this case, I find that the respondent did unreasonably delay her application for contribution to the IPS fees under s. 7, by delaying her application until after the three years of schooling were complete and all the costs were incurred. I also find that the claimant did not act unreasonably in failing to contribute to the IPS fees given the express assurance from the respondent that she would not seek contribution from him.
- [36] I find that the child's needs in relation to school were met during the years he attended IPS. The claimant has not established that he will experience hardship if a retroactive order was made. However, this factor is not determinative.

- [37] I find that, in the circumstances of this case, an order requiring the claimant to retroactively contribute to the costs of IPS is not justified, and I decline to make the order sought by the respondent.

Claimant's income for the period August 2021 to September 2023

- [38] On April 30, 2024, the court ordered the claimant to pay retroactive child support to October 1, 2023, in the monthly amount of \$1,668, based on the claimant's annual income of \$190,000.
- [39] On this application, the respondent seeks an order that I impute the claimant's annual income at \$190,000 for the period August 2021 to September 2023, and that the claimant pay retroactive child support in the amount of \$14,959 in relation to this period of time.
- [40] The respondent submits that an imputation of income is warranted because the claimant was voluntarily under employed during this period of time.
- [41] For many years, and throughout the life of the child, the claimant worked for the Canadian Armed Forces as a sea-going naval officer. In January 2017, the claimant had a spontaneous coronary artery dissection. This medical condition was such that he was no longer able to work in a marine environment as he did not meet Transport Canada medical regulations. While the respondent disputed whether the claimant was medically disabled from working in the navy, based on the evidence before me, including correspondence from his employer stating that he cannot continue due his medical limitations, I have no difficulty accepting that the claimant was no longer able to continue in the career he had held for many years.
- [42] On January 20, 2020, the claimant received a letter from the director of military careers administration releasing him for medical reasons, and advising the claimant that he could not serve in the Canadian Armed Forces after August 19, 2020. This appears to have been extended to August 2, 2021, the date he was ultimately released from the regular force.
- [43] Following his release from service, the claimant received an annuity on his pension (38% of the average of his best five years), and he received long term disability for a period of two years (August 2021 to August 2023), bringing his total benefits up to 75% of his salary on the date of his release.
- [44] In August 2021, the claimant began looking for work in the marine field, including positions in Saudi Arabia and the Middle East, with various private shipbuilding companies, and with Transport Canada as a marine security inspector.
- [45] In June 2022 the claimant was offered a position with Transport Canada as an inspector, based out of Prince Rupert. The claimant was required to go through security clearance, which took several months. He received his confirmation of employment in November 2022, and started work on December 8, 2022. His starting salary was \$90,012.

- [46] The claimant continues to receive his pension in the amount of \$40,000/year. His income with Transport Canada has increased over time. In his 2024 F8 financial statement, the claimant states his 2024 to be \$190,000, inclusive of employment income (\$150,000) and pension (\$40,000). In 2023 his income, including employment income and pension, was \$169,604.
- [47] Prior to his job with Transport Canada, in his final year with the Canadian Armed Forces, when he was released in August and therefore had only his pension and long term disability for a portion of the year, his income was \$126,568. In 2022, he mostly relied on his pension and disability payments, as he began his position with Transport Canada in December 2022. His total income for 2022 was \$85,453.
- [48] I am satisfied that the claimant acted reasonably in his efforts to find a job in his field. There is simply no evidence before me that claimant could have found a job that would provide him employment income of \$150,000, beginning immediately following his release from the Canadian Armed Forces in August 2021. Even in his current job, he did not receive \$150,000 in his first year.
- [49] The submissions of the respondent are based in speculation and do not reflect the realities of the claimant's efforts in diligently seeking work.
- [50] I find the claimant's guideline income for the years 2021 to 2024 to be the following:
- a) 2021 \$126,568
 - b) 2022 \$85,453
 - c) 2023 \$169,604
 - d) 2024 \$190,000

Retroactive child support

- [51] I understand that the claimant agrees that some retroactive support does need to be paid to reflect his income in the years following his retirement from the Canadian Armed Forces. I was not provided with the calculations for child support since August 2021, in accordance with my determinations of his guideline income.
- [52] I suggested to the parties that there did not seem to be a dispute in the application of the guidelines, once the income of the claimant had been settled. As such, I indicated that I would rule on the income of the claimant to be included in the guideline calculations. The parties can then determine any retroactive payments owing to the respondent. The retroactive obligation should be made express in the order arising out this decision, such that it may be provided to FMEP.
- [53] If for some reason the parties are unable to agree on the outstanding child support arrears, they can forward submissions in writing to me through the registry.

Section 7 expenses**Sharing**

- [54] The respondent seeks an order that s. 7 expenses be shared in accordance with the claimant's and the respondent's guideline incomes, which she has calculated at 58% for the claimant and 42% for the respondent.
- [55] In 2016 the parties agreed to share s. 7 expenses equally. The respondent now argues that the claimant's income exceeds her income, such that a change in the proportionate sharing should be made. The claimant concedes that the s. 7 expenses should be shared proportionate to income; although he disputes the percentages advanced by the respondent, which is based on a disputed imputed income of \$190,000 since 2021 for the claimant.
- [56] I order that all s. 7 expenses shall be shared proportionate to the parties' guideline income from August 2021 to the present. When drafting the order from these reasons, the parties shall calculate any retroactive s. 7 expenses owing, and such figure will be included in the order and will be forwarded to FMEP for payment to the respondent.
- [57] If the parties are unable to agree on the outstanding s. 7 expense arrears, they can forward submissions in writing to me through the registry.

Additional s. 7 expenses

- [58] The respondent seeks expenses for secondary and post-secondary tuition and school supplies (including text books and computers), costs associated with activities, field trips and excursions, and costs of away sports competitions and training camps (including transportation and accommodation).
- [59] The child is presently in grade 10 and attends public school. The respondent could not identify his post-secondary goals or school choices, or any expenses potentially associated with any such schools. I do not agree that it would be appropriate to make any orders for post-secondary expenses at this time, in the absence of any evidence as to what those costs might be.
- [60] Similarly, there was no evidence before me as to any tuition costs for private secondary school in the future, and no evidence of agreement between the parties as to the necessity for private secondary school. I do not agree that it would be appropriate to make any orders for secondary school tuition costs in the absence of any evidence as to such costs and the necessity of any planned private school.

- [61] The child is an accomplished athlete and a high level swimmer, and is required to attend meets away from home. Both parents support the child's swimming. I am satisfied that it is appropriate to include the costs of sports competitions and training camps, including the costs of transportation and accommodation required for competitions and camps, as a s. 7 expense. While the child is presently focussed on swimming, I do not limit such expenses to swimming in the event his interests broaden in the future.
- [62] FMEP has indicated that the current language in the order for s. 7 expenses is inadequate to cover the cost of computer equipment required for school. This issue arose with respect to the cost of an iPad purchased in the last year. The respondent takes the position before me that this was a cost required by the school. The claimant takes the position that the iPad was a Christmas present the respondent gave the child. I am not able to decide the issue of the iPad on this hearing. However, I accept that as the child ages, he may be required to obtain specialized textbooks and equipment, including computer equipment, to assist him with his schooling. I am satisfied that such future expenses are properly claimable by the respondent as s. 7 expenses.
- [63] I am also satisfied that expenses relating to activities, field trips and excursions are proper s. 7 expenses, to be shared between the parties.
- [64] I amend the order made September 2, 2016 to include the following as s. 7 expenses to be shared by the parties:
- a) textbooks and equipment, including computer equipment, associated with the child's schooling,
 - b) the costs of sports competitions and training camps, including the costs of transportation and accommodation required for such competitions and camps, and
 - c) all fees for activities, field trips and excursions attended as part of the child's schooling.

Parenting responsibilities under the Family Law Act, s. 41

- [65] The parents are currently joint guardians and share parenting responsibilities. The respondent seeks to have sole parenting responsibilities under the FLA.
- [66] The basis for the respondent's application is that the child has lived primarily with her since their separation, she is responsible for all day to day decision making, the claimant makes decision making difficult, and the claimant is living in a different city.
- [67] I have reviewed all the affidavit evidence before me. While it is clear that the respondent makes the decisions she thinks are appropriate for the child, it is also clear that she makes these decisions whether or not the respondent agrees with her. The respondent has strong views on how the child should be parented, and these do not always align with the views of the claimant. However, this is not in and of itself a reason for shared parenting to be abandoned.

- [68] In the email correspondence exhibited to the claimant's affidavit, I see attempts by the claimant to become more involved in the child's life. These attempts are often rebuffed by the respondent. She has resisted setting a schedule for the claimant to have visits with the child, and she often refuses visits or calls without explanation or alternative times offered.
- [69] There is no question that the claimant's jobs have taken him out of the jurisdiction over the years, and he is currently stationed in the north, far from the residence of the child. However, he appears to me to be a parent who is engaged in his child's life, and who has opinions on many aspects of parenting.
- [70] I also observe, however, that the claimant is often non-responsive to reasonable requests from the respondent. For example, when the respondent required the claimant's signature on the child's passport, the claimant was unduly obstructionist, refusing to sign the document when he came to pick up the child for a visit. There appeared to be no rationale for his refusal, other than he did not feel like signing it at that time.
- [71] Both parents seem to fall into reactive behavior, where they do not consistently practice respectful and responsive communication in relation to parenting issues. This has, unfortunately, led to unnecessary conflict.
- [72] In the 2013 order, when the parenting arrangements were first established, a parenting coordinator was determined as a means of resolving disputes. This option has not been exercised by the parties. While there is evidence that the respondent sought to engage a parenting coordinator to resolve parenting disputes, the claimant did not agree. This has led to a stalemate of sorts, and has resulted in the respondent simply taking responsibility to make decisions as she sees fit.
- [73] I do not agree that respondent should be awarded sole parenting responsibilities. However, the 2013 order which contemplated the use of a parenting coordinator to resolve disputes has proven to be inadequate to address parenting issues as they arise.
- [74] In the circumstances, I agree that a mechanism must be implemented to allow for decisions to be made in a timely and effective manner. As these people's lives have unfolded, the respondent has been the primary parent in the child's life. I agree that it makes sense for her to have the ability to make parenting decisions, after receiving input from the claimant. The respondent is not entitled to make unilateral decisions about the child without first informing the claimant and providing him with all the necessary information and an appropriate time window within which he can provide his thoughts and input. The respondent must take the claimant's views into account in her decision making.
- [75] I order that the parties continue to share all parenting responsibilities pursuant to s. 41 of the FLA. In the event of a disagreement between the parties as to a parenting decision, the respondent has the authority to make the final decision, subject to the right of the claimant to seek direction from the court pursuant to s. 49 of the FLA. Where a court issues directions to the respondent, such directions must be complied with by the respondent.

Costs

[76] As the claimant was substantially successful on these applications, I order ordinary costs in favour of the claimant.

"W.A. Baker J."

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Prepared on 24 October 2026 · Esheria