SUPREME COURT OF YUKON

Citation: *J.A.F. v. P.U.*, 2019 YKSC 68

Date: 20191216
S.C. No.19-D5168
Registry: Whitehorse

BETWEEN

J.A.F.

PLAINTIFF

AND

P.U.

DEFENDANT

Before Madam Justice S.M. Duncan

Appearances:
Shayne Fairman and Allyssa Tone — Counsel for the plaintiff
Megan É. Whittle and Emma Dickson — Counsel for the defendant

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is an application by the plaintiff, J.A.F., for payment of interim child support by the defendant, P.U. The defendant also brings an application to impute income of $100,000 to the plaintiff for 2019 for the purpose of child support.

[2] There are three children of the marriage: O.A.U., born October 24, 2012; W.D.U., born April 24, 2015; and R.I.U., born January 26, 2017.

[3] Both the plaintiff and the defendant are family physicians practising in Whitehorse. The plaintiff has a specialty in obstetrics and women's health and the defendant has a specialty in anaesthesia. They were married on June 18, 2011 and separated in September, 2018. Both have annual incomes of over $150,000. They have agreed to shared custody of the children on an equal basis.

[4] The applications raise the following issues:

i. Is the plaintiff's application premature given the uncertainty of the parties' respective 2019 incomes and the summary trial to address division of assets is scheduled in March 2020?

ii. How should the parties' incomes be calculated since their T-1 forms do not reflect their actual incomes?

iii. Should any income be imputed to the plaintiff on the basis of intentional under-employment?

iv. Do s. 4 and s. 9 of the *Federal Child Support Guidelines* ("the *Guidelines*") make the amounts set out in the applicable table inappropriate?

v. If so, what should the amount of child support be, considering the provisions of s. 4 and s. 9 and the applicable legal principles?

vi. If child support is ordered, should payments be retroactive?

vii. How should s. 7 special or extraordinary expenses be shared?

BACKGROUND

[5] The plaintiff and defendant moved to the Yukon in January, 2014 and incorporated U. Professional Corporation ("the Corporation") on February 26, 2014. All of their billings from Yukon Health as well as income from other sources were deposited

into the Corporation accounts until December 2018 when it was dissolved. The plaintiff and defendant decided after consultation with and advice from their accountant and financial planner their annual income amounts from the Corporation.

[6] It is acknowledged that the defendant has always billed significantly larger amounts than the plaintiff.

[7] The defendant voluntarily paid child support of $1,000 a month in October and November 2019. Although the parties separated in September, 2018, they shared expenses and the family home until March, 2019. From March to June, 2019, the plaintiff lived with a new partner. That relationship broke down and since June 2019, the plaintiff has been living in her own home and paying her own expenses.

Is the application premature?

[8] The defendant argues this application is premature because the nature of physicians' billings does not allow certainty of 2019 income at this time. Under the 'fee-for-service' billing model, physicians' earnings are determined by the number and type of services they provide within a certain period. The defendant says neither party will know their complete 2019 billings until at least January 2020.

[9] The plaintiff's billings for 2019 have been revised by an affidavit filed by her on December 13, 2019, after an error was discovered in Exhibit C to her second affidavit. Exhibit C contained the 2018 print out of earnings, not the 2019 print out. The December 13 affidavit attaches the 2019 print out of the plaintiff's earnings from January to October 31, 2019. Those earnings are $232,611.91.

[10] The defendant suggests that the issue of child support be adjourned to the summary trial to be held in March 2020, owing to the current uncertainty of earnings

calculations. Alternatively, he suggests that their 2018 incomes be used as a basis for calculation of child support until June 2020, when their personal income taxes and financial statements for 2019 have been prepared.

[11] The plaintiff responds that child support payments are long overdue. While she acknowledges that the information is imperfect, she says this should not preclude her ability to pursue child support now, as it is still sufficiently satisfactory and reasonable information. She also notes that s. 2(3) of the *Guidelines* provides that where any amount is determined on the basis of specified information, the most current information must be used.

[12] The *Divorce Act* provides in s. 15.3(1) that the determination of appropriate child support payments takes priority over the determination of spousal support. Although there is no application before me at this time for spousal support, I interpret this section to mean that the concern of the legislators is to ensure the children's needs are met. These are children of high income earners so the concern about their needs being met is not acute; nevertheless, I am of the view that the intention of the statute and *Guidelines* is to address child support as a priority.

[13] There is a substantial amount of billings information from 2019, because at the time this application was heard in November, 2019, the year was almost over. Although the earnings information from 2018 is certain, it is not the most current information. In extrapolating the billings for the last two months of 2019, information from previous years can be considered. If the income amounts on which any child support payment calculation is based turn out in the new year to be inaccurate, adjustments can be made. The 2019 actual amounts billed to October 31 and reasonable estimates for the

last two months of the year are the most current information. Given the importance of the determination of child support, and the available billings information, the application is not premature.

Calculation of income

[14] The plaintiff and defendant agree that the amounts reflected in their T1 General Tax Returns do not represent the full amount of their incomes on which child support calculations should be made. Section 18(1)(a) of the *Guidelines* contemplates this situation:

> 18(1) Where a spouse is a shareholder, director or officer of a corporation and the court is of the opinion that the amount of the spouse's annual income as determined under section 16 does not fairly reflect all the money available to the spouse for the payment of child support, the court may consider the situations described in section 17 and determine the spouse's annual income to include
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> (a) all or part of the pre-tax income of the corporation, and of any corporation that is related to that corporation, for the most recent taxation year; or
>
> (b) an amount commensurate with the services that the spouse provides to the corporation, provided that the amount does not exceed the corporation's pre-tax income

[14] Section 16 provides that a spouse's annual income is determined using the sources of income set out in the T1 General form issued by Canada Revenue Agency. Subsection 17(1) provides that if a court is of the opinion that the determination of income under s. 16 may not be the fairest determination of that income, the court may have regard to the spouse's income over the last three years and determine an amount that is fair and reasonable in light of any pattern of income or fluctuation in income.

[15] Both the plaintiff and defendant were directors, officers and shareholders in the Corporation until its dissolution in December, 2018. Since January, 2019, they have

each incorporated their own professional corporations. On advice from the financial advisor and accountant, the Corporation paid a certain amount of annual wages to each of them and also paid annual dividend amounts calculated in consideration of tax planning purposes. These wages and dividends became their income for the purpose of their personal income tax returns. The remainder of their annual earnings was retained in the Corporation and invested for savings and retirement purposes.

[16] The majority of the physicians' earnings are from billings to Yukon Health Care Insurance Plan on the 'fee-for-service' model. There is no salary or hourly wage. Generally, physicians are able to choose when and how much they work, and this in turn affects both the services they are able to provide as well as their income.

[17] It is agreed that both physicians have overhead costs estimated at 22%, as this represents an average percentage of overhead expenses from 2014 to 2018 calculated in the Financial Statements prepared for the Corporation. Although both physicians' specializations allow them to bill additional amounts beyond what a family physician without a specialization can bill, it is agreed that the defendant's specialization in anaesthesia allows more lucrative billing.

[18] In 2019, the plaintiff's billings to October 31, were $232,611.91. The amount she projects based on similar services rendered by her by the end of the year is $279,133.00. The defendant's billings to October 31 were $446,455.22. The straight line projection for his billings by the end of 2019 amounts to $535,746. Both projections appear to be based on no further holidays taken by either of them, although both depose they have some time off planned in November and December. Since both parties did not submit that these vacation days should be taken into account in

determining their respective 2019 billings, I will rely on the straight line projections provided by the parties.

[19] The plaintiff's projected earnings for 2019 after subtracting 22% overhead, are $217,724.00. The defendant's projected earnings for 2019 after subtracting 22% overhead are $417,881.00.

[20] Recognizing that these estimates may require adjustment when the final billings are paid in the new year, I am of the view that they represent the most current and reasonable calculation of income.

[21] Thus the *Guideline* table amount of child support to be paid by the defendant to the plaintiff is $7,281.82 and the *Guideline* table amount to be paid by the plaintiff to the defendant is $3,959.22. The set-off of these two amounts is $3,322.60.

Imputation of Income to the plaintiff

[22] The defendant argues that $100,000 of income should be imputed to the plaintiff. This is based on what he says is her choice not to work as much as she could. The determination of how much she could work is in turn based on a comparison of her work days to his work days. He says she is intentionally under-employed, according to s. 19(1) of the *Guidelines*.

[23] The defendant estimates over the last two years he has worked approximately 40 more days than the plaintiff each year. His evidence is their shared Google calendar and the Electronic Medical Record Schedule from their clinic. These documents capture the plaintiff's family practice, obstetric work, including on-call days, Atlin clinics, sexual health clinics and therapeutic abortion services. Similarly, they capture the defendant's family practice and anaesthetic work, including on-call days. Multiplying the

number of his additional days worked by a straight line projection of the plaintiff's actual billings to October 31, 2019 amounts to approximately $100,000 extra in her billings. He acknowledges that the differences in the remuneration schedules of their respective specialities will always result in higher billings by him, even if they worked the same number of days.

[24] The plaintiff responds that the defendant's request to impute income to her is a continuation of his ongoing complaints during their marriage that she did not work hard enough either within or outside the home. She says her annual earnings have been consistent except in the years she gave birth successfully. Her annual vacation days have also been consistent throughout their marriage and since separation.

[25] The plaintiff says that the defendant's comparison of their respective number of days worked is inappropriate because of the differences in their specialities, obstetrics and anaesthesia. For example, obstetrics on-call days are more frequent, they require more time and are less remunerative than anaesthesia on call days. The plaintiff notes that the defendant's calculation of days worked does not take into account her additional work related activities such as: participation in various boards and committees as a volunteer, including the maternity newborn committee, the midwifery advisory committee, Yukon Medical Association executive and the hospital based maternity clinic steering committee; on-call work for the sexual assault response team; attendance at conferences for mandatory medical education; and hospital in-patient call days. The plaintiff calculated these in-patient call days to be 35 for her and 20 for him over the last year. The plaintiff also offers her own calculations in her affidavit of the

number of days each of them has worked in the last year but does not set out the basis for those calculations.

[26] The plaintiff also says she has spent more time with their children over the years, despite having a nanny since 2016, and details these activities in her affidavits. They include attending their co-op pre-school as a parent helper and associated meetings; attending medical and dental appointments; enrolling them in extra-curricular programs and arranging play dates; shopping for clothes and sports gear; planning weekly grocery lists and meals; and staying home with them when they were sick and the nanny was unavailable.

[27] The defendant clarified that his comments about the plaintiff not working hard enough were restricted to her help with domestic duties at home and not her work as a physician. He disputes the plaintiff's assertions about the differences in their on-call responsibilities, saying that the volume of cases for which he is responsible on each on-call day is much greater, even though the number of his on-call days is less. The defendant concedes that his calculations do not include the in-patient call days for either of them and he does not offer numbers that differ from the plaintiff's estimate. He disagrees that he has spent less time than the plaintiff with the children's appointments or as a parent helper at school; and says he has spent time throughout the children's lives organizing activities and buying outdoor clothing and sports gear.

[28] Section 19(1)(a) of the *Guidelines* says:

> 19(1) The court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following:
>
> (a) the spouse is intentionally under-employed or unemployed, other than where the under-employment or

> unemployment is required by the needs of a child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the spouse.

[29] The test for imputing income was set out by the British Columbia Court of Appeal in *Marquez v. Zapiola*, 2013 BCCA 433 as follows:

> [36] For the purposes of both child and spousal support, there is a broad judicial discretion to impute income to either or both spouses. However, the party seeking to have income imputed to the other spouse has the burden of establishing an evidentiary basis for such a finding.
>
> [37] The test of imputing income of intentional under-employment or unemployment is one of reasonableness, having regard to the parties' capacity to earn income in light of their age, education, health, work history and work availability. A spouse's capacity to earn income will include that person's ability to work or to be trained to work. See *Van Gool v. Van Gool* (1998) 113 B.C.A.C. 200, 44 R.F.L. (4th) 314 at paras. 28-31, *Barker v. Barker*, 2005 BCCA 177, 45 B.C.L.R. (4th) 43 at para. 19, and *McCaffrey v. Paleolog*, 2011 BCCA 378, 24 B.C.L.R. (5th) 62 at para. 46.

[30] The Ontario Court of Appeal has held that in determining whether or not to impute income on the basis that a party is intentionally under-employed pursuant to s. 19(1)(a) of the *Guidelines*, it is not necessary to establish bad faith or an attempt to thwart child support obligations. A parent is intentionally under-employed within the meaning of this section if they earn less than they are capable of earning having regard for all of the circumstances. In determining whether to impute income on this basis, the court must consider what is reasonable in the circumstances. The Ontario decisions consider virtually the same factors set out above in *Marquez v. Zapiola*: age, education, experience, skills and health of the party, the party's past earning history and the amount of income that the party could reasonably earn if they worked to capacity (*Drygala v. Pauli*, [2002] 61 O.R. (3d) 711 (O.N.C.A.); *Lawson v. Lawson*, [2006] 81

O.R. (3d) 321 (O.N.C.A.); *Donovan v. Donovan*, 2000 MBCA 80 see *Kerr v. Pickering*, 2013 ONSC 317. See also *Hsieh v. Lui*, 2017 BCCA 51, paras. 47 and 48.

[31] There is evidence of the respective annual billings of the plaintiff and defendant for 2018 and for 2019 from January to October 31, 2019. Information before 2018 of their respective billings (as opposed to income showing on their T1 forms) is not available. When their billings were deposited in the account of the Corporation they were not segregated by individual. When the Corporation was dissolved, the income was split equally between them as equal shareholders.

[32] The defendant relies on two decisions of the British Columbia Court of Appeal in support of his argument. The first is *Barker v. Barker*, 2005 BCCA 177, in which the payor was a dentist working four days a week, a practice he had maintained for some time throughout his professional career and what he said his practice could support. One of the reasons for this was to help his common law wife who was suffering from cancer. The Court of Appeal noted that the important question was:

> 18. … whether the payor spouse has demonstrated an intention to be underemployed, with the consequence that his children do not benefit from his potential earning capacity. This does not mean a parent must work the long hours Ms. Barker puts in to earn her significant income. It does mean that a parent who chooses to work less than a regular work week must justify that choice by the needs of the children or suffer the loss personally. He cannot effectively transfer part of the cost of that choice to his children. …

[33] The Court of Appeal went on to hold that helping a sick spouse was not a reason recognized by the *Guidelines* for justifying under-employment for the purpose of determining the amount of child support to be paid. The inference of under-employment

in that case was open to the judge on the law and the evidence. The chambers judge imputed income of $8,329, $4,385, and $25,992 in each of the three years at issue.

[34] On review of the second case relied on by the defendant, *R.M.S. v. F.P.C.S.*, 2011 BCCA 53, I note that the issue of imputed income for the purpose of calculating child support was not appealed. Therefore, it is more instructive to review the trial decision at 2009 BCSC 1323. The Court imputed an additional $45,870 to the anaesthesiologist mother's income, from the net annual income amount she submitted to the Court of $173,300, for an annual income of $225,000. The Court assessed her last uninterrupted year of work, 2006, in which her net business income was $179,130. She worked three days each week and one on call day every month or two weeks for the first nine months of that year. She had no on call shifts for the last three months of 2006 because of problems with her second pregnancy. The reason for the imputed income was the Court's assumption that she would return to working her previous fortnight or monthly on call shift and would also be able to work additional shifts when the father had care of the children.

[35] In this case, unlike *R.M.S. v. F.P.C.S*., the plaintiff's billings and time spent at work have been consistent over at least the last two years. Unlike *Barker v. Barker*, and *R.M.S. v. F.P.C.S.* there is no evidence from the calendar excerpts or otherwise in the defendant's affidavit that the plaintiff is regularly working less than a full week. The defendant's argument is based on the number of hours or days he works, and his expectation that the plaintiff is able to work the same number of days as he does.

[36] I do not find the comparison of the number of days worked by the plaintiff and defendant helpful in determining whether or not to impute income to the plaintiff. There

are too many variables in their respective services that make a direct comparison difficult. There are many points of disagreement between the two of them in the methods of these calculations and there is insufficient objective evidence to assist me in resolving the differences. The defendant's exhibit to his second affidavit containing services with dates provided by each of them for this year does not take into account the qualitative differences in the provision of services and the additional work described above. Clearly, as is evident from their billings, both physicians work hard.

[37] There is also significant subjectivity in the estimation of the amount of time spent by each of them with the children. It is clear that both parents have always been very involved in their children's lives, and likely do spend relatively similar amounts of time now with the children, evidenced by the equal shared custody arrangement they have agreed to.

[38] I do find the number of vacation days taken each year by both to be helpful in determining whether any additional income should be imputed to the plaintiff. The vacation time taken each year between 2010 and 2018 set out by the plaintiff is not contradicted by the defendant. The information about vacation time taken in 2019 provided by the defendant is not contradicted by the plaintiff. It is undisputed that vacation time with the children has been a priority for them as a family. Attendance at professional education conferences has also been a significant part of the plaintiff's time away from billings in recent years.

[39] In 2016, both the plaintiff and defendant took 110 days' vacation and the plaintiff took an extra seven days with the children for a total of 117 days. In 2017, both took 77 days. In 2018, the defendant took 112 days and the plaintiff took 133 days. By the end

of 2019, the defendant will have taken 63 days and the plaintiff 86 days, according to their most recent affidavits and oral submissions.

[40] This shows that the plaintiff's vacation time in 2019 does not deviate from the established pattern. In fact, she has taken fewer days this year than any other year in the past four years, except for 2017. The defendant has taken fewer days' vacation in 2019 than he has in the last four years. This is his choice and should not be relied on as an argument that the plaintiff could and should be working more.

[41] My exercise of discretion in determining whether income should be imputed to the plaintiff must be dependent on factors related to her own choices and circumstances, and not on a comparison to the defendant's choices and circumstances.

[42] Considering the plaintiff's age, education, experience, skills, health, and her past earning history, I find she is earning what she is capable of earning. Her billings have been consistent in the last few years. She has a full schedule when her additional work activities are considered alongside her fee for service work. While her vacation time is generous by most standards, it is consistent with the time both she and the defendant have taken over the last several years and is based on a desire to spend time with their children. I decline to impute income to the plaintiff.

Do s. 4 and s. 9 of the Guidelines make the table amounts inappropriate?

[43] The objectives of the *Guidelines* are set out in s. 1 as follows:

> (a) to establish a fair standard of support for children that ensures that they continue to benefit from the financial means of both spouses after separation;
>
> (b) to reduce conflict and tension between spouses by making the calculation of child support orders more objective;

> (c) to improve the efficiency of the legal process by giving courts and spouses guidance in setting the levels of child support orders and encouraging settlement; and
>
> (d) to ensure consistent treatment of spouses and children who are in similar circumstances.

[44] Before the introduction of the *Guidelines*, child support was determined by complex calculations based on a determination of the child's needs. Rather than a needs-based analysis, the *Guidelines* focus on a determination of child support based on income. As noted by the Court of Appeal in *Francis v. Baker*, [1998] 107 O.A.C. 161 (affirmed [1999] 3 S.C.R. 250) the *Guidelines* have reformulated the concept of the "reasonable" need of a child:

> 48 … It is less the actual expense that matters; it is more the extent to which the payor's income permits the child to approximate the payor's own standard of living. The "reasonableness" of a need is now a function of what the payor can afford, not what would have been reasonable under the Paras formula. There is, on the whole, no more need for budgets containing estimated expenses. These estimates have been replaced by presumed expenses calculated to reflect "deemed" reasonableness, based on the payor's income.
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> 49 … Budgets estimating the reasonableness of a child's needs have now been replaced by Table amounts under the Guidelines attributing reasonableness, and the definition of reasonable needs contemplated by the Paras analysis has been similarly supplanted.

[45] Thus as a parent's income increases, so does child support. A child is entitled to benefit from a parent's rising income.

[46] This case requires the application of both ss. 4 and 9 of the *Guidelines*. They are as follows:

> 4. Where the income of the spouse against whom a child support order is sought is over $150,000, the amount of a child support order is
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> (a) the amount determined under section 3; or
>
> (b) if the court considers that amount to be inappropriate,
>
> (i) in respect of the first $150,000 of the spouse's income, the amount set out in the applicable table for the number of children under the age of majority to whom the order relates;
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> (ii) in respect of the balance of the spouse's income, the amount that the court considers appropriate, having regard to the condition, means, needs and other circumstances of the children who are entitled to support and the financial ability of each spouse to contribute to the support of the children; and
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> (iii) the amount, if any, determined under section 7.
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> ….
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> 9. Where a spouse exercises a right of access to, or has physical custody of, a child for not less that 40 percent of the time over the course of a year, the amount of the child support order must be determined by taking into account
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> (a) the amounts set out in the applicable tables for each of the spouses;
>
> (b) the increased costs of shared custody arrangements; and
>
> (c) the conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought.

[47] Much of the case law relates to the application of either s. 4 or s. 9, but not both. Many of the s. 4 cases relate to sole custody situations, where one party (generally the

non-custodial party) earns over $150,000, and the other party does not. This case is unusual because it combines an equal shared custody arrangement (s. 9) and two parents who earn over $150,000.

[48] I find most helpful the few cases in which both s. 4 and s. 9 applied. In *B.P.E. v. A.E.*, 2016 BCCA 335, the Court stated clearly that the legislators intended s. 9 to be a complete code, a distinct and separate regime applicable to shared custody arrangements from other parts of the *Guidelines* (see paragraphs 21 and 22). Support for this approach is found in *Contino v. Leonelle-Contino*, 2005 SCC 63. The Court there stated at para. 3 its view of s. 9 as follows:

> 3 … These shared custodial arrangements required the application of an entirely different formula, one that is not designed with the same guiding principles. Guidelines amounts applicable to the former non-custodial parent or to the highest income earner in the case of a first application cannot therefore be considered to be presumptively applicable. Shared custody arrangements are not a simple variation of the general regime; they constitute by themselves a complete system.

And at para. 24:

> 24 While ss. 3(2), 4, 5 and 10 [of the Guidelines] provide a framework establishing a structured discretion, each provision incorporates distinct factors which are absent in s. 9. Sections 3(2) and 4 specifically prescribe that the amount in the Guidelines is mandatory unless the court considers that there are reasons to find that it is inappropriate. Section 9 does not contain such a presumption…[I]f the drafters of the Guidelines had intended this approach, they would have used the same words to provide for direction in all of the relevant sections. In fact, the wording of s. 9 is imperative. The court "must" determine the amount of child support in accordance with the three listed factors once the 40 percent threshold is met. There is no discretion as to when the section is to be applied: discretion exists only in relation to the quantification of child support (J.D. Payne and M.A.

> Payne, *Child Support Guidelines in Canada 2004* (2004), at p. 254).

[49] As the Chambers Judge held in *B.P.E. v. A.E.*, there is no presumption under s. 9, so no higher burden of proof on one party over the other. My role is to exercise discretion on the totality of the evidence and by weighing the s. 9 factors. Further, as the Court held in *D. (L.D.) v. C. (R.C.)*, 2013 BCSC 590, the weight of each s. 9 factor will vary according to the particulars of the case. In applying s. 9 there is an emphasis on flexibility and fairness. A contextual analysis based on the facts of the case is required.

[50] Section 9(a) provides that the starting point of the analysis is the amount of support called for by offsetting the parties' obligations under the *Guidelines*. In this case, based on my findings above, that amount is $3,322.60.

[51] Section 9(b) requires consideration of the increased costs of shared custody arrangements. This is related to one of the overall objectives of the *Guidelines*, which is to avoid disparities between households and to ensure the standard of living of the children remains essentially the same at both homes. Here there is little to no evidence of increased costs of shared custody, or disparities between homes, so I give little weight to this criterion. Even if there have been some increased costs, I note the Court of Appeal's comment at para. 36 of *B.P.E. v. A.E.* that while "[s]hared custody may have increased child care costs generally in this case…those costs do not impose a significant constraint upon [in this case, the plaintiff's] ability to pay child support. Similarly, there was no constraint on [in this case, the defendant's] ability to bear the offsetting amount."

[52] Section 9(c) sets out the factor requiring the greatest analysis in this case-evidence of the conditions, means, needs and circumstances of the spouses and the children. Caution needs to be exercised to ensure the analysis does not become a predominantly needs-based approach, but remains an assessment focussed on income. As noted in *B.P.E. v. A.E.*, children should share the benefit of increases in a non-custodial parent's income, just as they would had the family remained intact. Where the payor's income is high, child support should include a large element of discretionary spending. The court has full discretion under s. 9(c) to consider "other circumstances".

[53] Courts have also allowed that the cases setting out principles arising under s. 4 of the *Guidelines* may be helpful to courts exercising discretion under s. 9. Section 4 was introduced to allow for an adjustment where one or both spouses have incomes over $150,000 and the strict application of the table amounts results in an unreasonable outcome. Section 9 does not require proof of unreasonableness to depart from the table set-off amounts, but courts have set out the following principles from the leading s. 4 case of *Francis v. Baker*, [1999] 3 S.C.R. 250, as summarized in *Archibald v. Archibald*, 2007 ABQB 486, at para 27, may be relevant:

> 1. High income earners are in a unique economic situation in that expenses which may in other situations be considered unreasonable, may, in a high income situation be reasonable. Therefore, in order to challenge budgets, payors in high income situations **must demonstrate that budgeted expenses are so high as to exceed the generous ambit within which reasonable disagreement is possible** [emphasis added].
>
> 2. In situations where the table amount is so excessive in comparison to the reasonable needs of the children that support under the table is no longer just child support but a de facto wealth transfer or spousal support, the table amount should be reduced. This is in keeping with s. 26.1(2) of the

> *Divorce Act* which dictates that maintenance of children, rather than household equalization or spousal support, is the object of support payments.
>
> 3. Child support payments will often produce an indirect benefit to the custodial parent and the court should not be too quick to find that Guideline figures enter the realm of wealth transfer of spousal support.
>
> 4. An award of discretionary expenses is not unreasonable and may be high in high income situations.

[54] In this case, the defendant has estimated the expenses, including discretionary spending, for the children. His monthly estimated spending includes groceries ($1,000), restaurants ($100), clothing ($100), gifts ($100), school fees and supplies ($20), sports, camps and entertainment ($400), vacations ($1,200) and fuel ($100). He says the family has always had a relatively modest lifestyle. Their homes are not large or luxurious; two of the children share a bedroom. They spend minimally on transportation, and the parents do not spend much on clothing or personal care. Their significant expenses are vacations and hobbies, many of which require sports equipment such as bikes and skis. The defendant says his total amount of monthly spending on the children is $2,520 and estimates that the plaintiff pays approximately the same. For this reason, he says that payment of a set-off amount according to the *Guidelines* is unreasonable, more than what is required to meet the children's needs and would result in a transfer of wealth to the plaintiff. He states that $1,000 monthly support from him is more than sufficient based on the plaintiff's earning capacity and the children's conditions, means, needs and circumstances.

[55] The plaintiff disputes the defendant's claim of a modest lifestyle. She states that their family income has allowed them to spend a large amount of money on their

children and they enjoy a higher standard of living than many other families. She does not provide a monthly budget for her expenses for the children. However, she disagrees with the reasonableness of the defendant's estimates of spending, saying that she believes they make significant expenditures on the children, including expenses for recreation, vacation and health care.

[56] The plaintiff also notes that she had to borrow from her professional corporation to make the down payment for her home and to purchase a vehicle for her personal use. She further says that her home is not big enough for the nanny to live there.

[57] The plaintiff argues that the set-off amount under the *Guidelines* is not excessive, given the lifestyle and expenditures for the children. She states that given the differences in their incomes, the financial impact on her of continuing the same lifestyle for the children is much greater than the financial impact on the defendant.

[58] The plaintiff further states that the table set-off amount fulfills the purpose of certainty, predictability and consistency of the *Guidelines*. She also notes that the set-off formula already incorporates an examination of each party's actual capacity to contribute to the expenses associated with raising children and what is reasonable to maintain equivalent standards of living in both homes. Finally, she notes a wealth transfer between parents is not in itself a reason to depart from the *Guidelines*.

[59] In exercising my discretion about the applicability of s. 9, assisted by the principles arising from s. 4, it is necessary to balance the concern of the defendant about the potential wealth transfer to the plaintiff, with the principle that children are entitled to benefit from the higher income of their father.

[60] I am persuaded by the holding of the Court in *B.P.E. v. A.E.* at para. 72:

> … In my view, the fact the set-off generated a high figure that would provide ample discretionary spending and would produce an indirect benefit to A ought not to have displaced the significant weight that ought to have been accorded to the set-off that was the starting point of the analysis.

[61] In other words, the fact that high child support payments will effectively transfer wealth between parents is not in itself reason to depart from the *Guidelines* calculations *(Francis v. Baker*, SCC decision at para. 41). In this case, in any event, I am not fully convinced that there will be a wealth transfer, given the number of activities of the three children, and the continuing focus of both parents on taking extensive vacations with their children. Some of the defendant's estimated spending seems low, especially school fees and supplies and sports, camps and entertainment, and vacations. I also note the focus of the Guidelines is on income, making the need for budget estimates much less important. Increased support may result in an increase in discretionary spending for the children, to which they are entitled by virtue of the high income levels of both parents. I also note that the defendant and plaintiff's combined incomes have remained relatively consistent, based on the information from the Corporation Financial Statements, and as a result the children have benefitted from the high incomes of both parents over the years. There is no reason why this should cease as a result of the separation.

[62] The defendant is required to pay a monthly amount of $3,322.60 based on the set-off amount calculated on the basis of the table amounts.

Should support payments be retroactive to April, 2019?

[63] The plaintiff requests any interim support payments be made retroactive to April, 2019, on the basis that she has been requesting them since February, 2019, and she

and the defendant stopped sharing the family home and expenses in March, 2019. She says she did not bring a formal application for child support sooner because she feared the defendant's threats of less cooperation with their shared parenting if he were required to pay child support. Her counsel also stated that they were attempting to negotiate a resolution outside of court. The plaintiff notes that the defendant did begin to pay $1,000 in each of October and November, once she advised him of her intention to make application for interim child support retroactive to April 1, 2019.

[64] The defendant objects to any retroactivity of child support. His main argument is that their 2019 income is uncertain and will remain so until May or June 2020 when they will have completed their tax returns and will have received their respective corporation financial statements. He also says that since the plaintiff was living with someone else from March to June, 2019, he is entitled to their household income information during those months before any child support is calculated.

[65] The Supreme Court of Canada has stated in *D.B. v. S.R.G.*, 2006 SCC 37, that in determining whether to make a retroactive support award, a court should strive for a holistic view of the matter and decide each case on the basis of its particular facts. The Supreme Court also held that the payor parent's interest in certainty must be balanced with the need for fairness to the child and for flexibility. The court should consider the following four specific factors:

a. the reason for the recipient parent's delay in seeking child support;
b. the conduct of the payor parent;
c. the past and present circumstances of the child, including the child's needs at the time the support should have been paid; and
d. whether the retroactive award might entail hardship.

Once the court determines that a retroactive child support award should be ordered, the award should, as a general rule, be retroactive to the date of effective notice by the recipient parent that child support should be paid or increased legal action; all that is required is that the topic be broached.

[66] In this case, while there was not an inordinate delay in bringing the formal application, the main reason for the nine-month gap between the notice and the application was the effect it might have on the negotiations for their shared parenting, according to the plaintiff. However, the initiation of the formal application prompted the defendant voluntarily to begin paying support of $1,000 a month. There was no evidence of any negative effect upon their shared parenting. Although we now have the benefit of hindsight, it still suggests that the delay in bringing the application was unnecessary.

[67] There was no evidence of misconduct on the part of the defendant, except to the extent he refused to pay child support. This is not sufficient to justify retroactive payments.

[68] There is no evidence that the children's needs were unmet. The plaintiff was living with someone else from March to June, meaning that her expenses were likely reduced during that period. There is no evidence that over the summer the children suffered as a result of an absence of child support.

[69] Finally, the defendant is unlikely to endure hardship, given his earnings, if a retroactive award is ordered.

[70] On review of all the circumstances, including the fact that the plaintiff was living with someone else from March to June, 2019, and that the defendant did start paying

some monies toward child support in October and November, 2019, I will order that the new support payments start in October, 2019.

Section 7 extraordinary expenses

[71] I will restrict my decision to the proportion of s. 7 expenses the plaintiff and defendant should each pay. As suggested by both parties, I will leave it to them to work out which expenses are included under s. 7.

[72] Section 7(2) of the *Guidelines* sets out the guiding principle that provides for the expenses under this section are shared by the spouses in proportion to their respective incomes. This is not a fixed rule or requirement, so in some cases the Court may depart from proportionate allocation. None of the kinds of situations where departure from the guiding principle exists here – i.e. substantial disparity in parental incomes such that one parent cannot afford the expense; past and present family support obligations; or unequal time sharing.

[73] I will order that s. 7 expenses be shared proportionate to each parent's income, as determined above in paragraph 19.

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DUNCAN J.