

CANADA / JUDGMENT

Branisky v. Kunert

2013 BCSC 222

COURT

Supreme Court of British Columbia

DECIDED

14 February 2013

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2013 BCSC 222 Branisky v. Kunert IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Branisky v. Kunert, 2013 BCSC 222 Date: 20130214 Docket: E56954 Registry: Nanaimo Between: Sabra Ruth Branisky Plaintiff And: Andreas Christopher Kunert Defendant Corrected Judgment: This judgment was corrected on February 25, 2013, to show the correct place of trial and judgment Before: The Honourable Mr. Justice Johnston Reasons for Judgment On her own behalf: S.R. Branisky On his own behalf: A.C. Kunert Place and Date of Trial: Nanaimo, B.C. November 27-29, 2012 Place and Date of Judgment: Nanaimo, B.C. February 14, 2013

- [1] This matter comes to trial with Mr. Kunert seeking orders reducing child support, ending spousal support, abrogating or reducing arrears of both child and spousal support, and fixing child custody, guardianship and access. In argument, he added an application to stop the Director of Maintenance Enforcement from continuing enforcement actions against him.
- [2] He also seeks a divorce, to which Ms. Branisky consents.
- [3] As to the rest of Mr. Kunert's applications, Ms. Branisky is content to continue with the status quo that has been established first in a separation agreement, then modified by various interim orders of the court.
- [4] I assume that the matter was set for trial because Mr. Kunert was dissatisfied with the terms of an interim variation ordered June 28, 2012, and with the fact that those terms could not be reviewed for a year.
- [5] Ms. Branisky was born April 23, 1969. She is now 43 years old. Mr. Kunert was born November 25, 1963. He is now 49.
- [6] The parties began to live together in October 2002. At the time, Ms. Branisky had a son by a previous relationship, R.W.N.J., born September 13, 1996. He is now 16.
- [7] Ms. Branisky and Mr. Kunert had a child, their daughter R.A.K., who was born March 3, 2003. She is now 9 years old.

- [8] Ms. Branisky has no formal arrangement with R.W.N.J.'s biological father, nor is there any court order, with respect to parenting or support of R.W.N.J. Instead she has an amicable relationship with the boy's father, who lives near her, and the father has paid child support voluntarily, which she has acknowledged at \$200 per month.
- [9] Ms. Branisky testified that this was because, when she became pregnant, the biological father made it clear that if she had the baby, she was on her own, and she agreed.
- [10] R.W.N.J. lived with Ms. Branisky and Mr. Kunert during the week, and spent weekends and holidays with his father.
- [11] Mr. Kunert also has a child by a previous marriage, who lives with his mother in Australia. Mr. Kunert pays \$350 per month child support on a voluntary basis, although, for reasons that will be developed, he is not always able to meet that commitment.
- [12] Ms. Branisky and Mr. Kunert married October 27, 2003.
- [13] At the time, Ms. Branisky was working at London Drugs, and earning \$17.80 per hour.
- [14] Mr. Kunert is and has been a self-employed stonemason. While there was no evidence of his historical earnings, he declared bankruptcy in May 2005, while he and Ms. Branisky were still married. He was discharged in February 2006.
- [15] Mr. Kunert earned income of \$24,295 in 2007.
- [16] In 2007 Ms. Branisky and Mr. Kunert separated for about four months, then decided to try to reconcile.
- [17] Ms. Branisky said she found she could not make ends meet on her wages during the separation.
- [18] She testified that when she and Mr. Kunert discussed reconciliation he suggested that she quit her job, and try to earn money at home, perhaps by making mirrors, or by working as a medical transcriber. She testified that Mr. Kunert told her he would try to take care of the family from his earnings.
- [19] She quit her job, and enrolled in a medical transcription course.
- [20] In 2008, Mr. Kunert sold mineral rights, for which he says he received \$100,000 in cash, plus stone material worth either \$39,000 or \$100,000, the evidence was not clear.
- [21] Mr. Kunert's financial documents show that in 2008 he earned \$10,000 from employment, and \$75,000 in dividends, which I attribute to the sale of the mineral rights.
- [22] The reconciliation attempt was unsuccessful, and the parties decided to separate.
- [23] Ms. Branisky found a template for a separation agreement on the internet, and modified it to fit their circumstances.

- [24] With neither party having had any legal advice, they both signed the separation agreement on January 8, 2009.
- [25] The recitals to the agreement include a statement that Mr. Kunert's annual income is \$100,000. They also state that there is one child of the marriage, the daughter of Mr. Kunert and Ms. Branisky, R.A.K., who was then five years old.
- [26] The recitals state that Ms. Branisky and Mr. Kunert intend the agreement to settle guardianship, custody and support of the child, as well as a final settlement of spousal support, whether contractual, compensatory or non-compensatory, their respective rights to each other's property or estates, and "all issues otherwise arising out of their marriage."
- [27] Each warrants that the recitals are true and that they knew the other was relying on the truth of the recitals.
- [28] The agreement provided that Ms. Branisky was to have sole custody and primary care of R.A.K., with guardianship to be joint. Access was to be generous and reasonable.
- [29] Joint guardianship is defined in the agreement so as to provide a right of survivorship in the event of the death of either parent; Ms. Branisky is obliged to inform Mr. Kunert of any matters of a significant nature affecting R.A.K.; Ms. Branisky is obliged to discuss with Mr. Kunert any significant decisions affecting the health (emergencies excepted), education, religious instruction and general welfare of R.A.K.; Mr. Kunert is obliged to discuss these matters with Ms. Branisky with a view to reaching an agreement, but in the event of failure to agree, Ms. Branisky is to have final decision-making authority, with Mr. Kunert having the ability to seek a review of any decision under s. 32 of the Family Relations Act, R.S.B.C. 1996, c. 128. Each has the right to seek information about R.A.K. from third parties.
- [30] With respect to child support, the agreement repeats that Mr. Kunert's income for child support purposes is \$100,000, and that he agrees to pay \$1,000 per month in child support. That is somewhat more than the Guidelines amount of \$906 at the time. The agreement provides that the monthly payment shall last "for so long as each child of the marriage remains a child of the marriage." Mr. Kunert agreed to provide Ms. Branisky with income tax and earnings information by May 31 in each year for which child support is payable.
- [31] The agreement sets out a \$25,000 lump sum spousal support payment, reserving to both parties the right to apply "in the event of an unforeseen and radical change in the financial circumstances of either party."
- [32] Neither Ms. Branisky nor Mr. Kunert sought or obtained legal advice before they signed this agreement in the presence of a neighbor, who acted as witness.
- [33] Eleven months later, on November 16, 2009, Ms. Branisky brought an application. Each of the parties was represented. The Order granted that day included a declaration that the parties had no reasonable prospect of reconciliation pursuant to s. 57 of the FRA, and an order restraining each from dealing with family or other assets.

- [34] The Order then went on to provide: AND UPON the Court being advised that the names and birthdates of the children of the marriage are as follows: The Order then sets out the names and birthdates of R.W.N.J., Ms. Branisky's son by an earlier relationship, and R.A.K., the daughter of the marriage.
- [35] The Order grants "Interim Primary Residence" for both children to Ms. Branisky, then states: AND UPON the Defendant, Andreas Christopher Kunert, having been found to have a Guideline Income of SIXTY THOUSAND DOLLARS (\$60,000); The order then fixes Guidelines child support for both children at \$907 per month, payable monthly, and fixes spousal support at \$1,000 per month.
- [36] After ordering Mr. Kunert to produce documents, the order provides that Ms. Branisky can apply for interim child and spousal support based on any additional documents disclosed.
- [37] Ms. Branisky has testified that she understood the separation agreement to be valid for only the one year the parties had to wait before applying for a divorce on the ground of marital breakdown.
- [38] Her application to the court within 11 months of signing the agreement is inconsistent with this belief.
- [39] Neither party has produced the reasons for decision on which the order was based, so it is not possible to know what importance the court placed on the agreement signed at the beginning of that year.
- [40] The order had the effect of adding R.W.N.J. to the children of the marriage, and granting Ms. Branisky ongoing spousal support in addition to the lump sum she had agreed to in January.
- [41] Ms. Branisky testified that she had received \$20,000 of the \$25,000 lump sum soon after signing the agreement, but the balance was slow in coming, although she eventually did receive it.
- [42] The order also found that Mr. Kunert had an income for Guidelines purposes of \$60,000, as opposed to the \$100,000 he had agreed to in January of that same year.
- [43] The parties sparred during Mr. Kunert's testimony over whether he had sworn an affidavit in which he claimed to be making \$5,000 a month, and whether that affidavit was before the court at the time of the November 2009 application.
- [44] Mr. Kunert did not deny swearing to that income, but said he was not present during the application, and he felt his lawyer had let him down.
- [45] He testified that at the time of the application, he was working on a job at a conference centre, where his pay was set at \$5,000 per month. He swore, however, that at the end of that job, the person he had worked for borrowed \$60,000 or more from him, then, when Mr. Kunert demanded repayment, took the position that the \$60,000 Mr. Kunert had been paid during the conference centre job had not been income, but instead was a loan to Mr. Kunert,

which had been repaid by Mr. Kunert. Thus, the employer/contractor's position was that he did not owe Mr. Kunert any money.

- [46] Based on this convoluted tale, Mr. Kunert's position is that, although he may have received \$5,000 a month in 2009 for working on this job, the subsequent loss of the money in a bad loan transaction, based on the apparently bizarre position taken by the debtor, means he had no income for 2009, and ought not to have been ordered to pay anything such as the child and spousal support he was ordered to pay in November 2009.
- [47] Another way of looking at it, of course, is that Mr. Kunert did indeed earn \$60,000 that year, and then made an improvident loan. The debtor's unusual explanation for refusing to repay the loan would have nothing to do with whether Mr. Kunert had a \$60,000 income that year on that interpretation of events.
- [48] He says his income has gone down since then, largely because, he says, any attempts to obtain lucrative contracts have been thwarted by the actions of the director of Maintenance Enforcement operating under the Family Maintenance Enforcement Act, R.S.B.C. 1996, c. 127, or by Ms. Branisky, who he accuses of contacting his clients or potential clients and injuring his reputation by making inquiries about his potential income or allegations about his child and spousal support arrears.
- [49] Ms. Branisky is convinced that Mr. Kunert is capable of making, and is making, substantially more income than he admits to, and that he has been able to mask his true earnings by financial manipulations carried out in two companies, his and that of his new partner.
- [50] Mr. Kunert's assessment notices, produced at trial, show: YEAR ITEM AMOUNT 2004 Employment, net and taxable income \$1,000 2005 Employment, net and taxable income 6,000 2006 Employment, net and taxable income 35,000 2007 Gross business income 8,400 Net business income 24,400 Total income 26,495 Net income 24,416 2008 Taxable dividends 75,000 Gross and net business income 10,000 Net income 84,678 2009 Gross business and total income 10,000 Net income 9,679 2010 Total, net and taxable income 30,000
- [51] Mr. Kunert testified that he has not received his 2011 assessment notice. The copy of his 2011 tax return attached to his sworn financial statement shows line 150 income of \$800, derived entirely from Universal Child Care Benefit.
- [52] Mr. Kunert operated for a while through a limited company that he controlled, 0757517 BC Ltd. This company's fiscal year is the calendar year.
- [53] Some of this company's financial statements, or parts of them, have been produced, and show as of December 31 in each year: YEAR ITEM AMOUNT 2008 Sales \$147,715.00 Cost of sales 100,780.00 Gross profit 46,935.00 Expenses 48,047.00 Gain on sale of claims 139,990.00 2009 Total income 9,538.37 Cost of goods sold 6,095.21 Gross profit 3,443.16 Total expense 44,352.27 Net income (loss) (40,909.11) 2010 Total income 106,888.75 Cost of goods sold 38,965.59 Gross profit 67,915.16 Total expense 76,746.19 Net income (loss) (8,831.03) 2011 Total income 20,451.85 Cost of goods sold 1,885.43 Gross profit 18,566.42 Total expense

8,742.66 Net income (loss) (7,506.63) The expenses set-off against income in the financial statements include some areas where Mr. Kunert could be considered to have benefitted personally from a legitimate business deduction. Ms. Branisky was alerted to the possibility that some of these deductions for business purposes might be notionally added back into Mr. Kunert's income for child or spousal support purposes by a comment made by a mediator during an attempt to settle matters.

- [54] Whether some portion of deductions claimed for home office expenses - \$4,903.18 in 2009, \$3,495.75 in 2010, and 0 in 2011, or vehicle expenses - \$12,706.67 in 2009, \$15,921.01 in 2010, and \$8,742.66 in 2011 should be added back into Mr. Kunert's income was argued, but the evidence supporting the argument was thin.
- [55] Ms. Branisky could not afford professional help to dissect Mr. Kunert's business records, and Mr. Kunert maintained that he did not understand why his accountants did things they way they did, but he had complete faith that they did them correctly.
- [56] He called his current accountant, who testified that she prepared his company financial statements from documents he provided through Ms. Zettl. Mr. Kunert took the position in argument that, having exposed his accountant to cross-examination, it was up to Ms. Branisky to cross-examine in order to reveal whether his corporate financial statements or income tax returns were misleading as to his available income. This overlooks the fact - brought out in a brief examination in chief, that the financial statement and tax returns were prepared on the basis of information and documents provided, with no real attempt at verification beyond routine questions to identify some expenses. Ms. Branisky's cross-examination was confined to establishing that the witness did not hold credentials as either a Chartered Accountant or a Certified General Accountant.
- [57] I note that in this company's financial statements, management fees - which I infer were paid to Mr. Kunert - of \$5,000 were shown as an expense in each of 2008 and 2009. In 2007, when the company's revenues were stated to be \$74,745, and its cost of sales \$13,141, a management fee of \$44,000 was charged as an expense.
- [58] Latterly, Mr. Kunert has worked for another numbered company, this one controlled by his new partner, Ms. Zettl.
- [59] That company's profit and loss statements show, for the financial years ending August 31:
YEAR ITEM AMOUNT
2009-2010 Total income \$87,750 Cost of goods sold 47,271 Gross profit 40,478 Total expense 35,549 Net income (loss) 4,929
2010-2011 Total income 91,035 Cost of goods sold 69,770 Gross profit 21,265 Total expense 43,084 Net income (loss) (21,819)
2011-2012 Total income 47,720 Cost of goods sold 33,065 Gross profit 21,265 Total expense 32,125 Net income (loss) (17,471)
- [60] The financial issues here are driven by the dismal financial pictures of each of the parties.

- [61] Mr. Kunert called his good friend Mr. Alger, who has had considerable experience as a construction superintendent. Mr. Alger's observation was that, from what he has been able to observe of Mr. Kunert's work, Mr. Kunert is a good worker, with poor organizational skills. He said Mr. Kunert, in his opinion, had a poor grasp of how to cost a project, or estimate the time it would take to complete, giving as an example a municipal project - one that Mr. Kunert and Ms. Zettl are quite proud of - that Mr. Alger thought was badly underbid. Divorce
- [62] The statutory requirements to enable a declaration of divorce were met during trial, and a divorce was granted November 26, 2012, on the ground of marriage breakdown. Child Support
- [63] This issue has two components: first, is the determination of Mr. Kunert's Guidelines income; second his obligation to support R.W.N.J.
- [64] I am satisfied that Mr. Kunert was not earning anything near \$100,000 when he agreed to that figure for support purposes in the settlement agreement of January 8, 2009.
- [65] I am satisfied that Mr. Kunert probably earned \$5,000 a month in 2009, as he admits he swore to in an affidavit, so the recital of that as his Guideline Income in the November 16, 2009, order was well-founded.
- [66] I am satisfied that Mr. Kunert has not earned that much since then, and it appears that was a high water mark for his employment earnings.
- [67] The reasons for that, however, bear on whether an income other than what I can glean from his financial statements and tax returns should be imputed to him.
- [68] Mr. Kunert has an obligation, to at least his daughter R.A.K., to seek out employment that will maximize his ability to pay child support. Mr. Kunert appears to prefer larger stone work, of a public nature, or in the way of monuments. Both he and Ms. Zettl value highly the artistic and artisanal elements of Mr. Kunert's works.
- [69] Without evidence on the point, it would be speculative to decide how much more money Mr. Kunert could make, and how much more consistent his income could be if he were to seek out more mundane work building retaining walls in suburban back yards, or sought other work entirely, I am not satisfied that he has utilized his income earning potential as well as he might.
- [70] With the advantage of having the parties testify, and having observed Mr. Kunert conduct his own case, I conclude that \$60,000 is an unrealistically high figure on which to base his support obligations, at least for the present.

- [71] The average of the income declared on his tax returns over the last three years would be an unsatisfactory basis for imputing income, as his assessment notices show incomes of \$10,000 in 2009, \$30,000 in 2010, and his 2011 income tax return shows \$800. Mr. Kunert is clearly capable of doing better, and has an obligation to make more reasonable attempts than he has to date to earn an income from which he can support his child.
- [72] While Mr. Kunert may prefer to pursue larger stone projects with higher artistic value and greater public presence, this preference cannot be allowed to get in the way of his child support obligations.
- [73] The evidence is incomplete, but the parties cannot afford to hire the professional assistance needed to perfect the financial picture, nor is it reasonable to put any of them through additional time at trial.
- [74] Doing the best I can with the evidence before me, I conclude that Mr. Kunert earns, or is capable of earning, \$30,000 per year and I impute that to him as his Guidelines income. Child Support - R.W.N.J.
- [75] This child is 16 years old. He has a good relationship with his biological father, who lives nearby. His biological father voluntarily pays \$200 a month toward R.W.N.J.'s support, in cash.
- [76] Ms. Branisky has not sought an order for child support against the biological father because she feels bound by an agreement she made with him to assume sole responsibility for R.W.N.J. when she elected to continue her pregnancy.
- [77] Although R.W.N.J. was not mentioned in the separation agreement signed by the parties, Mr. Kunert later agreed to assume responsibility for supporting R.W.N.J. in an August 2009 email. This was a sensible recognition that R.W.N.J. had become a child of his marriage to Ms. Branisky, and that was reflected in the November 16, 2009, order acknowledging that R.W.N.J. was a child of the marriage.
- [78] Section 5 of the Federal Child Support Guidelines SOR/97-175 provides:
5. Where the spouse against whom a child support order is sought stands in the place of a parent for a child, the amount of a child support order is, in respect of that spouse, such amount as the court considers appropriate, having regard to these Guidelines and any other parent's legal duty to support the child. The Court of Appeal has guided the application of this provision in cases such as this in *H. (U.V.) v. H. (M.W.)*, 2008 BCCA 177. After recognizing that s. 3 of the Guidelines imposes on a biological parent an obligation to support a child that may, not must, be a primary obligation, the court said at para. 38: I read s. 5 as requiring that the legal duties of support of the "other parent(s)" - in this case, the natural parents - be considered when support is sought from a stepparent. If such duties are to be considered, it seems obvious that they must be quantified if possible. For this purpose, the "other parent(s)" should be before the court, or other evidence satisfactory to the court relating to that parent's status should be adduced, as occurred in *Dutrisac and Kobe* (but not in

Chartier.) Unless that other parent is a stepparent, s. 3 requires that his or her support be the applicable table amount unless custody is being shared, the child is over age 19, or one of the other 'discretionary' provisions applies. (In the case at bar, the daughter had reached 19 by the time of the hearing below, but was still dependant on parental support, and no argument was advanced invoking s. 3(2)(b) of the Regulation. None of the other discretionary provisions applied.) At this stage, the process is not one of "balancing" or even "apportionment": It appears that the natural parent's obligation can be determined only in accordance with the non-discretionary "presumptive rule" of s. 3.

- [79] Because Ms. Branisky and R.W.N.J.'s biological father never married, the Family Relations Act, R.S.B.C. 1996 c. 128, would apply, as would the British Columbia Child Support Guidelines Regulation (British Columbia) (B.C. Reg. 61/1998). The result would be the same, as the provincial Guidelines "essentially incorporates" the federal Guidelines - see H. (U.V.) v. H. (M.W.) at para. 7.
- [80] The Court went on to say that once the biological parent's Guidelines obligation is determined under s. 3 of the Guidelines, a step-parent's obligations under s. 5 can be addressed.
- [81] The problem here, of course, is that R.W.N.J.'s biological father is not a party to this action, was not given notice that his interests might be affected, and did not appear. I am unable to make any order for child support against the biological father, even if I had a shred of admissible evidence as to his income, which I do not.
- [82] As the court said in H. (U.V.) v. H. (M.W.), at para. 39, a mother is not permitted to give a biological father a "pass" on child support, in favour of pursuing a stepparent.
- [83] The Guidelines amount for one child on an income of \$30,000 is \$269 per month; for two children it is \$463 per month.
- [84] In this case, Ms. Branisky is receiving \$200 per month from R.W.N.J.'s biological father.
- [85] In all of the circumstances, given the means of the parties, and the lack of evidence as to the biological father's income or means to pay child support, I conclude that the appropriate amount for child support for both children of the marriage is the \$269 per month. The Guidelines would otherwise provide for one child, as that is so near the Guidelines amount for two children, less contribution from the biological father of one of them. Retroactivity
- [86] Mr. Kunert did not appeal the 2009 order which set child support based on the income he probably was earning then.
- [87] He rapidly began to accumulate arrears as his income fell and he was unable to continue the payments ordered.

- [88] Rather than set this trial earlier, he sought a variation in June 2012. He achieved limited success, in that child support was reduced to reflect the voluntary payments from R.W.N.J.'s biological father, and his spousal support was reduced somewhat. He did not succeed in having the court order a reduction in his Guidelines income, on which the support payments were ordered.
- [89] It seems to me that to go back further than July 1, 2012, would have the effect of an appeal of the June 28, 2012 order. Mr. Kunert had an obligation to put his best foot forward at that time. If he felt he had done so, and the decision was wrong, he should have appealed it.
- [90] On the other hand, Ms. Branisky has had notice of Mr. Kunert's assertions as to his income since at least then.
- [91] I order that the change in child support is retroactive to July 1, 2012. Spousal Support
- [92] This was a short marriage, some five years from marriage to separation, six from cohabitation to separation.
- [93] Ms. Branisky altered her employment situation when she acceded to Mr. Kunert's suggestion that she quit her job and work from home, and she has not been able to find equivalent work, factors favoring spousal support.
- [94] The financial condition of both parties is bleak at the moment, with neither having significantly greater advantage or disadvantage arising from the marriage or its breakdown.
- [95] Ms. Branisky agreed to accept lump sum spousal support of \$25,000. There is no basis to infer that either party was under any disability at the time of the agreement, although neither had legal advice.
- [96] Subject to the outcome of Mr. Kunert's application to reduce or cancel arrears, Ms. Branisky has had the notional benefit of a spousal support order of \$1,000 per month between December 2009 and June 2012, when it was reduced to \$300.
- [97] Three years is sufficient length for spousal support following a six year relationship and a five year marriage, in circumstances like these, where the conditions, means and circumstances of both payor and payee are relatively equally unfortunate.
- [98] Mr. Kunert's obligation to pay spousal support to Ms. Branisky is cancelled effective immediately. Arrears
- [99] The principles to be applied to an application to reduce or cancel arrears of child support were summarized in *Earle v. Earle*, [1999] B.C.J. No. 383 (Q.L.) (S.C.). They are:
1. The onus is on an applicant to show a change in circumstances;
 2. Arrears will only be cancelled if the applicant is unable to pay now and unable to pay in the future;

3. The applicant must provide full financial disclosure under oath that the change in financial circumstances is significant and long lasting, the change was not the result of choice and efforts were made to earn money, but were unsuccessful;
 4. The applicant's responsibility for a second family does not relieve him or her of obligations to support the first family;
 5. Delay in enforcement is generally not a factor in arrears of child support;
 6. The rule against hoarding does not apply to child support;
 7. Arrears will not be cancelled because someone else had provided financial assistance to the children;
 8. Arrears will not be cancelled because the children no longer need the money;
 9. An agreement between parents to not pay support cannot be relied on because support is the right of the child;
 10. An applicant's lack of access to the children is not a factor;
 11. Money spent directly on the children is not a factor; and,
 12. The lack of legal advice is not a reason in itself. In this case, numbers 6, 7, 8, 9, 10, 11, and 12 are not applicable. With respect to the others, I conclude as follows:
 1. There has been a change in circumstances in that the income on which child support was based was anomalously high in 2009. Mr. Kunert has not come close to earning that much before or since, at least as disclosed in the evidence. Also relevant to this factor is that Mr. Kunert agreed to an even higher income figure of \$100,000 in January 2009;
 2. Although Mr. Kunert is presently unable to pay the arrears, I do not conclude that will always be the case, particularly if he begins to emphasize earnings over artistic ambitions;
 3. I have barely sufficient financial information, and what is lacking is not Mr. Kunert's fault. The change from \$60,000 earned in 2009 to what he has been able to earn since has been significant. Whether it is long lasting depends largely on Mr. Kunert. The change I find is largely of his choice in the type of work he has pursued, and he has not satisfied me that he has made sufficient effort to find other, perhaps more mundane, employment;
 4. This factor requires no elaboration; and
 5. There has been no delay in enforcement of which I am aware.
- [100] Part of Mr. Kunert's application with respect to arrears involves his desire that the Director of Maintenance Enforcement be ordered to stop enforcement actions that involve Mr. Kunert's clients or customers, and to restore his ability to renew his passport so he can travel to the United States or elsewhere to seek work.

- [101] Mr. Kunert did not give notice to the director as he was required to do by s. 7 of the Family Maintenance Enforcement Act. I conclude that ordering child or spousal support payments at trial is not a "variation" under s. 7 that would require notice, but it seems to me that an application for an order that would interfere with the director's activities under the Act requires such notice.
- [102] I also conclude that the director is not entitled to notice that an order for reduction or cancellation of arrears will be sought at a trial where the party in whose favour an order has been made is present and in a position to speak to their own interests.
- [103] It seems to me that in these circumstances, it might have been appropriate to consider suspending enforcement actions for a time to permit Mr. Kunert to reorganize his affairs, but as that is something of which the director is entitled to notice, I adjourn any application to suspend enforcement actions until Mr. Kunert has served the director with notice and the director has an opportunity to respond.
- [104] The application to reduce or cancel arrears is dismissed, largely because I am not convinced that Mr. Kunert will be unable to pay the arrears in the future, and because if the amount of the arrears accumulated is greater than it might have been if more complete or more timely financial disclosure or application to vary had been made by Mr. Kunert, he has brought that upon himself. Custody and Access
- [105] Although Mr. Kunert said at the beginning of the trial that he wished to deal with custody, guardianship and access to his daughter, in his final argument it became clear that he really wanted his access to be defined along the lines suggested by him in a draft settlement document he sent to Ms. Branisky.
- [106] At trial, Ms. Branisky agreed with most of the access proposals Mr. Kunert had made, with the exception of a return time.
- [107] The order that flows from this trial should be complete, so I will incorporate with some modifications the guardianship provisions of their settlement agreement as follows:
1. SABRA and ANDREAS are to be joint guardians of the child R.A.K., born March 3, 2003;
 2. In the event of the death of either parent, the surviving parent shall be the sole guardian of the child;
 3. The child shall be in the day-to-day care of SABRA, and SABRA will advise ANDREAS of any matters of significance affecting the child;
 4. SABRA will respectfully discuss with ANDREAS any significant decisions concerning the health (except for emergency health decisions), education, religious instruction, and general welfare of the child, and ANDREAS will respectfully discuss those issues with SABRA, and each parent will do their utmost to reach agreement with respect to those significant decisions;

5. In the event that SABRA and ANDREAS cannot agree on a significant decision, SABRA will have the right to make the decision, and ANDREAS shall have the right to seek a review of that decision under s. 32 of the Family Relations Act.
6. SABRA and ANDREAS are each entitled to seek and receive information concerning their child directly from third parties, including, but not restricted to, teachers, counselors, medical professionals or third party care-givers.

[108] I therefore make the following order with respect to access:

1. Mr. Kunert will have access to his daughter R.A.K. on alternate weekends while school is in session from 6:00 p.m. Friday to 7:00 p.m. Sunday;
2. As to summer school holidays, Mr. Kunert shall have R.A.K. for two consecutive weeks in August 2013, and for four consecutive weeks in August 2014, and each August thereafter. The parties may agree to vary the time on which the continuous access is to commence;
3. Mr. Kunert shall have R.A.K. from 5:00 p.m. Christmas Eve until noon Christmas Day in 2014, and in each even numbered year thereafter. Mr. Kunert shall have generous access, for up to half of the remainder of the Christmas school break, as agreed by the parties;
5. Mr. Kunert shall have R.A.K. for the entire spring school break in 2014, and each even numbered year thereafter;
6. Mr. Kunert shall have R.A.K. for the Thanksgiving break in 2013 and each odd numbered year thereafter.

[109] I have deviated from the suggested terms in order to ease R.A.K. into this increased overnight time with her father, and to make the division of holidays more even.

[110] Any statutory holidays, including any school holidays that fall on a Monday or a Friday, will be added to the weekend of the parent who is to have R.A.K. in any event.

[111] R.A.K. will spend Mother's Day with Ms. Branisky, Father's day with Mr. Kunert, and each parent's birthday with that parent.

[112] I consider the success on this trial to be divided roughly equally, and given the parties' respective financial situations, order that each bear their own costs. "R.T.C. Johnston, J." The Honourable Mr. Justice Johnston

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/SC/13/02/2013BCSC0222cor1.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/branisky-v-kunert-2013>

Prepared on 29 October 2026 · Esheria