
CANADA / JUDGMENT

C.L.C. v. B.T.C.

2012 BCSC 736

COURT

Supreme Court of British Columbia

DECIDED

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2012 BCSC 736 C.L.C. v. B.T.C.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

C.L.C. v. B.T.C.,

2012 BCSC 736

Date: 20120518

Docket: E004747

Registry: New Westminster

Between:

C. L. C.

Claimant

And:

B.T.C.

Respondent

Before: The Honourable Mr. Justice Verhoeven

Reasons for Judgment

Counsel for the Claimant:

K. A. Pepper

Counsel for the Respondent:

G. C. Scott

Place and Date of Hearing:

New Westminster, B.C.

May 1-3, 2012

Place and Date of Judgment:

New Westminster, B.C.

May 18, 2012

Introduction

- [1] The Respondent, who for convenience I shall refer to as the father, applies to terminate child support for C., the youngest of the three children of the parties. He contends that as of May 2009, when C. reached 18 years of age, C. was no longer a "child of the marriage" within the meaning of the Divorce Act, R.S.C., 1985, c. 3 (2nd Supp.), s. 2(1) (the "Divorce Act"), and therefore no further child support was payable.
- [2] Alternatively, he argues that C. is no longer a child of the marriage currently, or that the amount of child support payable should be reduced.
- [3] C. is mentally disabled. His functional and cognitive abilities are in the range of that of a 7 to 10 year old child. As a result of his disability, upon reaching the age of 18, C. became eligible to receive benefits from the Province of B.C. under the Employment and Assistance for Persons with Disabilities Act, S.B.C. 2002, c. 41 (the "EAPDA"), which provides benefits for a "person with disabilities" ("PWD"). C. receives benefits of \$940.69 per month pursuant to the legislation.
- [4] The father currently pays child support for C. of \$981.75 per month, pursuant to an order of the Court made December 1, 2006 by Madam Justice Martinson (the "2006 order"). The 2006 order provided that he pay child support for C. for as long as C. remains a child of the marriage under the Divorce Act.
- [5] The father's argument rests principally on the following grounds:
1. As of his 18th birthday, C. became eligible for the PWD benefits.
 2. As an adult, C. has refused to have any relationship with his father.
- [6] The father has also brought an application for production of documents and information by the Claimant, the mother. However, he acknowledges that with one exception, all of the information and document requests made have now been fulfilled.
- [7] The mother has brought a cross application, seeking arrears of child support in respect of C. determined retroactively to January 1, 2007. She seeks past base child support pursuant to the tables under the Federal Child Support Guidelines, SOR/97-175 (the "Guidelines"), and also seeks payment for additional child support (special or extraordinary expenses) under s.

7 of the Guidelines. She also seeks determination of the amount of C.'s future child support. In addition, the mother seeks arrears of child support for A., the second child of the parties, from January 1, 2007 to April 2009, at which time the mother concedes A. was no longer a child of the marriage. The father argues that he paid child support for A. until December 31, 2008, when she ceased to be a child of the marriage.

- [8] Largely for economic reasons, neither party wishes a trial of any issues. Therefore both parties seek to have the matters at issue determined on the basis of the affidavit evidence before me, though both recognize the limitations such a procedure imposes on the ability of the Court to make findings where the evidence is contested.

Issues

- [9] The issues to be decided are as follows:
1. Does C. continue to be a child of the marriage?
 2. If not, when did C. cease to be a child of the marriage?
 3. If so, what are the father's ongoing base and additional child support obligations for C.?
 4. What amount if anything is owed as arrears of base and additional child support for C.?
 5. What amount if anything is owed as arrears of child support for A.?
 6. What if any orders are required in relation to the father's application for document production?
 7. Costs

Background Facts

- [10] The parties were married in 1981, were separated in 1998, and were divorced in 1999. They have three children. The eldest two are daughters, L. and A., born respectively in 1983 and 1984. C., a son, was born in Romania in May 1991. He was adopted by the parties as an infant. His mental disability was diagnosed during infancy.
- [11] Following the parties' separation, the three children continued to reside with their mother. The father has not seen his daughters since May 1998, when they were 14 and 15 years of age. He alleges that the mother alienated his daughters from him.
- [12] By way of a consent order of Cole J. made July 7, 2000 (the "2000 order"), the parties agreed upon sole custody and joint guardianship of the children. Access to C. was specified. Access to the daughters was unspecified and as they might agree to. The child support obligations of the father were set out in the order.
- [13] The child support terms were varied somewhat by an order made by Crawford J. on August 19, 2002 (the "2002 order").

- [14] The father says that he has not seen his son, C., since in or about June 2006, when C. was 15 years of age. He alleges that over the course of the years leading to his final access to his son, the mother interfered with and frustrated access, and alienated his son from him. She denies these allegations. She says that the father's access to C. was irregular, unreliable, and problematic. She says that when C. was younger, she could encourage him to participate in access visits with his father, but access became more difficult as time went by. She says that finally, in June 2006, she could no longer force C. to go with his father. She says that C. did not want to continue with access due to his father's conduct during the access visits. She says that C. chose to terminate his father's access in 2006.
- [15] The mother says that in August 2006, she and C. discussed the problems with the father's access with Dr. Danso, C.'s longtime treating pediatrician. She asserts that Dr. Danso said that C. was old enough to make his own decision, and that he was capable of making the decision to refuse further contact with his father. There is no evidence from Dr. Danso directly on this, nor is there any other expert opinion on whether C. was then or is now capable of making this decision.
- [16] The parties both rely on the comments attributed to Dr. Danso, but for different reasons. The mother relies on the comments to resist blame for the breakdown of the relationship between C. and his father. The father relies on the comments to support his contention that his obligation to pay child support for C. should be terminated, due to C.'s voluntary withdrawal from his charge as a parent, which, as the father argues, has now continued into C.'s adulthood.
- [17] As both parties have relied on the hearsay opinion of Dr. Danso, the evidence is admissible by agreement of the parties. However, the hearsay nature of the evidence is relevant to the weight I can give to it.
- [18] In late 2006, the mother applied for retroactive variation of the 2002 order. The father filed an application for a finding of contempt against the mother in relation to denial of access to C. The father did not proceed with his application. He says he gave up trying to exercise access to C.
- [19] The 2006 order determined retroactive and ongoing child support amounts payable by the father. The oldest child, L., was declared no longer to be a child of the marriage after December 31, 2005, about a month before her 23rd birthday. It was ordered that A. would continue to be a child of the marriage until the earlier of:
1. December 1, 2009;
 2. her graduation; or
 3. when she is no longer pursuing her education full time.

- [20] In relation to payment of base Guidelines child support, the 2006 order provides that the father shall continue to pay "monthly base table child support" for A. and C. for as long as they are children of the marriage. Thus, the order provides for automatic variation of the father's obligation to pay child support in accordance with variations in his income. However, the order also fixes his child support obligation at the sum of \$1,559 per month. I interpret the specified monthly obligation as fixing the amount then payable at the time of the order only.
- [21] Until June 2010, C. attended a private school, Pacific Academy. C. completed his grade school education in June 2010. He did not formally graduate. The father paid \$348.60 per month as his share (60%) of the Pacific Academy educational expense, in addition to paying the base Guidelines table amount of \$981.75. The 60% share is set out in the 2002 order and has never been varied.
- [22] Beginning in September 2010, C. commenced a full time two year work access program at Kwantlen Polytechnic University. The program is called Access Programs for People with Disabilities. His mother has paid the annual tuition of \$994.
- [23] C. continues to reside with his mother. In 2010 the mother acquired a one-half ownership interest in a house in Surrey, which was purchased together with a male friend. C. occupies a suite in the basement but does not live independently.
- [24] The father is remarried. Since 2008 he has resided in Arizona.

Analysis

Does C. continue to be a child of the marriage?

- [25] Pursuant to s. 2(1) of the Divorce Act, in the case of a child who is over the age of majority, "child of the marriage" means a child who, at the material time, remains under the charge of the spouses or former spouses and who is unable, by reason of illness, disability or other cause, to withdraw from their charge, or to obtain the necessities of life.
- [26] The definition is disjunctive, in that there are two separate bases upon which it may be concluded that a child remains a child of the marriage: (1) the child is unable by reason of illness, disability or other cause to withdraw from the charge of the parents, or (2) the child is unable to obtain the necessities of life: *Briard v. Briard*, 2010 BCCA 431 [Briard], at paras. 8 and 9.
- [27] The onus of establishing that the adult child remains a child of the marriage is on the party so asserting: *Darlington v. Darlington* (1997), 32 R.F.L. (4th) 406, B.C.J. No. 2534 (C.A.), at para. 15; and *Farden v. Farden*, (1993), 48 R.F.L. (3d) 60, B.C.J. No. 1315 (S.C.) [Farden].
- [28] The affidavit materials of the mother include C.'s application for PWD benefits which resulted in his PWD designation in May 2011, with benefits commencing June 2011. The father did not object to the introduction of the application materials as evidence.

- [29] As part of C.'s application for PWD benefits, his family doctor indicated that C. has moderate to severe mental retardation, which affects his activities of daily living. The doctor states that he has been mentally handicapped since birth. His condition affects his memory and his ability to learn new things. He is easily distracted. He needs constant reminders. He requires assistance and ongoing care and support for many activities. He requires supervision with daily living activities so that he doesn't put himself or others in danger. He needs adult supervision to function in society. He can't adjust to social settings and new people or to change. His ability to interact in the community and use community resources is impaired. There are no remedial treatments available that may resolve or minimize his impairments.
- [30] A section of the application filled by his aunt, a registered nurse, who has known him since early childhood, describes him as being very impaired in terms of self-sufficiency. She notes he can be easily misled. His cognitive abilities are extremely poor. He has weak fine motor skills. He requires almost constant supervision in many of his daily routines as he has difficulty understanding what is appropriate, and has poor memory and recall. He has poor attention and concentration abilities. He takes medication to assist with his attention deficit difficulties. He requires constant reminders and prompting to attend to personal hygiene and appropriate dress. He is unable to read labels, understand pricing and pay for purchases. He requires supervision in the kitchen in preparing meals. He needs assistance with meal planning. He is unable to manage banking or finances. He requires preparation and supervision in taking public transit. He is unable to read schedules or to effectively seek assistance. His severe cognitive impairment affects his judgment. Family and friends provide the necessary support, without which he would require a safe, assisted, and supervised environment.
- [31] A neuro-psychoeducational assessment report conducted in early 2007 in order to ascertain his academic functioning noted that his full scale IQ of 40 would be described as "Extremely Low".
- [32] The writers of the report noted that in some areas his functional abilities were somewhat intact. But in terms of global functional skills such as economic and interpersonal skills, self-sufficiency and social or personal adjustment, he demonstrated significant impairments. The authors described him as meeting the criteria for "mild mental retardation". Despite the "mild mental retardation" assessment, they described him as having "severe overall intellectual and academic deficiencies" which were "exacerbated by significant memory processing and learning impairments".
- [33] In order to designate C. as a PWD under s. 2 of the EAPDA, the minister was required to be satisfied that C. has a severe mental or physical impairment that in the opinion of a medical practitioner is likely to continue for at least two years and which, in the opinion of a prescribed professional, directly and significantly restricts his ability to perform daily living activities, thus requiring help to perform those activities.

- [34] In my view, the materials submitted in support of the application amply support the minister's decision to designate C. as a PWD.
- [35] In her affidavits, the mother describes C.'s condition and ability to cope in some detail. She says that she does not expect C. will ever be able to live independently from a parent or caregiver. She says that she is assisting him, financially and otherwise, to take as many reasonable steps toward independence as he can. While she hopes that C. will learn to live semi-independently, that is not a situation that she anticipates will actually ever occur. In terms of employment, she says her best expectation is that C. will find a suitable volunteer position that will interest him and provide him with an occupation. She does not expect he will ever be financially or otherwise independent.
- [36] She states that C. does not have a caregiver, assistant or social worker. All of his day to day needs are addressed by his mother and the parties' two daughters. They live nearby, in the former matrimonial home.
- [37] The father does not seriously challenge any of the evidence relating to C.'s disability and level of functioning, or that C. remains under the charge of his parents and is, by reason of disability, unable to withdraw from their charge at present.
- [38] From a medical and functional perspective then, it is clear that C. remains under the charge of his parents and is unable by reason of disability to withdraw from their charge, and I so find. It is unnecessary, therefore, to consider whether, in addition, C. is unable to obtain the necessities of life.
- [39] Although C. is now in receipt of PWD benefits, this alone does not mean that the family is absolved from all financial contribution to the child, or that state support will be sufficient always to cover the necessities of life: Briard, at para. 18, quoting *Lougheed v. Lougheed*, 2007 BCCA 396, at paras. 25-26.
- [40] In support of his contention that C. is no longer a child of the marriage, the father argues that C. has voluntarily withdrawn from his charge.
- [41] In *Law v. Law* (1986), 2 R.F.L. (3d) 458, O.J. No. 2513 (H.C.J.) [Law cited to O.J.], Fleury L.J.S.C. stated, at para. 5, as follows:

... Kimberly has certainly withdrawn from the applicant's charge as a result of her failure to maintain any contact with him. Although it is sufficient that she be in the custodial parent's charge, I am of the view that where, as here, a mature child unilaterally terminates a relationship with one of the parents without any apparent reason, that is a factor to be considered by the trial judge in determining whether it would be "fit and just" to provide maintenance for that child. A father-child relationship is more than a simple economic dependency. The father is burdened with heavy financial responsibilities and the child has very few duties in return. It seems reasonable to demand that a child who expects to receive support entertain some type of relationship with his or her father in the absence of any conduct by the father which might justify the child's neglect of his or her filial duties.

[Emphasis added.]

- [42] In Farden, Master Joyce (as he then was) set out a list of factors which can be considered in assessing whether a child enrolled in post secondary education remains a "child of the marriage". Relying upon Law, the factors listed by Master Joyce include whether a mature child over the age of majority has unilaterally terminated a relationship with the parent from whom support is sought.
- [43] The comments of Fleury L.J.S.C. in Law go no further in stating that unilateral termination of a relationship with one of the parents by a mature child without any apparent reason is "a factor to be considered" in determining whether the rejected parent should be obliged to continue to pay child support. In Farden, Master Joyce referred to this as a factor that warrants consideration in relation to whether or not attendance in a post secondary institution will be sufficient cause for a finding that the child is still a "child of the marriage", upon examination of all of the circumstances. Master Joyce relied upon prior findings made by the Court in concluding at 66 that "the father was not guilty of any conduct which disentitled him to access." The adult son refused to consider any sort of relationship with his father.
- [44] However, on the limited evidence before me, I am unable to make the necessary finding that C. has unilaterally withdrawn from or terminated the relationship with his father without any apparent reason for doing so.
- [45] I have no direct evidence from C. The evidence from his parents as to where the fault lies for termination of the relationship is virtually all disputed. The father relies upon a note to him from the mother dated September 15, 2006, in which she alleges that as a result of the father's escalating anger and verbal abuse towards C., he is afraid to be with the father, and after referring to Dr. Danso's opinion, states "[i]f circumstances should change, and [C.] is willing, I will support him in his visits. Until then, he will not be visiting." The mother has attached to her affidavit notes written by C. in 2006 indicating that C. does not wish to see his father. There is no evidence as to C.'s current views. There is no evidence that either parent has attempted to renew the relationship since 2006.
- [46] As noted, the father denies any inappropriate behaviour on his part that would justify termination of the relationship, and he alleges that the mother frustrated and refused access, and that in approximately June 2006, he simply gave up attempting to obtain access. Unlike the situation in Farden, there are no prior rulings of the Court upon which I might rely in order to conclude that C. has no reason for refusing a relationship with his father.
- [47] I wish to make plain that I make no finding of any kind in relation to the cause of the breakdown of the relationship between C. and his father.

- [48] However, in my view it is not necessary that I come to any conclusion on that question. Given C.'s mental handicap, I am not satisfied that termination of the relationship should be given any weight in the circumstances of this case, whatever the real cause may be. C. cannot be equated with the "mature child" referred to in other cases such as Law.
- [49] I can place no weight on the alleged opinion of Dr. Danso in 2006 to the effect that C. had (even then as a fifteen year old) the capacity to make the decision to terminate his father's access. There are two reasons why I can place no weight on the alleged opinion: (1) the hearsay, and thus inherently unreliable nature of the opinion, and (2) the lack of any supporting facts or context for the opinion.
- [50] If, in fact, the mother has been less than fully supportive of access to C. by his father, again a matter about which I can make no findings, that would be an additional reason for concluding that C. is not responsible for deciding to terminate the relationship with his father.
- [51] I conclude that C. remains a child of the marriage within the meaning of the Divorce Act.
- [52] I wish to add that it is very troubling that C. has no ongoing relationship with his father, and the father's family, such as C.'s paternal grandfather. The situation is likely contrary to his best interests. The father has in the past certainly made great efforts to maintain the relationship, and I presume he still desires a relationship. No doubt his application to terminate or reduce support is driven at least in part by his understandable frustration over being called upon to continue to pay for support for C. when he has no parental relationship with C.
- [53] There is no application before me relating to access to C. Nonetheless, I urge the parties to make sincere efforts to restore the relationship.
- [54] I suggest that independent professional counseling be explored, firstly for C. and then for the parents if there is a potential for restoring the relationship.

What are the father's ongoing base and additional child support obligations for C.?

A. What approach to determination of child support should be used?

- [55] Determination of the father's child support obligations must be decided in accordance with s. 3(2) of the Guidelines, which states as follows:
- (2) Unless otherwise provided under these Guidelines, where a child to whom a child support order relates is the age of majority or over, the amount of the child support order is
 - (a) the amount determined by applying these Guidelines as if the child were under the age of majority; or

- (b) if the court considers that approach to be inappropriate, the amount that it considers appropriate, having regard to the condition, means, needs and other circumstances of the child and the financial ability of each spouse to contribute to the support of the child.
- [56] The father has the onus of establishing, as he contends, that the approach set out in s. 3(2) (a), that is, applying the Guidelines as if C. were under the age of majority (the "underage approach"), is inappropriate: *Wesemann v. Wesemann*, [1999] B.C.J. No. 1387, 49 R.F.L. (4th) 435 (S.C.) [Wesemann cited to B.C.J.], at para. 6.
- [57] If I am satisfied the underage approach is inappropriate, then I must determine the appropriate amount of child support having regard to the condition, means, needs and other circumstances of the child and the financial ability of each spouse to contribute to the support of the child, in accordance with s. 3(2)(b) of the Guidelines: *Wesemann*, at para. 13.
- [58] At present, C. is completing the second year of the two year Kwantlen University work access program. Tuition for the program is \$994 per year, which the mother has paid.
- [59] In her affidavit the mother states that in future C. may or may not find employment, or he may need more education. As noted, she expects that, at best, he will obtain volunteer work that will suit him and she expects that C. will always remain financially dependent on his parents, and will never achieve personal independence.
- [60] Only time will tell whether C. succeeds in obtaining some kind of paid employment, and what kind of earnings he might make, and the level of independence he might achieve. However, at present, just as before he reached the age of majority, C. continues to reside with his mother, earns no income, and remains dependent on his family.
- [61] Therefore, at present, apart from the fact that C. now receives PWD benefits, the approach of applying the Guidelines as if C. continued to be under the age of majority would continue to be appropriate.
- [62] The question, then, is simply whether the addition of the PWD benefits of approximately \$940 per month renders the underage approach to determination of child support inappropriate. In my view this question turns on the relative financial significance of the PWD benefits in the circumstances of this case.
- [63] The father's most recent financial statement sets out his income for child support purposes at US \$115,150.
- [64] I pause to comment that in my view the amounts in the father's financial statement should have been set out in Canadian currency, accompanied by an indication as to the exchange rate utilized. In this case, I must infer that the father is implicitly asserting that the foreign currency amounts set out in his financial statement have the same values in Canadian currency. At current exchange rates, Canadian and U.S. dollars are of roughly equivalent value, so I accept the U.S. currency figures as being equivalent to Canadian currency figures. During their submissions both parties treated U.S. and Canadian currency as being

equivalent.

- [65] The mother contends that, via her interpretation of the father's most recent paycheque statement, his gross employment income for 2011 is in fact \$119,326, which is somewhat higher than what he asserts in his sworn financial statement, \$115,150. However, the document sets out that the gross pay for the year was \$115,150. The mother has also re-calculated the father's income amounts for other years in question, and submits that the Court should utilize her re-calculated amounts. However, on the evidence available, I accept the father's evidence as to his annual income.
- [66] The base Guidelines table amount payable for one child at an income of \$115,150 for 2012 is \$1,046 per month. To date the father has been paying \$981.75 per month in base child support. As noted, prior to C.'s completion of high school in June 2010, the father also paid \$348.60 per month as his 60% share of the s. 7 educational expense for C.'s tuition at Pacific Academy.
- [67] The mother argues that once C. reached 18 years of age, she lost the benefit of the child tax benefit, which due to C.'s disability was \$338.55 per month. Therefore she contends that the net increase in government financial resources for C. is not the full amount of the PWD benefits; it is only approximately \$500 to \$592 per month. She contends that the net benefit is within this range after taking into account different tax treatment of the PWD benefits and the child tax benefit. Leaving aside the tax issue, the net difference is approximately \$600 per month.
- [68] The mother contends that C.'s expenses have risen, now that he is an adult, and since he has left Pacific Academy. Pacific Academy provided support, activities, and stimulation that must now be obtained separately. As an adult, costs for food, clothing, and other basic needs have increased. C.'s interests have changed, resulting in increased expense.
- [69] As noted, in 2010, the mother and her male friend purchased a home in Surrey. She has a 50% interest in the home. In purchasing the home, she looked for a home with a suite which would allow C. an opportunity for semi-independent living in the future. She says that due to the suite, the home they purchased cost more than another suitable home that they could otherwise have purchased. She estimates that the suite has a rental value of \$1,200 per month. The municipal property taxes are higher because the suite is equipped with a kitchen.
- [70] She asserts that the increased expenses for C. entirely offset the net extra government revenue that C. now receives in the form of PWD benefits.
- [71] She therefore argues that the Guidelines table amount of child support continues to be appropriate, and that the underage approach to determination of child support should continue to apply.

- [72] She does not attempt to state or estimate the precise extent to which C.'s expenses have risen, as she asserts. However, I accept, in general terms, the mother's evidence that C.'s expenses have risen as a young adult from those he incurred as a child. I also accept that the mother incurs significant housing and other costs for C.
- [73] The mother earns \$40,616 per annum as a hospital Emergency Nursing Unit Assistant. She works about 70% of full time. She says, and I accept, that she foregoes income in order to care for C. Given her care obligations for C., the amount of her time devoted to employment is reasonable.
- [74] Her financial statement lists individual monthly expenses for C. at \$828.66. This amount is apart from shared household expenses such as accommodation, food, and other expenses.
- [75] In my view, even assuming that the PWD benefits provide a net additional benefit that is in the range of \$600 per month, in all of the circumstances of the case, the underage approach to determination of child support is inappropriate. The addition of \$600 in additional government assistance is significant enough in the context of C.'s support expenses and the finances of the parents that it ought to be taken into account.

B. Determination of the appropriate amount of child support

- [76] Having decided that the underage approach set out in s. 3(2)(a) of the Guidelines is inappropriate, I must determine the amount that is appropriate, having regard to the condition, means, needs and other circumstances of the child, and the financial ability of each spouse to contribute to the support of the child in accordance with s. 3(2)(b).
- [77] The father argues that the mother's financial disclosure is inadequate to determine the appropriate amount of C.'s child support in accordance with s. 3(2)(b). He argues that the information is lacking in sufficient detail and support. He argues that the mother should provide a detailed budget relating to C.'s expenses, and that her own evidence concerning household finances are inadequate. The mother relies primarily on the figures set forth in her most recent financial statement.
- [78] However the father has left me with little choice. He acknowledges that his document disclosure demands of the mother have been met, with one exception. He did not want a trial or an adjournment of the applications set for hearing before me, and which occupied three full days. He has not cross-examined the mother on her affidavits.
- [79] The mother argues that a more detailed budget would be arbitrary, unrealistic and would serve no real purpose.
- [80] While the mother's evidence concerning C.'s financial needs could have been more detailed, I am satisfied that I have sufficient information to deal with the matter on the merits. In my view, more detailed budgets would not change my overall assessment for the purposes of s. 3(2)(b) to any significant degree.

- [81] As noted, on the basis of the father's current income of \$115,150, his monthly table child support obligation for C. would be \$1,046. The father contends that the whole of the \$940 per month PWD benefit should be offset against his child support obligations, therefore relieving him of 90% of his child support obligation. This contention ignores the fact that the mother continues to provide substantial financial support for C. If the PWD benefits are to be taken into account to ease the child support burden of the parents, the relief should be shared between them.
- [82] The mother estimates that C.'s monthly expenses are \$2,212, not including a Registered Disability Savings Plan that she would like him to participate in. The savings plan would attract a grant from the federal government. In my view, as desirable as it would be, the savings plan is not a relevant child support consideration. By their nature, in general, savings are not expenses.
- [83] Her estimate of monthly expenses for C. is calculated by reference to his personal monthly expenses of \$828.66 as shown on her financial statement, and 50% of her stated monthly household expenses.
- [84] The mother's monthly accommodation costs of \$1,315 per month could be considered as somewhat inflated, as she retains equity in the former matrimonial home that could have been used to reduce her current accommodation expense. However, I accept that the suite in her home occupied by C. would otherwise have a significant rental value, of which she would be entitled to 50%. However, there would be taxes and expenses. On the mother's calculations, C.'s monthly accommodation expense is \$657 per month, which looked at in isolation is a reasonable amount for such an expense. Assessment of the actual housing expense for C. is very difficult in the circumstances, but I am satisfied that it is slightly lower than the mother's estimate.
- [85] On the evidence available, it seems to me that the mother has prudently arranged her personal and financial affairs so as to be able to provide for C. and to provide care and assistance for him in an economical manner. This is to the advantage of all concerned, including, of course, the father.
- [86] I accept the mother's evidence that, but for her responsibility to care for C., she could earn more money by taking extra shifts at her work. I also accept that all of C.'s care is provided at no cost by his mother and his two sisters. The father is not at present being asked to contribute financially to such costs, nor is he being given an opportunity to assist.
- [87] The father argues that the mother has substantial net worth, and that he has comparatively little. The mother's net worth is about \$400,000, comprised mostly of the equity in the former matrimonial home. She retained the former matrimonial home when the parties divided their assets, and the equity largely reflects the increase in property values in this market. She has no significant financial assets. The minimal equity in the new home is not accessible.

- [88] The father's net worth is very modest, at about \$69,000. He has some equity in his residence in Arizona, and some financial assets.
- [89] The father is 54, the mother is 53. The reality is that neither parent has a substantial net worth, especially in view of their ages. In my view, consideration of the assets and net worth of the parties is not a significant consideration in the circumstances of this case.
- [90] Based upon the expenses shown on their financial statements, it appears that neither parent enjoys more than a modest lifestyle.
- [91] Proportionately, the father's income is about 74% of the total income of the two parents.
- [92] The father argues that the mother receives tax credits as a result of being a caregiver for a disabled person. However, the tax savings attributable to the credits are not large. The total tax savings in 2011 resulting from the credits was not more than \$600.
- [93] The mother's evidence sets out that she has investigated other benefits that C. might be able to receive. Those benefits immediately available consist of such things as optical and dental care, and relief against MSP fees. The other benefits are not significant to the financial analysis currently.
- [94] On the evidence, I conclude that the monthly expenses for C. are approximately \$2,100. In my view this is a reasonable amount of expense, upon a consideration of all of the factors referred to in s. 3(2)(b) of the Guidelines. Of this, \$940 is now received through the PWD benefits. Clearly, the amount of the PWD benefits does not approach the amount required for C.'s support. This leaves a monthly shortfall of \$1,160 to be financed by C.'s parents.
- [95] In my view it is appropriate that the shortfall in C.'s financial needs be financed by C.'s parents in proportion to their incomes. That is, 74% by the father, and 26% by the mother. On this basis, the appropriate amount of child support to be paid by the father is \$858 per month, commencing June 1, 2012.
- [96] As the father's obligation is dependent upon the amount of C.'s expenses in relation to the incomes of the parties, I order that the information the father may request under s. 25(1) of the Guidelines will also include an annual budget regarding C.'s expenses and any government benefits or subsidies to which he may be entitled, and information as to C.'s income.
- [97] The mother has been taking \$750 per month from the amount that C. has been receiving as PWD benefits to cover expenses relating to him. The remaining amount she leaves with C. as his personal spending money. The father criticizes the \$750 payments to the mother. However, the entirety of the PWD payment is being used to support C. How the mother chooses to allocate the PWD payment is not material to the analysis.

C. Child Support Arrears - C.

- [98] Since the December 1, 2006 order, the father has paid child support based upon an annual income of \$109,213. His actual income in the years that followed has been somewhat higher. As noted, the order stipulated that the father would pay monthly base table support for A. and C. for as long as they remained children of the marriage as defined by the Divorce Act. Thus, the order provided for automatic variation of the father's obligations.
- [99] The father calculates the cumulative underpayment of base Guidelines support at \$3,546 to the end of December 2011. This amount includes recalculation of his child support obligations for both C. and A. to December 31, 2008, and for C. alone thereafter in accordance with his annual income.
- [100] Based upon the terms of the 2006 order, no variation of the child support obligations is required in relation to base child support for C. The issue simply involves determination of the amount due under the order.
- [101] C. has been in receipt of the PWD benefits since June 2011, based upon an application for benefits submitted in April or May 2011. The father argues that the mother ought to have submitted the application earlier so that C. could have begun receiving the benefits commencing on his 18th birthday two years earlier, in May 2009. Although the mother says that she did look into it, she says she was either misled or she misunderstood the question of C.'s eligibility or the amount of benefits available.
- [102] There is some merit to the father's argument, as the mother has had sole guardianship and custody of C. in de facto terms for many years. The application made belatedly was at the instigation of the father, through legal counsel. The parents do not communicate directly. However, as child support is for the benefit of the child, not the receiving parent, I do not consider it appropriate to penalize C. for his mother's failure to obtain the PWD benefits sooner.
- [103] The father also alleges that he overpaid for s. 7 expenses, as the Pacific Academy tuition attracted a tax credit or deduction for the mother. This is a very belated complaint on the father's part, as he has been paying a share of these expenses for both C. and his older siblings for many years. The precise value of the alleged overpayment is not in evidence. I am unable on the evidence to make any findings in respect of this contention.
- [104] The mother claims for retroactive variation of the prior court order and payment of s. 7 expenses for C. The father accurately asserts that none of the claimed expenses were agreed to by him or even discussed with him prior to them being incurred, notwithstanding his legal status as joint guardian of C.
- [105] The existing order regarding s. 7 expenses is the 2002 order of Crawford J., which varied the 2000 consent order. The 2002 order provided that the father would pay 60% of C.'s s. 7 expenses. As noted, the 2002 order has never been varied in respect of s. 7 expenses. The 2006 order did not vary the prior orders in relation to s. 7 expenses. The mother seeks retroactive variation of the 2002 order effective January 1, 2007 to provide that the father

should pay s. 7 expenses in proportion to the income of the parties and seeks payment of certain s. 7 expenses incurred since that date.

[106] One of the expenses claimed is for the Kwantlen University work access program tuition, and some minor related expenses.

[107] The father argues that he was not called upon to pay for the post-secondary tuition for his daughters. However, in my view, that provides no precedent. C.'s situation is quite different than that of the daughters, due to his disability. The Kwantlen program is very economical. Having regard to the necessity of the program, which is in C.'s best interests, the reasonableness of the expense, and the language of s. 7(1), I am satisfied that the Kwantlen program is an appropriate s. 7 expense.

[108] I am not satisfied that the other expenses the mother claims have been proven. Little information is provided. The major expenses referred to are for "Guatemala Outreach" at \$1,525, and for some snowboarding lessons and camp.

[109] Although the hearing of the applications occupied three days, there were no specific submissions regarding the factors that should guide the Court in relation to applications for retroactive variation of child support orders as set out in *D.B.S. v. S.R.G.*, 2006 SCC 37, at paras. 94-116. In particular, there was no explanation for the fact that the 60% share of s. 7 expenses set out in the 2002 order was not varied in 2006. I have to infer that no application for variation was made at that time. Now the mother seeks variation retroactively commencing only one month following the making of that order. In the circumstances it would not be appropriate to retroactively vary the 2002 order in relation to the proportion of s. 7 expenses as sought by the mother.

[110] The Kwantlen University expenses claimed total \$2,130. I find that these expenses fall within the terms of the existing 2002 order for payment of s. 7 expenses by the father. Therefore the father must pay 60% of that amount, or \$1,278.

[111] However, the 2000 and 2002 orders will be varied to provide that, commencing June 1, 2012, the parties shall pay C.'s additional expenses falling within s. 7 of the Guidelines as may be determined from time to time by agreement of the parties or court order, in proportion to their respective incomes, after deducting from the expense the contribution, if any, from C.

What amount if anything is owed as arrears of child support for A.?

[112] As noted, the 2006 order stipulated that A., the second eldest child of the parties, would cease to be a child of the marriage upon the earlier of:

1. December 1, 2009;
2. her graduation; or
- 3, when she is no longer pursuing her education full time.

- [113] At the time of the order, A. was enrolled in a full-time nursing studies program. According to her mother's affidavit, A. finished her course studies in December 2008, but did not write her final nursing exam until February 4, 2009. She began paid employment as a nurse on April 8, 2009. The mother contends that under the terms of the 2006 order, A. continued to be a child of the marriage until April 1, 2009; therefore support payments were due until that date.
- [114] All child support payments of the father have been made through the Family Maintenance Enforcement Program ("FMEP"). The father states that the only information he received concerning A.'s education was through FMEP. The parties do not communicate other than through FMEP or legal counsel.
- [115] FMEP stopped collecting child support payments in relation to A. as of December 31, 2008, based upon their understanding, reflected in a letter to the mother on June 29, 2010, that A. "finished school" at that time. There is no evidence that the mother provided FMEP with verification to support that A. had not in fact concluded full time studies or graduated in December 2008 as FMEP, and by extension the father, understood.
- [116] There is no specific evidence before me as to when A. finished her full-time studies or graduated, apart from the mother's evidence that A. wrote her final exam on February 4, 2009. There is no evidence from A. No detail as to the final exam has been provided. It was within the mother's power to produce direct documentary evidence to support her present contention that A. remained a child of the marriage following December 2008. Although the mother argues that A. was unemployed and remained dependent on her parents until April 2009, when she began full time employment as a nurse, the order provides that A. would cease to be a child of the marriage when she was no longer pursuing her education full time or when she graduated, whichever occurred first.
- [117] On the available evidence, I find that A. ceased to be a child of the marriage within the meaning of the Divorce Act and the terms of the 2006 order in December 2008.
- [118] Both parties made submissions regarding whether the Court can retroactively vary a child support order for an adult child of the marriage, where the application is brought after the child ceases to be a child of the marriage. The father argues that the Court has no jurisdiction in such circumstances. The mother contends that the issue only arises on an initial application for child support under s. 15.1 of the Divorce Act, not, as here, on an application to vary an existing order under s. 17(1) of the Divorce Act, and that even on an initial application, the law is not clear.
- [119] As I see no need to vary the 2006 order in relation to assessment of arrears of child support for A., there is no need to consider this issue. The father concedes he is obliged to pay base Guidelines child support for A. until December 31, 2008, when she ceased to be a child of the marriage.

[120] I accept the father's submissions as to his income and arrears for both A. and C. following the 2006 order. As noted, he calculated the arrears in the total amount of \$3,546 to December 31, 2011.

[121] Based upon the amount I have determined to be appropriate as child support for C. after consideration of the receipt of the PWD benefits, the father has overpaid child support by about \$124 per month since June 2011. On a net basis, the underpayment by the father reduces to \$2,058, if as I assume, there have been 12 payments made at \$982 (rounded from \$981.75) that ought to have been made at \$858. Therefore the amount of base child support arrears that should be paid in respect of both A. and C. is \$2,058. Payment must be made within 180 days.

[122] The parties are at liberty to make submissions if I have made any error in calculations.

What if any orders are required in relation to the father's application for document production?

[123] During the hearing of the application, counsel for the father advised me that all of the information and documents sought from the mother have been provided, save for one document. The father sought production of the mother's mortgage application in relation to the purchase of a 50% interest in her home in June 2010. The father acknowledges that there is no longer any purpose in pursuing production of that document, in view of the present applications having proceeded. The claim for production of the document is not set out in his application. He suggests that the failure to provide the document could support an adverse inference against the mother, or could affect my discretion in relation to costs. The mother's position was and remains that the mortgage application is irrelevant. I am not persuaded that the mortgage application could have been relevant and ought to have been produced.

Conclusions and Summary

[124] In summary, I order as follows:

1. A declaration that C. remains a child of the marriage within the meaning of the Divorce Act.
2. The Respondent will pay \$858 per month in child support, commencing June 1, 2012.
3. The Respondent will pay \$1,278 as his share of the s. 7 expense for Kwantlen Polytechnic University tuition and related expenses. The Claimant's other s. 7 expenses claims are dismissed.
4. The information the Respondent may request under s. 25(1) of the Guidelines will also include an annual budget regarding C.'s expenses and any government benefits or subsidies to which he may be entitled, and information as to C.'s income.

5. The 2000 and 2002 orders will be varied to provide that, commencing June 1, 2012, the parties shall pay C.'s additional expenses falling within s. 7 of the Guidelines as may be determined from time to time by agreement of the parties or court order, in proportion to their respective incomes, after deducting from the expense the contribution, if any, from C.
 6. A. ceased to be a child of the marriage within the meaning of the Divorce Act and the terms of the 2006 order in December 2008.
 7. The Respondent will pay \$2,058 in base child support arrears. Payment must be made within 180 days.
 8. The parties are at liberty to make further submissions if I have made any error in calculations.
- [125] As success has been divided, there will be no order as to costs, subject to the potential application of Rule 9-1. In that respect the parties may make arrangements to make submissions if necessary.

"Verhoeven J."

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