

CANADA / JUDGMENT

A.S.G. v. N.K.G.

2010 BCSC 1188

COURT

Supreme Court of British Columbia

DECIDED

23 August 2010

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2010 BCSC 1188 A.S.G. v. N.K.G. IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: A.S.G. v. N.K.G., 2010 BCSC 1188 Date: 20100823 Docket: E19241 Registry: New Westminster Between: A.S.G. Plaintiff And N.K.G. Defendant Before: The Honourable Mr. Justice Joyce Reasons for Judgment Counsel for the Plaintiff: P.A. Fleming Counsel for the Defendant: N.J. Harold Place and Date of Hearing: Chilliwack, B.C. July 29, 2010 Place and Date of Judgment: New Westminster, B.C. August 23, 2010

NATURE OF THE APPLICATION

- [1] This application is concerned with the issue whether the plaintiff father, is obliged to provide child support for his two twin adult children, who are currently 23 years of age and about to complete their final year of a four-year program leading to Bachelor degrees in Pharmacy. More particularly, the question is whether the plaintiff has a continuing obligation to pay child support for the two children under a consent order that the parties entered into on June 30, 2005, or, if not, whether the applicant is entitled to a variation of the order requiring the payment of child support for the twins.

FACTS

- [2] By way of background, the parties were married on August 9, 1981. There were four children of the marriage: I.K.G., born in September 1982; R.G.1, born in December 1986; R.G.2, born in December 1986 (R.G.1's twin); and R.S.G., born in December 1994.
- [3] The parties separated in August 2002. The parties eventually negotiated a settlement of all of the corollary issues arising from the breakdown of their marriage. The settlement agreed was reflected in a consent order dated June 30, 2005 (the "Order"), which also included a divorce.
- [4] When the Order was made, the eldest child was over the age of 19, but was in full-time attendance at university and was still a child of the marriage. The twins were 18 years of age and had just completed their first year of university in the Faculty of Science. The youngest child was 10 years old.

[5] Paragraph 12 of the Order reads as follows:

12. Upon the Plaintiff having a Guideline Income of \$116,029 US = \$143,349.39 CAN, the Plaintiff shall pay to the Defendant child support for the four children of the marriage, in the sum of \$2,344.00 (or varied as per exchange rate at June 30) per month, payable on the first day of the month, commencing on August 1, 2005 and continuing on the first day of each month thereafter, until the children are no longer children of the marriage (the "Child Support"); for the next four years as long as [I.K.G.] and the twins remain enrolled full time at university, the child support payments will be made on the basis that the Plaintiff pays an amount calculated at an amount half way between three and four children. After the twins have completed five years of their post secondary education it will be dropped to a payment for one child only, provided that [R.S.G.] is still in the Defendant's care. Child support shall be paid as long as each child is enrolled in university or post secondary education full time or under the age of 19 years.

[6] Paragraph 14 of the Order provides a mechanism for adjusting the quantum of child support on an annual basis. It reads as follows:

14. The Plaintiff shall provide a copy of his tax summary to the Defendant, and the tax summaries for the children aged nineteen (19) years and older shall be provided to the Plaintiff each year by June 30, commencing June 30, 2005, including any Notices of Assessments when received. The Child Support shall be adjusted on August 1 of each year, commencing August 1, 2005, in reference to the Child Support Guidelines, taking into consideration [I.K.G.'s], [R.G.1's], [R.G.2's] and [R.S.G.'s] income, after each child is nineteen (19) years old, and based on the Plaintiff's income calculated at the exchange rate as posted on the daily noon rate of June 30, or the last business day prior on the Bank of Canada website at www.bank-banque-canada.ca. No reduction to child support shall be made without written agreement or further court order.

[7] The defendant purported to give up any right to claim support under s. 7 of the Guidelines. Paragraph 15 of the Order provides as follows:

15. The Plaintiff shall not be obligated to pay any section 7 expenses for any of the children of the marriage either now or in the future. The Defendant shall not bring on an application for section 7 expenses or any educational expenses or any other additional expenses now or in the future and the parties agree that the Plaintiff has waived any interest in the matrimonial home and chattels in exchange for an agreement that section 7 or any educational expenses or any other additional expenses for any of the children, shall not be sought now or at any time from the Plaintiff.

[8] It is common ground that the eldest child, I.K.G., obtained her qualifications as an optometrist in May 2009, although she did not find work in her chosen field until December 2009.

- [9] The twins remained enrolled in the Faculty of Science and completed three years in that program before they were accepted into a four-year program in the Faculty of Pharmaceutical Sciences leading to the degree of Bachelor of Science in Pharmacy in September of 2007. There is no evidence before me concerning when the twins submitted applications for admission to the pharmacy program.
- [10] Currently, it is expected that the twins will obtain their degrees in Pharmacy in May of 2011. They have done well in their studies, particularly in the second and third year of their pharmacy programs when R.G.1 obtained averages of 81.9% and 80.7%, respectively, and R.G.2 obtained averages of 80.0% and 81.5%, respectively.
- [11] The plaintiff made child support payments, adjusted in accordance with paragraph 14 of the Order, until August 1, 2009, when he reduced the payment to the amount payable pursuant to the Child Support Guidelines Tables for one child.
- [12] In addition to the child support paid by the plaintiff pursuant to the Order and the support provided by the defendant, an educational trust fund established by the twins' grandfather provided a source of funding for their education which was paid over three years from 2005 until 2007. Each of the twins received approximately \$33,000.00 over the three years. That funding came to an end in 2007, when each of the twins received \$6,068.00 from the education fund.
- [13] The twins have assisted in meeting the cost of their education by working part-time during the school year and during the summers. A summary of their employment earnings is set out below: Year R.G.1 R.G.2 2005 \$7,280.00 \$9,781.00 2006 8,955.00 13,741.00 2007 8,269.00 15,561.00 2008 7,601.00 12,918.00 2009 9,951.00 13,739.00
- [14] The twins also applied for and obtained British Columbia and Canada Student Loans for the 2009-10 school year. For that year, R.G.1 received \$14,527.00 and R.G.2 received \$13,846.00. They have applied for student loans for the upcoming year, but I have no information what amounts they will receive.
- [15] Since the twins started their pharmacy programs in September 2007, they have incurred the following tuition costs: Year R.G.1 R.G.2 2007-08 \$6,850.00 \$6,850.00 2008-09 7,182.00 7,182.00 2009-10 7,982.00 7,982.00 2010-11 6,899.00 6,899.00 Total \$28,913.00 \$28,913.00 THE PARTIES' POSITIONS
- [16] The defendant takes the position that the Order should be interpreted so as to require the payment of child support for so long as the children remain "children of the marriage" without any particular limitation as to the number of years of university education they might receive. In the alternative, she argues that if the Order provided for support for a further four years only, then it should be varied due to a change in circumstances. She submits that the fact that it will take two years longer than expected for the twins to obtain their degrees is a material change of circumstance.

- [17] The defendant seeks child support retroactive to August 1, 2009, calculated in the manner provided by paragraph 14 of the Order.
- [18] The plaintiff takes the position that his obligation under the Order, in relation to the three older children, came to an end at that time because the eldest had graduated and the twins had completed five years of university, even though they were two years' short of obtaining their degrees in pharmacy. He argues that it was known or anticipated that the twins would not obtain their degrees within a further four year period when the Order was pronounced. WHAT DOES THE ORDER MEAN?
- [19] Paragraph 12 of the Order is not a model of clarity and, at least at first blush, appears to contain an inconsistency. The opening clause refers to support being payable "until the children are no longer considered children of the marriage". The final sentence refers to the payment of child support "as long as each child is enrolled in university or post secondary education full time or under the age of 19 years". Between these two parts of the paragraph is the portion that refers to the following four years or the time until the twins have completed five years of their post-secondary education.
- [20] In my view, the Order should be interpreted in light of the court's obligation under s. 11(b) of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) to ensure that reasonable arrangements have been made for the support of any children of the marriage as well as in light of the proposition that support is the right of the child. In my view the overarching agreement reflected in the consent order is that support would be provided for the twins until they obtained their degree, during which time they would remain children of the marriage. HAS THERE BEEN A MATERIAL CHANGE OF CIRCUMSTANCES?
- [21] If I am wrong in my construction of the Order and it is to be interpreted as providing for a cessation of support for the twins after four years or when they had completed five years of university, even though they might remain children of the marriage thereafter, then it is necessary to consider whether there has been a material change of circumstances and whether the Order should be varied to accommodate the change of circumstances.
- [22] The defendant deposes that when the agreement was negotiated and the Order made "it was anticipated by everyone that the twins would complete their training within five years" but that has not been the case.
- [23] The plaintiff, on the other hand, deposes that It would have been obvious by June 2005, when final negotiations occurred, that the twins would not have been accepted into the UBC Pharmacy program for the 2005-2006 school year. Thus, it was very clear to me at the time of the agreement the twins would need education beyond the five years that was defined by the Order to complete their Pharmacy degrees, but the additional RESP principal funds of \$33,456.70 and my walking away from any interest in the mortgage free home would compensate for that.

- [24] The plaintiff does not explain in his first affidavit why it would have been obvious in June 2005 that the twins could not complete their Pharmacy degrees within a further four years of university. However, in his subsequent affidavit, the plaintiff deposes that his daughter, R.G.2 told him in March 2005, during a telephone conversation, that she and her sister were planning to take the Pharmacy College Admission Test ("PCAT"), which is a pre-requisite for admission, in June 2005. He deposes that he recorded this and other telephone conversations without his children's knowledge.
- [25] The defendant objects to the plaintiff's reference to the statement made by R.G.2 because of the surreptitious recording. While such conduct is not to be condoned, it is not unlawful. Further, the recording is not tendered in evidence. The plaintiff simply deposes what was said and, if it were done based on memory alone, would not be objectionable on those grounds. I am of the view that this evidence is admissible.
- [26] This evidence does not necessarily mean that the parties could not have held the belief that their daughters would be able to start their pharmacy degrees the following September.
- [27] The plaintiff, based on his review of the UBC Faculty of Pharmaceutical Sciences website, concluded that the deadline for submitting the PCAT score is April 1 for a September admission, with the result that the twins could not have gained admission in 2005. He does not say that he was aware of this condition at the time the consent order was negotiated.
- [28] However, while the evidence may tend to establish that in fact it was impossible for the twins to obtain their Bachelor of Pharmacy degrees by May 2009, four years after the Order was made, I am not satisfied that it establishes what was the expectation of the parties at the relevant time.
- [29] Despite the plaintiff's bald assertion that it was clear to him that the twins would attend university beyond the additional four years contemplated by the agreement, other evidence persuades me that when the agreement was made there was a common belief and understanding between the parties that child support was to be paid for the children's post secondary education and that, in the case of the twins, that was thought to be for another four years. This evidence includes the following:
- (a) when the Order was made the twins had clearly expressed the intention to pursue a degree in pharmacy, which is a four-year program;
 - (b) the parties had always placed a high priority on the children's post secondary education;
 - (c) the plaintiff had agreed to support the eldest child in her educational pursuits after she had completed a first degree; and
 - (d) the Order contains no express limitation on the number of years of support for the youngest child.

- [30] I am satisfied, therefore, that I would have the jurisdiction to vary the Order to provide for continuing support until June of 2011, by which time, I am satisfied, the twins will successfully obtain their pharmacy degrees.
- [31] I am also satisfied that, given the success the twins have enjoyed in their university studies, the efforts that they have made to assist financially in obtaining their degrees and the extent to which the defendant has been required to support them, that it is appropriate that the plaintiff continue to pay support, in accordance with the Guideline tables from August 1, 2009 until and including May 1, 2011. While the twins have had incomes from summer jobs and student loans, I am satisfied that they require support from their parents in terms of housing and other living expenses. Since August 2009, the defendant has borne the burden of that additional expense.
- [32] The defendant submits that there should be some "buffer" period after the twins' convocation date to accommodate their need to find employment. However, they will no doubt be looking for positions prior to convocation and, given their track records, I expect they will have no difficulty finding positions.
- [33] The amount of support will be based on the plaintiff's prior year earnings in accordance with paragraph 14 of the Order. For clarity, the Order will be varied such that the plaintiff's obligation to pay child support since August 1, 2009, is as follows: Period Income Monthly support (3 children) Aug 1/09 - July 1/10 \$139,416.00 \$2,503.00 Aug 1/10 - May 1/11 \$100,113.00 \$1,877.00
- [34] On June 1, 2011, support will be reduced to the amount payable for one child based on an income of \$100,113.00 (\$906.00 per month) until August 1, 2011, when it will be adjusted in accordance with paragraph 14 of the Order.
- [35] Arrears under the Order since August 1, 2009 amount to \$15,650.00 calculated as follows:
- | Month | Amount per Order | Amount Paid | Difference |
|-----------|------------------|-------------|-------------|
| Aug 2009 | \$2,503.00 | \$1,251.00 | \$1,252.00 |
| Sept 2009 | \$2,503.00 | \$1,251.00 | \$1,252.00 |
| Oct 2009 | \$2,503.00 | \$1,251.00 | \$1,252.00 |
| Nov 2009 | \$2,503.00 | \$1,251.00 | \$1,252.00 |
| Dec 2009 | \$2,503.00 | \$1,251.00 | \$1,252.00 |
| Jan 2010 | \$2,503.00 | \$1,251.00 | \$1,252.00 |
| Feb 2010 | \$2,503.00 | \$1,251.00 | \$1,252.00 |
| Mar 2010 | \$2,503.00 | \$1,251.00 | \$1,252.00 |
| Apr 2010 | \$2,503.00 | \$1,251.00 | \$1,252.00 |
| May 2010 | \$2,503.00 | \$1,251.00 | \$1,252.00 |
| June 2010 | \$2,503.00 | \$1,251.00 | \$1,252.00 |
| July 2010 | \$2,503.00 | \$1,251.00 | \$1,252.00 |
| Aug 2010 | \$1,877.00 | \$1,251.00 | \$626.00 |
| Total | | | \$15,650.00 |
- [36] The defendant is entitled to her costs of the application. "B.M. Joyce J."

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Prepared on 26 October 2026 · Esheria