IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Nijjar v. Gill,*
2016 BCSC 1327

Date: 20160719
Docket: E150107
Registry: Vancouver

Between:

Jatinder Kaur Nijjar

Claimant

And

Lakhbir Singh Gill

Respondent

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment

Counsel for Jatinder Nijjar:	Ron Huinink
Counsel for Lakhbir Gill:	Fanda Wu
Place and Date of Hearing:	Vancouver, B.C. April 12 and 15, 2016
Place and Date of Judgment:	Vancouver, B.C. July 19, 2016

INTRODUCTION

[1] The claimant, Jatinder Nijjar, and the respondent, Lakhbir Gill, married on July 9, 2006. Currently, Ms. Nijjar is 41 years old and Mr. Gill is 40 years old.

[2] The parties have a nine-year-old son, S.G., who was born on July 14, 2007.

[3] Shortly after S.G.'s birth, the parties separated in late November 2007. Mr. Gill essentially abandoned his family, both financially and otherwise. He would disclaim any interest in his son for many years to come. The subsequent course of Mr. Gill's relationship with Ms. Nijjar and their son has been very unusual, as I will describe below.

[4] These proceedings will address various parenting issues. Despite later agreements between the parties as to custody of S.G. and child support, substantial issues arose in late 2014 when Mr. Gill indicated that he now wanted to be in his son's life. Ms. Nijjar ultimately refused.

[5] A trial has been scheduled for October 2016. In the meantime, on this summary trial application, Ms. Nijjar seeks an award of retroactive child support from Mr. Gill for the period from December 2007 to May 2012. Ms. Nijjar also seeks an order that Mr. Gill contribute to certain s. 7 expenses under the *Federal Child Support Guidelines,* SOR/97-175 (*"Guidelines"*), relating to S.G. in 2013/2014.

[6] Mr. Gill opposes the application. In particular, he objects to the matter proceeding by way of summary trial.

BACKGROUND FACTS

(1) Mr. Gill's Departure and Aftermath (2007-2009)

[7] The parties lived with Mr. Gill's parents after they were married in 2006. After S.G.'s birth in July 2007, Ms. Nijjar temporarily moved into her parents' home, where she could receive greater care in her recovery from the birth and related health issues.

[8] In November 2007, when S.G. was about four months old, Mr. Gill abandoned his entire family, including Ms. Nijjar and S.G. Mr. Gill would have no real contact with S.G. for approximately six years, or until mid-2013.

[9] Mr. Gill began planning his departure in September 2007. In October 2007, he began looking for another place to live. In November 2007, Mr. Gill began buying furniture and made arrangements to purchase, for his sole use, a condominium residence in Richmond, B.C. (the "Richmond Condo"). He collapsed his RRSP holdings to make the down payment. He purchased the Richmond Condo on November 21, 2007, for the price of $248,000.

[10] Mr. Gill hid these plans and his purchase of the Richmond Condo from Ms. Nijjar and his family. Ms. Nijjar would only learn about these events in July 2015, as a result of disclosure by Mr. Gill in these proceedings.

[11] News of Mr. Gill's departure to his parents was perfunctory.

[12] On November 30, 2007, Mr. Gill's parents shared with Ms. Nijjar an undated letter written by Mr. Gill:

> To: Mom & Dad
>
> I am writing to you to tell you that I am leaving home. I am not happy here, and have decided to be on my own. I know what I am doing [i]s not right and you will be very upset but this is what I want. I want to say I am sorry, that I have hurt you, but I can not live my life this way any more. As far as my son, [S.G.] goes please read the following letter and do as I have asked on the attached letter. I ask you please, do not come looking for me, as no one knows where I am. My friends do not even know where I am. So do not cause any more problems than you have to. I will not come back, and will be moving out of town soon. I wish you guys all the best and all the happiness in the world.
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> [Emphasis added]

[13] The attached letter referred to by Mr. Gill was dated November 30, 2007, and addressed "To: Whom It may Concern". In this letter, Mr. Gill indicated that his share of the proceeds from the real property on Arthur Drive in Ladner, B.C. ("the Ladner Property") owned by him, his father and brother were to go to S.G. "for his well being". The parties refer to this as the "Child Support Letter".

[14] Mr. Gill's departure without any further details was, of course, disconcerting to all members of his family. Efforts to locate him were unsuccessful.

[15] On January 28, 2008, Mr. Gill sent an email out of the blue to Ms. Nijjar. This communication and his later evidence make clear that Mr. Gill was well-aware of his obligations to pay child support for S.G. In the January 28 email, he declared that he had not signed the papers required to give his share of the Ladner Property to S.G., mainly because he did not trust his parents. He suggested settlement to the claimant. He wrote:

> … Either you can pay me back my $25000 [I] invested in the house, which [I] have records of giving the money to my parents. Along with the $25000 will be my share of fair market value of what the house can be sold for today, so my percentage of that. And this money in return, thru the legal system will distribute monthly payments for his upbringing until it runs out. Or two, you can keep the money and not demand child support payments for five years.
>
> Now you may ask how [I] came to five years, well with my $25000 plus fair market value of what the house could be sold for, I should receive $35000 - $40000 (estimate based on 2007 BC Assessment) divide that by what [I] would have to pay for child support payments, which would be roughly $575 a month.

[16] Ms. Nijjar understood from this "offer" that Mr. Gill wanted her to pay him the difference between $25,000 and the value of his interest, such that she would step into his shoes in relation to the Ladner Property. The $25,000 would be used to "prepay" his child support obligations relating to S.G.

[17] In any event, Ms. Nijjar did not have the means to take Mr. Gill up on this "offer".

[18] In addition, despite Mr. Gill suggesting in his January 28, 2008, email that he was obliged to pay $575 a month for child support, he was likely well-aware that his increased 2007 income required him to pay a higher amount of support ($705) under the *Guidelines*.

[19] Ms. Nijjar also states that she spoke with Mr. Gill in January 2008, at which time he indicated that he did not wish to have any contact with S.G. or play any role in his life.

[20] At some point, Ms. Nijjar moved back in with Mr. Gill's parents. She resided there until September 2008, at which time she and S.G. moved into her parent's home.

[21] On May 7, 2008, at Ms. Nijjar's request, Ms. Nijjar and Mr. Gill signed a one-paragraph agreement pursuant to s. 121 of the *Family Relations Act*, R.S.B.C. 1996, c. 128 ["*FRA*"]. It provides "that Jatinder Nijjar shall have sole custody and sole guardianship of [S.G.]" (the "Parenting Agreement"). The Parenting Agreement was filed in the Richmond Registry of the Provincial Court on June 10, 2008.

[22] At the time of the signing of the Parenting Agreement, Mr. Gill did not disclose that he had disposed of his interest in the Ladner Property. Just weeks earlier, in March 2008, Mr. Gill had received $25,000 from his parents in exchange for transferring all of his interest in the Ladner Property to certain family members.

[23] Thereafter, Mr. Gill used the entirety of the $25,000 proceeds (the "Proceeds") for his own use. Contrary to his stated intention as set out in the Child Support Letter and his January 28, 2008 email, he did not pay any child support to Ms. Nijjar, from the Proceeds or otherwise.

[24] He quite blithely explains the reason he didn't use the Proceeds to pay or prepay child support was that he was "gravely concerned" about his accumulated debts. It did not seem to occur to him to be gravely concerned about supporting his son. Mr. Gill would later state at his examination for discovery in July 2015:

> I needed the money to pay for bills and my mortgage. So I needed it for myself.

[25] Ms. Nijjar knew nothing of these transactions concerning the Ladner Property and the Proceeds. Mr. Gill and his parents did not advise Ms. Nijjar, in any way, about these dealings. She would only later learn of them in July 2015, as a result of disclosure in these proceedings.

[26] In following years, when S.G. was three, five and six years of age, Ms. Nijjar would take S.G. to the PNE, where Mr. Gill worked. She would see Mr. Gill from time to time from afar. Ms. Nijjar refers to these as "cameo" appearances.

[27] The next contact from Mr. Gill was an email to Ms. Nijjar on October 7, 2009. He apologized for his behaviour. He indicated that he wanted a divorce and that he would be filing for one soon. Mr. Gill did not contact Ms. Nijjar about a divorce for years to come and no such filing occurred as a result of this email.

[28] Mr. Gill admits to being financially able to support S.G. prior to October 2009 but did not do so because he was "selfish". In fact, he has been gainfully employed and earning substantial amounts since his son's birth.

(2) 2012 Support Agreement/Divorce (2012-2013)

[29] On June 4, 2012, the parties filed another agreement pursuant to s. 121(1) of the *FRA* with the Richmond Provincial Court (the "2012 Support Agreement"). This agreement provided for Mr. Gill to pay child support to Ms. Nijjar in the amount of $576 per month, on the 15th of every month commencing June 15, 2012, based on Mr. Gill having *Guideline* income of $62,000. The agreement also provided that Mr. Gill would provide Ms. Nijjar with a copy of his filed income tax return and notice of assessment on an annual basis commencing June 30, 2013.

[30] Mr. Gill did not provide any income tax documentation to establish his *Guideline* income to Ms. Nijjar prior to the execution of the 2012 Support Agreement. In fact, Mr. Gill's actual income was far higher from 2007-2009, after which it dipped to $61,793 in 2010 and $58,506 in 2011. His 2012 *Guideline* income was $65,141.

[31] In any event, the force of the 2012 Support Agreement appears to have been lost on Mr. Gill. For the next two-and-a-half years, until early 2015, Mr. Gill made no child support payments to Ms. Nijjar and failed to provide his income tax returns.

[32] Ms. Nijjar's evidence is that she asked Mr. Gill to pay support in accordance with the 2012 Support Agreement on numerous occasions. She says Mr. Gill's

typical response was that “money was tight at the time but that he would make good on it later”, or that he needed money to pay the mortgage on a property he co-owned with another man in Burnaby, B.C. He never made a payment.

[33] In February 2013, the parties filed a joint family claim by which they sought a divorce. Mr. Gill prepared all the documents to be signed and filed.

[34] In the usual fashion, before a divorce could be granted, they were required to establish to the Court that appropriate arrangements had been made for the support of S.G. They jointly filed a child support affidavit, sworn February 15, 2013, referring to the 2012 Support Agreement and that Mr. Gill would be making monthly payments of $576 per month based on his $62,000 annual income. At para. 11 of that affidavit, both stated:

> The amount of arrears of child support, as at 15/Feb/2013, under any existing order or written agreement is nil.

[35] On April 26, 2013, an order of divorce was granted.

[36] The above statement in the child support affidavit was, of course, not true to the knowledge of both parties. No child support had been paid by Mr. Gill at all, particularly under the 2012 Support Agreement, which required payments commencing June 2012.

(3) Mr. Gill’s Re-involvement with S.G. (2013-2014)

[37] From the time of his departure in late 2007 until mid-2013, Ms. Nijjar states that at no time did Mr. Gill make any efforts to inquire about the health, education or well-being of S.G. Mr. Gill’s describes these encounters as more significant. He stated that during these visits to the PNE he would briefly interact with this son, when Ms. Nijjar would bring him over to “say hi”.

[38] In December of 2012, Mr. Gill contacted Ms. Nijjar for the first time to request that he be allowed contact with his son. By this time, S.G. was about five-and-a half years old. S.G. did not know who his father was and had never asked his mother what became of him. Ms. Nijjar thought about this request and eventually agreed to

a number of trial meetings, on the condition that Mr. Gill would not tell S.G. that he was his father. During these visits, Mr. Gill was referred to by the parties as "mommy's friend".

[39] Ultimately, Ms. Nijjar decided that Mr. Gill's visits with S.G. were not in S.G.'s best interests and discontinued them in July 2014.

[40] Mr. Gill states that he had moved back into his parent's home by September of 2014.

(4) Court Proceedings Begin (2014-2015)

[41] In response to being denied access to S.G., Mr. Gill filed proceedings in the Richmond Provincial Court.

[42] On October 23, 2014, Mr. Gill filed an application in the Provincial Court seeking to vary the Parenting Agreement to provide that he and Ms. Nijjar share joint custody and guardianship of S.G., with his primary residence with Ms. Nijjar. Later, in the proceedings, Mr. Gill would seek regularly-scheduled, reasonable, and generous parenting time with his son.

[43] No doubt anticipating that the matter of child support would be raised, Mr. Gill filed an affidavit sworn October 22, 2014, stating:

> 17) I have attempted to pay [Ms. Nijjar] child support in accordance with the [2012 Support Agreement], but she refused to accept money from me. I believe this to be because it is her belief that if I do not pay for him then I cannot expect to insist on spending time with him.
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> 18) On September 26, 2014 I provided [Ms. Nijjar] with a cheque in the amount of $20,736.00 along with a spreadsheet showing that the cheque was for monthly child support for [S.G.] up to and including next June, 2015. To date she has not cashed it.

[44] Even accepting his evidence, it appears that Mr. Gill did not explain why he had failed to provide any payments from June 2012 to September 2014 in accordance with the 2012 Support Agreement.

[45] Mr. Gill later confirmed that he had obtained these monies from his parents. He said that he had mailed the cheque and spreadsheet to Ms. Nijjar.

[46] Ms. Nijjar denies that she received any such cheque or spreadsheet on September 26, 2014. Even so, her counsel made efforts to obtain a $20,736 cheque from Mr. Gill. Despite his assertions that he was in a position to make immediate payment of these monies, no cheque was then forthcoming. The cheque was not delivered to Ms. Nijjar until January 5, 2015.

[47] Other statements in Mr. Gill's October 2014 affidavit raise issues about his credibility. At para. 6 he states that he recently sold his townhome and moved back in with his parents. Ms. Nijjar understood this to reference the Burnaby property that Mr. Gill had earlier told her he owned and was paying the mortgage on.

[48] In fact, Ms. Nijjar later learned that Mr. Gill disposed of his Richmond Condo in 2011 (not 2014). Mr. Gill says that he allowed the properly to go into foreclosure. He filed a consumer proposal with a trustee in bankruptcy in January 2011 and moved out in late 2011.

[49] In addition, the Burnaby property Mr. Gill claimed to have owned and been making mortgage payments towards was not co-owned with another man; it was purchased by a woman, Natasa Petric, in 1999 and remains in her name. This was the property Mr. Gill indicated as his address on many of his tax returns (2007-2008, 2011-2014). He says he moved into a basement suite on the property in November 2011.

[50] The relationship between Ms. Petric and Mr. Gill is not clear, although recently Mr. Gill described her as a "friend". He also states that they dated in late 2011.

[51] Ms. Nijjar is of the view that when Mr. Gill advised her of his financial obligations regarding a property in 2013, he was referring to the Burnaby property. She is also of the view that he did have some ownership interest in that property with Ms. Petric, but that Ms. Petric paid him out in late 2014. Indeed, Mr. Gill's Form F8

sworn March 2, 2015, refers to him "borrowing" $28,800 from Ms. Petric in December 2014, around the time he commenced the Richmond Provincial Court proceedings. It appears that this loan was subsequently paid off by Mr. Gill's parents.

[52] Ms. Nijjar filed a reply to Mr. Gill's Provincial Court application on November 19, 2014, opposing the relief sought by him.

[53] On January 15, 2015, Ms. Nijjar commenced this family proceeding, seeking orders with respect to S.G., namely: interim and permanent sole custody and guardianship of S.G.; that Mr. Gill have no interim or permanent access or contact with S.G.; that Mr. Gill be restrained from communicating with S.G. until an investigation and report under s. 211 of the *FLA* have been conducted; and child support orders.

[54] On March 23, 2015, Master Taylor granted an order on Ms. Nijjar's application to consolidate the Provincial Court proceedings with those of this Court: *Nijjar v. Gill*, 2015 BCSC 437. As such, all parenting and child support issues are to be resolved in this Court.

(5) Status of Court Proceedings (2016)

[55] Since proceedings have begun in this Court, the following steps have taken place:

a) both parties have been examined for discovery. Mr. Gill was examined in July 2015, when many facts not then known to Ms. Nijjar were disclosed by Mr. Gill for the first time. Ms. Nijjar was examined in December 2015. Both parties were further examined in March 2016;

b) the parties have engaged in discovery of documents and the exchange of Form F8 financial disclosure. In doing so, Mr. Gill disclosed his income tax return documentation from 2007 for the first time;

c) an interim court order was granted on November 30, 2015, enjoining Mr. Gill from any access to or communications with S.G.;

d) on January 11, 2016, an order was granted that the parties obtain a report pursuant to s. 211 of the *Family Law Act,* S.B.C. 2011, c. 25 ["*FLA*"]; and

e) the matter has been set down for a five-day trial commencing October 3, 2016.

SUMMARY OF OUTSTANDING ISSUES

[56] The parties have each provided a recalculation of the amounts owing under the June 2012 Agreement from June 2012 to August 2015.

[57] It is agreed that on the basis of recalculation, Mr. Gill has paid all but the further sum of $102 for that period of time. In addition, it is my understanding that he continues to pay the correct child support *Guideline* amount to Ms. Nijjar.

[58] Accordingly, the most significant child support issue remaining in dispute is the ability of Ms. Nijjar to claim regular child support from the time of separation in December 2007 to May 2012 (namely, before the 2012 Support Agreement was executed which required payments commencing June 2012).

[59] The calculations below indicate that, if Mr. Gill is held responsible for child support from December 2007 to May 2012, he owes the further sum of $35,187. The schedule of Mr. Gill's *Guideline* income and the calculations (to August 2015) are as follows:

Year	Mr. Gill's Line 150 Income	Monthly Table Amount	Number of Months	Annual Table Amount
2007	$75,944	$705	1	$705
2008	$65,189	$609	12	$7,308
2009	$73,637	$686	12	$8,232

2010	$61,793	$577	12	$6,924
2011	$58,506	$546	12	$6,552
2012	$65,141	$606	12	$7,272
2013	$68,054	$634	12	$7,608
2014	$71,310	$666	12	$7,992
2015	$71,310 (using 2014 figure)	$666	8 (to August 31)	$5,328
TOTAL				**$57,921**
Amount paid by Mr. Gill				$22,734
BALANCE				**$35,187**

[60] In addition, there is disagreement concerning Ms. Nijjar's claim for a contribution of $4,111 from Mr. Gill for certain Sylvan Learning Center ("Sylvan") expenses of $5,002.50 incurred in 2013/2014, and her application for an order that he continue to pay for any future expenses with Sylvan. This issue engages another matter in dispute; namely, the determination of Ms. Nijjar's *Guideline* income from 2013.

[61] Ms. Nijjar also seeks the fairly uncontroversial order that the parties exchange tax information each year for the purpose of calculating ongoing child support.

[62] Finally, Ms. Nijjar seeks an order that Mr. Gill pay a fine pursuant to s. 213 of the *FLA* in an amount not exceeding $5,000 for repeatedly failing to disclose required financial information and documentation.

[63] Before embarking on this application, I heard Mr. Gill's application for an adjournment on the basis that the matter was not appropriate for summary trial. I dismissed that adjournment application, having decided to hear all the submissions and consider all the evidence prior to making a determination on the issue.

[64] I have now had an opportunity to read all the evidence in detail and consider the comprehensive written and oral submissions of the parties. Having done so, I am of the view that Mr. Gill's position is correct and that all issues should be addressed at the trial of this matter, currently set for five days commencing October 3, 2016.

SUITABILITY FOR SUMMARY TRIAL

[65] The relevant portions of the *Supreme Court Family Rules* relating to summary trials are found in Rule 11-3(15):

> **Judgment**
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> (15) On the hearing of a summary trial application, the court may
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> (a) grant judgment in favour of any party, either on an issue or generally, unless
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> (i) the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law, or
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> (ii) the court is of the opinion that it would be unjust to decide the issues on the application,
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> (b) impose terms respecting enforcement of the judgment, including a stay of execution, and
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> (c) award costs.

[66] I am aware of the factors to be considered in deciding whether a summary trial is appropriate, arising from *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 (C.A.), and the many cases that have followed.

[67] Those authorities indicate that, in considering whether it would be unjust to proceed summarily, the courts have typically considered the complexity of the matter, any urgency and prejudice likely to arise by reason of delay, the cost of taking the case forward to a conventional trial in relation to the amount involved, the course of the proceedings, whether credibility is a critical factor in the determination of the dispute, whether the summary trial may create an unnecessary complexity in the resolution of the dispute and whether the application would result in litigating in slices.

(1) Regular Child Support (2007-2012)

[68] Ms. Nijjar argues that Mr. Gill's obligation to pay child support arose on November 30, 2007. There appears to be little controversy in that statement.

[69] However, Ms. Nijjar then says that Mr. Gill became contractually bound to pay child support in March 2008, when he received $25,000 from his parents in exchange for his interest in the Ladner Property. She says this obligation arises because he "took the money and ran", rather than honouring his previous intention to use this money for child support as set out in his January 2008 email to Ms. Nijjar. As such, Ms. Nijjar suggests that this case should be considered one of enforcement or collection of regular child support.

[70] I have serious doubts that this is the correct approach. The cases cited in support are all cases involving the cancellation or reduction of arrears of child support owed as a result of court orders: see *Berntzen v. Berntzen* (1982), 27 R.F.L. (2d) 174; *McIvor v. British Columbia (Director of Maintenance & Enforcement)* (1998), 105 B.C.A.C. 221; *Earle v. Earle*, 1999 BCSC 283; *Ghislieri v. Ghislieri*, 2007 BCCA 512; and *Semancik v. Saunders*, 2011 BCCA 264.

[71] Here, it is common ground that no order was in place requiring payment of child support by Mr. Gill until the 2012 Support Agreement was executed by the parties.

[72] Ms. Nijjar's alternative argument, and the one I think is more appropriate, is that the application for payment in this period of time can be characterized as one for retroactive child support.

[73] The discretion to make an order of retroactive child support is found in s. 15.1 of the *Divorce Act* and s. 170(b) of the *FLA*. Ms. Nijjar seeks to proceed under only the *Divorce Act*.

[74] The circumstances in which retroactive child support may be awarded were addressed in *D.B.S. v. S.R.G.*, 2006 SCC 37. The Supreme Court of Canada

directed trial judges to adopt a broad and holistic approach in the application of four factors, summarized at para. 133, none of which are determinative on their own:

> a) Is there a reasonable excuse for why support was not sought earlier?
>
> b) Was there any blameworthy conduct on the part of the payor parent?
>
> c) Is a retroactive award appropriate in light of the child's past and present circumstances?
>
> d) Will a retroactive award cause hardship to the payor parent or to his or her other children?

[75] At paras. 120-125 of *D.B.S.*, the Court stated that the commencement date for an award of retroactive child support should not be restricted to the date an application to a court or formal notice is given. Rather, the court should look to the date of effective notice by the recipient parent to the payor parent. Effective notice was defined as "any indication by the recipient parent that child support should be paid …": para. 121. The Court suggested that this is generally when the topic of child support is broached.

[76] There are circumstances where it is reasonable to infer that effective notice has been given to a payor parent, even in the absence of a specific request. This is founded in the principle that both parents have a legal obligation to contribute to the support of their child after separation.

[77] Mr. Gill's counsel has referred me to a very recent decision of our Court of Appeal where the *D.B.S.* factors were applied in somewhat similar circumstances: *Brown v. Kucher*, 2016 BCCA 267.

[78] Mr. Gill advances a number of arguments as to why a summary trial is not appropriate, all arising from the factors to be considered in the *D.B.S.* analysis.

[79] On the issue of whether Ms. Nijjar has a reasonable excuse for the delay, there are direct conflicts between the parties regarding Ms. Nijjar's efforts to obtain payment of child support from 2007-2012.

[80] The substance of the November 2007 letter and later email exchanges is clear. However, Ms. Nijjar also states in her evidence that she verbally asked Mr. Gill

for payment of child support from time to time. Mr. Gill denies this and submits that Ms. Nijjar's evidence should not be believed.

[81] Mr. Gill also challenges Ms. Nijjar's assertion that, notwithstanding that no payments were made from 2007 to late 2014, she still somehow expected that Mr. Gill had secured $25,000 to pay child support. She admits not responding to Mr. Gill's various emails or texts. In my view, there is currently no clear explanation as to why she did not raise the issue in a response to any of these communications, particularly where she was clearly aware of her right to child support payments and where she now asserts that she needed those payments. In fact, the matter of the $25,000 was not broached by her until Mr. Gill's examination for discovery in July 2015, when she learned that the Ladner Property had been transferred by him and the $25,000 had been spent.

[82] In addition, in her affidavit evidence addressing why the matter was not raised in the context of the 2012 Support Agreement and the later divorce, Ms. Nijjar offers two different explanations for her sworn evidence that no arrears existed at that time.

[83] Ms. Nijjar states in her affidavit #2, sworn June 23, 2015, that when she signed the child support affidavit:

> 11. … [Mr. Gill] had not yet told me that he did not intend on following through with the promise to support [S.G.] contained in the [Child Support Letter] and the January 2008 communication. As a result, it was my understanding that he did not have arrears of child support because he had in place an arrangement to pay support for those years. ….

[84] Later, in her affidavit #3, sworn September 16, 2015, Ms. Nijjar gave another reason why she signed the child support affidavit:

> 24. … I noticed this error and brought it to the attention of the Respondent. The Respondent told me that he would soon be paying up but that it he indicated there were any arrears of child support, I would not be able to get my divorce.

[85] Mr. Gill denies that the matter of the outstanding child support was raised by Ms. Nijjar in June 2012.

[86] It will be readily apparent from the above description of some of the evidence relating to one of the *D.B.S.* factors (whether Ms. Nijjar acted reasonably) that the credibility of both parties is in issue.

[87] In *Bank of Montreal v. Fraser*, 2013 BCSC 2328, Justice Ballance commented on the Court's task in dealing with conflicting testimony on a summary trial application:

> [26] Whether to proceed summarily is a matter for the discretion of the judge hearing the application. It has been observed that determining on which side of the line a particular case falls can be a matter of some delicacy: *North Fraser Harbour Commission v. Hardy BBT Ltd.*, [1994] B.C.J. No. 1672 (S.C.).
>
> [27] The test for the suitability of summary disposition is not assessed by asking whether a full trial could conceivably turn something up or produce a different outcome. When an application for summary trial is made, the parties are expected to take every reasonable step to put themselves in the best possible position and adduce all evidence they believe is necessary for judgment: *R.G.H. v. British Columbia*, [2010] B.C.J. No. 806, 2010 BCCA 220.
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> [28] Being what it is, litigation almost invariably involves disputed facts.
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> [29] In *Cotton v. Wellsby* (1991), 59 B.C.L.R. (2d) 366 (C.A.), Madam Justice Southin cautioned against the use of the summary trial procedure when there are conflicting affidavits and the issues of who said what to whom and when are of significance. At p. 378, her Ladyship reminded:
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> > Where such issues are crucial, the trial judge must be alive to the possibility that the case is simply not suitable for summary trial.
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> [30] It is settled principle that the existence of conflicting evidence, of itself, is not conclusive that a summary trial is unsuitable. The court is not precluded from finding the facts essential to decide the issues simply because material evidence is in conflict. So long as the judge is able to find the facts required to render judgment by reference to other evidence, the matter may well be amenable to summary determination even where there are conflicting affidavits on central issues: *Placer Development Ltd. v. Skyline Explorations Ltd.* (1985), 67 B.C.L.R.366, 1985 CarswellBC 336 (C.A.); *Steen McVeigh v. Boeriu*, 2011 BCSC 400 at para. 49.
>
> [31] That state of affairs is to be distinguished from the case where the only relevant evidence before the court on a material point is comprised of the conflicting testimony in the affidavits, and it is not possible for the court to decide the case summarily without making findings of credibility and ultimately preferring one affidavit over the other. In that situation, the general rule is that it is not appropriate to proceed summarily: *Jutt v. Doehring* (1993), 82 B.C.L.R. (2d) 223 (C.A.); *Cotton v. Wellsby, supra*; *Bouchal v. Slovakotour Inc.* (1993), 83 B.C.L.R. (2d) 103, 1993 CarswellBC 235 (C.A.); *Parker v. Campbell*, [2002] B.C.J. No. 1697 (S.C.).

> [32] Where the Court concludes there is insufficient evidence before it to decide the issues, it may adjourn the application and order that one or more deponents attend for cross-examination or that further affidavit material be filed. Another option is to simply decline to try the issues summarily and order a conventional trial: *Placer Development v. Skyline Explorations* (1985), 67 B.C.L.R. 366 (C.A.).
>
> [33] Where there is sufficient material before the court to enable it to decide the issue summarily, it does not follow that the trial will proceed that way. It remains open to the court to decline to proceed if, in all the circumstances, the court considers it would be unjust to do so. The concept of whether it would be unjust to proceed summarily is to be given a broad meaning, taking into account the interests not only of the litigants at hand, but the interests of other persons as well: *Stoney Creek Indian Bank v. British Columbia* (1999), 69 B.C.L.R. (3d) 1 (C.A.), 1999 BCCA 527, 1999 CarswellBC 2166 (C.A.); leave to appeal refused (2000), 2000 CarswellBC 1752, 2000 CarswellBC 1753 (S.C.C.); *Topgro Greenhouses Ltd. v. DeVries*, [2007] B.C.J. No. 883.
>
> [Emphasis added]

[88] I am reluctantly drawn to the conclusion that I am unable to find the necessary facts in order to determine whether Ms. Nijjar acted reasonably in delaying her claim for retroactive child support for some eight years. In my view, it is necessary for the trier of fact to have the benefit of both parties' *viva voce* evidence, which can then be tested in cross-examination.

[89] Similarly, issues arise as to whether Mr. Gill's conduct in not paying child support during this period of time has been blameworthy. Ms. Nijjar asserts that his conduct has been egregious, citing a number of factors. I will not list them all but they include allegations that he made untrue "excuses" when asked by Ms. Nijjar to pay under the 2012 Support Agreement, and that he "used threats and intimidation".

[90] Mr. Gill did later describe his January 28, 2008 email as "intimidation". I am not aware of what other "threats" are referred to.

[91] Frankly, it would be hard not to describe at least some of Mr. Gill's conduct as blameworthy. Mr. Gill conceded as much in argument. However, Mr. Gill argues that this factor is balanced as against Ms. Nijjar's delay in seeking child support.

[92] It will be apparent from my recitation of the background facts that the fairly significant financial transactions by Mr. Gill from 2007 to 2012 are very much in issue, including the purchase of the Richmond Condo, the disposition of his interest in the Ladner Property and his interest, if any, in the Burnaby residence where he lived with Ms. Petric. There are also allegations that he was financially extravagant.

[93] There are further issues raised by Mr. Gill as to the extent of his communications with Ms. Nijjar regarding payments under the 2012 Support Agreement.

[94] The evidence as to the circumstances of S.G. while he and Ms. Nijjar were living with Mr. Gill's parents after the separation is also a matter of some controversy. Ms. Nijjar states that her in-laws did little to help her in caring for S.G., both financially and otherwise. To the contrary, Mr. Gill's mother, Balvinder Gill, states in her evidence that she and Mr. Gill's father were very much involved in S.G.'s upbringing. She attests to taking time off work to care for S.G. Mr. Gill's mother also says that she and her husband assisted financially.

[95] Mr. Gill also raises issues concerning Ms. Nijjar's income and expenses. He contends that she has fewer expenses and more income than what she alleges. Mr. Gill argues that income of $30,000 should be imputed to Ms. Nijjar, rather than the amounts stated in her income tax returns. A determination of this issue will also affect an analysis of the s. 7 expenses incurred by Ms. Nijjar in 2013/2014 relating to Sylvan.

[96] I agree with Mr. Gill that the evidence of the family finances from 2007-2012 and how the non-payment of child support might have affected S.G. has not been comprehensively addressed in the affidavit evidence.

[97] Again, I am unable to resolve this factual dispute in reaching conclusions as to how S.G. might have been impacted by Mr. Gill's lack of payments during 2007-2012. It is clearly necessary to determine how S.G.'s needs were affected during

that period of time. Within that context, Mr. Gill's parents' contributions, if any, will need to be considered.

[98] The final issue concerning regular child support, which is very much in dispute, is whether any retroactive payment would be a hardship to Mr. Gill. Mr. Gill plainly states that he doesn't have the financial resources to pay any retroactive amount. He states that his only asset is a $15,000 RRSP. Ms. Nijjar suggests that he should cash in the RRSP and that he has the ability to borrow the amount owing from his parents; however, Mr. Gill says that he is already in debt to his parents for $75,000, and they cannot afford to advance him more monies.

[99] Ms. Nijjar also suggests that since he abandoned them in 2007, Mr. Gill has added substantially to his skills and accreditations. She argues that he is on the cusp of an accreditation as a Chartered Public Accountant, which Mr. Gill expects will pay him over $100,000 per year. Accordingly, Ms. Nijjar argues that he will have the capacity to pay in the future. In my view, all these questions should be tested at a trial. The matter of Mr. Gill's career prospects will no doubt be considered in deciding whether an award is appropriate and, if so, in what amount and when any payment is due.

[100] The amount sought – $35,187 – is substantial. There is no doubt that such an award will be significant to Mr. Gill.

[101] There is also a matter of access to justice. Mr. Gill argues that he has expended substantial monies on legal fees to date and will be required to expend further substantial amounts to proceed to trial. He contends that if he is also required to pay retroactive child support, he will simply be unable to afford to go to trial and he will lose any further opportunity to re-establish a relationship with his son.

[102] One might feel inclined to be unsympathetic to Mr. Gill's arguments, since his problems can be described more as self-inflicted than arising from circumstances beyond his control. It was his clear decision to abandon S.G. shortly after his birth and not pay child support for many years to come, even in the face of his express

agreement in the 2012 Support Agreement. His complaints about not seeing his son since July 2014 also ring somewhat hollow, since he was clearly content not to see S.G. at all for almost six years, from late 2007 to mid-2013.

[103] Having said that, the parties have been on a clear path now for some 18 months toward a resolution of the major issues of custody/access and parenting time. It is evidently in S.G.'s best interests that there is a decision as to whether Mr. Gill will be a figure in his life.

[104] I agree that the retroactive child support issues are also significant. However, they arise from the factual matrix that will inevitably be considered at the trial in relation to the custody/access and parenting issues. I appreciate that dealing with these child support issues at trial will add somewhat to the time required, but not unduly so.

[105] Finally, as Mr. Gill argues, the matter can hardly be described as urgent. These amounts have been outstanding for many years now. While timely payment of child support is justifiably important, I do not consider that a further delay of three-four months (to October 2016) justifies departing from a process that will see an overall resolution of all outstanding matters.

(2) The Sylvan Expenses

[106] Substantial factual issues also arise in relation to this expense.

[107] S.G. has several learning disabilities. Difficulties were identified when he was three years old and continued when he was in kindergarten (2012-2013). Ms. Nijjar states that she later investigated what she could do to assist her son and obtained various recommendations. As a result, she considered it best that S.G. participate in a supplemental learning programme, such as that provided by Sylvan.

[108] Ms. Nijjar states that she advised Mr. Gill of S.G.'s difficulties and the possibility of sending him to a programme at Sylvan for testing and lessons. As a

result, S.G. attended Sylvan from September 2013 to November 2014. The cost of the programme over that time was $5,092.50.

[109] Despite some suggestion in the evidence that he agreed to S.G.'s attendance at Sylvan, Mr. Gill now states that he was not consulted and did not agree.

[110] Ms. Nijjar also states that she was told by Mr. Gill that he would pay 100% of the costs of the Sylvan attendance. She says that despite his earlier statement, Mr. Gill has refused to pay or even contribute to this cost.

[111] Mr. Gill denies that he refused to pay for or contribute to these costs. He says that when Ms. Nijjar mentioned the programme, he offered to contribute to the cost, but Ms. Nijjar only said "okay, okay". There is no written confirmation of any of these exchanges. Mr. Gill contends that the first time he became aware of the actual cost was when Ms. Nijjar's counsel sent a letter in February 2015, after these proceedings were commenced, but that this letter only referred to *future* costs of S.G. attending at Sylvan.

[112] Even more confusing, at his discovery in July 2015, Mr. Gill conceded that it was appropriate and necessary to send S.G. to Sylvan. He stated that he would need time to come up with plan in order to contribute to the cost. That position has changed; he now challenges the reasonableness of Ms. Nijjar incurring that expense in the first place, particularly given their respective incomes.

[113] A later letter from Ms. Nijjar's counsel in October 2015 did set out the past amounts expended and stated that Ms. Nijjar sought payment from Mr. Gill in the amount of $4,111. This is based on Mr. Gill paying 78.65% and 82.33% for the expenses in 2013 and 2014 respectively. I note that the lateness of this communication is understandable because Ms. Nijjar had only recently received Mr. Gill's historical income tax documentation from 2013-2014, which allowed her to calculate the proportionate sharing of these expenses.

[114] Ms. Nijjar remains of the view that it is important for S.G. to continue this extra learning in order to continue his progress. However, Ms. Nijjar states that without

financial support from Mr. Gill for these expenses (both past and in the future), she cannot afford to pay for continuing S.G.'s attendance at the programme. In the meantime, S.G. is not attending Sylvan at this time.

[115] As with the other issues, there is so much conflicting evidence on the issue that I am unable to find the necessary facts. In my view, it is appropriate that this minor issue be addressed at the trial.

Conclusions and Orders

[116] For the above reasons, I dismiss Ms. Nijjar's application. I have concluded that given the conflicts in the evidence, the matter is not suitable for summary determination. I also conclude that it would be unjust to proceed in this fashion when I expect that the facts that would be determined on this application will inevitably be considered at the trial, as they are significantly intertwined with the custody/access and parenting issues to be addressed. Accordingly, proceeding now would potentially give rise to findings of fact that may hamper a proper resolution of the other issues.

[117] I would reserve the matter of costs of this application for consideration and determination by the trial judge. Should the matter not proceed to trial, for whatever reason, the parties have liberty to apply before me to resolve that matter.

Fitzpatrick J.