
CANADA / JUDGMENT

Anderson v. Anderson

2013 BCSC 129

COURT

Supreme Court of British Columbia

DECIDED

30 January 2013

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2013 BCSC 129 Anderson v. Anderson

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Anderson v. Anderson,

2013 BCSC 129

Date: 20130130

Docket: E101045

Registry: Vancouver

Between:

Shirley Marie Anderson

Claimant

And

Brian Melvin Anderson, Donna Lee Anderson Dobko

Keith Warren Anderson, Kenneth Wayne Anderson,

Darrell Leslie Anderson

Respondents

Before: The Honourable Mr. Justice Butler

Reasons for Judgment

The Claimant, Shirley Marie Anderson:

Appearing In Person

Counsel for the Respondent, Donna Lee Anderson Dobko:

John-Paul E. Boyd

Counsel for the Respondent, Keith Warren Anderson:

Jeffrey H. Bryant

Agent for the Respondent, Kenneth Wayne Anderson:

Sherry Anderson

Place and Date of Trial/Hearing:

Vancouver, B.C.

August 7 and 8, 2012

Place and Date of Judgment:

Vancouver, B.C.

January 30, 2013

- [1] The claimant, Shirley Anderson commenced this claim for parental support on July 12, 2000. She says she is impecunious and cannot support herself. She has five children, all of whom were named as defendants when the proceedings were commenced. On November 23, 2000, Master Donaldson made an order for interim parental support pending the trial of the action. He ordered that each of the children pay \$10 per month to the claimant. An appeal of the interim order to this Court was dismissed on February 12, 2001. No further steps were taken in the proceedings until May 2008, when the claimant filed a notice of intention to proceed. Following a number of adjournments and applications for production of financial information, the proceeding was ordered to be tried by summary trial pursuant to Rule 11-3 of the Supreme Court Family Rules.
- [2] Darrell Anderson ("Darrell") did not file a statement of defence and has never taken part in the proceeding. The claimant has reconnected with Darrell. She says he was injured in a welding accident while he was in prison and is legally blind. In any event, she has not pursued the claim against him. She provided no information to the Court about his current financial situation or the extent to which he has provided support to her. The other four respondents filed statements of defence. On December 5, 2010, Brian Anderson ("Brian") passed away at the age of 52. At the hearing before me, the three other children of the claimant, Donna Dobko ("Donna"), Keith Anderson ("Keith") and Kenneth Anderson ("Kenneth"), who are now 53, 51 and 48 respectively, vigorously opposed the claim. They say that the claimant abandoned all of them when they were in their teenage years. They are all estranged from her and have been for 20 or 30 years. They question her need for support and say she has not been forthcoming with financial information. In addition, they maintain they do not have disposable income to pay support to the claimant after taking into account

their personal circumstances and obligations.

- [3] I commence my analysis by setting out the legislation and law regarding parental support. I then set out the background of the claimant and the three remaining respondent children and make findings of fact. Finally, I apply the law to the facts and the overall circumstances. When I do that, I conclude that the claimant cannot succeed with her claim for support. Accordingly, for the reasons that follow, the claim is dismissed against Donna, Keith and Kenneth.

Legislation and Law

- [4] The claim is brought pursuant to s. 90 of the Family Relations Act, R.S.B.C. 1996, c. 128 (the "Act"), which provides:

- (1) In this section:

"child" means an adult child of a parent;

"parent" means a father or mother dependent on a child because of age, illness, infirmity or economic circumstances.

- (2) A child is liable to maintain and support a parent having regard to the other responsibilities and liabilities and the reasonable needs of the child.
- [5] This section was repealed on November 25, 2011, as a result of the operation of ss. 258 and 482 of the Family Law Act, S.B.C. 2011, c. 25. The repeal of s. 90 followed the release of the White Paper on Family Relations Act Reform which was published by the Justice Services Branch on July 6, 2010. The white paper noted that s. 90 was rarely used and that it "creates more problems than it solves. The cost for an elderly parent to sue an adult child for parental support could often exceed the amount of support ordered, and such litigation is likely to damage the relationship between adult child and parent." As a result of the repeal of s. 90, this decision is of interest to the litigants but has no precedential value.
- [6] There are few reported decisions considering s. 90 or its predecessor sections. In *Hua v. Lam*, [1985] B.C.J. No. 2706 (P.C.), the court considered the differences in the Act between the various obligations a person has to support his or her children, a spouse and parents. By analyzing the interplay of the provisions in the Act, Collings P.C.J. concluded at para. 29:

The result of my reading of s. 58(2) [now s. 90(2)] is that the obligations to support a child or a spouse rank ahead of the obligation to support a parent. To put that another way round, the funds available must be applied first to support the child and the spouse, and only after those obligations have been fulfilled should they be applied to support the parent.

- [7] The conclusion in *Hua* was implicitly approved in *Newson v. Newson* (1997), 35 B.C.L.R. (3d) 341 (C.A.), the leading case in British Columbia on the application of s. 90 of the Act. In *Newson*, the court considered an application for interim parental support by a father against his estranged children, none of whom were providing support to him at the time of the

application. The court allowed the father's appeal, overturned the dismissal of the father's application and remitted the matter to the Supreme Court for determination. In doing so, the court determined that the section does not require a parent to demonstrate an existing dependency upon an adult child before he or she can seek support. The word "dependent" in the definition of "parent" is to be given its primary meaning of financial dependence.

However, the court also concluded as follows at para. 35:

S-s.(2) of s.58 [now s. 90] qualifies the adult child's liability to maintain and support a parent in want for the reasons stated in s-s.(1) in these terms: "... having regard to the other responsibilities and liabilities and the reasonable needs of the child". These are words broad enough to enable the court to consider nearly all, if not all, of the children's objections to alleviating the parent's need. Specifically, the period of and the reasons for the estrangement of parent and children are factors to be taken into account in the objective evaluation and consequent ranking of the needs of the adult child.

[8] In *Newson v. Newson* (1998), 65 B.C.L.R. (3d) 22 (C.A.) [Newson 2], the court was again called upon to consider the dismissal of the father's application for interim support. The father was homeless and in need of financial assistance. The court was critical of the approach taken by the chambers judge who made extensive findings of fact including a determination that the father had abused the children. The court found that it was not appropriate on an interim application to make findings of fact which could potentially embarrass the trial judge. The court found that the father had made out a prima facie case of entitlement and that two of the children had a financial surplus. The court ordered them to pay \$200 per month. In doing so, the court stated at para. 15:

In the present case we are of the view the father has made out a prima facie case of entitlement. The circumstances of the children must be considered in a manner that avoids "thrashing out the merits of the case". On an interim application these would include their financial circumstances and responsibilities and the long period of separation between them and the father. In our view, the unadorned facts of separation and estrangement would relieve the court from considering any moral claim on the part of the father to a lifestyle comparable to that of any one of the children. There would then remain for consideration whether relief is needed to relieve the more emergent consequences of indigence and of the financial circumstances and responsibilities of the children in this context.

[9] In *S.A.G. v. M.R.G.*, 2000 BCPC 45, a mother who was estranged from her son sought parental support from him sufficient to put her on similar economic terms. His annual income was approximately equal to his reasonable expenses including annual RRSP contributions. The court found that the applicant's conduct, even though it led to the estrangement, did not disentitle her to support. After examining the income and expenses of both parties, Gillis P.C.J. concluded at para. 57:

The result is that the son, though liable to pay maintenance for his mother's support, does not have sufficient funds to pay any amount.

[10] The final decision commenting on s. 90 of the Act is Master Donaldson's ruling on the interim application in this case: *Anderson v. Anderson*, [2000] B.C.J. No. 2694 (S.C.) [Anderson #1]. His review of the authorities led him, at para. 13:

... to several conclusions, not the least of which is that in determining the ability to pay maintenance for a parent the existing needs of the child's present family must first be considered; and secondly, that one is required to take into account only the child's own income and not that of his or her spouse.

[11] The limited jurisprudence has established the following approach to claims for parental support:

- a) The first step is to examine the applicant's financial circumstances as well as her health and personal circumstances to determine if she is financially dependent.
- b) After examining those circumstances if it is determined that the applicant is financially dependent - in other words her assets and ability to earn income are not sufficient to enable her to support herself - then she has an entitlement to support under s. 90.
- c) The next step is to examine the means of the children from whom support is sought as well as their responsibilities, liabilities and reasonable needs. If it is determined that a child has an excess of income over his or her reasonable expenses for responsibilities, liabilities and needs, an order for support may be made.
- d) At the final stage, the court should examine the other circumstances of the parent/child relationship to determine the level of support. At this stage of the analysis, the reasons for and the length of any estrangement between them "are factors to be taken into account in the objective evaluation and consequent ranking of the needs of the adult child": *Newson*. Estrangement may lead the court to conclude that a parent has no moral claim to a lifestyle comparable to that of any of her children.

[12] The issues I will consider are the following:

1. Is the claimant financially dependent such that she has an entitlement to support from her children?
2. If so, do any of the respondent children have an ability to support their mother taking into account their responsibilities, liabilities and reasonable needs?
3. If any of the respondent children have the ability to pay support, what level of support should they provide to the claimant?

Issue 1. Is the claimant financially dependent such that she has an entitlement to support from her children?

[13] In Newson, the court reviewed the legislative history to determine the meaning of dependence as used in s. 90. The court concluded at para. 19 that the term "dependent" referred to "a state of need" and that the definition of "parent" should be interpreted to mean:

... a father or mother who, by reason of age, illness, infirmity or economic circumstances, is dependent on a child.

Accordingly, the inquiry at this stage is whether the claimant is, by reason of age, illness, infirmity or economic circumstances in a state of need.

[14] The claimant was born on June 7, 1938 and is now 74 years old. She is well past the usual age of retirement. Further, she does not have a strong employment history. She separated from her husband in 1989 and received spousal support of \$1,200 per month until he died in 1996. As Master Donaldson noted in Anderson #1, her primary source of income was social assistance although she did receive a \$31,000 lump sum payment as her share of her husband's pension.

[15] There is insufficient evidence to determine the claimant's annual income between 2001 and 2008. The material produced indicates the following levels of income and their sources from 2009 through 2011:

- 2009 - \$15,630.84 in CPP and OAS (both gross pension and net supplements) payments. There is no information as to whether she received Shelter Aid for Elderly Renters ("SAFER") benefits from the B.C. government. She likely received the HST Rebate but this information has not been provided.

- 2010 - \$15,649.26 in CPP and OAS payments. \$2,176.65 in employment income. \$1,506.72 in SAFER benefits. HST rebate of \$599.50 and \$62.40 in B.C. Sales tax rebate for a total of \$19,994.53.

- 2011 - \$16,177.47 in CPP and OAS payments. \$1,900.18 in SAFER benefits. \$723.74 in HST rebates for a total of \$18,801.39.

[16] The above figures do not include the parental support payments which she received in that time period. Donna and Kenneth have now made all of the ordered interim support payments, although there were many years when the payments were not kept current. Keith made all of his payments until 18 months before the hearing when he lost his job. He has not made any payments since February 2011. In any event, the claimant never received more than \$480 per year in parental support.

[17] The respondent children take issue with the lack of financial disclosure made by the claimant. There is some merit to their complaints. Her disclosure has been delayed and is incomplete. Her most recent Financial Statement (November 2011) was photocopied from an earlier version (June 2010) and neither attached the required documents. She produced information long after it was required in accordance with the order of December 1, 2010. She did not attend a required discovery until a second order required her to do so. She was

late in producing information from her examination for discovery which I ordered her to do on two occasions. She was late in producing the affidavit evidence required for this application.

- [18] On May 5, 2010, Cole J. ordered the claimant to produce all receipts, invoices and statements setting out the amounts she paid for expenses. She has never done this. The respondents were also ordered to make detailed production of documents to support expense claims. Donna and Kenneth have produced voluminous documentation to substantiate their expense claims. Keith has produced bank statements as well as receipts. The claimant has not offered a satisfactory explanation for failing to provide supporting documentation for her expense claims. Her lack of production stands out given the steps taken by the respondents to comply with the court order. As a result, I must regard her evidence about her personal expenses with some caution.
- [19] The Financial Statements the claimant has filed indicate that she has annual expenses of more than \$48,000 on an income of about \$16,000. In spite of the excess of expense over income, her debt did not increase in the year and a half between the two statements. Her most recent affidavit clarifies matters somewhat as she admits that she is not actually incurring at least \$5,000 of the expenses claimed. For most of the actual expenses (which total about \$7,000), she did not produce receipts in breach of Cole J.'s order. A lot of the alleged monthly expenses relate to credit card debt that she is not actually servicing. Her statements indicate a total of about \$19,000 in credit card debt and another \$10,000 in debt arising from costs awards that have been made against her. Most of this resulted from unsuccessful litigation with a housing co-operative of which she was a member. In any event, it is evident that her actual expenses are much less than \$48,000.
- [20] The claimant currently lives in an apartment which she pays for with the assistance of the SAFER benefits. Her amenities include a home telephone, internet access, cable television and a cell phone. She drives a 1990 Chevrolet and estimates that she spends approximately \$180 per month on gas, oil, insurance and monthly parking. She has a cat and estimates that she pays approximately \$50 per month for pet food and care.
- [21] The respondents take issue with the lack of medical evidence to support the claimant's assertion that she is unable to earn income. She attempted to admit in evidence a letter from Dr. Stanley, her family physician, which outlines some of her medical difficulties. The letter does not meet the requirements for an expert report and so is not admissible as opinion evidence.
- [22] While I have concerns about the claimant's poor financial disclosure and cannot accept her doctor's letter in evidence, I nevertheless must conclude that she is financially dependent. I arrive at this conclusion based on her work history, education, age and financial circumstances. Her present circumstances combine to make her competitively unemployable. While she may be able to earn some income, as shown on her 2010 tax summary, it is extremely likely she will not be able to find employment that would pay her

income above a nominal level at this stage of her life. As a result, she must turn to some other source for support. Before she turned 65, she relied on social assistance benefits. After reaching the retirement age, the claimant's primary support has continued to come from government sources - CPP, the OAS and SAFER benefits. She does not have a pension from employment or any savings. As a result, her present dependence on government benefits will continue.

- [23] While her financial disclosure has been less than it should have been, there is no evidence she has assets which might be available to cover her necessary living expenses. There is also no evidence from which I could infer that she is hiding assets. Without an ability to earn enough income to support herself and without any assets to provide for her retirement years, she is clearly "financially dependent".
- [24] Before leaving this issue, I should note that I am of the view that the respondents cannot say that the claimant is not financially dependent because she is entitled to receive government benefits. The fact that she needs those benefits to pay her daily living expenses means that she is dependent. The question as to how to balance the dependency on government benefits with the ability of the children to provide support is more properly dealt with under the third issue.

Issue 2. Do any of the respondent children have an ability to support their mother taking into account their responsibilities, liabilities and reasonable needs?

Donna

- [25] Donna is 53 years old. She was employed for many years as a manager/quality control auditor for Labatt Breweries. She had to leave that employment in February 2002, as a result of a thyroid condition caused by chemotherapy treatments she received in the 1990s after she was diagnosed with cancer. She was unemployed for more than six years until she returned to work in July 2008. Since then she has worked at BCIT in a permanent, almost full-time position. She currently earns \$38,810 per year.
- [26] Donna married Tom Dobko in 1982. They live with their two daughters, Kayla and Ashley in Burnaby. Kayla is now 25 and is taking law at UBC. Ashley is 20 and is in the third year of an undergraduate program at UBC. The Dobkos are still providing support to their two daughters. I have not been provided with information about the daughters' incomes or the amount they contribute to their education. Mr. Dobko is employed in the sheet metal department at UBC and has declined to release full details of his financial situation. He owns the house in which the Dobkos live. There is a mortgage on the home and the monthly payment is approximately \$530 which does not include property taxes or utilities. He earned approximately \$58,000 in 2010 but has not provided an updated income figure. Donna takes the position that his income and finances are irrelevant for the purposes of the claimant's parental support claim.

- [27] Donna provided a Financial Statement in 2010 with a great deal of supporting documentation. She updated her Financial Statement by providing additional information as ordered. Her net income is used to support herself and her family. Mr. Dobko deposits money each month into the account used to pay the family expenses. He contributes a little more than \$3,000 per month to the payment of expenses.
- [28] Based on the Financial Statement, the family is operating in a deficit position and has been for some time. Their expenses are listed at more than \$120,000 per year while their net income is only half of that. Donna says that the shortfall is covered by borrowing. In that regard, the line of credit shows a balance of approximately \$49,000. In an earlier affidavit, she indicated that Mr. Dobko also contributed to the shortfall from his own savings.
- [29] While documentation is provided for the majority of the expenses, I conclude that the Financial Statement overstates the amount of the deficit. I say this because there are "monthly costs" that are likely not incurred continuously - for example, \$1,050 for legal fees and \$595 for dental and implant costs. She also lists monthly expenses of \$1,200 for education expenses for their daughters. Given the daughters' ages and the family's financial circumstances, I would expect the daughters to be contributing to their own expenses. Without information about their contributions, I cannot say if it is reasonable for the parents to pay \$1,200 per month. In addition, the amounts listed for gifts, activities, entertainment and recreation are likely overstated as they are listed twice (totalling \$575). I also note that the line of credit balance has not changed in two years which suggests they are not incurring debt to cover expenses.
- [30] While I find that the Financial Statement overstates the shortfall, I conclude that Donna does use the full amount of her income to provide for herself and her family. The expenses include amounts for personal items, vacations, gifts, pension plan contributions, house repairs, entertainment and recreation. It is reasonable for Donna to incur these kinds of expenses. They are not extravagant or excessive. In other words, these expenditures are for items which are properly considered to be "the reasonable needs of the child". It is also reasonable for Donna to make some contribution to the education of her children at least by way of providing room and board. The family does not have much in the way of unallocated income to use for discretionary expenses. However, for the small amount of income Donna has that is not required for her own needs and obligations, she can properly place the needs of her daughters ahead of those of the claimant: Hua and Newson.
- [31] The claimant says that when Mr. Dobko's income and assets are taken into account I should conclude that Donna does have an ability to support her. In the circumstances I cannot accede to her argument. I must be careful not to make an order which would require Mr. Dobko to support the claimant. I agree with Master Donaldson's statement in Anderson #1, that a court is "required to take into account only the child's own income and not that of his or her spouse" when making an order for parental support. Any order that would require Mr. Dobko to take on, as between himself and Donna, more than his fair share of their family's liabilities, responsibilities and needs would mean that he would effectively be asked

to pay support for the claimant.

- [32] In some circumstances it might be difficult to assess the fair amount that each spouse should contribute to the needs, responsibilities and obligations of the family. For example, this might be the case if the child from whom support is sought has a modest income but has substantial assets which could be used to produce income. In such a case, the parent could argue that the child's income is not required for her needs or for her liabilities and responsibilities. However, in the circumstances of this case, it is not difficult to determine that Donna's income is required to support the family. The incomes of both of the Dobkos are fully committed to their reasonable needs, responsibilities and liabilities. In these circumstances, I find that Donna does not have an ability to support the claimant.

Keith

- [33] Keith is presently 51 years old. He lived with his parents until he was in Grade 10, at which time they moved from Creston to Osoyoos and left him behind to finish school. After his parents left, he received no support from them. He supported himself by working after school four days a week. He managed to graduate and worked as a labourer for a few years until he was involved in a serious car accident in which he fractured both legs. After a year of recovery, he moved to Vancouver where Donna supported him for a period of time. He ultimately found work as a warehouseman. Most recently, he was employed by Safeway for approximately 20 years. Unfortunately, Safeway closed its warehouse department and he was laid off in February 2011.
- [34] Keith was married to Carol Anderson in 1992. The claimant did not attend Keith's wedding and does not know either of his two children: Sam, who is 20 years old and Brooke, who is 17. Keith and his wife own a home in Maple Ridge where he lived for many years. In February 2012, Keith and his wife separated. She continues to live in the home with their children. He now rents a small apartment. The couple has yet to finalize issues regarding support and division of property.
- [35] Keith's current financial situation is precarious. While employed, he earned approximately \$63,000 per year. His line 150 income in 2011 was \$74,000, but this included his severance package as well as Employment Insurance ("EI") benefits for approximately ten months. His EI benefits ran out in June 2012. Since losing the position with Safeway, he has applied for numerous warehousing jobs. However, he has yet to find employment. As of the hearing of this application, he has no income and no employment prospects.
- [36] In order to support himself and contribute to his family in the face of these financial difficulties, he withdrew all of his RRSP savings and borrowed approximately \$30,000 on his line of credit. His present obligations include his legal requirement to support his children. Sam is a full-time student at Douglas College. Brooke is in Grade 12. She is an elite athlete and so has additional expenses for her sporting activities. In addition to his line of credit, there is a mortgage on the family home with the principal balance of approximately

\$145,000. The biweekly payments are about \$600. His wife is employed and earns approximately \$33,000 per annum. Given his obligations and lack of income, he is considering applying for social assistance. At the time he lost his job, Keith was current with the support payments to the claimant. He has not made the payments since he lost his job.

- [37] In these circumstances, I have no hesitation in concluding that Keith does not have an ability to support the claimant taking into account his current circumstances including his responsibilities, liabilities and reasonable needs.

Kenneth

- [38] Kenneth is the youngest of the five children. He lives in Oliver, B.C. with his wife, Sherry. They operate a trucking and farming business, Kensher Trucking, from a property they purchased in 2007. They have two children. Brock is 19 and taking Piping Foundation at BCIT. Brett is 18 and just finished high school. He hopes to play a year of Junior B hockey as his brother did after completing high school. He still lives with his parents.
- [39] At the age of 15, Kenneth was left behind when the claimant and her husband moved to Castlegar. He was required to work to support himself and left high school before he completed Grade 10. In spite of Kenneth's difficult start in life, he has worked hard to build up a small business and acquire the property which he and Sherry hope to rely upon for their retirement.
- [40] The 9.28 acre farm property has a two bedroom house and approximately seven acres which Kenneth has prepared for planting grapes. The family's living accommodation is accurately described as extremely modest. The house is very small and is of basic rural construction. It is heated entirely by wood. Kenneth describes the house as a tear down and says the walls are inhabited by mice. His long term plan is to bulldoze the house and put a modular home in its place. The property was purchased with a mortgage which has an outstanding principal balance in excess of \$320,000 at the date of the hearing. The monthly payment of approximately \$2,700 takes a large part of the family income. When their debt load becomes more manageable, they hope to borrow sufficient funds to plant a vineyard. They have delayed doing so because of the cost and the fact they would not see any return on their investment for at least four years.
- [41] Kenneth has produced full details of Sherry's income as well as his own. He has done this because they split the income from their businesses. Their incomes fluctuate depending primarily on the fortunes of the log hauling business. Kenneth is the driver. Sherry acts as the secretary. Sherry also cleans offices and delivers papers and the income from those activities is included in their proprietorship income. In 2010 and 2011, she also worked for Sears in Osoyoos. As a result of this additional income, her income for tax purposes in those two years was greater than Kenneth's. The Sears business was sold in October 2011 and at the time of the hearing her only income came from Kensher. Their net incomes for the last four years are:

Kenneth

Sherry

2008

\$35,019

\$34,088

2009

\$56,876

\$55,946

2010

\$30,980

\$43,440

2011

\$32,020

\$48,306

[42] The claimant argues that Kenneth pays his personal and family expenses through the business and urges me to conclude that his income is greater than what is shown on the tax returns. For example, in Kenneth's March 2012 Financial Statement he shows his gross self-employment income as approximately \$203,000 with a net income of approximately \$33,000. However, Revenue Canada audited the family businesses in 2008 and 2009. There were relatively minor changes to the incomes and taxes as filed. Given the detailed disclosure of financial information and the tax audit, I am able to accept the accuracy of the incomes as reported. I also conclude, however, that some of the business expenses may have a personal component so that Kenneth's line 150 income is somewhat greater than his taxable income. However, in the circumstances of this case the difference is not significant.

[43] Like Donna, Kenneth has made full disclosure of his financial situation. He has produced detailed documentation to support all of the expenses listed on his Financial Statement. Indeed, he has retained and produced documentation to support expenses going back to 2000. His extremely detailed affidavits explain virtually all of the family's expenses for 2009 and 2011 and attach almost all of the receipts or invoices to verify those expenses.

[44] In 2009, the highest income year for Kenneth, he paid \$14,082 for taxes and CPP which left him with about \$42,500 in income, or \$3,500 per month, available for expenses. Assuming that he shares the family expenses equally with Sherry, he had about \$1,900 left over each month after the mortgage payments, utilities and property insurance. The family's food, clothing, cosmetics, medical and dental expenses are very modest. The monthly

discretionary expenses for recreational activities are also relatively modest: \$91 - golf membership for the family; \$141 - travel expenses; \$34 - community centre; and \$20 - alcohol. The one large expense which is more than might be expected is the monthly "educational" expense of \$2,147. Virtually the full amount of this expense was to cover the cost of Brock's enrollment in the Pursuit of Excellence hockey program. The annual cost included \$14,200 for the program cost, \$4,000 for the team fee and \$7,000 for billeting. The program develops elite hockey players. Brock went on to play a year of Junior B hockey. While this is a somewhat extravagant expense when compared to the family's other expenses, it is not a continuing expense and it was incurred in a year when the couple was able to pay it.

- [45] In 2011, Kenneth's income was significantly lower and his compulsory deductions were accordingly about \$5,000 less than in 2009. The expenses were also reduced. The couple paid only \$2,600 per month against the mortgage rather than \$3,000. The expenses for the two boys decreased substantially. The amount spent on hockey including equipment expenses was about \$7,500. The hockey expenses will continue to decrease but the boys' education expenses will increase in the next few years. In 2012, Brock's tuition at BCIT cost \$3,500. The recreation expenses for Kenneth and Sherry were similar to those spent in 2009 including the annual golf membership. The cost of insurance and fuel for vehicles was quite high in both years. In 2011, it is about \$7,000 per year. I assume this expense is incurred because their residence is in a rural location and family members need to drive for most activities.
- [46] The Financial Statement shows annual expenses for the family of approximately \$100,000 on a total income of only \$80,000. How the family is able to cover the shortfall is not explained. I assume that the shortfall is mostly covered by the fact that some of the expenses are actually treated as business expenses for tax purposes. In other words, some portion of the total amount of the invoices, cheques and receipts are not for personal expenses. I also expect that the two boys make some contribution to the family expenses and in particular to their hockey, cell phone and education expenses.
- [47] As Kenneth and Sherry are self-employed, they have no pensions. As a result, they are intent on saving for their retirement. I infer from all of the evidence that the farm property is intended to be their primary retirement asset. In order to purchase the property, they cashed in some of their RRSP savings. They have not been making contributions to their RRSP accounts in recent years. Instead, most of Kenneth and Sherry's available income is directed to the property investment. They have managed to retain some of their RRSP savings which now have a total value of approximately \$102,000 which is split equally between them.

- [48] This strategy has been quite successful. The farm property has a value of \$800,000. They own numerous vehicles, although most of these are used for business purposes. The total value of their vehicles is about \$75,000. They have approximately \$60,000 in bank accounts, although the majority of that is in a business account. The most recent Financial Statement shows an excess of assets over liabilities of approximately \$700,000.
- [49] The only expenses listed in the Financial Statement which might be questioned are the educational expenses, the significant amount spent on the property (i.e. their retirement savings) and the recreational expenses. As noted, the obligation to support children has priority over the obligation to support a parent: *Hua and Newson*. In addition, it is reasonable for an adult child to put aside funds to save for his retirement before contributing to his mother's support: *S.A.G. v. M.R.G.* In other words, the reasonable needs of a payor child include the cost of saving for his own retirement. Whether the amount directed to the savings is reasonable will depend on all of the circumstances. Similarly, it is reasonable for a payor child to pay for modest recreational expenses rather than contribute to his mother's support. The test will be the same; whether the amount spent by the child is reasonable considering his total income and his other responsibilities.
- [50] It is challenging to determine the amount that is reasonable for an adult child to set aside for retirement. Here, Kenneth and Sherry have adopted a retirement strategy which has focused on the acquisition of a significant asset. This caused them to incur a substantial mortgage debt. They now maximize payments against the mortgage to increase their equity in the property. They hope to eliminate the debt before their retirement. Their revenues fluctuate and they aggressively maximize the amount of debt reduction in accordance with those fluctuations. They know that the revenues are not guaranteed and that injury to one of them or changes in the log hauling industry could quickly set back their strategy.
- [51] While it is possible to conclude that the amount of current income committed by Kenneth to secure his retirement is excessive, it is also easy to conclude that his strategy is reasonable. The strategy adopted by Kenneth involves considerable compromise in the family's lifestyle. They have chosen to live in housing accommodation which is marginal. If I concluded that he should not contribute as much of his current income to the acquisition of the farm, I would then have to determine how much more he reasonably should have been permitted to spend on adequate accommodation. Such a balancing exercise would be arbitrary and artificial.
- [52] In my view, the proper way to approach the situation is to take a broader view of all of the circumstances to determine if the amount spent by the child on his responsibilities, liabilities and needs is reasonable. This will include amounts for recreation, retirement and for the children. If the amount spent is reasonable in relation to the child's income but there is no excess income from which to make support payments, no support should be ordered. While this approach does not directly consider assets, the reasonableness of the needs, responsibilities and liabilities does take into account the expenses incurred to acquire assets. Obviously, if there are substantial assets which produce or could produce income,

then the available or notional income would have to be considered. However, Kenneth and Sherry have no such assets.

- [53] When I consider all of the circumstances here, I am satisfied that the amount spent by Kenneth on retirement savings, educational expenses for his children and recreation for his family are reasonable and can rank in priority to his obligation to support his mother. While his income is higher than the claimant's income, his obligations and needs at this stage of his life are much greater than hers. He should not be forced into a situation where his children's future, or his and Sherry's retirement are jeopardized because he has to pay support to his mother. In other words, given his level of income, it is reasonable for him to prioritize the amounts spent on his children's education ahead of support for his mother. Similarly, it is reasonable for the family to incur recreational expenses in the amounts indicated. Finally, it is also reasonable for Kenneth to commit the bulk of his income to building up equity in the farm property in order to provide for his retirement.
- [54] Given Kenneth and Sherry's modest lifestyle, spartan living accommodation, and the fact that the full amount of their income is committed to their needs, responsibilities and liabilities, I conclude that Kenneth does not have sufficient income available to provide support to the claimant.

Issue 3. If any of the respondent children have the ability to pay support, what level of support should they provide to the claimant?

- [55] Given my conclusion that Donna, Keith and Kenneth do not have an ability to support the claimant, I do not need to consider the level of support required. However, as the respondents placed before me considerable evidence regarding the circumstances of their upbringing, I will make findings regarding the allegations of abandonment and estrangement. I do this in relation to the claims advanced by the claimant against Donna and Kenneth. Both of them have a reasonable income and assets of some value. In light of these circumstances, it is possible my conclusion that they do not have the ability to support the claimant is incorrect. I will not consider the circumstances regarding Keith's upbringing in any detail as I am of the view there is no doubt he is unable to support the claimant given his present financial circumstances.
- [56] I concluded that Donna and Kenneth's expenditures on their children's education, their retirement and the family's recreational activities were reasonable and that they do not have surplus funds available to provide parental support. I arrived at this conclusion solely on the basis that their expenditures are reasonable in all of the circumstances including their level of earnings, their needs and other obligations. In reaching that conclusion, I did not consider how the claimant's alleged abandonment of and estrangement from the respondent children might impact their obligation to provide parental support.
- [57] As indicated in Newson, at the final stage of the analysis it is possible for the court to consider "the period of and the reasons for the estrangement of parent and children". It is possible to take into account evidence of estrangement or abandonment and the reasons for

those circumstances "in the objective evaluation and consequent ranking of the needs of the adult child". Accordingly, I intend to review the circumstances of the upbringing of Donna and Kenneth and their relationship with the claimant in order to determine if those circumstances should be a factor in the level of support she is entitled to receive in the event I am incorrect in my conclusion regarding their ability to provide parental support.

- [58] Donna described her upbringing and relationship with the claimant in affidavits filed early in this action. Her father suffered a serious truck accident when she was seven years old. The claimant had difficulty coping with five young children and so separated the children. Donna and Brian were sent to live with a family in Salmo for almost two years. Keith moved from relative to relative for a lengthy period of time. Kenneth and Darrel, the two youngest, lived with their mother and grandmother.
- [59] Donna says her mother was manipulative and psychologically abusive during her teenage years. She describes this in some detail in her affidavits. I need not repeat the evidence here. I accept that she had a difficult time growing up with the claimant who was not a supportive or nurturing parent. As a result, Donna moved away from the claimant's residence when she was 17. Thereafter she supported herself financially without any assistance from her parents.
- [60] Since her marriage, Donna has had little to do with the claimant. Her mother provided no support to her when she was undergoing surgery and treatment for breast cancer. The claimant has not developed a relationship with her granddaughters. While the claimant contacted Donna a few times over the years, it was only when she wanted money. Donna and her mother have been effectively estranged for the whole of Donna's adult life. I have no hesitation in concluding that the claimant was the cause of the estrangement. She was the one who decided to send Donna away as a young girl and provide minimal support during her teenage years. She was also the one who decided not to maintain contact or provide maternal support to Donna in her adult years.
- [61] Kenneth's upbringing was equally difficult. In his early affidavits filed in this action, he described the claimant's failure to provide supervision and support to the children. He describes how she frequently locked herself in the bathroom and told the children she was going to swallow pills and end her life. With little supervision and no guidance, Kenneth and Darrell started drinking when they were very young. On two occasions Kenneth was rushed to the hospital to have his stomach pumped for drinking gasoline. He says he struggled with school and recalls receiving no support or assistance from the claimant.
- [62] When Kenneth was in Grade 10 and his parents moved to Castlegar, he was placed with another dysfunctional family. He says the claimant and her husband did not provide any financial support to the family or Kenneth. He began to support himself by pumping gas when he was 16. He eventually received much needed support in the form of room and board from the couple who employed him at the gas station. He stayed with them until he was 25 and they treated him as their own son. They continued to provide parental support

after he moved in with Sherry who he eventually married.

- [63] The claimant never developed any kind of relationship with Kenneth and Sherry as adults. The limited contact she had with them was upsetting to Kenneth and his family. When Kenneth and Sherry were about to be married, the claimant began to deny she was his mother and threatened to publish a story to this effect in the Osoyoos paper. As a result of her behaviour, Kenneth and Sherry have had no contact with her since 1995. The claimant has never had any relationship with her grandsons.
- [64] The claimant takes issue with the allegations of abandonment. She says she never abandoned her children. Rather, she found homes for them when she was unable to support them given her husband's inability to work. When he was able to return to work and was transferred to Castlegar, she says that Kenneth was rebellious and made his own decision to stay in Osoyoos.
- [65] It is noteworthy that the claimant does not deny Donna and Kenneth's allegations that she failed to provide emotional or financial support to them. She does not deny the estrangement and does not suggest that she made any attempt to remain a part of their lives.
- [66] The claimant's argument can be summarized succinctly. She says that none of the respondents' claims amount to allegations of child abuse. She denies she abandoned them but admits that she did not provide support to them at various times during their childhood. In her written argument she sums up her position as follows: "the most that can be said by the children is that I did not treat them well; but ...I was not abusive to them."
- [67] I need not decide whether the claimant's actions amount to "abandonment" of her children. I have no doubt that she was faced with a difficult financial situation when her husband was injured and that she was overwhelmed with five young children. Kenneth's description of the claimant's actions suggests that she suffered from some form of psychological disorder. In any event, there is little doubt that she did not provide parental support to her children - either financial or emotional. The evidence of all of the respondent children describes an unhappy childhood at the hands of an uncaring mother. It is no coincidence that all of the children had similar experiences with the claimant.
- [68] While I cannot conclude that the claimant abandoned her children, I can conclude that she did not nurture or support them as children. She was ready and willing to leave them to the care of others when it suited her purposes. The resulting estrangement when the children became adults was entirely her fault. She made no attempt to foster relationships with her adult children, including Donna and Kenneth.

- [69] Given these findings, if I had to determine an appropriate level of support to be provided by Donna and Kenneth, I would take the circumstances of the estrangement into account. The childhood experiences of Donna and Kenneth and the lengthy estrangement which resulted from the claimant's failure to parent the children in any meaningful way are sufficient to relieve the Court from considering any moral claim by the claimant to a lifestyle similar to that of her children.
- [70] Additionally, I can consider the government benefits the claimant receives at this stage of the analysis. I find that the absence of any moral claim by the claimant against Donna and Kenneth means that there is no reason why they should have to step in to replace government benefits to which the claimant is entitled. Here, the claimant says that she would lose her SAFER benefits if I ordered the respondents to pay support. The total benefits she receives permit the claimant to live in a reasonable manner. She is able through the CPP, OAS and SAFER benefits to provide herself with a car, television, internet and a cell phone.
- [71] In all of the circumstances of this case, including the lengthy estrangement of the claimant and the respondents, there is no reason to rank the claimant's desire for more amenities above the needs of Donna and Kenneth. Accordingly, even if I had concluded that they had an ability to provide some support to the claimant, I would have declined to order any support.

Conclusion

- [72] The claimant's application for parental support from Donna, Keith and Kenneth is dismissed. They are entitled to costs from the claimant at Scale B.

"Butler J."

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