
CANADA / JUDGMENT

Vasudev .v Vasudev

2020 BCSC 1787

COURT

Supreme Court of British Columbia

DECIDED

20 November 2020

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2020 BCSC 1787 Vasudev v. Vasudev

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Vasudev v. Vasudev,

2020 BCSC 1787

Date: 20201120

Docket: E047413

Registry: New Westminster

Between:

Anu Bala Vasudev

Claimant

And

Gautam Vasudev

Respondent

Before: The Honourable Madam Justice Horsman

Reasons for Judgment

Counsel for the Claimant:

G. Tiwana

The Respondent, Appearing in Person:

Gautam Vasudev

Place and Date of Hearing:

New Westminster, B.C.

October 29, 2020

Place and Date of Judgment:

New Westminster, B.C.

November 20, 2020

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INTRODUCTION

- [1] The claimant and the respondent were married on November 18, 2001, and separated in April 2014. A final order for divorce was issued on June 27, 2016. There are two children of the marriage, who are now 17 and 13 years old.
- [2] On June 27, 2016, the parties consented to a final order, granted by Madam Justice Warren, which settled all matters in dispute in the proceeding (the "Final Order"). At the time of the Final Order, the parties anticipated moving to a shared parenting arrangement. This never occurred. The children have resided exclusively with the claimant at least since the parties' divorce. The respondent has had only periodic contact with the children since then, primarily over the telephone. He did not pay child support between October 2016 and January 2020.
- [3] On January 30, 2020, the claimant filed a notice of application seeking to vary the terms of the Final Order that relate to parenting issues and child support, and to enforce the terms for property division. She also seeks to recover what she alternatively characterizes as child support arrears or retroactive child support. The claimant seeks orders imposing a fine on the respondent and requiring him to provide security for future child support payments. The latter orders are meant to address what the claimant describes as the respondent's wilful neglect of his child support obligations.
- [4] The time it has taken the claimant's application to come on for a hearing is due to a variety of factors, including the suspension of the Court's operations due to the COVID-19 pandemic. The application was re-set for hearing on July 9, 2020. On that date, the parties appeared before Justice Crabtree. Some issues were addressed, including the issue of prospective child support. The remaining issues were adjourned to August 19, 2020, for a full day hearing. The August 19 hearing date was also adjourned at the request of the respondent's newly-retained counsel. The claimant's application was then re-set for October 29, 2020, again for a full day hearing. The respondent was no longer represented by counsel by the time of this hearing.
- [5] The respondent filed a separate notice of application on July 21, 2020, which seeks over 20 different orders relating to property division, parenting time, and child support. On October 23, 2020, the respondent filed a requisition purporting to set down his July 21, 2020, application for hearing on October 29, 2020.

- [6] The claimant objected to the respondent unilaterally setting his application for hearing on the date set for the hearing of her application. I directed at the outset of the hearing that I would first hear submissions on the claimant's application before deciding what, if any, of the respondent's application could be addressed within the court time available. As matters unfolded, there was sufficient hearing time to address the claimant's application as well as those aspects of the respondent's application that he indicated he wished to pursue.
- [7] Accordingly, these reasons for judgment will address both applications.

BACKGROUND

- [8] I will briefly summarize the factual background common to both applications.

The section 211 report

- [9] The children resided primarily with the claimant after the parties' separation. They appeared to have had a difficult relationship with the respondent for reasons I cannot, and need not, resolve on the applications before me.
- [10] Dr. Rebecca England was appointed by the court to prepare a report pursuant to s. 211 of the Family Law Act, S.B.C. 2011, c.25 [FLA]. In her report of May 14, 2016, Dr. England noted the competing theories of the parties as to the source of the children's troubled relationship with the respondent: the claimant's theory that the respondent was abusive, and the respondent's theory that the claimant was alienating the children from him. In Dr. England's view, the children had a "mixed presentation" in that some aspects of their views were consistent with estrangement from a parent as a result of harsh or abusive parenting, and some aspects were consistent with alienation.
- [11] Dr. England recommended that the children continue to reside primarily with the claimant in the short term, but that their contact with the respondent increase over time. She recommended a "case management" approach to the issue of parenting arrangements. In her view, every member of the family was in need of intervention in the form of therapy or counselling. She recommended that Dr. Lisa Ferrari act as a parenting therapist for the family, and also that the claimant and respondent both attend and complete a parenting course.

The Final Order

- [12] The s. 211 report provides the context for the terms of the Final Order relating to parenting and child support. The parties agreed that they would have joint custody and guardianship of the children. The Final Order anticipated that the parties would, with the assistance of a family therapist, move towards a shared parenting arrangement for the children. The relevant terms are as follows:

3. Subject to the terms of the herein order, the Children shall reside with each parent on an equal basis;
4. The parties and the Children shall forthwith attend family therapy with Dr. Lisa Ferrari, on the terms recommended by Dr. Rebecca England in the section 211 report. The parties shall each pay for their own individual therapy sessions with Dr. Lisa Ferrari. Dr. Ferrari's therapy sessions with the Children and any joint sessions with the parties are to be paid equally by the parties. Dr. Lisa Ferrari's therapy shall proceed on the following basis:
 - a. Therapy shall be provided to the parties and the Children to effect a reconciliation between the Children and the Respondent;
 - b. Therapy sessions are to be conducted as directed by Dr. Lisa Ferrari with the number of sessions per week to be at her discretion. The Children and the parties shall attend all therapy sessions as and when directed by Dr. Lisa Ferrari;
 - c. Therapy shall be used as a tool to implement the party's equal parenting arrangement;
 - d. A report on the Children's progress as to implementation of the equal parenting arrangement shall be provided to the parties and their counsel by not later than eleven weeks after the commencement of therapy. If Dr. Lisa Ferrari reports that implementation of the equal parenting arrangement is unlikely to be successful through continued therapy within a period not to exceed three weeks from the date of Dr. Lisa Ferrari's report, she shall so advise, and if she so advises, the Respondent is then at liberty to apply for a court order on the following terms:

"The parties shall enrol the children in the Family Reflections Reunification Program (the "FRRP") and shall each agree to the standard form of agreements required by Dr. Kathleen Reay for enrolment within the FRRP program, including the FRRP requirements for the aftercare portion of the FRRP. The parties shall each pay one half of the costs required for this program..."

- [13] The parties' expectations that they would, with the assistance of family therapy, eventually move to a shared custody parenting arrangement is also reflected in their agreement regarding child support. The Final Order provides:
11. The Respondent shall pay to the Claimant, child support in the amount \$721 per month for the months of July, August and September 2016, with liberty to apply in the event that equal parenting is delayed, after which, based on the equal parenting schedule pursuant to section 9 of the Federal Child Support Guidelines, neither party shall pay child support to the other for the benefit and support of the Children;
- [14] In relation to s. 7 expenses, term 13 of the Final Order provides that the parties shall "share equally any future section 7 expenses to which they both agree in writing".

- [15] The Final Order also contained provisions for the final division of family property. The main asset of value appears to have been the family home in Surrey, British Columbia, which, in the Final Order, is deemed to have a fair market value of \$730,000. The parties agreed that the respondent would buy out the claimant's half interest in the home through a formula set out in the Final Order.

The respondent's withdrawal from family therapy

- [16] The parties were unable to retain Dr. Lisa Ferrari as a family therapist, and they agreed instead to retain Drs. Bob Finlay and Greg Daily. The counselling sessions began in September 2016.
- [17] The respondent stopped participating in the counselling sessions in December 2016. From the affidavit material, it appears that Drs. Finlay and Daily advised the respondent in November 2016 of their view that progress was being made but that at least a further two months of counselling was required. The respondent initially agreed to this but then later advised that he would not attend further counselling sessions. Dr. Finlay's interpretation, as set out in his email to the respondent of December 21, 2016, is that the respondent unilaterally withdrew from counselling.
- [18] The respondent takes the position that the Final Order only required him to participate in 11 weeks of counselling, a requirement that he says he had completed by December 2016. In fact, Term 4(d) of the Final Order provides that the family therapist will provide a report to the parties within 11 weeks of the commencement of therapy. As set out above, the Final Order also provides that if the family therapist reported that shared parenting could not be successfully implemented with further therapy, then the respondent was at liberty to apply for a court order that the parties enrol in a family reunification program. The respondent did not apply for such an order. Because the respondent withdrew from counselling, the family therapists never prepared a final report stating their views on the prospect of a successful move to shared parenting.
- [19] Following the breakdown of family therapy, the respondent has had limited contact with the children, consisting primarily of telephone calls. He did not pay any child support from October 2016 up to the time he was served with the claimant's application in January 2020.

Negotiations after the Final Order

- [20] In the months following the Final Order, there was a series of communications between the parties and their counsel regarding outstanding issues arising from the Final Order.
- [21] In relation to child support, the claimant advised the respondent as early as October 20, 2016, of her view that the respondent had to pay child support as long as she continued to have primary care of the children. The claimant's counsel wrote four letters to counsel for the respondent between November 16, 2016 and April 7, 2017, requesting that the respondent pay child support. While counsel for the respondent communicated on issues

concerning property division, neither the respondent nor his counsel ever responded to the claimant's repeated demands that the respondent pay child support.

- [22] The respondent also failed to respond to the claimant's requests that he contribute to the children's s. 7 expenses she was incurring, as required by Term 13 of the Final Order.
- [23] In relation to property division, the parties exchanged proposals on how to calculate the amount the respondent was entitled to receive from the respondent for the purchase of her interest in the family home. There were interim payments to the claimant of \$150,000 and \$17,268, but the parties did not reach agreement over the final amount owing. Negotiations occurred through an exchange of proposed Vendor's Statement of Adjustments. The sticking point appeared to be the respondent's proposal to deduct his interest in the claimant's pension and RRSP accounts from the remaining funds owed to the claimant. The claimant considered this to be double counting because the claimant had rolled over half the RRSPs into the respondent's name, and the respondent had elected to have the claimant's pension divided at source.
- [24] On April 7, 2017, the claimant sent the respondent her final proposed Vendor's Statement of Adjustments. According to the claimant's calculations, the respondent owed her the sum of \$32,954.66, in final settlement of the property division required by the Final Order. The respondent did not respond to this proposal.

THE CLAIMANT'S APPLICATION

Division of assets

- [25] The relief sought in the claimant's notice of application includes an order that the respondent pay her \$32,954.66, towards the division of assets set out in the Final Order. On June 17, 2020, the respondent paid a further \$22,811.07 to the claimant towards the division of property. He says he does not owe the claimant anything further. The claimant says she is still owed \$10,143.59.
- [26] The difference between the parties, as it crystallized during the hearing, does not relate to the previously contentious issues of RRSP and pension deductions. Instead, the dispute concerns the claimant's RESP account. Term 16 of the Final Order provides:
16. The Claimant will pay to the Respondent one half of the contributions and investment value increases on contributions to the RESP, less the notional tax thereon, up to April 2014, exclusive of any government grant amounts. To calculate the notional tax that would be payable by the Claimant on the RESP, the notional tax thereon will be calculated only on the increased value on the RESP contributions, as at the Claimant's marginal tax rate, and exclusive of tax that would be attributable on the government grant contributions. The Respondent shall execute such documents as are necessary to transfer to the Claimant sole authority over, and use of, the RESP;

- [27] It is not in dispute that the claimant has not paid the respondent any money pursuant to Term 16 of the Final Order. The RESP was not included in the parties' Vendor's Statements of Adjustment. Instead, it was the subject of separate discussion. The parties attempted to negotiate the amount owed to the respondent in relation to the RESP, but this issue was also never finally settled.
- [28] The claimant seeks a variation of the Final Order to remove the claimant's obligation to pay the respondent any amount in relation to the RESP. She says the funds should be left in the account in her sole name to be held in trust for the children for the purpose of their education. She points out that the respondent will eventually share equal responsibility for the children's education expenses in any event. The respondent opposes any variation. He seeks to enforce his entitlement under Term 16.
- [29] I cannot see any basis for varying a term in a final order relating to a comprehensive scheme for property division, particularly in light of the fact that there has been no intervening change in circumstances. Whether or not the arrangement the claimant now proposes is a sensible one, it is not the agreement the parties reached in June 2016. In my view, therefore, any final resolution of the property division must account for the respondent's entitlement to one-half of the contributions and investment value increases on contributions to the RESP, less notional tax.
- [30] The claimant says the amount owing to the respondent pursuant to Term 16 of the Final Agreement is \$8,380.40. The correspondence exchanged between the parties during negotiations suggests the dispute in valuing the respondent's entitlement focussed on the tax rate that applied to RESP earnings. The claimant's calculation was \$8,380.40, whereas the respondent's calculation, as set out in a letter from his counsel dated March 6, 2017, was \$9,273.99. In her final proposal of April 7, 2017, the claimant offered to reduce the tax rate to that suggested by the respondent, but said the proper calculation was \$8,794.85. There was no further progress towards a settlement after this.
- [31] At the hearing before me, the respondent suggested the claimant owes him over \$11,000 in relation to the RESP. It is not clear to me where this calculation comes from. Counsel for the respondent did suggest early in the parties' negotiations that the claimant owed him \$11,150 in relation to the RESP. However, the respondent appears to have accepted the claimant's subsequent advice that, based on her discussions with the bank, this figure was incorrect. As noted, the final correspondence from respondent's counsel on the topic quantified the amount owing as \$9,273.99.
- [32] The best evidence I have before me of the value of the respondent's entitlement under Term 16 of the Final Order is the calculations contained in the correspondence exchanged between the parties immediately before negotiations broke off. On the material before me, I am unable to resolve the dispute over the applicable tax rate. In my view, the fairest way to value the respondent's entitlement is to use the sum of \$8,794.85, as offered by the claimant as a compromise in her correspondence of April 7, 2017.

- [33] Accordingly, I conclude that the claimant is owed \$10,143.59, in relation to her interest in the former family home, and the respondent is owed \$8,794.85, in relation to the RESP account. This leaves a net amount \$1,348.74, that the respondent owes to the claimant to finalize the property division.
- [34] Before turning to issues of custody and guardianship, I note that at the hearing the respondent also suggested that there was an account listed in the claimant's June 20, 2016, Form 8 Financial Statement (the "NEXT STEP" account) that has not yet been accounted for in the parties' property division. The respondent says he is entitled to half the value of the account as of the date of the parties' separation. The Final Order does not provide for the division of this account. It is not necessary for me to inquire into the reasons for the exclusion. Once again, there is no basis for me to revisit the parties concluded agreement regarding property division, as reflected in the terms of the Final Order, and I decline to do so.

Custody and guardianship

- [35] The claimant's notice of application seeks an order varying the Final Order to provide that she has sole custody of the children and the authority to exercise the parental responsibilities listed in s. 41 of the FLA. Term 1 of the Final Order provides that the claimant and respondent have "joint custody and joint guardianship" of the children. Term 2 defines joint guardianship. As noted, Term 3 provides that, subject to other terms of the Final Order, the children shall reside with each parent on an equal basis. The Final Order contains no provision that allocates parental responsibilities under s. 41 of the FLA.
- [36] The claimant does not seek an order to vary the provision for joint guardianship. In the course of the hearing, counsel for the claimant confirmed that the claimant also does not press the application to vary the Final Order to provide for sole rather than joint custody. An order for shared custody under the Divorce Act, R.S.C. 1985 (2nd Supp.), c. 3, may be appropriate even where one parent has primary physical custody of a child: *Anson v. Anson* (1987), 10 B.C.L.R. (2d) 357 (S.C.). The more important issues, from the claimant's perspective, are that she have the authority to exercise parental responsibilities and that the Final Order is varied to reflect the fact that she has primary care of the children.
- [37] Save for two points, I did not understand the respondent to object to the granting of orders that would: (i) vary the Final Order to reflect that the claimant has primary care of the children, and (ii) allocate parental responsibilities to her under s. 41 of the FLA. The two exceptions are that the respondent does not agree that the claimant should have the responsibility to make decisions respecting where the children will reside (FLA, s. 41(b)), or with whom the children will live and associate (FLA, s. 41(c)).

- [38] There has clearly been a material change in circumstances that warrants varying the Final Order to reflect the current reality that the parties do not have a shared parenting arrangement. I will therefore order that Term 3 of the Final Order be varied to provide that the children are in the claimant's primary care.
- [39] Other than the one subsection of s. 41 that is addressed below, I also consider it appropriate to make an order that the claimant shall exercise the parenting responsibilities under s. 41 of the FLA. I do not agree with the respondent that there should be exceptions for the matters set out in ss. 41(b) and (c) of the FLA so that he has joint responsibility to make decisions regarding where the children will reside and respecting with whom they will live and associate. The respondent says that, otherwise, the claimant will have the unilateral power to prevent him from exercising parenting time with the children. This is not so. It is open to the respondent to apply to court for an order for specified parenting time, as he has done in this case. The allocation of decision-making authority to the claimant under ss. 41(b) and (c) simply reflects the current reality that she is solely responsible for the children's care, and has been for the past four years.
- [40] The one parental responsibility listed under s. 41 that, in my view, should not be allocated to the claimant is s. 41(j): "requesting and receiving from third parties health, education or other information respecting the child". Allocating this responsibility to the claimant would set up a conflict within the Final Order because Term 2(g) provides that each party, as guardian, will have the right to obtain information concerning the children directly from third parties. The claimant agrees that the respondent should have such a right.
- [41] The respondent will continue to be a joint guardian for the children. Pursuant to Term 2 of the Final Order, the respondent is entitled: to be advised by the claimant of matters of a significant nature affecting the children; to be involved in discussions of any significant decisions which have to be made concerning the children; and to obtain information about the children directly from third parties, including teachers and medical professionals. He will continue to have those rights. The separation in the FLA between guardianship and parenting responsibilities allows a parent to remain a guardian even when it would not be in the child's best interest for that parent to exercise parenting responsibilities: *J.W.K. v. E.K.*, 2014 BCSC 1635 at para. 35.
- [42] In this case, I conclude that it would be in the best interests of the children to allocate parenting responsibilities under s. 41 of the FLA, with the exception of s. 41(j), to the claimant given that she is, and for some time has been, solely responsible for their care.
- [43] The final form of relief sought by the claimant as it relates to parenting arrangements is an order that she be permitted to travel with the children to any place within Canada and internationally without the respondent's consent. The respondent does not oppose an order that the claimant can travel within Canada without his consent, but maintains that she should not be permitted to travel outside Canada without his consent.

- [44] I see no basis upon which to limit the claimant to domestic travel with the children without the respondent's consent. There is no suggestion in the evidence that the claimant has put the children in some danger through international travel. It should be sufficient, from the respondent's perspective, if the order requires the claimant to provide him with advance notice of any travel, an itinerary, and contact information.

Child support

Prospective child support

- [45] The relief sought in the claimant's application includes an order for prospective child support. Following service of the application, the respondent began, as of January 1, 2020, to pay the claimant monthly child support in the amount of \$861. This amount is based on the respondent's 2018 Line 150 income of \$55,481. The Line 150 income includes employment income of \$46,119, and \$9,113 in income that the respondent received through the rental of a suite in his house.
- [46] The claimant says that at the hearing before Justice Crabtree the respondent, through counsel, agreed to an order that he continue to pay monthly child support in the amount of \$861 as long as the children remain children of the marriage. This is reflected in Term 1 of the entered order of Crabtree J., which was signed by counsel for both parties. The respondent provided the claimant with posted-dated cheques for monthly child support until the end of 2020.
- [47] The respondent believes that Term 1 of the entered order does not accurately reflect what was in fact ordered by Justice Crabtree on July 9, 2020. He refers to this as a "clerical error". The respondent says his income declined in 2019, and then has further declined in 2020 due to the impact of COVID-19. Accordingly, the respondent says the current order is not consistent with his actual income. He says the monthly amounts should be lower. In mid-August, the respondent stopped payment on the post-dated cheques he had provided to the claimant. He has not made any child support payments to the claimant since August 1, 2020.
- [48] The respondent produced his 2019 income tax return for the first time in an affidavit sworn on October 22, 2020. The respondent earned \$41,262 in Line 150 income in 2019. The respondent says he was laid off from his job as a field service technician on April 14, 2020, due to the COVID-19 pandemic, and has been unable to find new employment. He deposes that he will "likely be unemployed for the near future". The basis for this belief is not explained in his affidavit. The respondent's affidavit material does not contain any documents to corroborate his evidence that he is currently unemployed or that he has made efforts to secure alternative employment.
- [49] The claimant disagrees that there is any error in the entered order of Justice Crabtree. She says the order reflects what the parties agreed to at the July 9, 2020, hearing. She notes that the respondent was represented by counsel at the hearing, and that counsel endorsed the order in the form in which it was entered. The claimant says that the child support reflected

in the order is consistent with the respondent's income in any event. While the respondent's Line 150 income in 2019 was \$41,262, she notes that this does not include rental income from the suite. The claimant says this is income available to the respondent and should be imputed to him.

- [50] As I explained to the respondent at the hearing of these applications, I am not prepared to go behind the terms of an entered order of this Court. If the respondent believes there is a clerical error in the order, he should raise it before Justice Crabtree on an application to amend the order under the slip rule (R. 15-1(18) of the Supreme Court Family Rules, B.C. Reg. 169/2009 [SCFR]). Alternatively, if the respondent believes there has been a material change in circumstances that should reduce the level of child support, he can bring an application to vary the order pursuant to s. 17 of the Divorce Act.
- [51] However, until the order is varied pursuant to the Divorce Act or "corrected" under the slip rule, the order binds the respondent to pay the claimant monthly child support in the amount of \$861. The respondent was not entitled to unilaterally withhold child support after August 2020. The respondent must pay the claimant \$2,583 in arrears owed under the order.

Retroactive child support

Legal principles

- [52] In light of the submissions that the respondent advanced on the issue of retroactive child support, it is useful to begin with a reminder of some fundamental principles. Parents have a legal obligation to support their children to an extent that is commensurate with their income. In *D.B.S. v. S.R.G.*, 2006 SCC 37 [D.B.S.], the Supreme Court of Canada summarized the core principles that animate this obligation:
- [38] ...child support is the right of the child; the right to support survives the breakdown of a child's parents' marriage; child support should, as much as possible, provide children with the same standard of living they enjoyed when their parents were together; and finally, the specific amounts of child support owed will vary based upon the income of the payor parent.
- [53] A parent's obligation to pay child support can be retroactively enforced in the sense that a payor spouse may be ordered to pay support obligations that arose prior to the date of the hearing of the court application. As Justice Bastarache observed in *D.B.S.*, at para. 2, such awards are not retroactive in the sense that they hold a parent to a legal standard that did not exist at the relevant time. They are retroactive only in that they require the payor parent to pay an amount that, in hindsight, should have been paid before. In other words, an order for retroactive support remedies a past failure to meet an existing, but unfulfilled, legal obligation. A retroactive variation of a child support order is expressly contemplated in s. 17(1) of the Divorce Act.

- [54] The objectives to be achieved through a retroactive order are to ensure that children benefit from the support they are owed at the time they are owed it, and to eliminate incentives for the payor parent to avoid their obligations. An order for retroactive support is not exceptional: D.B.S. at paras. 4-5. These points are reiterated in the recent judgment of the Supreme Court of Canada in *Michel v. Graydon*, 2020 SCC 24. Justice Brown, for the majority, stated:
- [31] When a payor parent fails to pay the appropriate amount of child support, the recipient parent is left to shoulder the burden. If the recipient parent does not have the means to provide their child reasonable support, the child suffers. Both the recipient parent and the child may experience hardship because of a payor parent's neglect. Seen in this light, it bears repeating that retroactive child support is not exceptional relief (D.B.S., at para. 5): there is nothing exceptional about judicial relief from the miserable consequences that can flow from payor parents' indifference to their child support obligations. This is not to say that hardship is required to ground an award for retroactive child support, as there is also nothing exceptional about relief that creates a systemic incentive for payor parents to meet their obligations in the first place. Just as an order of child support is intended to provide children with the same standard of living they enjoyed when their parents were together (D.B.S., at para. 38), an order of retroactive child support provides an (albeit imperfect) remedy where that does not occur. And as this Court recognized in D.B.S., "courts are not to be discouraged from defending the rights of children when they have the opportunity to do so" (para. 60).
- [55] The court's jurisdiction to order retroactive child support is discretionary rather than mandatory. As explained in D.B.S., at para. 63, the payor parent may have a reasonable expectation that past support obligations are settled, particularly where they have diligently been following an existing court order. A retroactive award disrupts certainty for the payor parent and may lead to financial hardship. D.B.S. directs that courts are to take a "holistic" view in determining whether a retroactive award should be made, having regard to the factual matrix of each case (at para. 99). The factors to be considered in determining whether a retroactive award is appropriate include: whether the recipient parent has a reasonable excuse for why the order was not sought earlier; blameworthy conduct on the part of the payor parent; the circumstances of the child; and, whether any hardship would be caused by a retroactive award: D.B.S. at paras. 100-116.
- [56] The presumptive date of retroactivity is the date when effective notice was given to the payor parent that child support should be paid or increased. Effective notice consists of any indication from the recipient parent that child support needs to be paid or renegotiated. Once such indication has been given, the payor parent can no longer assume that the status quo is fair and their interest in certainty is less compelling: D.B.S. at para. 121.

- [57] However, once the recipient parent raises the issue of child support, they are still obliged to move the discussion forward. A prolonged period of inactivity after effective notice may indicate that the payor parent's reasonable interest in certainty has returned. For this reason, absent blameworthy conduct by the payor parent, it will usually be inappropriate to make a support award retroactive to a date more than three years before formal notice was given: D.B.S. at para. 123.
- [58] Finally, a court will need to determine the quantum of the retroactive award. A court ordering a retroactive award pursuant to the Divorce Act must do so in accordance with the Federal Child Support Guidelines, SOR/97-175 [Guidelines]. However, courts have some discretion under the Guidelines to deviate from the Table, for example in cases of undue hardship (s. 10) and where the child is over the age of majority (s. 3(2)): D.B.S. at paras. 128-129.

Application to the facts

- [59] The first issue that must be addressed on the claimant's application is whether she is seeking to enforce child support arrears, as the claimant maintains, or whether she is seeking an order retroactively varying the child support term of the Final Order pursuant to s. 17(1) of the Divorce Act. This turns on the proper interpretation of Term 11 of the Final Order.
- [60] In my view, the amounts that the claimant seeks to recover from the respondent are not properly viewed as arrears under the Final Order. As I have noted, the Final Order was structured in a manner that anticipated the parties moving to a situation of shared parenting. The order addressed the contingency that shared parenting might be delayed, in which case the claimant had liberty to apply to extend child support pursuant to Term 11 of the Final Order. The order does not address the contingency that shared parenting might never be achieved. There is no court order that required the respondent to pay child support after September 2016. As such, this is not a case in which the applicant seeks to recover arrears that have accrued under a court order.
- [61] At the same time, I do not accept the respondent's interpretation that the Final Order had the effect of terminating child support after September 2016, subject to any future review. As long as the children remained in the primary care of the claimant, the respondent had a legal obligation to pay child support. The Final Order did not extinguish that obligation, it simply anticipated a parenting arrangement of shared custody that never materialized. To that extent, there has clearly been a material change in circumstances from what the parties contemplated at the time of the Final Order.
- [62] The claimant's application, therefore, seeks an order for retroactive support that should be resolved in accordance with the D.B.S. framework. I will begin with a review of the factors listed in D.B.S. that are relevant to the appropriateness of a retroactive award.

Reasons for the claimant's delay

[63] In my view, the claimant has provided a reasonable excuse for her failure to bring the application sooner. She attempted to address child support in the course of negotiations regarding settlement of the terms of the Final Order. She repeatedly advised the respondent of her view that he owed child support. She attempted to enrol with the Family Maintenance Enforcement Program ("FMEP"), but was told that the Final Order was not sufficiently clear to permit enforcement action to be undertaken. After 2017, the claimant says she lacked the resources to bring a court application. She finally borrowed money to pay a lawyer to pursue it. The claimant notes that it was only after the application was filed that the respondent paid her the \$22,000 that he acknowledges was owed to her as part of the property division. I agree with the claimant that the respondent cannot complain of delay when he has withheld monies owing that would have facilitated her access to the courts.

Blameworthy conduct

[64] I find the respondent's conduct to be blameworthy within the meaning of D.B.S. This application could have been avoided if the respondent had taken appropriate action to acknowledge his child support obligations after September 2016. This is not a case in which the payor parent had a reasonable expectation that his support obligations were being fulfilled. Instead, the respondent adopted an untenable interpretation of the Final Order as excusing him from any child support obligations regardless of whether the parties ever moved to shared parenting. He simply refused to acknowledge the claimant's repeated requests that he fulfill his legal obligation to support his children.

Circumstances of the children

[65] There is no evidence before me regarding the children's current or past circumstances. As such, I find this to be a neutral factor.

Hardship to the respondent

[66] The respondent says he will suffer financial hardship if the claimant is awarded retroactive child support due to his current financial circumstances. For the purpose of the present application, and despite the limited evidentiary record, I assume this to be true. However, hardship cannot always be avoided. As noted in D.B.S., hardship for the payor parent is of much less concern where it is the product of their own blameworthy conduct (at para. 116).

[67] I have already reviewed the reasons why I consider the respondent's conduct to be blameworthy in this case. During the period of time that the respondent was ignoring his children's entitlement to financial support from him, the claimant had to assume sole financial responsibility for support. The respondent's child support obligations went unfulfilled between October 2016 and January 2020 despite the fact that the respondent was working full-time, owned his own home, and was collecting rental income.

- [68] Viewing the matter holistically, in my view the factors listed in D.B.S. support an award of retroactive child support in this case.

Date of retroactivity and quantum of award

- [69] There can be no dispute about the date of effective notice in this case. The claimant put the respondent on notice in October 2016 that she believed he owed child support as long as the parties had not moved to shared parenting. The claimant repeatedly stated this position in her communication with the respondent over time.
- [70] D.B.S. establishes a general, but not invariable, rule that a support order should not be retroactive to a date more than three years before formal notice was given to the payor parent. However, where the payor parent has engaged in blameworthy conduct, it may be appropriate to award retroactive support from the time it should have been paid. Once a payor parent engages in such conduct, there can be no claim that they reasonably believed the child's support entitlement was being met: D.B.S. at paras. 123-124.
- [71] In my view, it is appropriate in this case to make a support award that is retroactive to October 2016, which is more than three years prior to the date of formal notice. For the reasons I have stated, I consider the respondent's conduct to have been blameworthy within the meaning of D.B.S. The respondent could not reasonably have believed his children were receiving their support entitlement in the months and years after the Final Order. On the contrary, he knew they were not receiving their entitlement. The respondent simply refused to acknowledge or respond to the claimant's repeated requests that he fulfill his obligation to support his children.
- [72] The claimant seeks an order that the respondent pay retroactive child support in the amount of \$721 per month between October 2016 and January 2020, for a total of \$28,119. In my view, this is a reasonable basis on which to calculate a retroactive support award. As the claimant notes, the amount the claimant seeks is actually less (by about \$2,000) than it would be if strictly based on the respondent's Line 150 income over those years. I have already addressed the respondent's claim of hardship. I accept that there is some hardship to the respondent in facing a lump sum award of retroactive child support that covers a period in excess of three years. However, it is hardship that would have been avoided if the respondent had fulfilled his support obligation to his children at the time it arose.
- [73] Although the respondent's argument was exclusively focussed on resisting any award of retroactive child support, I note that hardship in the form of a current inability to pay a lump sum retroactive award may also be addressed by the court as a matter of enforcement rather than entitlement. Section 17(1) of the Divorce Act provides that the court may suspend a retroactive support order. Rule 15-4(31) of the SCFR permits the court to stay its own order "until such time as it thinks fit" and to order the payment of money in installments. The availability of such flexible enforcement mechanisms means that the court is not simply faced with a choice between a lump sum order for retroactive child

support, payable and enforceable immediately, or an order reducing or eliminating the amount of retroactive support that must be paid.

- [74] It seems to me that if a payor parent seeks some accommodation in the enforcement of a retroactive support order, they are obliged to make sufficient financial disclosure to prove a genuine inability to pay the lump sum award. In the present case, the respondent has sworn a Form 8 Financial Statement, which includes his statement of assets and debts, but there is no supporting documentation. The respondent has not produced recent bank account statements, mortgage documents, or employment records. It is not evident that the respondent has insufficient cash on hand to pay an award of retroactive child support, or that he would not be able to access the equity in his home for that purpose. I have already commented on the lack of disclosure around the respondent's current employment situation.
- [75] Accordingly, I order that the respondent must pay the claimant \$28,119 in retroactive support between October 1, 2016, and January 1, 2020. I am not persuaded on the evidentiary record before me that the enforcement of the order should be suspended or stayed, or that the amount owed under the order should be paid in installments. This conclusion is without prejudice to the respondent's ability to apply to vary or suspend enforcement of the order in the future, on a fresh evidentiary record, if he finds himself unable to pay the lump sum award.

Section 7 expenses

- [76] The claimant seeks reimbursement from the respondent of his 50% share of s. 7 expenses that she has incurred since September 1, 2016. The claimant's application material includes receipts for the expenses she claims. The respondent's share is \$1,004.33. At the hearing, the respondent advised the Court that he is prepared to pay this sum to the claimant towards retroactive s. 7 expenses.
- [77] The claimant also seeks a variation of Term 13 of the Final Order to address prospective s. 7 expenses. As noted, Term 13 requires the parties to equally share s. 7 expenses that they both agree to in writing. The claimant says Term 13 has proved unworkable because the respondent can avoid any obligation to pay s. 7 expenses by simply failing to respond to the claimant's requests for reimbursement. The claimant proposes that the Final Order be varied by removing the requirement for joint consent in writing, and instead replace it with a list of agreed-upon s. 7 expenses. She proposes that the list include: medical and dental expenses, school fees, and post-secondary education costs.
- [78] I am persuaded on the material evidence that Term 13 of the Final Order should be varied as proposed by the claimant. It has proved unworkable in practice for the reasons highlighted by the claimant. Both parties would be better served by an order that particularizes the s. 7 expenses to be shared. I did not understand the respondent to object to the list of s. 7 expenses proposed by the claimant.

Fine/Security for child support

- [79] The claimant seeks an order pursuant to s. 230 of the FLA that the respondent pay a fine not to exceed \$5,000 for what is alleged to be the respondent's non-compliance in paying child support under the Final Order. The claimant also seeks an order pursuant to s. 12 of the Guidelines requiring the respondent to pay a lump sum amount into court or her counsel's trust account as security for child support.
- [80] Both forms of relief are premised on the claimant's assertion that the respondent's failure to pay child support since October 2016 amounts to a breach of a court order. In my view, that is not a proper characterization of the circumstances. The Final Order did not require the respondent to pay child support. While I have found that the respondent's conduct in failing to acknowledge his legal obligation to the children was blameworthy within the meaning of D.B.S., his conduct does not rise to the level of breach of a court order. This is, of course, with the exception of the respondent's recent refusal to follow the order of Justice Crabtree on the basis of his belief that the entered order is incorrect. However, I cannot conclude on the evidence that an order for a fine or security for support is necessary to secure the respondent's compliance with a court order for child support.
- [81] I note, further, that if the respondent fails to comply with the orders of this Court, both Justice Crabtree's order for prospective child support and my order for retroactive support, the claimant will have the ability to enrol with the FMEP. This was not an enforcement mechanism available to her in the past due to the lack of a clearly defined order for support.
- [82] For these reasons, I dismiss the claimant's application for orders that the respondent pay a fine and security for child support.

THE RESPONDENT'S APPLICATION

- [83] In the course of the hearing, the respondent narrowed the relief he wished to pursue on the application. Much of the relief sought is already addressed in my reasons for judgment on the claimant's application. This includes the respondent's request for an order that he does not owe retroactive child support (Part 1, para. 1); an order for the final division of property (Part 1, para. 11); and, an order that he remain a joint guardian of the children (Part 1, para. 12).
- [84] The additional issues raised by the respondent that remain to be resolved concern parenting arrangements. The respondent seeks an order that the children be required to attend counselling with Angela Pallan, with the costs to be shared between the parties (Part 1, para. 5). He also seeks orders directing that the respondent have specified parenting time with the children, including on birthdays and statutory and cultural holidays (Part 1, paras. 8, 18).

Counselling

- [85] The respondent's material provides no details of Ms. Pallan's qualifications, the nature of the counselling services he proposes she will provide to the children, or even her willingness and availability to provide counselling pursuant to a court order.
- [86] The claimant says she is not opposed to counselling for the children in principle, but objects to the lack of specificity in the respondent's proposal. The claimant notes that when counselling was last set up for the children it was pursuant to the carefully crafted terms of the Final Order that implemented the recommendations of a comprehensive s. 211 report. The claimant says that if the respondent genuinely wishes to re-establish his relationship with his children, the starting point should be an updated s. 211 report so that the court can have the benefit of recommendations of how best to achieve a reconciliation. She objects to any order that she be required to pay the costs of either counselling or a s. 211 report.
- [87] I agree with the claimant that there is no basis in the evidence for me to conclude that it would be in the best interests of the children to order that they must participate in a counselling program of unknown scope and purpose. The respondent had the opportunity to work on his relationship with the children through the family therapy provided pursuant to the Final Order. He chose not to complete that therapy. Since then, the respondent has had only phone contact with the children. They are now both teenagers. The factors relevant to consideration of the best interests of a child under s. 37 of the FLA include the child's views, unless it would be inappropriate to consider them. Given the history in this case, and the children's ages, it would be appropriate for the court to consider their views on re-establishing a relationship with the respondent, and the appropriate methods for doing so, before making compulsive orders.
- [88] I am therefore not prepared to order that the children participate in counselling with Ms. Pallan. It seems to me that there is considerable weight in the claimant's suggestion that the starting point for the respondent in seeking to re-establish a relationship with his children is an updated s. 211 report. I make no final determination on this issue because it is not before me. The application before me simply contains insufficient material on which to conclude that it would be in the children's best interests to grant the order sought by the respondent.

Parenting time

- [89] The respondent has exercised virtually no parenting time with the children, at least in person, since he withdrew from family therapy in December 2016. The limited material I have before me suggests that the children resist seeing him, and find it upsetting when the respondent has occasionally appeared without notice at their school or soccer games.
- [90] The respondent accuses the claimant of alienating the children and preventing him from seeing them. The evidence he has tendered in support of this accusation does not show alienating behaviour by the claimant. The few emails in evidence that the parties exchanged between 2017 and 2019 indicate that the claimant facilitated the respondent's requests for

telephone contact with the children. On one occasion, in January of 2018, the respondent requested that the claimant set up a time for him to meet with the children in person to discuss an issue with their grandmother. The claimant advised that the children were not comfortable seeing him, and she encouraged him to call them directly. On another occasion, in 2017, the respondent insisted that she had to force the children to call him on Father's Day. The claimant suggested that he should call them instead.

- [91] The claimant says she has always encouraged her children to speak to the respondent when he calls. She is also prepared to facilitate any in-person contact that the children wish to have with their father. However, she opposes any court order that would require her to force the children to attend parenting time with the respondent that they do not want to have. The claimant says it was the respondent's choice to walk away from family therapy in December 2016, and thereafter absent himself from his children's lives.
- [92] While I acknowledge that it may ultimately be in the children's best interests to re-establish some form of relationship with their father, it is less clear how that can be practically achieved in these circumstances in a manner consistent with their best interests. I reiterate the point I have already made about the assistance the court may derive from an updated s. 211 report. The family dynamics are no less complex now than they were in 2016 when Dr. England recommended a "case management" approach to the issue of parenting arrangements. Indeed, there is now the added complexity of the further deterioration of the respondent's relationship with his children in the intervening years.
- [93] For these reasons, I am not prepared to issue orders requiring the children to attend counselling or to attend for specified parenting time with the respondent. I cannot conclude on the evidence before me that such orders would be in the best interest of the children. I am concerned that an order compelling them to participate in parenting time with their father would in fact be contrary to their best interests in the circumstances. It must be borne in mind that the children are teenagers who have had a historically troubled relationship with their father, and have not had parenting time with him since 2016. I accept the claimant's assurance that she will continue to facilitate contact between the children and the respondent, including in-person contact if the children are willing.
- [94] In the course of the hearing, the respondent suggested that if he could not have court-ordered parenting time with the children, the claimant should at least provide him with periodic updates on the children. He also wishes to receive pictures of the children. The claimant does not oppose an order imposing such an obligation on her, although she considers the respondent's suggestion of weekly updates and photos to be excessive. She also wishes a reciprocal order to limit the respondent's emails to her. The claimant says the respondent has emailed her excessively since she filed the present application.
- [95] I conclude that it is reasonable to require the claimant to provide monthly updates on the children to the respondent via email. She should also provide photos of the children, as requested by the respondent, on their birthdays and major holidays at a frequency that is no

less than four times per year. The respondent, for his part, should limit his emails to the claimant to twice per month, other than when he is directly responding to a communication from the claimant. Both parties should maintain a respectful tone in their communications with each other, and about each other in speaking to the children.

CONCLUSION/ORDERS

[96] In summary, I make the following orders on these applications:

i. The respondent shall pay the claimant \$1,348.74, as final settlement of their property division under the Final Order;

ii. The respondent shall pay the claimant \$2,583 in child support arrears owed pursuant to the July 9, 2020 order of Justice Crabtree;

iii. Term 3 of the Final Order is varied and replaced as follows:

The claimant will have primary residence of the children.

iv. The claimant shall have the parenting responsibilities set out in s. 41 of the Family Law Act, with the exception that the parties will jointly have the parental responsibility in s. 41(j);

v. The claimant may travel with the children, within Canada and internationally, without the respondent's authorization;

vi. The claimant shall inform the respondent of any travel plans that involve removing the children from the Lower Mainland for a period of more than three days;

vii. The claimant will provide the respondent with at least seven days' notice of any such travel plans, including an itinerary as well as contact information to be used by the respondent in case of emergency;

viii. The respondent shall pay the claimant \$28,119 in retroactive child support between October 1, 2016, and January 1, 2020;

ix. The preceding order is without prejudice to the respondent's ability to bring an application in the future to seek a suspension or stay of the enforcement of the order, and/or an order for payment of arrears by installment, if he finds himself unable to pay the lump sum arrears;

x. The respondent shall pay the claimant \$1,004.33 as his share of s. 7 expenses for the children incurred since September 1, 2016;

xi. Term 13 of the Final Order is varied and replaced as follows:

The claimant and the respondent shall equally share s. 7 expenses for the children, as long as they remain children of the marriage, including:

- medical and dental expenses;
- school fees;

- post-secondary education costs; and
- any other expenses that the parties agree are s. 7 expenses.

The claimant shall provide receipts for s. 7 expenses to the respondent, and he shall pay his share within 30 days of receiving the receipts.

Either party is at liberty to apply to court for direction if they cannot agree on s. 7 expenses beyond those specifically listed.

xii. The claimant's application for an order pursuant to s. 230 of the FLA that the respondent pay a fine is dismissed;

xiii. The claimant's application for an order that the respondent pay security for costs is dismissed;

xiv. The claimant shall provide the respondent via email with a monthly update on the children;

xv. The claimant shall provide the respondent with photographs of each of the children at least four times a year, including on their birthdays and major holidays;

xvi. The respondent shall not email the claimant more than twice per month, other than when he is responding to a specific communication from the claimant;

xvii. The parties will put the best interests of the children before their own interests, encourage the children to have a good relationship with the other parent and speak to the children about the other parent in a positive and respectful manner, and make a real effort to maintain polite, respectful communications with each other, refraining from any negative or hostile criticism, communication or argument in front of the children;

xviii. The balance of the relief sought in the respondent's application is dismissed.

[97] The claimant is the successful party on these applications. She is entitled to her costs of the applications, including the costs of the hearing on July 9, 2020, from the respondent at Scale B.

"Horsman J."

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Prepared on 26 October 2026 · Esheria