

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
Heather Margaret McArthur)
)
Applicant) Mason Morningstar and Aiishwariya Haran
) (limited-scope retainer), for the Applicant,
) and the Applicant who was self-represented
– and –) for part of the trial
)
Loc Phu Le (a.k.a. Jay Le))
)
Respondent) Kristen Normandin and Cara Senese, for the
) Respondent
)
)
)
) **HEARD:** May 15, 16, 17, 18 and 19, 2023

2023 ONSC 4897 (CanLII)

JUDGMENT

SHARMA J.

- [1] This Judgment concludes a five-day trial. Closing submissions were received in writing on June 1, 2023.
- [2] The Applicant, Heather McArthur, seeks orders for sole decision-making, parenting time, spousal support and child support in relation to the parties’ child, JDL, born September 14, 2020 (the “child”), although parenting time was settled mid-trial. She also seeks a restraining/non-harassment order. For the support claims, she seeks to impute an income to the respondent of \$900,000. While not expressly sought in her Application, the Applicant alluded at trial to the possibility of a relocation.
- [3] The Respondent, Jay Le, seeks orders for joint decision-making, and equal parenting time on a 2-2-3 schedule, which shall move to a 2-2-5-5 schedule when the child begins Junior Kindergarten in September 2024. His position on child support is that he has made overpayments on what he owes, after considering his income, support payments to the Applicant, and his payment of expenses for the condo in which the Applicant lived exclusively since separation. He argues the Applicant’s spousal support claim, and her request for a restraining/non-harassment order should be dismissed. He also seeks the return of a dog which the Applicant possesses.

- [4] Prior to trial, consent Orders were made settling the holiday parenting schedule, and that the parties communicate through Our Family Wizard. Myers J. presided over a mid-trial settlement conference at which point the regular parenting schedule was also settled. Therefore, the parenting issues to be decided are decision-making responsibility and the Applicant's claim to relocate. The financial issues for determination are the parties' respective incomes, a determination of child support and s. 7 expenses, the Applicant's claim for spousal support. I also address the issue of ownership of a dog, and the Applicant's claim for a restraining/non-harassment order.
- [5] In this Judgment, and with no disrespect to either party, I refer to the Applicant as Heather and the Respondent as Jay. This is how they were often referred to at trial.
- [6] The parties were not married. The relief sought is pursuant to the *Children's Law Reform Act*, R.S.O. 1990, c. C.12 ("CLRA") and the *Family Law Act*, R.S.O. 1990, c. F.3 ("FLA").
- [7] The issues to be determined are:
- a. Who should exercise decision-making responsibility over the child? Should a restraining/non-harassment order issue?
 - b. Whether Heather should be permitted to relocate from Toronto with the child? Should there be a restriction on how far apart the parties must live given the parties' shared parenting schedule?
 - c. What are the parties' respective incomes for determining child and spousal support?
 - d. What retroactive and prospective child support and s.7 expense orders should be made?
 - e. Is Heather entitled to spousal support? If so, what amount is she entitled to receive retroactively and prospectively?
 - f. Of the payments and contributions made by Jay, has he satisfied any retroactive support obligations by the payments and contributions he has made to Heather? Does Heather owe an amount to Jay?
 - g. Who owns the dog?

Overview

- [8] In the Spring of 2019, Heather and Jay both lived in separate rented units at 75 Portland Street, Toronto. Jay worked as a process server for Solution Process Serving and earned employment income of roughly \$83,000. Heather was self-employed, operating a concierge business. Her 2019 corporate tax return shows modest income of \$7,489, although that year she had been supported by an ex-boyfriend who had paid for her rent and provided her with a Range Rover.

- [9] At Jay's request, Victoria Zingaro, the owner of neighbouring juice bar, arranged for the parties to meet at a dinner party. Victoria had known Jay and Jay had seen Heather frequent the juice bar. Jay and Heather enjoyed each other's company at the dinner party.
- [10] In June 2019, Jay asked Heather out on a date. They continued to see each other in Toronto, although it was interrupted by travel plans Heather had pre-arranged to Bermuda.
- [11] Heather had also planned a three-week trip to Italy in 2019. She invited Jay to join her. Jay accepted. Jay did not dispute Heather's evidence that, on this trip, they enjoyed many luxuries, including dining at Michelin star restaurants, shopping at designer boutiques, and staying at 5-star hotels. It was also not disputed that Heather made all the travel arrangements, and that Jay paid for everything.
- [12] Prior to leaving for Italy, Jay invited Heather to see Unit 524 at 75 Portland Street. According to Heather, while they were in Italy, Jay asked Heather to move in with him. Jay purchased Unit 524 - 75 Portland Street (the "condo"). In October of 2019, after returning from Italy, the parties moved into the condo.
- [13] After moving in together, both parties' evidence was that they lived a vibrant lifestyle as a young couple. They went out a lot for dinners and on shopping trips. Heather gave evidence of shopping trips where Jay bought her two bracelets from Tiffany's for \$14,000, a cosmetic bag from Louis Vuitton, and a purchase at Chanel for \$5,000. Heather's evidence was that Jay paid for all of this by credit card or cash. Jay did not dispute this in his evidence. Around the time of moving in together, Jay bought Heather a Rolex watch, but they disagree on whether it cost \$6,500 or \$36,000.
- [14] Heather alleged at trial that Jay's ability to afford these luxuries was from dealing drugs, which Jay denied. She testified that she asked him while they were dating whether he was a drug dealer, and he said yes. Jay offered a different explanation. He gave evidence that, in 2018, he received the bulk of the proceeds of sale from a restaurant that he used to own, and which sold in 2015 for \$100,000. His position is that these funds supported their lavish lifestyle.
- [15] In December 2019, they travelled to Columbia to attend a wedding of one of Jay's friends, and later that month travelled to Switzerland over the Christmas holidays. After they returned to Toronto in January 2020, Heather told Jay that she was pregnant. Jay was shocked with the news, but at the same time excited to become a father.
- [16] Both parties testified that there was growing conflict in their relationship, however, there was no physical violence prior to the child being born on September 14, 2020.
- [17] Parties were jointly involved in the child's daily life soon after he was born. After the child was born, parties were also assisted by a nanny named Kristy, who was Heather's housekeeper when Heather lived in the rental unit.
- [18] Both parties testified about disagreements leading up to January 1, 2021, which was the day Jay moved out of the condo. Jay voluntarily left his condo, leaving Heather and the

child. According to Jay, he needed space. However, he would return to the condo multiple times each day to spend time with the child, often as many as three times a day. There was evidence of the parties co-parenting well through parts of 2021, although there were also “rough patches” and disagreements. Heather testified that the relationship became cold, devoid of feeling, and that there were two instances of physical violence and a threat of violence. Jay testified that Heather engaged in coercive behaviour by threatening to withhold the child from him. She is alleged to have said that a trial would not result in a favourable outcome for him because her father is a participant in the justice system and because Jay has prior criminal convictions.

- [19] By September 2021, if not sooner, Heather had been communicating with Jay about formalizing a parenting plan and financial support.
- [20] On October 12, 2021, Heather called the police. According to her, she did so after Jay threatened to have someone shoot her if she did not abandon her lawyer, and then he smashed her phone. When the police arrived, Heather advised the police of the alleged prior physical abuse.
- [21] Jay was arrested and charged with assault and mischief. Those criminal charges are before the Ontario Court of Justice. A trial was expected to be heard in June 2023. Subsequent charges were also laid against Jay for harassment and failing to comply with undertakings, but Jay has either been acquitted of those charges or they have been withdrawn.
- [22] On October 18, 2021, this Application was commenced.
- [23] Heather brought a motion that was heard on March 29, 2022 seeking orders for interim child and spousal support, plus an interim preservation order.
- [24] On April 20, 2022, Papageorgiou J. made interim, without prejudice orders. First, a preservation order under s. 40 of the *FLA* in relation to Jay’s investment account and the condo in which the parties lived. Next, she imputed an income to Jay of \$400,000 based on evidence of his spending. On this income, she ordered interim spousal support be paid by Jay to Heather in the amount \$8,553 per month, commencing February 1, 2022, and interim child support be paid in the amount of \$3,099 per month, commencing May 1, 2022.
- [25] Jay also brought motions. His motion for increased parenting time was settled on consent on March 20, 2022, resulting in a graduated increase to his parenting time. He also brought a motion to travel to Vietnam for Lunar New Year. On December 8, 2022, Brownstone J. denied that relief due to concerns of the child’s capacity to travel long distances at his age.
- [26] Jay has paid all outstanding cost orders.
- [27] Jay has not made all support payments as ordered by Papageorgiou J. However, he has paid to the Family Responsibility Office (“FRO”) roughly \$73,000 to satisfy his support obligations. As of May 3, 2023, FRO’s Statement of Arrears reflected roughly \$116,000 in support arrears owing.

- [28] After separation on January 1, 2021, Jay continued to pay all mortgage, maintenance fees, property taxes and insurance on the condo, without contribution from Heather. Jay testified that he was unable to continue to make the payments while also meeting his support obligations. He ceased making all condo payments in August 2022.
- [29] Prior to Papageorgiou J.'s preservation order being released, Jay had negotiated an Agreement of Purchase and Sale for the condo. Ms. Zingaro was the purchaser. After the preservation order was made, Heather did not consent to the sale of the condo. Heather confronted Ms. Zingaro and accused her of forcing Heather and the child out of the condo. As a result of this interaction, Ms. Zingaro no longer wished to purchase the condo. Jay consented to release Ms. Zingaro from the Agreement of Purchase and Sale.
- [30] By September 15, 2022, Jay had defaulted on his mortgage payments to BMO. By April 10, 2023, BMO had obtained judgment. Heather and the child continue to live at the condo. At the time of trial, an eviction was expected to be enforced by the sheriff imminently.

Credibility

- [31] The Court must consider many factors when assessing credibility. It must do its best to articulate “the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events”: *R. v. Gagnon*, 2006 SCC 17 (S.C.C.), at para. 20.
- [32] The Court may accept some, none or all of a witness’ evidence: *R. v. D.R.*, 1996 CanLII 207 (SCC), [1996] 2 S.C.R. 291 *per* L’Heureux-Dubé J. (in dissent in the result) at p. 318; *R v. Cunsolo*, 2011 ONSC 1349 (CanLII) at para 228.
- [33] The assessment of credibility is a “holistic undertaking, incapable of precise formulation”: *Dunford v. Hamel*, [2018] ONSC 3427 at para. 20. However, certain factors are often relied upon in undertaking an assessment of credibility, as listed more fully in *McBennett v. Danis*, 2021 ONSC 3610 at para. 41:
- a. inconsistencies in the evidence, which may exist between a witness’ evidence and various other things – the evidence of other credible witnesses, the documentary evidence, or the witness’ previous evidence;
 - b. whether a witness has a motive to deceive;
 - c. whether the evidence is inherently improbable and implausible? Is it “in harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions?” (*Faryna v. Chorny*, 1951 CanLII 252 (BC CA), [1952] 2 DLR 354 at at p. 357);
 - d. Whether a witness is straightforward or “evasive, strategic, hesitant or biased”;
and

- e. Whether a witness is able to make concessions or gives self-serving evidence.
- [34] My impression of both parties, from their testimony, was that they both suffered trauma, either from the events leading to this litigation, by the family and criminal court processes, and by the uncertainty of the outcome of this litigation and their respective financial futures. This is not uncommon for many family litigants.
- [35] Some of the parties' testimony I found to be credible and consistent with other evidence, including the other party's testimony. I found other aspects to be unreliable.
- [36] I begin with Heather. I found some of her testimony credible. She made concessions in her testimony with respect to Jay, his ability and capacity to parent, and her willingness to work with Jay on parenting issues. She admitted and did not challenge inconsistencies in her evidence. She was not argumentative.
- [37] However, I find that she was not truthful with other parts of her evidence and that she had motive to be dishonest.
- [38] Heather described an event that occurred on the evening December 22, 2022. This was after Jay had moved out, after this litigation had commenced, and on a night when the child was in Heather's care. She testified that she had a prescription for Propranolol to manage her anxiety, as well as a prescription for Lorazepam, a sedative to take as required. She had picked up her prescriptions from the pharmacy, but because of a shortage of Propranolol, she was only given two tablets. She testified that she picked up the child, had dinner, gave the child a bath, read to him and put him to bed. There was an upcoming disclosure motion. She had work that evening to prepare for the motion. According to Heather, she felt she needed to take a Propranolol, but she decided not to take one because of her limited supply. Instead, she took a Lorazepam. She testified that she also drank one glass of wine. Later in the evening, she called a friend to say she was not feeling well, and the next thing she remembered she was in hospital with two police officers. She understood that Jay had later came to the condo to pick up the child and their dog.
- [39] On cross-examination, she admitted that she was unconscious when the police arrived at her home on December 22, 2022. The paramedics report from December 22, 2022 was admitted into evidence as a business record, on consent. It records that Emergency Medical Services staff witnessed an empty bottle of wine in the condo. They found Heather sleeping and the child lying beside her. Heather was not responsive until a sternal rub roused her.
- [40] On cross-examination, Heather explained that she realized that the bottle of wine was "corked" and therefore, she dumped the rest of the bottle of wine down the sink.
- [41] When asked whether she should have cared for the child that evening, she testified that she had put the child to bed that night. However, the 911 call made by Heather's neighbour, Craig, who was also on the condominium board, was admitted into evidence as a business record on consent. In this recording, Craig states that Heather's friend had called the building's concierge because she was concerned about Heather. Craig entered Heather's unit with a female, and they discovered the child was lying on top of Heather asleep. The

recording recounts Craig advising the 911 operator that they tried to be as loud as they could to wake Heather, but they could not wake her.

- [42] Jay testified that he came to pick up the child that night, after being contacted by the police. He testified that the child was not wearing any clothes, except for a diaper which was put on backwards.
- [43] I find that Heather intentionally misled the Court about only having had one glass of wine or only taking one Lorazepam, and about her capacity to care for the child that night. I do not accept her evidence that she had put the child down to bed. I do not accept her evidence that she only had one glass of wine. If the bottle had cork remnants in it, Heather did not explain why she would have had even one glass of the wine. I also question whether one glass of wine and one Lorazepam would have rendered her unconscious and unable to wake with loud noises. I also note that she gave evidence at the criminal trial on April 12, 2023 that she was not unconscious in bed when paramedics arrived. This testimony was clearly false.
- [44] Heather also gave inconsistent evidence around her work. At one point during this trial, she indicated that she was not working in 2023, but later gave evidence of having recently worked for clients. In her written opening statement, she said she was “currently unemployed” which was not accurate.
- [45] I also draw a negative inference from her lack of disclosure around her income. There were at least two Requests for Information (RFIs) delivered to her, as well as a Consent Order from Brownstone J., dated January 24, 2023, requiring specified disclosure. Notwithstanding the RFIs and the court Order compelling her to produce documentation, Heather admitted in her testimony that she did not provide the disclosure as requested or ordered.
- [46] Jay’s counsel asked Heather multiple times, prior to trial, to sign mutual authorizations and directions that would have allowed Jay and Heather to independently obtain bank records about the other from most major financial institutions. Heather would not agree. On February 23, 2023, Heather disclosed the existence of an RBC Savings Account ending in *3529 that was not previously disclosed. There was a real question at trial with respect to Heather’s income and the funds deposited into this account. These matters could have been resolved before trial had there been full and frank disclosure.
- [47] With respect to her allegations that Jay physically assaulted her, I do not draw a negative inference from her delay in reporting the alleged assaults to the police. There are many reasons why victims of intimate partner violence do not immediately report violence to the police: *R v. Lavallee*, 1990 CanLII 95 (SCC), [1990] 1 SCR 852.
- [48] However, on cross-examination, Heather acknowledged Jay’s fear of the police. The evidence disclosed that Heather called the police about Jay in March 2021, *before* the alleged assaults occurred. She also called the police after Jay had been arrested and bail

conditions were in place. The resulting charges of breaches of bail conditions were either withdrawn or resulted in an acquittal.

- [49] Finally, Heather’s position at trial with respect to the abuse was not consistent with other evidence. In her Opening Statement, she stated: “Throughout their relationship, even during the Applicant’s pregnancy with [the child], the Respondent was abusive towards the Applicant.” However, Heather is reported to have said something entirely inconsistent on March 28, 2021 to the Children’s Aid Society of Toronto (“CAST”). The CAST record from March 29, 2021 states: “Heather advised that [Jay] has a history of getting angry, which is why she called police. Heather did however advise that [Jay] has never assaulted her nor threatened her.”
- [50] Heather had motive. There was evidence of the parties spending exorbitant amounts on luxury items during their relationship, and of Heather living a luxurious lifestyle before they met. There was evidence of Heather living well beyond her own income, travelling extensively to 20 holiday destinations between 2016 and 2019, and being financially supported by wealthy clients and an ex-boyfriend prior to meeting Jay. She continued to be supported by Jay in a lavish lifestyle during their brief relationship, and she continued to be supported by Jay post-separation.
- [51] Post-separation, she testified that she had not been working full-time hours, that she had a nanny who was paid \$3,000 monthly, that she unilaterally enrolled their 2 year-old child in a Montessori daycare in May 2022 at a cost of \$3,700 monthly, that she hired a subcontractor who often picked up the child from daycare and who was paid between \$2,400 and \$3,200 monthly, and that she was not paying any of the carrying costs of Jay’s condo in which she lived. I do not question how Heather chose to spend any support she received or expected to receive. However, these facts suggest that she had motive, beyond a typical support recipient, to receive a significant support order to fund a lavish lifestyle well beyond her own means.
- [52] With respect to Jay, I found some of his evidence to be honest and credible. He was soft spoken and not argumentative. He admitted several facts given by Heather in her evidence, notably, that he paid for all of the parties’ expenses on their trip to Italy, and that he also sought to work with Heather to make decisions for the child in the child’s best interests.
- [53] Jay gave evidence about his upbringing, that he only attained a grade 11 education, his prior criminal convictions (his last conviction was in 2010 for possession of marijuana for the purpose of trafficking), his experience of being targeted by the police because he is racialized, and his desire to live a “straight and narrow” lifestyle. I accept this evidence as credible, as much of it goes against Jay’s own interest or because it was consistent with records of what the parties had previously reported to CAST.
- [54] There were inconsistencies in the two Form 35.1 Affidavits sworn by Jay. In his first one, he did not disclose prior convictions. He did not provide a sufficient explanation for this inconsistency. However, he was honest in his most recent Form 35.1 Affidavit filed for

trial. It is more probable than not that he was fearful of the repercussions in this family proceeding were he to disclose his prior convictions. He was ultimately honest.

- [55] Jay explained that his ability to afford the expenses he paid for, including the trip to Italy and the luxurious shopping sprees, was from a cash payment he received in 2018 of \$100,000, arising from the sale in 2015 of a restaurant he owned. Even if I were to accept his evidence of the cost of some of the items purchased (e.g., \$6,500 for a Rolex watch vs. \$36,000 as alleged by Heather), it is difficult to appreciate how he could afford these luxuries plus monthly housing costs exceeding \$4,000 on an annual salary of approximately \$83,000 in 2019. Even if the Court were to accept his evidence that he used \$100,000 he received in 2018 from the sale of his restaurant, \$100,000 in conjunction with his income in 2019 would not have been sufficient to explain his spending on the condo, the luxurious trips the parties took, the high-end shopping, and the cost of the nanny. He admitted to paying for all of these items.
- [56] Jay's testimony about the generosity of his friends lacked credulity. Jay testified that he had a friend, John Raimondi, who transferred a lease of a 2017 Lamborghini to him. Jay testified that the lease was transferred to him by Mr. Raimondi, at Mr. Raimondi's request. According to Jay's testimony, Mr. Raimondi paid one year of lease payments upfront. The monthly lease cost was \$2,998. Jay testified that Mr. Raimondi also provided Jay, in cash, the cost of insurance which Jay deposited into his bank account. Jay testified that Mr. Raimondi died in January 2022. As such, Mr. Raimondi was unable to provide corroborating evidence around the Lamborghini. After Mr. Raimondi died, Jay returned the Lamborghini to the dealer. Jay testified that John also loaned watches of significant value to Jay. Jay explained that he and Mr. Raimondi had been friends for half of Jay's life, and their relationship was such that neither would say no to the other.
- [57] Jay's explanation is not credible. Whether Jay and Mr. Raimondi were directly or indirectly involved with a criminal enterprise is an issue that I need not decide. However, Jay could have led evidence from a third party who witnessed their friendship, or from the car dealership which would have had a record of who paid the lease on the Lamborghini. No such evidence was adduced. Furthermore, on cross-examination, when asked about the nature of Mr. Raimondi's business, Jay testified he "didn't know about his life." This was after Jay testified that Mr. Raimondi was like his "big brother" and a person to whom he could not say "no".
- [58] How Jay paid for these previous expenses may have no bearing on his current support obligations if I am satisfied with his evidence of his current income. However, his past income is relevant to any retroactive orders. Papageorgiou J. based her interim support order on Jay's failure to explain his spending. It was incumbent on him, in my view, to provide explanations to permit the Court to assess his spending. Jay was reminded by his counsel at the beginning of Jay's testimony about his right against self-incrimination protected under s. 13 of the *Charter of Rights and Freedoms*, as well as the requirement for him to answer questions that may tend to criminate him. Heather was not represented during her cross-examination of Jay. The source of Jay's prior income was not a focus of her cross-examination.

- [59] Jay also had motive to be disingenuous with respect to the source of his income and the alleged domestic violence. A higher income would require higher support to be paid. A finding around the alleged violence would impact parenting orders, and Jay's reputation.
- [60] Three other witnesses were called. None of their evidence was sufficiently challenged on cross-examination.

Issue 1: Who should exercise decision-making responsibility over the child?

- [61] In making a parenting order, the Court shall only take into account the best interests of the child: s. 24(1) *CLRA*. The Court must consider all factors related to the circumstances of the child, giving primary consideration to the child's physical, emotional and psychological safety, security and well-being: s. 24(2) *CLRA*.
- [62] I have reviewed the parenting schedule agreed to on consent of the parties. I am satisfied it is in the child's best interests. It implements a roughly equal parenting schedule as of May 18, 2023 (6/14 nights), with a fully equal parenting schedule as of June 2024 (7/14 nights).
- [63] I next consider the best interests of the child factors in assessing who should exercise decision-making responsibility. It is Heather's position that she should exercise sole decision-making authority. Jay wishes to exercise this responsibility jointly. After considering the following factors, I order this responsibility to be exercised jointly, however, in the event of a dispute, the parties shall engage a parenting coordinator to provide certain parenting coordination services, not including final adjudication.

Child's needs (s. 24(3)(a) CLRA)

- [64] The child will turn three years old in September 2023. A child of this age requires stability. Due to the impending eviction from the condo, he will be required to move out of the home he has known since birth. However, he will continue to be in the care of both parents who have been actively involved in all aspects of his care since birth.
- [65] If the child were older, the child would have some say in major decisions. However, this child, who is soon three, will require his parents to make all major decisions in his life, including choice of school, daycare, extra-curricular activities and medical decisions. As a result, his parents will either need to agree, or find a process to reach an agreement.

Nature and Strength of Child's Relationship with Each Parent (s. 24(3)(b) CLRA)

- [66] I am satisfied that the child has a close and loving relationship with both parents, which will be nurtured by the shared parenting schedule. As the child grows, and because of the significant bonds he has with both parties, the child will come to expect that his parents will make decisions jointly in his best interest. He will come to expect that both of his parents will respond to needs, likes and dislikes, and that they will act accordingly.

Parent's Willingness to support the child's relationship with the other parent

- [67] There was evidence that Heather preferred the child to be in daycare, rather than spending time with his father. At a time when Jay was seeking additional parenting time, Heather refused further parenting time. Instead, the child attended daycare.
- [68] For a period after December 22, 2022, when Heather was found unconscious with the child and was admitted to hospital, Jay refused Heather parenting time because he was concerned for the child's safety in her care. I am satisfied that Jay's reasons for doing so was because he was concerned about the child in Heather's care; not because he was trying to interfere in the child's relationship with his mother.
- [69] Each party may have had their reasons in the past for not allowing the other to exercise parenting time. However, the evidence at trial from both parties was consistent: they considered the other to be a good parent. Even after Jay left the home, and after Heather initiated this litigation, she wrote to Jay's lawyer stating that she values the child's relationship with Jay in the same manner as she values her own relationship with the child. In her Form 35.1 Affidavit, and despite the allegations of violence, Heather indicated that she wanted Jay (or the nanny) to care for the child when she was not able to. I am satisfied that they both share a desire for the child's relationship with each other to be positive.

History of care of the child

- [70] Both parties were actively involved in the child's care. Before Jay left the condo, Heather acknowledged the degree to which Jay shared in the child's care. Jay was primarily responsible for the night shift, and Heather was responsible for the morning shift. During the day, they were both involved in his daily care. After Jay left the condo, Heather also acknowledged that he would come to the condo two or three times each day to care for the child. There was evidence of text messages exchanged between the parties which show that Heather and Jay coordinated to ensure that at times when Heather was working, Jay would be available to care for the child.

Child's views and preferences

- [71] The child is too young to have his views and preferences known.

Child's Cultural, Linguistic, Religious, Spiritual Heritage

- [72] This was not an issue on which Heather had views that were different from Jay.
- [73] Jay spoke of his Vietnamese heritage, his family's Buddhist faith tradition, and the importance of the Lunar New Year in his family. Heather was open to the child exploring Buddhism, and she was not opposed to the child travelling to Vietnam in the future to participate in Lunar New Year festivals. She remained open to speaking with Jay about future travel with the child to Vietnam.

- [74] Heather's heritage was English although her father's family is from the Czech Republic. Jay did not lead evidence opposing the child's participation in any of Heather's family traditions.

Plans for Child's Care

- [75] Heather enrolled the child in a Taddle Creek daycare unilaterally, without consulting with Jay. She wants the child to remain in this daycare next year. Jay opposes it.
- [76] Heather had no definite plans to leave Toronto. Her evidence was that she was contemplating a relocation to Thornbury, but she had not put forward a plan of care. In her draft Order, she did not seek an Order to relocate with the child.

Ability and willingness to care for and meet the child's needs

- [77] There was no compelling evidence challenging either party's ability or willingness to care for and meet the child's need. Jay regularly attended the home to care for the child after separation. In terms of Heather's care of the child, the only concerning incident is when she consumed alcohol and Lorazepam on December 22, 2022. As the CAST concluded, I am satisfied that this was an isolated incident and is not likely to be repeated.
- [78] In any event, this factor is more relevant to a parenting time order. It is less relevant when considering decision-making responsibility.

Ability and willingness to communicate and cooperate with one another

- [79] After litigation commenced, there was communication between Jay's counsel and Heather around specific issues relating to Jay's care. They dealt with the child's sleep schedule, bowel movements, a rash, and return of clothing. The communication would suggest that the parties are not able to work cooperatively to meet the child's needs, but context is important.
- [80] First, the communication only went through counsel because of the bail condition that prevented direct communication between the parties. Many of the issues were minor and could reasonably and promptly be addressed through direct communication between the parties if that were permitted at the time.
- [81] Second, the parties have now agreed to communicate via Our Family Wizard. Therefore, many of the disputed issues can be expected to be resolved directly, quickly and sensibly.
- [82] Third, some of these issues will disappear as the child grows older, out of a nap schedule, and as he assumes responsibility for his own belongings, or at least taking with him what it is he wishes to bring between homes.
- [83] What is more compelling is that neither party, subject to some limited and minor exceptions, took issue with the ability or willingness of the other to co-parent the child.

- [84] They both acknowledged that, in the past, they were able to work cooperatively to make “larger decisions” for the child around education. The evidence was not disputed that they both explored school options. At trial, Heather admitted that she wants to “continue to work with Jay as a parent”, that she “wants to co-parent with Jay,” and she agreed that Jay was a “good dad” and that he loves the child. She testified that she agreed to the consent order that the parties communicate using Our Family Wizard because she wanted to communicate with Jay with respect to the child.
- [85] Jay offered similar evidence at trial, indicating that he wanted to co-parent and make decisions jointly with Heather. He explained that they always made it work before Heather called the police in October 2021. His intention is to keep the doctor and dentist the same, and they could pick up their discussion of schools for the child.

Family Violence

- [86] Both parties made allegations against the other with respect to family violence. I summarize those allegations. However, after careful consideration, I give reasons why I conclude that it is not necessary to make factual findings as to whether the family violence occurred.
- [87] Heather testified that after Jay moved out by January 1, 2021, he would return to the condo two or three times each day to spend time with the child. Both parties were consistent in this evidence.
- [88] Heather testified that after a few months of this new *status quo*, she alleged Jay was being more critical of her care of the child, and that he was controlling the temperature and the lights. The parties’ evidence was consistent that their disagreements typically arose or were instigated by the temperature in the condo.
- [89] Heather testified that on May 20, 2021, she was at the condo and the child had already gone down for the night. Jay entered the condo without saying hello, and he adjusted the temperature. Heather said she felt hot air and saw the temperature was now set to 86. She said she heard the child start to cry and noted that he was still in his winter sleep sack. She testified that she went to “push pass Jay to go to the Master bedroom” and that Jay hit her in the face and she saw white all around. She asked, “What are you doing?” and then Jay hit her in the face again. She said she did not see Jay again until the next day when he asked, “How is your black eye?” She admitted into evidence photos she said she took the following day, on May 21, 2021. The photos show redness on the left side of her face, and some darkness under her left eye.
- [90] She testified that the physical abuse represented a point of “no turning back”. On the day after this incident, she testified that she retained counsel.
- [91] She testified that after this incident, Jay continued to come to the condo, but less and later in the morning (i.e. usually after 11 a.m.). One morning, he came before 10 a.m. and he was upset that Heather had adjusted the thermostat, so he locked it to prevent Heather from adjusting it. In response, Heather stated she called Honeywell to find out how to unlock it,

which she did successfully. She instructed her new nanny, Diana, on how to lower it but gave instructions to raise the temperature before Jay's expected arrival.

- [92] The second incident of alleged abuse occurred in June or July of 2021 when Jay came earlier than expected one day. He realized the temperature was adjusted, and according to Heather, she "could tell he was ready to blow." She testified that she gave a look to the nanny as a signal to leave the home with the child, and that she led Jay away into the bedroom. Once there and after Diana had left the condo with the child, Heather alleges Jay said, "Girl, you bring out the devil in me" and he pinned Heather up against the wall by her neck with his left hand and then began to punch her on the head with his right hand. She cannot recall if she passed out or not, but she said it felt like her mind fell into her stomach. She testified that Jay then stood back, almost shocked, and then he left. She testified that Jay's punches left dents in the drywall. She produced no pictures of the drywall damage or of any injury to herself.
- [93] After this second incident of alleged violence, Heather said things went back to normal and that they never discussed the incident.
- [94] There was a third incident when Jay came home and was upset. Heather alleges Jay ripped the thermostat off the wall. She introduced a photo of what appeared to be a thermostat without its cover. After this incident, she told Diana to take the child to the Shangri-La Hotel where they stayed for three days. She told Jay where she was staying and she met Jay there with the child but said that he could only spend time with the child in the hotel lobby. They then went to the Four Seasons hotel for 10 days. Lawyers became involved, a parenting schedule was in place, and Heather returned to the condo with the child.
- [95] Heather then said despite the parenting schedule, Jay would come to the condo as he pleased. Heather further testified that one day, Jay apologized to her and that he wanted to settle things without lawyers. The child's birthday was approaching, and Heather said she agreed to do things his way to try and work things out. She said they planned trips, but then he would not come, and there remained an absence of love and closeness.
- [96] A further incident is then alleged to have occurred. On October 12, 2021, Jay had again discussed the parties' abandoning their lawyers. Heather alleges Jay said that he could not control what his associates would do to her if she continued with litigation. According to Heather, Jay is alleged to have said he would shoot Heather in front of her Range Rover. Heather then started to email her lawyer. Jay asked what she was doing, and Heather says he then smashed her phone. Heather then explained that she went to the building concierge who took a photo of her smashed phone. The concierge then called the police. When the police arrived, Heather testified that she advised the police of the prior incidents of violence, which resulted in the domestic violence charges against Jay.
- [97] On October 18, 2021, Heather began this Application.

- [98] Jay denies all allegations of violence. He argues Heather fabricated them because she wanted to get back together with Jay and raise the child together, but Jay refused to resume a relationship with her.
- [99] Jay testified that he moved out in January 2021 because he needed space. He returned to the condo multiple times daily to remain in the child's life. He said that through most of 2021, the parties co-parented well together and they took the child to the park, dinner, the ROM, and to her family's cottage in the summer of 2021.
- [100] This continued until the summer of 2021 until they had "rough patches." He admitted that the parties often disagreed about the temperature. He said he wanted the temperature to be consistent all the time, but Heather would turn up the heat in the winter so that the condo was a sauna and that she made it too cold in the summer. He said that they would argue and make up repetitively. He admitted that the relationship was volatile and that he would be angry sometimes.
- [101] Rather than threatening Heather, Jay said that in the fall of 2021, Heather threatened that she would withhold the child from Jay. According to Jay, Heather also threatened that if they went to court, no one would believe Jay because he had prior criminal convictions and because her father was a participant in the justice system.
- [102] Jay argues the false allegations of violence only arose because Jay refused Heather's efforts to resume a relationship. In 2021, the parties had planned three trips together. The first was to Fogo Island. Jay booked the flights and Heather booked accommodations. After it was booked, Jay said he realized he could not go because it would mislead Heather into believing they would get back together, and Jay was clear this was not what he wanted. He cancelled this trip around June 21, 2021.
- [103] A second trip was booked to Langdon Hall, but again Jay cancelled it.
- [104] A third trip was booked by Heather to a farmhouse in Ontario for one night, from October 8-9, 2021. The booking shows it was for two adults. Again, Jay cancelled this trip.
- [105] Jay's theory is that after this third trip was cancelled in October 2021, Heather lost hope in salvaging their relationship, and that she carried through on her threat of withholding the child by bringing the false allegations of domestic violence. Heather was also aware of Jay's fear of the police. Once the criminal charges were laid, Heather dictated and controlled Jay's parenting time. This Application was issued six days after the criminal charges were laid. Jay only had increases in parenting time after motions were brought. Heather also began making unilateral decisions about the child, without consulting Jay, such as his enrolment in daycare, and arranging a driver to take the child to daycare who Jay did not know.
- [106] Even if the allegations of domestic violence, threats and coercion are true, I am not persuaded that they have bearing on who should assume decision-making responsibility for the child.

- [107] First, the alleged incidents were often triggered by disputes around the temperature in the condo, and whether this case should come to Court. The parties are now living separate and apart. With this Judgment and the parties' consent Orders on parenting time and communication, this case is now concluded. Therefore, the triggers that allegedly caused the family violence no longer exist.
- [108] Second, there was no evidence that the child witnessed or was impacted by the alleged violence.
- [109] Third, and most compelling, is that notwithstanding the allegations of family violence, both Heather and Jay gave testimony at trial that they had worked co-operatively together in making decisions with respect to the child in the past, and that they were both were willing and wanted to co-parent with the other in the future. Even prior to trial, approximately one year after this litigation had commenced, Heather wrote to Jay's counsel on November 4, 2022 stating "*I need to discuss directly with your client to produce a timely decision which is necessary in all regards but mostly to address [the child's] needs.*" She further wrote, "*I would like an opportunity to honestly address these concerns, and only these concerns, with Jay.*" And finally, "*Your client and I were always able to come to agreements about [the child's] care...*" Similar statements were included in subsequent correspondence from Heather to Jay's counsel on April 25, 2023. None of this suggests an inability or unwillingness on Heather's part to communicate or make decisions jointly with Jay about the child's care.
- [110] For these reasons, the Court was perplexed to understand Heather's position that she should exercise sole decision-making responsibility. Heather consented to an order that they communicate through Our Family Wizard. She consented to a parenting schedule that approaches equal parenting time. Despite her testimony that after the first alleged assault it was a point of "no turning back", she continued to plan trips with Jay and the child to Fogo Island, Langdon Hall, and to a farmhouse, and she consented to Orders around communication and parenting time.
- [111] Heather gave evidence of being afraid of Jay. She was suspicious that she was the subject of on-going surveillance by Jay, as there was some evidence of a private investigator following Heather. She wanted security and peace. Jay also gave evidence of being afraid of Heather. He was fearful that Heather may make further false allegations to the police. I accept that fear was likely a dynamic at play more recently in their relationship. But notwithstanding these fears, both parties have a mutual desire and willingness to co-parent with each other that was constant before trial and at trial.
- [112] Finally, all of the evidence of family violence was received prior to the mid-trial settlement conference, at which point, a final parenting schedule was agreed upon. Had parenting time not been resolved, the allegations of family violence would have been relevant to the Court's determination of a parenting schedule.

Decision-Making Orders

[113] After considering these factors, I order that the parties shall exercise joint decision-making with respect to the child as follows:

- a. The party who has care of the child at the relevant time shall make decisions affecting his day-to-day wellbeing.
- b. With respect to decision-making around the child’s healthcare, parties shall only make medical decisions that are consistent with the advice and recommendations of the treating physician, specialist, dentist or mental health practitioner. Current healthcare providers shall remain the child’s healthcare providers. New or different healthcare providers shall be agreed upon by the parties.
- c. With respect to decision-making around education, daycare and extra-curricular activities, parties shall make decisions that consider the child’s needs, skills and development, the child’s views and preferences with appropriate weight given commensurate with his age and maturity, and the financial means of the other. In the event of a disagreement, parties shall mediate their dispute with a mutually agreed upon parenting coordinator or mediator. If they are unable to reach an agreement, that issue shall be litigated unless parties agree to have the issue arbitrated.
- d. With respect to decision-making around religion, the parties may each expose the child to Buddhism and other faith traditions.

[114] Parenting coordination orders cannot deprive litigants from accessing the Court by forcing them to submit to arbitration through a parenting coordinator: see *C.A.M. v. D.M.*, 2003 CanLII 18880 (ON CA); *Salton v Walton*, 2022 ONCJ 394 at paras 86 to 90. As such, while I encourage parties to submit to arbitration through a parenting coordinator if they cannot resolve decision-making on education, daycare and extra-curricular activities, the Court cannot order the parties to do so. The parties should, nevertheless, consider the scope of services that a parenting coordinator may offer, including mediation, educational assistance, improving or facilitating communication, and resolving parenting schedule changes (e.g. to facilitate travel, holidays, etc.).

[115] As stated by Chappel J. in *S.V.G. v. V.G.*, 2023 ONSC 3206 (SCJ), at para 120,

“The services of parenting coordinators have been widely accepted by Family Law professionals and the courts as being an integral part of the Family Law system and highly beneficial for parents and children. As the court stated in *Sehota v Sehota*, 2012 ONSC 848 (S.C.J.), at para. 24:

‘[T]he court values the work of such professionals for the vast potential it holds for easing many of the difficulties litigants face. In particular, the court usually sees the children being benefitted by the help of a parenting coordinator because that person can help the parents to put their children's interests first,

to understand how conflict hurts children and to cooperate in spite of their past sorrows and hurts.”

- [116] I am satisfied that, under s. 28(1)(c) of the *CLRA*, this Court may order parties to attend mediation to resolve future parenting disputes after a final parenting order is made. For this reason, I have ordered parties to attend mediation in the event of a future dispute around decision-making on education, daycare and extra-curricular activities.
- [117] I acknowledge that in 2015, the Ontario Court of Appeal ruled in *M. v. F.* 2015 ONCA 277 (CA) at para 43, that the Court cannot make an order requiring parties to attend mediation/arbitration in the absence of consent. However, *M. v. F.* was decided prior to the recent legislative amendments to the *CLRA* (and *Divorce Act*) which signified a significant policy shift in favour of parties participating in alternative dispute resolution. In *S.V.G. v. V.G.* at paras 128 to 130, Chappel J. rationalizes why s. 31 of the *CLRA* does not preclude the Court from ordering mediation, absent the parties’ consent, to resolve future parenting disputes after a final parenting order is made. Her reasons are compelling. I adopt and agree with the conclusion she reaches.
- [118] I make the following further orders around decision-making responsibility:
- a. Parties shall advise each other of any healthcare appointments scheduled for the child within 24 hours of making the appointment. Parties shall alternate attending the child’s healthcare appointments and shall promptly advise the other of any health concerns prior to a scheduled appointment and any prescribed medicine or treatments following an appointment.
 - b. Neither party shall change the child’s name without the other’s written consent.
 - c. The child’s Ontario Health Insurance Card shall remain in a secure location in the child’s backpack which shall accompany the child during all transitions.
 - d. Heather shall hold the child’s social insurance card and passport and shall provide the originals to Jay as needed. Heather shall ensure Jay has a certified true copy of the original of these documents.
 - e. Jay shall hold the child’s birth certificate and shall provide the original to Heather as needed. Jay shall ensure Heather has a certified true copy of the original of this document.
 - f. Either party may apply for or renew any of the child’s government issued documents and the parties shall provide any consent and cooperate in completing any necessary forms to this end.
 - g. Both parties may make inquiries of and be given information from the child’s teachers, school officials, health care providers, daycare providers, camp counsellors and others involved in the child’s care. If required by an individual or an institution, the parties

shall cooperate and execute any required documentation necessary to ensure parties have a right to access all information about the child.

Restraining/Non-Harassment Order

[119] I decline to issue a restraining order. It would make it impossible for the parties to implement the communications and parenting time orders that they have agreed upon. However, I do make the following orders that shall govern the parties' behaviour, and are in response to the allegations made at trial:

- a. Both parties are restrained from molesting, annoying, harassing or threatening the other party.
- b. In all of the parties' communication, they shall be civil and respectful towards the other.
- c. Parties shall not speak in a negative or disparaging way about the other party to the child or in the child's presence, nor shall they invite or encourage others to do so.

Issue 2: Whether Heather should be permitted to relocate from Toronto with the child? Should there be a restriction on how far apart the parties must live given the parties' shared parenting schedule?

[120] I decline to make an Order permitting Heather to relocate from Toronto with the child for the following reasons.

[121] Heather did not deliver to Jay a Notice of Relocation as required under s. 39.3 of the *CLRA*. This issue was only raised on the eve of trial. It was not included in the draft Order submitted to the Court at trial. Heather did not indicate in the only Form 35.1 Parenting Affidavit that she swore on October 13, 2021 of an intention to relocate despite acknowledging in this affidavit her obligation to provide updated and accurate information about her plan of care for the child. And finally, at trial, she did not provide any evidence of where she planned on relocating, only that she was possibly thinking of a move to a smaller city, like Thornbury. This evidence was also given prior to her agreement, mid-trial, to a near equal shared parenting arrangement which would make a relocation outside Toronto impossible.

[122] Jay seeks an Order that the parties shall live within 5 kilometres of each other. I agree that it is in the child's best interest that the parties do not live a significant distance from each other. The current shared parenting schedule that parties agreed to sees three transitions weekly. It is not in the child's best interest to be subjected to long travelling distances between homes multiple times each week.

[123] However, where the parties will be housed on a more permanent basis is uncertain. Jay is currently residing in a condo that belongs to his friend and he has not been paying rent. How long he will remain there is unknown. At the time of trial, Heather was residing in the condo Jay owned, but due to power of sale proceedings, she was expected to be evicted shortly. Given the parties' incomes, and the challenges with finding housing in Toronto,

it may be difficult for the parties to find housing five kilometres apart. Evidence was not led that would allow the Court to determine whether it would be possible for the parties to live five kilometres apart.

[124] Accordingly, I order that the parties shall reside with the child in the City of Toronto. I further order that, effective January 1, 2024, they shall not reside more than 10 kilometres apart. It is hoped that this geographical restriction will permit parties to find suitable, permanent accommodations and that it will minimize travel for the child.

Issue 3: What are the parties’ respective incomes for determining child and spousal support?

Jay’s Income

[125] I begin with Jay’s income. Heather seeks to impute an annual income to Jay in the amount of \$900,000. Under s. 19(1) of the Ontario *Child Support Guidelines*, O. Reg. 391/97 (“*Guidelines*”), the Court may impute such income to a parent as it considers appropriate for child support purposes. The Court may also impute income for spousal support purposes: *Crowe v. McIntyre*, 2014 ONSC 7106 at para 27.

[126] In 2019, Jay was employed by Solution Process Serving as a process server. His 2019 Notice of Assessment shows he had income of \$83,478. He was later promoted to an accounts manager, until he was terminated in March 2022. Jay believes he lost this job as a result of the criminal allegations against him, for which he has since been acquitted. In June 2022, Jay obtained new employment with ACE Car Spa, a car wash/detailing company, earning minimum wage.

[127] Jay’s line 150 annual incomes from his Notices of Assessment were as follows:

Year	Jay’s Line 150 Income
2019	\$83,478
2020	\$83,938
2021	\$140,400
2022	\$35,696

[128] Heather testified that Jay also had significant other income as a drug dealer which funded their lavish lifestyle, an allegation that Jay denied. Jay gave evidence that he had received payment in cash from a restaurant he had sold in 2015 for \$100,000, but that the bulk of the proceeds of sale, pursuant to the Agreement of Purchase and Sale, were received by him in cash in 2018. Jay argues that these funds were used to fund their lifestyle.

- [129] In my assessment of the parties' credibility, I doubted that Jay could have afforded the parties' lavish lifestyle with his income in conjunction with the \$100,000 cash payment. Jay did not lead evidence from Rich Imbriaco who allegedly paid him the \$100,000 in cash. Even if it were assumed this amount was paid, it is improbable that this amount plus Jay's income could have funded the expenses that Jay incurred from 2019 to 2021.
- [130] In 2019, the year Jay met Heather, he earned \$83,478. They travelled that year to Italy for three weeks, and Jay paid for all expenses. A review of Jay's Visa bills from June 2019 (when he met Heather) to December 2019 shows that Jay charged to his credit card \$151,734, or \$68,256 in excess of his gross annual income:

Month	Total Visa Charges Paid in Full
June 2019	\$11,619
July 2019	\$19,295
August 2019 (including expenses from trip to Italy in July)	\$36,759
September 2019	\$11,873
October 2019	\$31,045
November 2019	\$28,557
December 2019	\$12,586
Total	\$151,734

- [131] I have not factored in the Visa charges from January to May 2019, nor have I factored in his rental, car/transportation, or other living expenses not charged to his credit card or for which he paid cash.
- [132] In 2020, Jay's gross income was \$83,938. The parties were living together in the condo that Jay purchased. The monthly costs of the condo were roughly \$4,200 (mortgage, property taxes, insurance, and condo fees). He paid for all housing expenses (roughly \$50,000 annually). A review of his 2020 Visa credit card records reveals he regularly spent thousands or tens of thousands of dollars per month (e.g., \$23,093 in March 2020, \$17,642 in July 2020, \$18,501 in August 2020). It is not necessary to recount each of his monthly charges. I am satisfied that Jay's after-tax income, would not have come close to affording his housing and expenses charged to his credit card.

- [133] Notably, as of October 2020, the amounts charged to Jay's Visa credit card dropped significantly and totalled less than \$1,000 per month. By March 2021, his Visa credit card statements increased to a few thousand dollars per month, but none thereafter were as high.
- [134] In 2021, Jay's income was \$140,400, and he paid roughly \$40,000 in taxes, resulting in about \$100,000 in net income. He moved out in January 2021. In 2021, he paid for all condo housing expenses (\$50,000), \$3,000 per month for a nanny/housekeeper (estimated for 6 months because Heather testified she began to pay for the nanny/housekeeper in June 2021), totalling \$18,000, plus Heather's Visa bills, which according to Heather, ranged from \$4,000 to \$12,000 per month (estimated for 9 months, resulting in a minimum of \$36,000 annually). Jay did not dispute paying for all of these expenses. These expenses alone total \$104,000 in 2021, more than Jay's 2021 net income of around \$100,000.
- [135] These expenses do not include Jay's rental expenses for the new apartment in which he lived. In addition, according to Heather, and based on Jay's 2021 credit card statements, Jay spent a further \$14,606 on travel, \$35,003 on luxury items, \$4,673 on technology, \$4,644 on transportation, plus another \$10,000 on restaurants and miscellaneous items. These amounts alone total \$68,926, in addition to the other \$104,000 in expenses noted above, resulting in Jay spending \$172,926 in 2021 – or roughly \$73,000 more than his net income.
- [136] I have also reviewed Jay's Amex statements from May 2021 to April 2023. With a couple of exceptions that were explained by Jay, I do not find the charges on Jay's Amex statements to be extravagant.
- [137] I reject the assertion that Jay funded the lavish spending solely from the \$100,000 in cash he says he received from Mr. Imbraico in 2018. Based on the above calculations, and after factoring in his Line 150 incomes, Jay would certainly have expended the \$100,000 by 2020 at the latest, and most likely earlier.
- [138] I also reject any argument that Jay's credit card bills and expenses were so high because he would regularly place charges on his credit card for dinners out with friends, and that his friends would reimburse him in cash. While there were many charges for dinners on his credit card statements, several of which exceeded a \$1,000, there were many other expenses for thousands of dollars from luxury stores, hotels, and for flights. No explanation was given as to why his friends would be reimbursing him for those expenses. Furthermore, there was no independent evidence from others of reimbursing Jay for expenses he put on his credit cards.
- [139] I find that Jay did have another source of income when the parties met and this source of income continued at least until October 2021. I also conclude that it is more likely than not that this source of income was from illegal means. Heather gave evidence that his source of income was from drug dealing, based on what he reported to her one day early in their relationship when they were dating. Jay denied this. However, he offered no other acceptable explanation for how he could have afforded their lifestyle.

- [140] I am not persuaded that Jay continued to have an income in excess of his Line 150 tax return income from October 2021 onwards. He was arrested this month and had motive not to engage in further criminal activity. His spending in 2022 was significantly less. It is also probable that with the death of Jay's friend, John Raimondi, in January 2022, Jay had lost opportunities to receive gifts from him, or possibly sources of undeclared or illegal income.
- [141] Other factors suggest he had no other income. If Jay continued to receive the income that he once did, he would not have let his equity in the condo he owned be lost through power of sale proceedings. Similarly, he would not have incurred a loss of over \$60,000 from his \$120,000 deposit on a condominium pre-construction project on Logan Avenue. There was evidence, which I accept, of Jay seeking to get out of this deal with the builders in August 2022, and that the builder only agreed to release Jay from the purchase agreement if the builder retained approximately \$60,000 of the original \$120,000 deposit. Furthermore, Jay is now living in a condominium of a childhood friend, Mario Leonetti, who testified that Jay owes him rent for staying there which he expects paid in the future. Mr. Leonetti testified that Jay owes Mr. Leonetti roughly \$60,000, reflecting rent owed and other money loaned by Mr. Leonetti to Jay. None of this represents or suggests a lifestyle commensurate with an income more than Jay's current income, as reflected in his T4 statements and evidence of his current minimum wage income.
- [142] Even if I were to conclude that Jay *continues* to earn an income from illegal means, such as drug trafficking, I would decline to impute an income to Jay from 2022 onwards. First, there was no evidence of spending in 2022 being exorbitant or of Jay's current spending exceeding his income. There was no evidence of him continuing to engage in illegal activity. Second, there is authority, primarily from courts in British Columbia, which does not support imputing an income for the purposes of determining present and on-going child support where it is alleged that a support payor earns money from drug trafficking: see *J.T.L. v. R.J.L.*, 2010 BCSC 1233 (CanLII), citing *S.A.B. v. C.D.B.*, 2004 BCSC 314 at para. 30; *B.G.M.S. v. J.E.B.* 2018 BCSC 1628 at para 198 and 202. The rationale in these cases is that it would be contrary to public policy to impute an income based on what a support payor could earn through drug trafficking. To do so would encourage or require a support payor to continue to engage in criminal activity. I accept this as a compelling rationale for not imputing an income for the purposes of current and future support obligations where it is alleged the income is from illegal means.
- [143] However, in determining a support payer's *retroactive* support obligation, the same rationale does not apply. A retroactive support order, if based on funds that have already been obtained from illegal means and which remained available to a support payor at the time, would not encourage or require a support payor to continue in the criminal activity. Support orders are intended to benefit children and equalize standards of living between separated spouses. While it may be unsavoury to live off the proceeds of crime, it would also frustrate the objectives of support orders if funds from illegal means that are available to a support payor could not be relied upon for the purposes of determining retroactive support obligations. See *B.G.M.S. v. J.E.B.*, 2018 BCSC 1628 at para 199.

[144] The challenge is determining the amount of income to impute retroactively. There was no reliable evidence of Jay's prior income earned from illegal means. Jay denied drug dealing and offered no evidence on this point. At best, Heather gave evidence of seeing bags of cash of tens of thousands of dollars at their condo, and at one point, half a million in duffel bags. Even if this evidence were credible, it is too imprecise. It is unknown whether all of these funds belonged to Jay. Heather also did not identify when she saw these funds. The imputation of income requires a rational and solid evidentiary foundation grounded in fairness and reasonableness: *Drygala v. Pauli*, 2002 CanLII 41868 (ON CA), 61 O.R. (3d) 711, at para 44.

Jay's 2021 Income

[145] Because Jay moved out in January 2021, I begin by determining Jay's 2021 income to quantify his retroactive support obligation for 2021. As noted, his annual salary was \$140,400, as reflected on his income tax return, and his net income after taxes was approximately \$100,000. However, as summarized earlier, his 2021 expenditures were at least \$173,000. Of which, \$100,000 could have been funded from his employment income. The balance of \$73,000 was from another source.

[146] In addition to the \$73,000 discrepancy in his expenditures versus his income, there was one other notable expenditure. Heather alleges Jay made lease payments in 2021 on a 2017 Lamborghini in the amount of \$23,907. She introduced into evidence a lease in Jay's name, dated May 26, 2021 showing monthly leasing costs of \$2,988.38. Jay's evidence was that Mr. Raimondi asked Jay to take over this lease, and that Mr. Raimondi paid upfront for the monthly leasing costs. The rationale for this transaction is questionable. I doubted Jay's testimony when it came to Mr. Raimondi. While Mr. Raimondi is deceased, there was no other independent evidence, for example from the car dealership, of Mr. Raimondi having made these lease payments. I found this evidence tested credulity. I prefer the documentary evidence of the lease, which shows that Jay was responsible for the lease payments. Accordingly, I find that Jay made lease payments on the Lamborghini in 2021 in the amount of \$20,916 (or \$2,988.38 x 7 months from May 26, 2021 to December 26, 2021).

[147] As a result, I find that in addition to Jay's 2021 T4 income of \$140,400, he also had further non-taxable income in 2021 of at least \$93,916 (\$73,000 + \$20,916). Using DivorceMate to gross up this non-taxable income and after including his T4 taxable income of \$140,400, results in Jay having Annual Guidelines Income of \$332,913. I find that in 2021, for support purposes, Jay's income was \$332,913.

Jay's 2022 and 2023 Income

[148] For reasons given, I am not persuaded that Jay's income in 2022 was in excess of his Line 150 income, namely \$35,696. This reflects income, in part, from his past job with a process serving company until he was terminated, and his new minimum wage income at a car spa. I am satisfied that he lost his prior job where he was earning \$140,400, and that due to his criminal record and limited education, he has had difficulties finding employment

commensurate with his past income. While there were aspects of Jay's testimony that I did not accept, I accept his evidence that he is fearful of the police and wants to live a life that is now "straight and narrow". He has applied to obtain a Pardon from Pardons Canada for his prior criminal convictions and will be eligible for a Pardon on October 19, 2024. If a Pardon is granted, or if he attains further education, he may earn more in the future. There was no evidence of his spending in 2022 or onwards exceeding his Line 150 income.

- [149] For his 2023 income, I conclude that it will be roughly the same as it was in 2022. Minimum wage is currently \$15.50 per hour, and it will increase to \$16.55 on October 1, 2023. Jay's 2022 income was slightly more than one would earn annually on a minimum wage salary in 2022.¹ Accordingly, I rely upon it as a reasonable proxy for what Jay will earn in 2023.
- [150] Finally, I recognize that the amount of income I have attributed to Jay is different than what Papageorgiou J. found on the interim motion she heard. Her orders were made on an interim and without prejudice basis on limited affidavit evidence. She imputed an income of \$400,000 to Jay for support purposes. Papageorgiou J. relied on Jay's pattern of spending in 2019, 2020 and 2021. However, at trial, and for the purposes of determining Jay's income in 2021, 2022, and 2023, better evidence was available. Unlike Papageorgiou J., I assessed the parties' credibility with respect to income from illegal means and when it ceased, which factored into my decision-making on whether to impute income, by how much, and for how long.

Heather's Income

- [151] When the parties' met, Heather was running her own business through a corporation, Hjem Personal Services ("Hjem"), which provides personal concierge services for high-net worth individuals. She has various subcontractors who provide the services to Hjem clients, although Heather also provides services personally. The services include personal driving for clients or their children, personal shopping, party planning, travel planning, packing, styling, house-sitting (or homestays) and cleaning services. Heather testified that most of her clients are wealthy men. She testified that she was operating this business from 2016 until she met Jay, but that she did not incorporate the business until 2019.
- [152] Heather attended butler-training school in 2014, and prior to that, she completed a diploma in Culinary Management in 2012. She had worked for a family for over a year. She testified that she worked as an escort briefly in 2016 and 2017 but is no longer working as an escort. Her sole source of income was from Hjem.
- [153] There were several challenges in correctly identifying Heather's income from Hjem.
- [154] First, Brownstone J. issued a consent Order, dated January 24, 2023, which ordered Heather to produce significant disclosure from 2019 through to trial. It included a

¹ An employee in Ontario earning an hourly wage of \$34,000, working 40 hours a week, 52 weeks a year translates to \$16.35 per hour. See: [Gross to net income calculator, hourly salary in Ontario \(calculconversion.com\)](https://www.calculconversion.com/gross-to-net-income-calculator-hourly-salary-in-ontario)

requirement that she answer all outstanding undertakings, under advisements and refusals from her questioning on May 27, 2022. The information she was required to produce included invoices, booking records, corporate PayPal account, HST filings, communications with and proof of payments to subcontractors, and other information that would allow Jay to correctly ascertain her business income and expenses. Heather confirmed at trial that she did not produce any response to the outstanding undertakings, under advisements or refusals, as ordered by Brownstone J. This was despite correspondence sent from Jay's counsel to Heather on April 4, 2023, demanding compliance with the January 24, 2023 Order, and specifically listing what information was outstanding.

- [155] Without fulsome information about the actual income and expenses of Hjem, it was not possible to accurately confirm Heather's income. This is because Heather testified that sometimes she prepared invoices, sometimes she would engage the services of a bookkeeper, sometimes she would use QuickBooks, sometimes she would perform the concierge services, and sometimes they would be performed by subcontractors. However, there was evidence at trial of Heather paying a bookkeeper, Cody Engell, several times in 2020, 2021 and 2022, and therefore, it is more likely than not that some bookkeeping records were available. At her questioning, she admitted to keeping track of her invoices through QuickBooks and a bookkeeper, but at trial, suggested that she did not always invoice her clients. Heather did not prepare or produce an income valuation report, nor did she call her bookkeeper as a witness. The information that Jay sought was necessary for him and the Court to piece together Heather's actual income.
- [156] Second, on April 4, 2023, Jay's counsel delivered a Request for Information. Among the items included in the Request was an explanation from Heather of the source and nature of the e-transfer deposits to her personal accounts and business accounts, and confirmation of purchases Heather made on behalf of clients. Again, Heather admitted at trial that she did not provide any response to the Request for Information. This information was critical. Without having disclosed proper business records, the best proxy for determining her income was to look at deposits to her business and personal accounts to understand from where they originated. Any business expenses drawn from her accounts could have also been explained. At her questioning, she stated that there was "always a piece of paper" in respect of records of her subcontractor's work. Despite an Order for production of those records, none were provided.
- [157] Third, Heather's testimony of her work history was not consistent. She testified that after she met Jay, Jay said she did not need to work and that he would provide for her. However, Heather's own testimony was that she continued to serve clients in 2019, 2020, 2021, 2022 and 2023. She testified about a driving contract in the years 2019 to 2023. In 2021, she continued to have driving contracts and *ad hoc* contracts. In 2022, she testified about having a 3-month contract, cleaning homes, and continuing to perform homestays and personal driving services. While giving evidence in chief, she testified about an *ad hoc* contract with a client the night before. She testified that she continues to have "varying income" and that she continues to receive referrals. This was despite her Trial Opening Statement, which indicated she was unemployed. There were also text messages

exchanged between the parties in 2021 where Heather was asking Jay to come to the condo at specific times to care for Jay so that she could attend to one of her clients.

- [158] Fourth, given the uncertainty of Heather’s income, and the claims each side had about the other’s income, Jay had proposed to Heather on December 13, 2022 that the parties execute mutual Authorizations and Directions to all major banking institutions to allow the parties to independently obtain all bank statements from the other. Follow up requests by Jay’s counsel were made on March 1, 2023 and March 22, 2023. Heather did not take Jay up on his offer. Had she done so, it would have cured one portion of the Brownstone J. Consent Order. This request from Jay was not unreasonable or disproportionate. Heather, in her first two financial statements sworn in this case, did not disclose an RBC Bank Account ending in *3529. Heather did not disclose this account until February 23, 2023.
- [159] Fifth, Heather did not serve an updated sworn Financial Statement for the trial, in breach of Rule 13(12) of the *Family Law Rules*. While she alluded in her Opening Statement to relying on loans and credit cards to cover daily expenses, the Court had no current and reliable evidence of those loans and credit card debts. She called no witnesses to support her claim that she was indebted to others.
- [160] Parties to litigation are subject to a general obligation to disclose all information that is relevant and material to the case: *Kinsella v Mills*, 2020 ONSC 4785, cited with approval in *Colucci v Colucci*, 2021 SCC 24 at para 129. “The most basic obligation in family law is the duty to disclose financial information. This requirement is immediate and ongoing.” (*Roberts v Roberts*, 2015 ONCA 450 at para 11). The issue of Heather’s income was relevant and material. Not only did Heather fail to live up to this obligation, she was also in breach of a court Order, refused to answer Jay’s Request for Information, declined opportunities to remedy her breach, and failed to provide an updated Financial Statement prior to trial as required under the *Family Law Rules*.
- [161] In these circumstances, and pursuant to rule 1(8) of the *Family Law Rules*, it is appropriate to draw a negative inference against Heather: see *Bourassa v. Magee*, 2014 ONCJ 393 at para 31. I place little to no weight on Heather’s evidence explaining her income, unless it is corroborated by clear documentary evidence adduced at trial.
- [162] Heather’s personal and corporate income tax returns provide little helpful guidance. Without supporting documentation of her actual corporate and personal income and expenses, the amounts reflected in her Income Tax Returns and Notices of Assessment may not accurately reflect her income. What inputs were used to calculate her income for tax purposes remain unknown.
- [163] I am persuaded that the best proxy of her income are the deposits made to her business and personal bank accounts. Jay has summarized these amounts, found in Schedule E to his Closing Submissions based on bank records that have been disclosed and admitted as exhibits at trial, as follows:

Year	2019	2020	2021	2022
Total Deposits per Year	\$46,390.37	\$90,876.38	\$218,622.02	\$181,123.16

[164] On cross-examination, Heather did not dispute these totals reflected the deposits to her accounts, except one deposit in the amount of \$161,709 in 2021 (discussed below).

[165] In determining Heather's income from her bank deposits, I have considered whether the following adjustments should be made to reflect her income more accurately:

- a. There was a deposit to Heather's RBC Personal Account ending in *3529 of \$161,709.00 on January 14, 2021. Heather testified at trial that this amount was not actually deposited. She was depositing a cheque for \$1,617.09 but she erred in placing the decimal when making the deposit. She said this amount bounced and the proper amount of the cheque went in. Upon examining her RBC Bank Statement for the period from December 17, 2020 to January 15, 2021, it reflects a withdrawal described as an "ATM/Mobile adjustment debit" of \$160,091.05. This documentary evidence supports Heather's claim of a data entry error. Accordingly, I reduce her 2021 income by \$160,091.05.
- b. Heather testified that if the deposits from her business and corporate accounts were used to represent her income, it would result in a double counting of the same income. This is because she would regularly pay herself by transferring funds from her business account into her personal account. I agree if such transfers were made, a double counting would result. However, Jay specifically requested an explanation of the banking and online transfer deposits into Heather's personal and business accounts, which were itemized at Schedule 4 to his Request for Information. Heather failed to provide an explanation prior to trial. On cross-examination, she stated that the amounts in Schedule 4 represented payments to herself from her business account.

The challenge with Heather's testimony is that she did not provide this explanation prior to trial, despite being asked to do so. It would be unfair to Jay and would result in unfair surprise to him were the Court to accept this evidence. A Request for Information serves a specific function - to elicit information from an opposing party prior to trial, just like answers one would give at questioning or an examination for discovery. Under rule 31.07(2) of the *Rules of Civil Procedure*, if a party fails to answer a question at a discovery, the party may not introduce at trial the information that was not provided, except with leave of the trial judge. For these reasons, I decline to accept Heather's evidence that the amounts in Schedule 4 of the Request for Information represented transfers from her business account to her personal account.

Furthermore, I question whether these amounts reflect transfers from Heather's business account to her personal account, or a double counting. The Request for

Information states that an explanation about the Schedule 4 deposits to her business and personal accounts was because the deposits “*are not reflected as withdrawals from the other respective account.*” Heather cannot now assert double counting was at play, when she failed to establish this prior to trial.

Even if I was persuaded that double counting would occur, the Court does not have an evidentiary basis to determine the amount that was double counted. Heather’s bald assertion that all Schedule 4 deposits represent the amount of double counting is contrary to the line-by-line assessment of deposits performed by Jay’s counsel, and as explained in Jay’s Request for Information. Accordingly, I decline to accept Heather’s evidence and I decline to adjust the deposits to her accounts when determining her income.

- c. In 2022, there were multiple and regular deposits throughout the year to her RBC Personal Account ending in *3531, which totalled \$23,683.20. The description of these deposit states “CANADA”. Heather was asked in the Request for Information to explain these deposits. She failed to do so. Reviewing the deposits, several were for the same amount in each month (e.g., \$692, \$37.59), and in one month, there was a deposit of \$14,158.64. It seems more likely than not that these amounts were payments from the government of Canada. Some of these deposits may not have reflected income – they may have been tax or HST refunds or represent the Canada Child Benefit which is not considered income for child support purposes (see Ontario *Child Support Guidelines*, O. Reg. 391/97, Schedule III, s. 3(b)).

While Heather ought to have answered questions with respect to these payments, it would be incorrect in law to include in her income the Canada Child Benefit. I have determined it fair and appropriate to decrease her 2022 income by \$14,158.64 which is more likely than not a tax refund. I see that her 2021 Income Tax Return indicates a refund due to Heather in a similar amount (\$14,458.63). In addition, I make a further reduction of \$8,400 (roughly \$700 x 12 months) representing what appears to be the Canada Child Benefit. This results in a total reduction of \$22,558.64. This would not result in unfair surprise to Jay. He had a copy of her 2021 Income Tax Return and ought to have known Heather was entitled to and receiving the Canada Child Benefit.

[166] As I did with Jay, I will only determine Heather’s 2021, 2022 and 2023 incomes, since the parties separated in January 2021.

[167] With the above adjustments, and using the deposits to Heather’s bank accounts as the best available evidence of her income, subject to the adjustments explained above, I have determined that Heather’s income to be as follows, after grossing up her income using DivorceMate:

YEAR	2021	2022
Income, using adjusted deposits as proxy	\$58,530.97	\$158,564.52
Grossed Up Income, using DivorceMate	\$70,256	\$252,377

[168] With respect to Heather's 2023 income, the Court does not have a current sworn Financial Statement from Heather; her last sworn Financial Statement entered as an Exhibit is from September 20, 2022. As indicated above, her financial disclosure and evidence at trial was incomplete or inconsistent with respect to her income. Accordingly, I find for the purposes of determining her support obligation in 2023, her 2022 income shall be used.

Issue #4: What retroactive and prospective child support and s.7 expense orders should be made?

[169] Following Papageorgiou J.'s order on April 20, 2022 requiring Jay to make interim child and spousal support payments to Heather, Jay made various payments directly to Heather or through the Family Responsibility Office, totalling \$70,633.26. Jay argues Papageorgiou J. did not give Jay any credit for all of the expenses he paid for maintaining the condo in which Heather continued to live exclusively. According to him, this amount totals \$114,918.96. He argues that these amounts should be credited to him.

[170] Before addressing any credits to Jay, I begin with determining the parties' respective child and spousal support obligations.

Child Support – January 2021 to May 2023

[171] I am satisfied that the child was primarily in Heather's care from January 1, 2021 to May 30, 2023. Even though Jay regularly spent time with the child at the condo from January 2021 to October 2021, I remain satisfied that the child was primarily in Heather's care. The child spent nights at the condo with Heather during this period. After October 2021, the child continued to remain primarily in Heather's care until May 18, 2023, when the new parenting schedule agreed to at trial came into effect. While a nearly equal parenting schedule is in place as of May 18, 2023, I have determined that the child remained primarily in Heather's care during the month of May 2023.

[172] Therefore, Heather is entitled to Table Child Support from January 2021 to May 2023.

[173] I find Jay's child support obligation to Heather from January 2021 to May 2023 to be as follows:

Period	Jay's Guidelines Income	Monthly Child support	No. of Months	Total child support for period
Jan – Dec 2021	\$332,913	\$2,616	12	\$31,392
Jan – Dec 2022	\$35,696	\$312	12	\$3,744
Jan – May 2023	\$35,696	\$312	6	\$1,872
Total Child Support Obligation				\$37,008

- [174] From June 2023 onwards, a shared parenting schedule is in place that has the child in the care of both parties approximately equally, and in excess of the 40% threshold. By June 2024, it will be an equal shared parenting schedule. Pursuant to s. 9 of the *Guidelines*, where each parent exercises parenting time not less than 40% of the time over the course of a year, the amount of child support shall be determined by taking into account the amount of table child support payable by each party, the increased costs of sharing parenting time, and the condition, means, needs and other circumstances of each parent.
- [175] In this case, it makes most sense to interpret “over the course of a year” to be the year running from June to May of the following year. This is consistent with how the parties have implemented their new parenting schedule.
- [176] The starting point of a s. 9 analysis is what is the set-off in table child support. However, that does not end the analysis. The Court must also look at the parties’ respective budgets relating to the care of the children, as well as a comparative analysis of the parties’ standards of living (i.e., the condition, means, needs, and other circumstances of each spouse). See *Contino v. Leonelli-Contino*, 2005 SCC 63, [2005] 3 S.C.R. 217.
- [177] Using the set-off in table child support as the start of the analysis based on 2023 incomes, the parties’ respective child support obligations would be as follows, resulting in Heather paying Jay monthly child support of \$1,765 as of June 1, 2023:

Party	2023 Guidelines Income	Child Support
Jay	\$35,696	\$312
Heather	\$258,084	\$2,077
Set-Off Child Support Obligation by Heather to Jay		\$1,765

[178] The parties did not deliver a budget relating to the care of the child. Since the parenting schedule was determined mid-trial, the issue of what amount of child support that should be paid as of June 2024 was not the focus of the parties' evidence or submissions.

[179] There is much uncertainty in the lives of the parties making a comparative analysis of the parties' standard of living difficult. Heather will (or has) vacated the condo which Jay owned due to power of sale proceedings and the bank executing a Judgment it obtained. At trial, Jay was living in a condo owned by a friend and had not been paying rent, although rent will be owed to Mr. Leonetti at some point. Both parties' evidence was that they had amassed debt. Only Jay introduced corroborating evidence of that debt from Mr. Leonetti. Jay's future employment was uncertain. At the time of trial, he was earning minimum wage. While Heather had not complied with her financial disclosure obligations, there is uncertainty with her self-employment income; it fluctuates from year to year and is dependent upon referrals. She also indicated an intention to transition her business from providing services to products. As I find below, Heather will owe a debt to Jay to account for support overpayments he has made to Heather or for condo expenses for which he is entitled to a credit. While neither party has made a request under s. 10 of the *Guidelines* for payment of an amount of child support that is different from the amount determined in s. 9, I accept that re-payment of the amount I have determined Heather will owe to Jay will impact her capacity to pay full set-off child support. This is also during a period when she will be seeking new accommodations.

[180] Having considered these factors, I order:

- a. From June 1, 2023 until September 1, 2024, Heather shall pay Jay child support fixed in the amount of \$1,000 per month.
- b. The amount of child support shall be subject to an annual review in September of each year, commencing September 2024. Parties shall exchange complete financial disclosure of their incomes by August 1, 2024 and by August 1st in subsequent years. Child support for a given year shall be determined based on the parties' prior year's incomes, and the new amount shall be payable on September 1st of each year.

[181] Because Heather's corporate year-end is June 30, I have determined August 1, 2024 is the appropriate period for financial disclosure and that an annual review of child support shall be conducted in September 2024.

Retroactive S. 7 Expenses

[182] In her closing submissions, Heather argues that Jay owes retroactive s. 7 expenses in the amount of \$28,628. In coming to this calculation, she determines Jay's proportion of expenses to be 65%. The expenses Heather seeks to recover are as follows:

Nanny	\$30,410
Speech Language-Assessment	\$200

Preschool registration fee	\$1,545.16
Preschool Tuition (\$3,797.99 x 3)	\$11,393.97
Total:	\$44,044.13
Jay's Portion (65%)	\$28,626

- [183] Pursuant to s. 7 of the *Guidelines*, the Court must take into account the necessity of the expense in relation to the child's best interests, the reasonableness of the expense in relation to the means of the parents, and the spending pattern of the parents in respect of the child during cohabitation.

2021 Nanny Expense

- [184] I begin with the 2021 nanny expense. There was evidence of the parties using the services of a housekeeper/nanny before and after Jay left the condo, which cost was \$1,500 bi-weekly. According to Heather, Jay had been paying the nanny/housekeeper until June 2021, and then Heather took over the payments. Just prior to trial, Heather uploaded two documents to CaseLines that she introduced as exhibits. These documents were not provided to Jay prior to trial. They summarize the payments Heather made to two different nannies – Diana from April 2021 to November 2021, totalling \$13,765, and Kristy from January 2022 to September 2022, totalling \$16,645. They were sometimes paid out of Heather's personal account, and sometimes her business account.
- [185] I am satisfied that, pursuant to 7(a) of the *Guidelines*, Heather did require assistance with the care of the child to enable her to work.
- [186] Prior to October 2021, the evidence at trial was that the parties engaged a nanny and that Jay would make himself available to care for the child when Heather required time to work. However, when Jay was arrested in October 2021, bail conditions made Jay unable to come into contact with Heather.
- [187] On December 8, 2022, Jay asked for regular parenting time on Tuesdays, Thursdays and Sundays from 11 a.m to 5 p.m. Heather did not agree to Jay having any regular parenting time until February 2022, which resulted in Jay having the child every Tuesday from 2 pm to 8 am on Wednesday; Thursday from 11 am to 5 pm; and alternating weekends from Friday at 2 pm to Sunday at 8 am. Transitions were facilitated through a 3rd party, or by the parties' nanny.
- [188] For the period from July 2021 to December 2021, it is not unreasonable for Heather to expect Jay to contribute to childcare costs. The cost of a nanny was an expense incurred during cohabitation. Heather's evidence of the e-transfers sent to Diana during these months was \$12,340. Diana was not paid for in the month of December, when Jay was asking for more parenting time. I do not allow re-imburement for Diana's cost for the months of April and June 2021 as Heather's evidence was that Jay paid for the nanny expense for these months, and it is not clear that Heather's payments to Diana during this

period related to her services caring for the child or Diana's services as a subcontractor in Heather's business. Finally, while it would have been preferable for Heather to have disclosed details of the nanny expense prior to trial, the 2021 cost would not have been a surprise to Jay given the parties pattern of spending.

- [189] The cost of \$12,340 was reasonable in relation to parties' 2021 incomes, as I have found them. Factoring in spousal support payments according to DivorceMate, their proportionate contribution towards this expense in 2021 results in 46.2% payable by Jay and 53.8% payable by Heather.
- [190] Therefore, I find that in 2021, Jay owes Heather \$5,701.08 in s. 7 expenses for childcare costs.

2022 Speech Language Assessment, Nanny, and Preschool Expenses

- [191] The child underwent speech therapy in 2022 for four sessions. The expense totals \$695. I am satisfied under s. 7(c) of the *Guidelines* that this was a necessary and reasonable expense.
- [192] Heather's evidence of the cost of a nanny, Kristy, in 2022 was \$16,645, for which she seeks contribution from Jay. For the following reasons, I only order Jay to contribute to this expense from January to March 8, 2022, which expense for these months was \$4,500.
- [193] There was significant correspondence and confusion between the parties' lawyers with respect to the cost of the nanny, commencing in December 2021, which included a request from Jay's counsel for information about the nanny expense. The communication related, at first, to who would facilitate transitions between the parties. Heather's lawyers repeatedly stated "there is no nanny to facilitate exchanges" but did not make clear whether or not Heather continued to engage the services of a nanny. On February 9, 2022, Justice Steele ordered Heather to provide complete details of the nanny. On February 28, 2022, Heather swore an affidavit saying she had childcare from July 1, 2021 *through to present*, and specifically, the nanny, Kristy, was employed from January 1, 2022 to present. I can appreciate Jay being confused to receive this information, after Heather's lawyers repeatedly stated that there was no nanny *to facilitate exchanges*. Heather explained at trial that Kristy was not comfortable with facilitating exchanges with Jay. It may be that it was only at trial that Jay understood that there was a nanny engaged by Heather in 2022, but that the nanny was uncomfortable facilitating exchanges with Jay. However, Jay received some clarity in the form of an affidavit by February 28, 2022 about the nanny expense. He was working at the time and based on their pattern of spending for a nanny in the past, it should not have been a surprise to Jay that this expense continued, or that there was an expectation that it was in his means to pay for some of this expense.
- [194] Then, on March 8, 2022, Jay's counsel advised Heather's counsel that Jay had lost his job. From this juncture onwards, Heather had notice that Jay's ability to contribute towards this expense may have been beyond his means. There was no evidence of Heather seeking agreement from Jay as to the continuation of this expense. I also question the extent to

which Heather in fact needed a full-time nanny from March 2022 to September 2022. She could have considered, as she did in the past, relying on Jay to care for the child when she needed childcare for her to work. He had some parenting time, which could have been expanded. Moreover, much of Heather's testimony about her work at trial suggested that she had limited clients and limited work following the birth of the child, which begs the question of why she needed childcare at all. She failed to produce records of her work. She also failed to deliver to Jay, prior to trial, an updated summary of the nanny expense. This behaviour should not be rewarded.

[195] For these reasons, I only treat the cost of a nanny from January 2022 to March 8, 2022 as a s. 7 expense, in the amount of \$4,500.

[196] With respect to the preschool expense, Heather unilaterally enrolled the child in a daycare/preschool at Taddle Creek without Jay's knowledge or consent. The monthly tuition cost was \$3,797.99. She alone signed the enrollment and payment obligation forms. When Heather did so, she would have had Jay's financial statement, sworn February 2, 2022, which showed his monthly income of \$11,700 and his annual income of \$140,400. She also had Papageorgiou J.'s order of April 20, 2022 which ordered Jay to pay monthly child support of \$3,099, and monthly spousal support of \$8,553. These combined amounts exceeded his monthly income. Most importantly, Heather was aware on March 8, 2022, that Jay had lost his full-time employment. "[A] custodial parent does not have *carte blanche* to enrol a child in any number of extra-curricular activities and then look to the non-custodial parent to share all of the costs without consultation." See *Simone v Van Nuys*, 2021 ONCJ 652 at para 157, and cases cited therein. I decline to treat this expense as a s. 7 expense for this reason, and because this expense was not reasonable in relation to Jay's means at the time. The obligation rested on Heather to consult with Jay and obtain his agreement before expecting contribution from him.

[197] The total cost of s. 7 expenses that I have allowed in 2022 is \$5,195. Based on the parties' 2022 Guidelines Incomes which I have found, 14% of this cost shall be paid by Jay and 86% shall be paid by Heather.

[198] Therefore, I find that in 2022, Jay owes Heather \$727.30 in s. 7 expenses which represents his share of speech therapy and nanny expenses.

Issue 5: Is Heather entitled to spousal support? If so, what amount is she entitled to receive retroactively and prospectively?

[199] As the parties were not married, the governing legislation is the *FLA* and not the *Divorce Act*.

[200] The parties were cohabiting from October 2019 to December 2020, for a total duration of 15 months, and have a child together. I am satisfied that under the definition of "spouse" in s. 29 of the *FLA*, the parties were spouses in a relationship of some permanence and parents of the child.

[201] Under s. 33(1) of the *FLA*, the Court may order a person to provide support for a spouse. Section 33(8) sets out the objectives of a spousal support order, namely:

(a) recognize the spouse's contribution to the relationship and the economic consequences of the relationship for the spouse;

(b) share the economic burden of child support equitably;

(c) make fair provision to assist the spouse to become able to contribute to his or her own support; and

(d) relieve financial hardship, if this has not been done by orders under Parts I (Family Property) and II (Matrimonial Home).

[202] While interpreting similar legislation under the *Divorce Act* for spousal support orders, the Supreme Court of Canada has made clear that the Court must consider all four statutory objectives when a spousal support order is made: *Moge v. Moge*, [1992] 3 SCR 813; *Bracklow v. Bracklow*, [1999] 1 SCR 420 at para 35.

[203] Entitlement to spousal support, with regard to the objectives of a spousal support order under the *FLA*, must be established before it can be awarded. *Charbonneau v Charbonneau*, 2004 CarswellOnt 5211, at para 16.

[204] Compensatory entitlement to spousal support is intended to “recognize and account for both the economic disadvantages incurred by the spouse who makes...sacrifices and the economic advantages conferred upon the other spouse”: *Moge*, at para 74. Compensatory support is also “intended to deal with the economic consequences” following relationship breakdown: *Moge*, at para 43. A common basis for compensatory support claims is when one spouse obtains advantages of earning an income, promotions, and not missing work opportunities, while the other spouse attends to childcare and misses these opportunities. The spouse who remains at home to care for a child is entitled to compensation for that work.

[205] Non-compensatory entitlement to spousal support is based on a spouse's need. It exists because it is artificial to assume that “all separating couples can move cleanly from the mutual support status of marriage to the absolute independence of single life”: *Bracklow*, at para 31. Non-compensatory support “places the burden of support for a needy partner who cannot attain post-marital self-sufficiency on the partners to the relationship, rather than on the state”: *Bracklow*, at para 31.

[206] A third basis for spousal support entitlement is contractual. It does not apply in this case.

Compensatory Support

[207] I find there is no entitlement to spousal support on a compensatory basis. The evidence was that both parties shared equally in childcare responsibilities. Heather's evidence was that Jay would manage the night shifts and that Heather would assume the morning shift

until she could “delegate” childcare responsibilities to the nanny. Heather testified that after the child was born, the nanny worked five days a week, from 7 a.m. to 3 p.m. I am satisfied that the parties both played an equal role in the child’s care, and that during the day while Jay was at work, Heather was supported by a nanny. In terms of other household chores, there was not sufficient evidence to lead me to conclude that Heather performed significantly more than Jay. Heather admitted that Jay did his own laundry. Parties were also supported by a nanny who, in the past, performed housekeeping duties.

[208] I have also considered whether Heather missed work opportunities because of the roles the parties played in the relationship. Heather’s evidence was that for the first three or four months after the child was born, she did not really work, except for a few hours on Friday afternoons.

[209] For the 15 months of their cohabitation, there was no compelling evidence which suggested that Heather missed work opportunities or made sacrifices to support a compensatory claim. While Heather’s concierge business may have slowed down in 2020 due to the COVID pandemic, this was not a result of the role she played in the parties’ relationship. Heather has also not provided complete disclosure of her business records, making it impossible to assess whether in 2021, when the parties separated, she was disadvantaged as a self-employed individual earning less than previously. Heather’s three financial statements, sworn October 13, 2021, February 1, 2022 and September 20, 2022, suggest that her income increased from \$34,000 in 2020 (of which \$20,000 represented a CERB loan), to \$58,062 in 2021. As I have found, her Guidelines (grossed up) Income for 2021 was \$70,256. This does not suggest she or her business were disadvantaged as a result of the roles played during their relationship.

[210] For these reasons, I find Heather has no compensatory entitlement to spousal support.

Non-compensatory support

[211] I am satisfied that in 2021, Heather had entitlement to non-compensatory spousal support. The parties were living in a condominium that Jay owned solely. He was paying for all of the parties’ expenses. They had been living a lavish lifestyle, supported almost exclusively by Jay. With the arrival of the child in September 2020, and Jay having left the condo in January 2021, Heather needed support to ensure accommodations, food and clothing for herself and the child. Her first Financial Statement, sworn October 13, 2021, along with her subsequent Financial Statements, showed that her debts exceeded her assets, resulting in her net worth ranging from negative \$60,000 in her first Financial Statement, to negative \$160,000 in her last Financial Statement. I am satisfied that Heather had need for spousal support in 2021.

[212] When determining the amount and duration of spousal support, the court must consider a variety of factors listed in s. 33(9) of the *FLA*. They include and are summarized as:

- a. The parties’ current assets and means;
- b. The assets and means the parties are likely to have in the future;

- c. The dependent's capacity to contribute to his or her own support;
- d. The respondent's capacity to provide support;
- e. The parties' ages and physical and mental health;
- f. The dependent's needs, with regard to the accustomed standard of living while the parties' resided together;
- g. The measures available for the dependent to become able to provide for his or her own support;
- h. Any legal obligation of the parties to provide support to another person;
- i. The desirability of the parties remaining at home to care for a child;
- j. A contribution by the dependent to the realization of the respondent's career potential;
- k. If the dependent is a spouse: (i) the length of cohabitation; (ii) the effect on the spouse's earning capacity of the responsibilities assumed during cohabitation; (iii) any housekeeping, child care or other domestic service performed by the spouse for the family, as if the spouse were devoting the time spent in remunerative employment and were contributing the earnings to the family's support; and (iv) the effect on the spouse's earnings and career development of the responsibility of caring for a child.

[213] Papageorgiou J. made an order for interim spousal support on an interim and without prejudice basis, commencing February 1, 2022 in the amount of \$8,533. Now with fulsome evidence at trial, I find it is appropriate to vary that interim spousal support order.

Spousal Support from January 2021 to December 2021

[214] After considering the factors in s. 33(9) of the *FLA*, and after considering DivorceMate calculations of the range of spousal support that should be ordered, I order Jay to pay retroactive spousal support to Heather in the before tax amount of \$4,734 per month for the period from January 1, 2021 to December 1, 2021. I relied on Heather's three sworn financial statements, sworn October 13, 2021, February 1, 2022 and September 20, 2022, and the parties' incomes in 2021 as I have determined them to be. Jay's Financial Statement with respect to his 2021 income was not helpful, as I have found he earned significantly more than he reported.

[215] The DivorceMate calculations, based on the parties 2021 imputed incomes, results in a range of \$2,782 (low), \$3,808 (mid) and \$4,734 (high). I have determined that monthly spousal support of \$4,734 per month for the 2021 calendar year is appropriate for the following reasons:

- a. The monthly housing costs of the condo in which the parties lived was \$4,297. A support amount slightly in excess of that amount was necessary to ensure that Heather and the child had housing, plus resources for food and clothing.
- b. The parties had been accustomed to living a lavish lifestyle. A period of time was necessary to allow Heather to become accustomed to living more modestly in relation to her income.
- c. Heather had an imputed income of \$70,256 in 2021. This would not have been sufficient to allow her to cover expenses with regard to the standard of living to which the parties had been living for the prior 15 months.
- d. Jay's imputed income in 2021 of \$323,913 was sufficient to support a spousal support order at the high end of spousal support advisory guidelines. He also had assets (i.e., a pre-construction investment in the Logan Avenue condominium project) that he could leverage to pay spousal support.
- e. As indicated, I was not satisfied that Heather made greater contributions towards childcare or the household, or that she had sacrificed career opportunities that resulted in compensatory entitlement to support. The more significant factor was need, the standard of living to which Heather had been accustomed albeit briefly, and the need to provide some measure of support to allow Heather to become self-sufficient and within her capacity of earnings.

[216] Neither party's 2021 Income Tax Return identifies spousal support as having been paid. Spousal support is taxable income for Heather, and tax deductible by Jay. Accordingly, using DivorceMate and the parties 2021 imputed income, the after-tax calculation of monthly spousal support of \$4,734 results in an annualized after-tax lump sum cost to Jay of \$33,377 and an annualized after-tax lump sum benefit to Heather of \$48,724 (see attached 2021 DivorceMate calculations). Since Jay did not declare income other than his T4 income in 2021, it would be unfair to Heather and artificial to provide Jay with tax advantages associated with paying spousal support from an income that he did not declare. Accordingly, I find that the lump sum amount of spousal support payable by Jay to Heather in 2021 is \$48,724, representing the after-tax benefit to Heather of a lump sum spousal support payment for the 2021 calendar year.

Spousal Support for January 2022 onwards

[217] The challenge with continuing spousal support from 2022 onwards is that Heather has not provided an updated sworn Financial Statement or budget setting out her needs-based claim. The *FLA* requires that I consider the parties' *current* assets and means. Her last Financial Statement was sworn on September 20, 2022. Furthermore, the parties' 2022 incomes, as I have found them (\$252,377 for Heather and \$35,696 for Jay), do not support continuing need on the part of Heather for spousal support or a capacity on Jay's part to pay.

[218] Heather's last Financial Statement identifies \$8,424 in monthly expenses. With the income I have found Heather to have earned in 2022, she would have been able to cover most if not all of these expenses. There were also some expenses that appeared excessive, such as \$1,984 on monthly leasing expenses for a Range Rover and over \$600 per month on pet expenses. I question the necessity of these expenses. In any event, Heather testified that her Range Rover was stolen, and this leasing cost may no longer exist (she provided no police or insurance reports of its loss or documentary proof of current lease payments). Also, as I find below that the dog belongs to Jay and should be returned, there will be a further reduction in pet expenses for Heather.

[219] I have also considered that the child was primarily in Heather's care in 2022 and until May of 2023. When a spouse also has childcare responsibilities, the *Spousal Support Advisory Guidelines* and DivorceMate ranges for spousal support typically provide for indefinite spousal support until the child becomes of an age where the child can live independently. However, I must also consider the length of the parties' cohabitation (15 months), and that in 2022, Jay's income fell significantly while Heather's income rose significantly. Jay did not have capacity to pay support, and Heather had capacity to support herself. Updated DivorceMate calculations using the parties' 2022 incomes results in no spousal support being ordered.

[220] For these reasons, I decline to award spousal support to Heather from 2022 onwards.

Issue 6: Of the payments and contributions made by Jay, has he satisfied any retroactive support obligations by the payments and contributions he has made to Heather? Does Heather owe an amount to Jay?

[221] I have found that Jay had the following support obligations to Heather until May 31, 2023:

	2021	2022	Jan – May 2023	Total
Child Support	\$31,392	\$3,744	\$1,872	\$37,008
S.7 Expenses	\$5,701.08	\$727.30		\$6,428.38
Spousal Support (lump sum after-tax amount)	\$48,724	\$0	\$0	\$48,724
Total Support Obligation				\$92,160.38

[222] To date, Jay has made the following payments to Heather:

Description	Date	Amount
Uncharacterized advance provided to Heather's counsel	August 2021	\$2,500
Receipt of cheque from Jay's counsel to Heather's counsel	September 28, 2022	\$13,037.14
Proceeds from disposing Jay's interest in Logan Avenue pre-construction project forwarded to FRO	November 23, 2022	\$42,444.12
Payment to FRO, pursuant to Voluntary Arrears Payment Schedule	May 8, 2023	\$12,652.00
Total Support Paid by Jay		\$70,633.26

[223] In addition, Jay had continued to pay all the carrying costs of the condo on Portland Avenue in which the parties lived, except utilities. Upon review of the payments made from Jay's TD Account ending in *1133, I come to a slightly different conclusion of the total expenses Jay paid for carrying the condo as set out in Jay's closing submissions:

Description	Amount	Total
Mortgage payments of \$3,215.44 from January 2021 to July 2022 ²	\$3,215.44 x 19 months	\$61,093.36
Condo Fees to TSCC 2012 \$633.44 (January 2021 to July 2021) \$657.25 (August 2021 to July 2022)	\$633.44 x 7 months \$657.25 x 12 months	\$12,321.08
Toronto Property Taxes	\$1,868.08 paid March 2021	\$5,737.05

² Jay's Bank Statements reveal that his BMO Mortgage payment was returned NSF in August 2022. I have included Jay's August 2022 unpaid mortgage payment within the judgment granted to BMO.

	\$1,940.53 paid July 2021 \$25.13 paid October 2021 \$1,903.31 paid February 2022	
Condo Insurance ³	\$109.44 x 19 months	\$1,313.28
Unpaid monthly mortgage cost included within BMO Judgment against Jay, dated March 24, 2023 ⁴	\$3,215.44 x 10 months (August 2022 to May 2023)	\$32,154.40
Total Expenses and Liability Incurred by Jay		\$112,619.17

[224] I have considered the following factors when deciding whether Jay is entitled to a credit for the amounts he paid (or is obligated to pay) for the condo during a time when Heather had exclusive use of the condo:

- a. In her April 20, 2022 decision, Papageorgiou J. did not give credit to Jay for any of the on-going carrying costs of the condo when making her support award. She did grant a preservation order restraining Jay from disposing of the condo. Following a trial, I have found that in 2022 onwards, Jay was not able to afford both his interim support payments and maintaining the condo.
- b. In January 2021, Jay unilaterally left the condo, without asking for contribution from Heather for her primary use of the condo. Instead, he continued to make all payments. In addition, Jay would continue to attend the condo several times daily from January to October, 2021. The child continued to require a home in which to reside. Child and spousal support were not being paid in 2021, although I have made a retroactive order for both.
- c. It would be unfair to expect Jay to contribute to the entire costs of the condo from November 2021 onwards, and most certainly from March 2022 onwards when Heather had notice that Jay lost his job. He enjoyed no benefit from the condo after October 2021 when

³ Jay's TD Bank Statements show monthly payments of \$339.50 to "Certas H&A Ins", although Jay is only claiming \$109.44 in monthly condo insurance costs. It is assumed that these withdrawals cover home insurance and some other insurance. In any event, \$109.44 is not an unreasonable amount of monthly condo insurance and I allow Jay's claim for this amount.

⁴ BMO obtained judgment against Jay in the amount of \$662,158.21 as a result of the default on his mortgage for the Portland condo. I have concluded that this Judgment includes all unpaid mortgage payments that Jay owed up to May 31, 2023 and while Heather remained in the condo.

the criminal charges against him were laid, and he had significantly reduced income from March 2022 onwards.

- d. Jay's counsel wrote to Heather's counsel on May 9, 2022, May 30, 2022, June 22, 2022, July 11, 2022, August 31, 2022, and October 3, 2022, pleading for Heather's cooperation and agreement to sell the condo. In fact, Jay had already entered into an Agreement of Purchase and Sale with Ms. Zingaro, prior to the preservation order being made. I am satisfied from Ms. Zingaro's testimony that she backed out of purchasing the condo after Heather confronted her and accused her of rendering Heather and the child homeless.

Assurances were given to Heather that the net proceeds of sale would be used to make all outstanding support payments, and that support payments would continue from this source until trial. Heather rejected this proposal. Jay's counsel also communicated that because Jay had lost his job and because of the interim support order, he was unable to continue to afford to pay for the condo. Still, Heather rejected the proposal to sell the condo. On September 15, 2022, Jay's counsel advised Heather's counsel that Jay was in default on his mortgage payments which will force the property into a power of sale. On October 3, 2022, Jay's counsel made a last-ditch attempt to seek Heather's agreement to the sale, which she rejected.

I find that Heather's conduct was entirely unreasonable and irresponsible. She remained steadfast in her opposition to the sale. She insisted that Jay pay all costs associated with a condo that he owned and from which he enjoyed no benefit, plus payment of child and spousal support. She was advised repeatedly that Jay was not able to afford all of these expenses, and of the risk of a power of sale. While Heather did not receive any significant support payments until September 28 and November 23, 2022, she could have received her support payments sooner from proceeds of sale had she agreed to the condo's sale in May 2022. It would be unconscionable for Jay to be responsible for both support and maintaining the home throughout the entire period leading up to trial.

- [225] Having considered these factors, and the global financial circumstances of the parties, I find that Jay is entitled to a credit of \$76,000 for expenses he incurred in relation to the condo. I come to this figure by using the estimated monthly condo expense of \$4,300. I have attributed full responsibility for this cost to Heather for the period from April 2022 to May 2023 (x 13 months = \$55,900), reflecting a period when Jay lost his job and could not afford the condo, and when Heather unreasonably opposed its sale and her income could not afford all condo payments. I then provide for a further \$20,100 contribution by Heather towards condo costs from January 2021 to April 2022. In my view, this represents a reasonable and fair contribution by Heather towards condo costs (roughly 30% of monthly housing costs), considers that Jay unilaterally moved out of the condo in January 2021, that Heather had some expectation of Jay continuing to pay for all housing costs, and that Heather has been credited with a retroactive spousal and child support award for 2021.
- [226] The retroactive calculation factors in Jay's support obligation from January 1, 2021 to May 31, 2021, the support payments Jay has made, and the credit to which Jay is entitled to

receive from Heather for the condo expenses. It results in Heather owing Jay \$54,472.88, calculated as follows:

Jay's Support Obligation (child, spousal, and s.7):	\$92,160.38
Less Support payments Jay made:	\$70,633.26
Less credit to Jay from Heather:	<u>\$76,000.00</u>
Heather Owes Jay:	\$54,472.88

[227] Accordingly, I order that Heather pay Jay the amount of \$54,472.88, reflecting overpayments Jay has made to Heather for child and spousal support and for condo expenses for the period from January 2021 to May 2023.

Issue 7: Who owns the dog?

[228] Jay testified that he got a dog, named Molly, in 2013 before he opened his restaurant. After opening the restaurant, he did not have time for Molly so he asked Mr. Raimondi to care for the dog. When Heather was pregnant, Jay testified that he thought Molly would brighten Heather's spirits, and Jay asked Mr. Raimondi to have Molly back. Jay testified that after a month of having Molly, Heather asked to keep Molly and not return Molly to Mr. Raimondi. Mr. Raimondi, reluctantly, agreed to return the dog to Jay.

[229] Heather's position is that the dog was a gift to her.

[230] I am not persuaded that Molly was a gift to Heather. I am satisfied that Jay acquired the dog. I am also satisfied that Jay asked Mr. Raimondi for the permanent return of Molly because of Heather's request, but I am not persuaded that Jay gifted Molly to Heather.

[231] Accordingly, I order that Heather return Molly to Jay.

Costs

[232] Parties are encouraged to settle costs of this trial.

[233] If they are unable to do so, parties may deliver brief cost submissions not exceeding 5 pages double-spaced. They shall attach a Bill of Costs along with any accompanying documents

on which they intend to rely. As Jay was primarily successful at trial, Jay shall deliver his cost submissions first, and by no later than September 22, 2023. Heather shall deliver her responding cost submissions by October 13, 2023. Reply cost submissions, if any, shall be delivered by October 27, 2023.

Justice M. Sharma

Released: September 1, 2023

Attached: DivorceMate Calculations for 2021 and 2022/2023



Tools One 2021

McArthur v Le: McArthur v Le - 2021 Child Support Calculation

Prepared by:
August 28 2023

Calculation Input		Annual \$
Jay	38, Resident of ON	
Income		
Employment income	140,400	
Other non-taxable income (auto gross up)	93,916	
Heather	32, Resident of ON	
Income		
Other non-taxable income (auto gross up)	58,531	
Children	Age	Lives with
Child 1	0	Heather
Youngest child attends full time school 5 years and finishes high school 18 years from the date of separation.		

Cautions/Overrides

▲ **Child Support (Table)** - Jay's Income over \$150,000; CSG Table Amount may be inappropriate.

Child Support Guidelines (CSG)	Jay	Heather
Annual Guidelines Income	332,913	70,256
CSG Table Amount (current)	2,616	0
Child Support (Table)	2,616	0

Spousal Support Advisory Guidelines (SSAG)

Length of marriage/cohabitation: 1.25 years
Recipient's age at separation: 32 years

"With Child Support" Formula

Low	Mid	High
2,782	3,808	4,734

The formula results in a range for spousal support of \$2,782 to \$4,734 per month for an indefinite (unspecified) duration, subject to variation and possibly review, with a minimum duration of 5 years and a maximum duration of 18 years from the date of separation.

SSAG Considerations: The results of the SSAG formula must be interpreted with regard to: Entitlement; Location within the Ranges; Restructuring; Ceilings and Floors; and Exceptions.

Dependant credit claimed by Heather.

Note: This calculation includes amounts that have been grossed-up; this gross-up accounts for income tax only.

Support Scenarios	Monthly \$	A. SSAG Low		B. SSAG Mid		C. SSAG High	
		Jay	Heather	Jay	Heather	Jay	Heather
Gross Income		19,526	4,878	19,526	4,878	19,526	4,878
Taxes and Deductions		(2,486)	(60)	(2,060)	(326)	(1,760)	(607)
Benefits and Credits		0	818	0	626	0	525
Spousal Support		(2,782)	2,782	(3,808)	3,808	(4,734)	4,734
Child Support (Table)		(2,616)	2,616	(2,616)	2,616	(2,616)	2,616
Net Disposable Income (NDI)		11,642	11,034	11,042	11,602	10,416	12,146
adult in household child in household shared/summer child in household Payor's NDI/Contribution							
Percent of NDI		51.3%	48.7%	48.8%	51.2%	46.2%	53.8%
CSG Special Expenses Apportioning %		74.3%	25.7%	71.2%	28.8%	68.5%	31.5%
After-tax Cost/Benefit of Spousal Support		(1,574)	2,685	(2,175)	3,445	(2,801)	4,089
Spousal Support Lump Sum (NPV)							
Jay's after-tax cost			18,756		25,917		33,377
Heather's after-tax benefit			31,994		41,050		48,724
Midpoint			25,375		33,484		41,050

Net Present Value (NPV) Assumptions: spousal support duration is 1 year (specified); spousal support payments not discounted for Recipient's life expectancy; discount rate of 1.3% applied (Indexed - based on the risk-free rate of return currently available from a Long-Term Government of Canada Real Return Bond, which rate effectively indexes support payments for currently anticipated inflation in the CPI over the next 20-30 years); support payments and taxation rates remain constant throughout duration; NPV based on the after-tax cost/benefit of spousal support to the parties; lump sum payment of spousal support assumed to be non-deductible/non-taxable to the Payor/Recipient respectively.



Calculation Input		Annual \$
Jay	39, Resident of ON	
Income		
Employment income	35,696	
Heather	33, Resident of ON	
Income		
Other non-taxable income (auto gross up)	158,564	
Children	Age	Lives with
Child 1	0	Heather
	Table Amt	Claimed by
	Yes	Heather

Youngest child attends full time school 5 years and finishes high school 18 years from the date of separation.

Dependant credit claimed by Heather.

Note: This calculation includes amounts that have been grossed-up; this gross-up accounts for income tax only.

Child Support Guidelines (CSG)	Jay	Heather
Annual Guidelines Income	35,696	252,377
CSG Table Amount (current)	312	0
Child Support (Table)	312	0

Spousal Support Advisory Guidelines (SSAG)	Monthly \$
Length of marriage/cohabitation:	1.25 years
Recipient's age at separation:	33 years

"With Child Support" Formula

Low	Mid	High
0	0	0

The formula results in a range for spousal support of \$0 to \$0 per month for an indefinite (unspecified) duration, subject to variation and possibly review, with a minimum duration of 5 years and a maximum duration of 18 years from the date of separation.

SSAG Considerations: The results of the SSAG formula must be interpreted with regard to: Entitlement; Location within the Ranges; Restructuring; Ceilings and Floors; and Exceptions.

Support Scenarios	Monthly \$	A. SSAG Low		B. SSAG Mid		C. SSAG High	
		Jay	Heather	Jay	Heather	Jay	Heather
Gross Income		2,975	13,214	2,975	13,214	2,975	13,214
Taxes and Deductions		(478)	0	(478)	0	(478)	0
Benefits and Credits		70	874	70	874	70	874
Spousal Support		0	0	0	0	0	0
Child Support (Table)		(312)	312	(312)	312	(312)	312
Net Disposable Income (NDI)		2,255	14,400	2,255	14,400	2,255	14,400
adult in household child in household shared/summer child in household Payor's NDI/Contribution							
Percent of NDI		13.5%	86.5%	13.5%	86.5%	13.5%	86.5%
CSG Special Expenses Apportioning %		12.4%	87.6%	12.4%	87.6%	12.4%	87.6%
After-tax Cost/Benefit of Spousal Support		0	0	0	0	0	0

CITATION: McArthur v. Le, 2023 ONSC 4897
COURT FILE NO.: FS-21-00026090
DATE: 20230901

2023 ONSC 4897 (CanLII)

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

Heather Margaret McArthur

Applicant

– and –

Loc Phu Le (a.k.a. Jay Le)

Respondent

REASONS FOR JUDGMENT

Justice M. Sharma

Released: September 1, 2023