
CANADA / JUDGMENT

D.S. v. E.P.S.

2011 BCSC 1102

COURT

Supreme Court of British Columbia

DECIDED

15 August 2011

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2011 BCSC 1102 D.S. v. E.P.S.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

D.S. v. E.P.S.,

2011 BCSC 1102

Date: 20110815

Docket: E023034

Registry: New Westminster

Between:

D.S.

Claimant

And

E.P.S. also known as W.S.

also known as E.W.

also known as E.W.S.

also known as W.P.E.S.

Respondent

Before: The Honourable Madam Justice E.A. Arnold-Bailey

Reasons for Judgment

Counsel for the Claimant:

V.M Little

Counsel for the Respondent:

K. Redmond

(Counsel withdrew prior to further disclosure being provided by the Respondent)

Place and Date of Hearing:

New Westminster, B.C.

October 21, 2010

Place and Date of Judgment:

New Westminster, B.C.

August 15, 2011

Introduction

- [1] The claimant, D.S. (whose legal last name is now M.), and the respondent, E.P.S., filed applications in June 2010, seeking orders in relation to financial disclosure and child support obligations, and custody and access for the parties' child, A., born February 28, 2003.
- [2] The respondent's application, the first to be filed, seeks to reduce his child support obligation under the Federal Child Support Guidelines, SOR/97-175, based on a change in his income as of January 1, 2009. The respondent was involved in a serious motorcycle accident in May 2008, and has been disabled since that time. He submits that his serious injuries and disability arising from the accident amount to a "change in circumstances" under s. 17(4) of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.). The respondent also seeks a reduction in s. 7 expenses, a reduction in child support arrears to an amount fixed and deemed to be paid, and a s. 15 report under the Family Relations Act, R.S.B.C. 1996, c. 128, to address custody and access issues. The respondent has concerns about the child's behaviour and the amount of time he is spending in daycare. Now that the respondent is unable to work because of his injuries and disability he seeks to spend more time with the child.
- [3] In response to the respondent's application, the claimant applied for an executed release authorizing her to obtain the respondent's income tax returns and notices of assessment from the Canada Revenue Agency ("CRA") for 2007, 2008, and 2009, and orders for other disclosure related to the respondent's income, health, disability pension, prognosis, and the status of his personal injury litigation.
- [4] At the conclusion of the October 21, 2010 hearing, I granted certain orders sought by the claimant, including production of the respondent's income tax returns and notices of assessment for 2008-2010. I also ordered that the respondent provide, attached to a supplementary affidavit, particulars of his receipt of Canada Pension Plan ("CPP") disability

benefits and details regarding the status of his outstanding personal injury claim. I adjourned the balance of the applications until the above information was produced to the claimant and the Court.

- [5] Some of the disclosure sought has been provided but not all, and the respondent's counsel has withdrawn. The available information relating to the respondent's past income, his receipt of a CPP disability pension, and his outstanding personal injury litigation have been forwarded to the Court by counsel for the claimant. The respondent has not filed the supplemental affidavit as ordered in para. 3 of the October 21, 2010 order. These reasons will deal with the relief sought by both parties in their applications based on the available evidence, including the information provided on April 29, 2011.
- [6] In relation to the relief sought concerning the respondent's Guidelines income, it is necessary for the Court to determine whether non-taxable benefits received by the respondent are to be grossed-up. Once that is determined, the parties can calculate the child support and s. 7 amounts payable retroactively and prospectively.
- [7] I interpret counsel for the claimant as agreeing that the respondent's injuries and disability arising from the May 2008 motorcycle accident constitute a change in circumstances as required by s. 17(4) of the Divorce Act.
- [8] As the respondent is now self-represented, I anticipate that once the issue regarding the respondent's Guidelines income has been addressed, his child support and s. 7 obligations will be varied downwards to reflect his reduced income in 2008 and 2009 and the amount of arrears outstanding will be adjusted accordingly.

Issues to be Decided

- [9] The issues to be decided on these applications are:
1. Should non-taxable benefits received by the respondent from ICBC for 2008 and 2009 be imputed as income and grossed-up for the purpose of determining his Guidelines income and the calculation of child support?
 2. Should the respondent receive credit for an overpayment in child support in the amount of \$8,674.08 and the balance of the outstanding arrears he owes be cancelled?
 3. Should a report pursuant to s. 15 of the FRA be ordered to assist in further investigation as to whether the claimant maintaining sole custody and guardianship of the child continues to be in his best interests?

Relevant Background

- [10] The parties were married on September 17, 2002, and separated on September 15, 2005. Their child was born in February 2003. They became divorced on the 31st day after October 23, 2007.

- [11] There have been protracted legal proceedings over the years in relation to the child and financial matters that are outlined in the claimant's tenth affidavit, sworn June 14, 2010. I do not propose to go into great detail, but I will refer to some of the orders granted by the Court. The original shared parenting arrangement with the claimant having the child reside primarily with her did not work. It would seem that the respondent engaged in some bizarre behaviour in relation to the claimant and inappropriate parenting of the child, such that Dillon J. granted the claimant sole guardianship and sole custody in 2006.
- [12] On April 11, 2006, Master Bolton ordered the respondent to pay \$498.74 per month interim child support and set arrears at \$682.50 for the preceding month-and-a-half. The parties were to exchange their 2005 tax returns and notices of assessment, and the respondent was to provide an executed authorization to the claimant regarding his income tax returns.
- [13] On September 21, 2005, Master Taylor granted the claimant interim sole custody of the child, and ordered that the respondent deliver the child to the claimant with peace officer assistance clauses.
- [14] On November 18, 2005, Shaw J. granted primary residence of the child to the claimant with specified reasonable access to the respondent, joint guardianship, and other specific terms regarding the child, including his non-removal from British Columbia and requirements as to where the claimant was to reside while the child resided primarily with her.
- [15] By June 2006, both parties had filed competing applications for sole custody and guardianship of the child. As previously indicated, the matter was heard by Dillon J. In oral reasons dated July 12, 2005, she varied the order of Shaw J. and granted sole custody and guardianship to the claimant. She stated:
- [9] It is very difficult to make sole custody orders in situations where both parents care deeply for the child and believe that they have his best interests at heart. However, in all of the circumstances here, it is apparent that the child's best interests would be served by an order for sole custody and guardianship to the plaintiff at this point. The defendant has been misguided in his conduct towards the child and has subjected him to needless medical intervention, interrogation, and indiscriminate photographs. He has also fostered an environment of open hostility towards the mother. However, this conduct does not go so far as to warrant supervised access.
- [16] Prior to July 2005, a reoccurring theme of the respondent's was that the child does not eat properly. It was this issue that led the respondent to subject the child to unnecessary medical intervention without the claimant's knowledge or consent. The child's regular physician provided a letter tendered at the July 12, 2005 hearing that indicated that although the child was slightly underweight, "the normal curve for his height and weight and growth velocity have been normal."

- [17] On October 23, 2007, Williamson J. made orders including: that the parties were divorced; that the claimant's last name was changed to M.; the respondent was to pay the claimant \$679 per month in child support for the child of the marriage based on the respondent's 2007 Guidelines income of \$72,986, and the claimant's 2007 Guidelines income of \$75,747; child support arrears owed by the respondent from September 15, 2005 to August 28, 2007, were fixed at \$8,812 as at August 28, 2007; the respondent was to pay 49% of daycare costs amounting to \$318.50 per month from November 1, 2007 onwards; and arrears in daycare expenses from July 2006 to October 1, 2007, were fixed at \$4,981 as at October 1, 2007. The Court further ordered that the respondent was to file his income tax return every year, and once he received his notice of assessment each year he was to provide the claimant with a copy of both his return and his assessment within 14 days. Based on that information the parties could make any necessary adjustments in child support pursuant to the Guidelines.
- [18] I note that the above order pre-dated the respondent's motorcycle accident in May 2008, and thus he was significantly in arrears for child support and s. 7 expenses relating to day care for the child well prior to the accident. The FMEP statement filed by the respondent for the period of September 13, 2006 to March 18, 2010, shows arrears at enrollment of \$3,176.20, regular garnished payments usually totalling \$750 per month, a reduction in arrears to almost nil at the end of 2007, additional amounts being added to the arrears for child support arrears and s. 7 expenses (day care) and, despite some payments, arrears of \$18,654.82 as of May 1, 2008.
- [19] In his most recent affidavit, sworn April 10, 2010, the respondent seeks a s. 15 report in relation to the child for the following reasons:
48. The reasons for asking for the report are as follows. The current situation is not in the best interests of A. I am home full time and able to care for him before and after school, as well as all pro-d days and holidays. It would be in A.'s [sic] best interests to spend that time with me rather than in day care.
- [20] The respondent then deposed that he has been denied access to his son since separation, which is disputed by the claimant. He states that he has been denied telephone access to his son since November 2009, and that he has no way to contact his son. Given that he has been seeing his son alternating weekends since October 2010, I assume that his concerns about lack of access are no longer current.
- [21] The respondent has concerns about his son's behaviour:
51. A. often expresses anger to the point of outrage and violence. He uses language that is inappropriate and unacceptable in our home. When playing with a neighbor's child he said that he wished the tree branch would fall on her head and kill her. He seems to have no sense of responsibility for his actions and we have serious concerns about his mental health and physical well being in the care of the plaintiff. It appears that he is being taught to lie and keep secrets. He says things about my fiancée's children that are inappropriate and, that they have "brain injuries". He tells us that he is being bribed and interrogated for

information about us and our home. He says it makes him uncomfortable to be used as an informant.

- 52. I am living in a secure and stable environment and would like to have my son with me on an equal basis. Alternatively, I would like to have A. come and live with me since I am able to care for him full time. I believe that an independent section 15 custody and access report is required.
- 53. I understand that he spends a considerable time in before and afterschool daycare, up to 6:00 p.m. on week nights.
- 54. I am seeking a change in custody, guardianship and access because I feel that it would be in the best interests of my son to spend more time with his father than the Plaintiff and [sic] the current order allows.

[22] Recent material filed by the claimant indicates that the child is doing well. His kindergarten and grade one (from 2009-2010) report cards indicate that he is progressing well in school. He won awards for leadership and safety and his teachers do not note problems with violence and anger towards others. To the contrary, he seems to play well with others. He is taking swimming lessons and playing on a soccer team. The claimant deposes that the respondent has not exercised his regular Tuesday/Thursday access since May 2008 (which corresponds with his motorcycle accident). Her efforts to have other people take the child to see the respondent during his recovery broke down, due apparently to the respondent having disagreements with these people. She points out that "telephone access" was never ordered by a court, although the child did speak to the respondent by telephone while he was in hospital after the accident. She points out that both parties are still bound by a restraining order that prohibits them from attending at each other's residences. The claimant referred to several unsettling and bizarre incidents regarding the respondent and states that she still fears for her safety and does not wish to disclose her telephone number or address to the respondent.

[23] In October 2010, the parties agreed in writing to the respondent having access to the child on alternating weekends and the claimant indicates this has been proceeding without complaint from the respondent, with pick-up and drop-offs at the daycare.

Relevant Financial Information

[24] While the respondent provided the claimant with an authorization dated November 16, 2010, for release of his entire 2008, 2009, and 2010 tax returns with attachments and the corresponding notices of assessment after the October 21, 2010 hearing, the CRA did not consider the release to be sufficient and only provided the claimant tax summaries (not the full income tax return with attachments) for 2008 and 2009. As of January 2011, the respondent had not filed for 2010. Therefore, the financial information is not as complete as one might like to make the necessary determinations regarding the respondent's Guidelines income for 2008 and 2009. However, given the need to determine the matter the Court will

proceed.

- [25] Prior to his accident the respondent worked as a grain worker. The respondent's tax summary for 2008 indicates a total Line 150 income of \$45,681, comprised of: \$24,146 (described as Total earnings (T4), which appears to be related to \$27,146.21 shown on the T4 with the Government of Canada as the employer); \$12,880 (Sun Life benefits); and \$5,655 (Employment Insurance benefits). Union or professional dues are \$223.
- [26] In his affidavit sworn April 19, 2010, the respondent states that his total income for 2008 was \$51,966.92, which was comprised of: \$6,285.71 from ICBC; \$5,665 from Employment Insurance; \$12,880 from Sun Life; and \$27,146.21 from employment.
- [27] The respondent's tax summary for 2009 indicates a total Line 150 income of \$35,744, comprised of: \$1,304 (described as Total earnings (T4) and shown on the T4 with the Government of Canada as the employer) and \$34,440 (Sun Life benefits). No union or professional dues are noted.
- [28] In his affidavit sworn April 19, 2010, the respondent states that his total income for 2009 was \$50,079.24, which was comprised of: \$15,639.24 from ICBC and \$34,440 from Sun Life.
- [29] Neither tax summary shows Temporary Total Disability ("TTD") benefits that the respondent received from ICBC as income for 2008 and 2009, as they are non-taxable.
- [30] The financial statement sworn by the respondent on April 19, 2010, attached a copy of his 2007 tax return with a Line 150 income of \$72,571 and a notice of assessment indicating his income was \$73,332; a copy of his 2008 tax return and a notice of assessment indicating his income was \$45,681; and a copy of his 2009 tax return.
- [31] The respondent provided information about his CPP disability pension that, as of a notice dated September 23, 2010, indicated an effective date of June 2009, a total monthly amount of \$900.66, and a retroactive amount of \$14,385.43. A statement dated October 13, 2010, indicated that the respondent received a net monthly total of \$675.50 from a total disability benefit of \$900.66, less \$225.16 to "Family Order and Enforcement."
- [32] Mr. Scott Stanley, counsel for the respondent in his personal injury action, provided a letter dated November 18, 2010, to the respondent's former counsel in this matter. In that letter he indicates that the respondent's case is set for trial in Supreme Court from November 19 to December 14, 2012. Mr. Stanley writes:

I am unable to comment on the amount of compensation that E.P.S. expects to receive as this will depend largely on the extent to which he is able to return to work.

I assume you are largely interested in E.P.S.'s claims for past and future wage loss. I can say with confidence that even with an optimal recovery, E.P.S. will not recover the earnings he would have enjoyed, but for the accident, due to legal fees and other deductions.

- [33] The respondent has started two actions in relation to his accident, one against named defendants (Van. Reg. No. M084737) and one against ICBC (Van. Reg. No. S103894) for Part 7 benefits.
- [34] Based on his actual income for 2009 and what the respondent anticipates his income will be for 2010, the respondent submits that he has overpaid child support. As of April 2010, when he swore his affidavit, the respondent advised that the arrears he owed the claimant for child support and s. 7 expenses were \$18,134.44, as calculated by FMEP. He seeks that the amount of child support he has overpaid be fixed at \$8,674.08 and the balance of the arrears be cancelled.

Analysis and Findings

Issue 1

- [35] Since his motorcycle accident, the respondent has received non-taxable TTD benefits from ICBC and wage-loss replacement benefits from Sun Life. The Sun Life wage replacement benefits are included in the respondent's income for 2008 and 2009. The Sun Life benefits may also be linked to a form of tax credit, but the Court did not receive sufficient evidence (as only tax summaries were provided) or submissions on the details of these benefits to address that issue. However, the Sun Life wage replacement benefits are presently included in the respondent's income for child support purposes. The non-taxable TTD benefits that replace income that the respondent otherwise would have earned in his employment as a grain worker require careful consideration.
- [36] The Court may exercise its discretion to gross-up a wage-replacement benefit that is exempt from income tax to an equivalent gross taxable amount that reflects what the recipient would otherwise have earned through employment. Portions of benefits that are not wage replacement are not subject to being grossed-up, but may be considered income.
- [37] Section 19 of the Guidelines identifies circumstances where the court may impute income, including:
19. (1) The court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following:
- ...
- (b) the spouse is exempt from paying federal or provincial income tax;
- [38] In *S.C.E. v. W.C.K.*, 2010 BCSC 1592, Joyce J. considered s. 19 in relation to a party who received non-taxable disability benefits. Reference was made to the Alberta Court of Appeal decision in *Dahlgren v. Hodgson*, 1999 ABCA 23. In *S.C.E.*, it was held that, pursuant to s. 19, the Court has discretion to impute additional income in relation to benefits that non-taxable, including disability benefits:

[28] Section 19(1)(b) of the Guidelines permits the court to impute income to the paying spouse where he or she is exempt from paying federal or provincial income tax. The authorities hold the court may exercise its discretion under this section in the case of pension benefits which are received free of income tax and impute additional income to bring the pension amounts up to the equivalent gross taxable amount: see *Dedosenco*; *Peterson*; and *Dahlgren*.

[29] The rationale for grossing up tax-exempt income was stated by Fraser C.J. in *Dahlgren* at para. 5 in the following way:

5 ... when dealing with any form of benefits or attributed benefits received by a parent that are not taxable for income tax purposes, it is essential that any such amount be grossed-up to take into account what it would have been had it been taxed. The purpose in doing so is to ensure that the apportionment of responsibility between the parents for child support is based on the same approach for both parents. The guidelines are premised on division of financial responsibility based on gross before tax income. Therefore, to properly apportion that responsibility for child support between the parents, the same foundation must be used. In this regard, it would be wrong to equate non-taxable income in the hands of one parent with taxable income in the hands of the other without the appropriate gross-up.

...

[34] Based on the authorities to which I have referred, and the reasons stated therein, I am of the opinion that it would be appropriate to use s. 19(1)(b) to impute additional income to account for the tax-free nature of the payments.

[35] There is, however, an issue as to whether all or only some of the WCB benefits should be grossed up. One portion of the respondent's benefits is a clothing allowance (\$500.00 per year); and another portion is an allowance for cleaning and house maintenance (\$2,640.00 per year). In *Dedosenco* the court declined to gross-up that portion of the WCB benefits that represented a "care allowance", but did include the net amount of those parts of the total benefits determining income. Counsel for the appellant submits that it would be appropriate to treat the clothing allowance and the cleaning and house maintenance portion of the respondent's benefits in a similar manner. I accept that submission.

[39] In *Peterson v. Horan*, 2006 SKCA 61, the Saskatchewan Court of Appeal provided a comprehensive analysis of s. 19 and the imputation of income:

8 The determination of annual income on this basis is subject to section 19, among others. Section 19 empowers the court to impute such amount of income to a spouse as it considers appropriate in the circumstances, including the circumstances enumerated in paragraphs (a) through (i) of subsection 19(1). Generally speaking, these enumerated circumstances fall into two categories, a point made by Julien D. Payne and Marilyn A. Payne in their book *Child Support Guidelines in Canada 2004* (Toronto: Irwin Law Inc., 2004). As identified by the authors, the categories are:

- (i) those related to external factors such as income tax laws and
- (ii) those related to the conduct of the obligor, such as under-employment, failure to provide income information, or the unreasonable deduction of expenses from income.

9 These are circumstances in which the income of the parent, determined in accordance with section 16, is unreflective of his or her real ability to contribute to the maintenance of a child. And in this lies the object of section 19: To enable the court to impute income to ensure that the amount of child maintenance reflects the real ability of the parent to contribute to the maintenance of the child.

10 Thus subsection 19(1) empowers the court, in the exercise of its discretion, to impute income in circumstances where, according to paragraph (b), "the spouse is exempt from paying federal or provincial income tax." In this circumstance, the real ability of the parent to contribute to the maintenance of a child is greater than it would otherwise be, for the parent has more disposable income available for this purpose than does a parent whose income is subject to the payment of income tax. This is so because child support payments are no longer deductible for tax purposes, meaning that a parent whose income is subject to income tax pays child maintenance in after-tax dollars, whereas a parent whose income is exempt from income tax pays in tax-free dollars.

11 This suggests that subsection 19(1), and in particular paragraph (b), allows the court to gross up a parent's annual income to the extent the income of the parent consists of non-taxable Workers' Compensation benefits. This is particularly so in light of the object of the subsection.

12 A similar issue arose in the case of *Dahlgren v. Hodgson* (1998), 43 R.F.L. (4th) 176 (Alta. C.A.)...

[40] S.C.E. imputed income in relation to non-taxable WCB benefits. This was also done in *Waugh v. Waugh*, 2010 BCSC 110, and *L.D.F. v. S.F.J.*, 2007 BCSC 1800. In my view, the same principles ought to apply to the TTD benefits that represent wage replacement. Section 19(1) (b) of the Guidelines contemplates imputing income where "the spouse is exempt from paying federal or provincial income tax." The jurisprudence indicates that the purpose of s. 19(1)(b) is to gross-up the income amount to take into account what it would have been had it been subject to normal taxation. The following statement of the Saskatchewan Court of Appeal in *Peterson*, at para. 10, is apposite:

...In this circumstance, the real ability of the parent to contribute to the maintenance of a child is greater than it would otherwise be, for the parent has more disposable income available for this purpose than does a parent whose income is subject to the payment of income tax. ...

[41] The respondent benefits from the non-taxable status of his ICBC TTD benefits. The authorities indicate that this benefit should be considered in determining his contribution to A.'s child support as determined by the Guidelines. In relation to imputing income there is no difference in principle between the WCB wage-loss replacement benefits and similar ICBC benefits

- [42] I note, however, it is important to identify the nature of the non-taxable payment, as only some aspects may be subject to grossing-up. As discussed at para. 35 of S.C.E., the Court may decline to gross-up a portion of the benefits that does not represent income per se, but is provided to cover care or maintenance, such as a cleaning or clothing allowance. In such circumstances, the Court may include the net amount of those parts of the total benefits in the determination of income. This will not arise in every case.
- [43] In the context of the present case, I find that only the wage replacement portion of the respondent's ICBC benefits are to be grossed-up and included in his income for Guidelines purposes.

Issue 2

- [44] The respondent seeks to have outstanding arrears of \$18,654.82, as of May 1, 2008, the approximate time of the accident, cancelled except insofar as the amount of \$8,674.08 ought to be deemed to be an overpayment of child support.
- [45] In terms of an alleged overpayment of child support, a determination of the respondent's Guidelines income for 2008 and 2009 may indicate that he overpaid. If so, he ought to receive a credit for any overpayment, and his ongoing monthly child support and s. 7 obligations should be calculated on his 2010 Guidelines income with ICBC TTD benefits grossed-up.
- [46] The respondent seeks to have the outstanding child support and s. 7 arrears for the child cancelled. As of March 18, 2010, the outstanding arrears were \$22,518.68.
- [47] Reduction of arrears is a form of variation. In *Earle v. Earle*, [1999] B.C.J. No. 383 (S.C.), Martinson J. provided a thorough treatment of the principles in respect of reduction and cancellation of arrears, at paras. 15-46, aptly summarized as follows:
- [46] These basic principles can be summarized this way:
1. Maintenance Generally
 - a. Parents have a joint and ongoing legal obligation to support their children.
 - b. It is the child, not the other parent, who has the right to maintenance.
 - c. The payment of maintenance is based on not just what a parent does earn but what a parent can earn.
 2. Variation
 - a. There has to be a material change of circumstances, a change that is significant and long lasting.
 - b. A change to the Guideline amount is not automatic.
 3. Arrears

Basic Principles

- a. There is a heavy duty on the person asking for a reduction or a cancellation of arrears to show that there has been a significant and long lasting change in circumstances. Arrears will not be reduced or cancelled unless it is grossly unfair not to do so.
- b. If arrears are not reduced or cancelled, the court can order a payment plan over time if convinced the arrears cannot be paid right away.

Examples

- a. Arrears will only be cancelled if the person is unable to pay now and will be unable to pay in the future.
- b. A reduction or a cancellation requires detailed and full financial disclosure, under oath (usually in the form of an affidavit) that at the time the payments were to be made:
 - i. the change was significant and long lasting and
 - ii. the change was real and not one of choice and
 - iii. every effort was made to earn money (or more money) during the time in question, and those efforts were not successful.

[48] There is a heavy onus on the respondent to establish a material change of circumstances that is significant and long lasting to reduce arrears. Arrears will not be reduced unless it is grossly unfair not to do so.

[49] In this case, the respondent's serious motorcycle accident has resulted in a disability that has rendered him unable to return to his employment. Correspondence from his counsel indicates it is their position that he may be significantly delayed from returning to his previous employment or, potentially, unable to do so at all, necessitating a change of occupation. This is a material change of circumstances that is significant and long lasting.

[50] However, the upcoming law suit may result in the respondent receiving a significant award of damages by the end of 2012. It may be appropriate that he pay the outstanding arrears or a portion of them at that time. Alternatively, it may be appropriate to reduce or cancel the arrears if his recovery is modest. Regardless, the arrears should not be dealt with until the amount has been adjusted to reflect accurate amounts owed based on the respondent's income for 2008 and 2009. The amount of the respondent's future employment income, if he recovers, or wage-loss replacement benefits is unknown at this time and will be more definite at the end of next year. At this time, I find that a reduction of arrears is premature, and this aspect of his application is dismissed, with leave to reapply without showing a further or different change in circumstances.

Issue 3

[51] The respondent seeks a s. 15 report as a basis for reconsidering issues of custody and access, given the change in circumstances relating to his disability. He claims that, as he is at home recovering from his accident, it is in the child's best interests to spend time before and after school and on holidays with the respondent rather than in day care. As I have previously set out, the respondent raises general concerns with the mental health and physical well-being of the child that, it is inferred, are a result of the time the child spends with the claimant and at day care.

[52] The decision to order a s. 15 report is discretionary. Where a party seeks a s. 15 report, they bear the burden of establishing a basis for ordering the report. The purpose of the report is to assist the Court; it is not a report for the parties, as they may retain their own experts. The report should be necessary to assist the Court to determine what parenting arrangements are in the best interests of the child.

[53] In *Gupta v. Gupta*, 2001 BCSC 649 at para. 11, Hood J. identified the threshold requirement for ordering a s. 15 report:

...The purpose of a s.15 Report is to assist the Court in its task, and it is for the Court to decide whether such a Report will be of assistance, based on the subject matter, the evidence and the assertions of the parties before the Court. And when the family matter concerns the evidence or views of children, or their emotional state, matters of much importance to the Court, the threshold requirement for the obtaining of an Assessment and Report of a neutral s.15 Expert, to assist the Court, should be minimal.

[54] However, in *Symington v. Simor*, [2000] B.C.J. No. 2688 (S.C.), Preston J. identified the need for properly assessing whether ordering a s. 15 report is appropriate in the circumstances:

9 The important thing to note, from the point of view of this application, is that the ordering of a Custody and Access Report under s. 15, is a matter of discretion for the court. The ordering of s. 15 reports and the circumstances under which those reports should be ordered, under this statute and under similar statutes in other provinces, has been the subject of some judicial comment.

10 I have been referred to *Farmakoulas v. McInnis* (1996), 152 N.S.R. (2d) 52 (N.S. S.C.), a decision of the Nova Scotia Supreme Court; *Saffin v. Saffin* (1991), 123 A.R. 350 (Alta. Q.B.) a decision of the Alberta Court of Queen's Bench, and a decision of this court *Reid v. Watts*, [1992] B.C.J. No. 1610 (B.C. S.C.). The cases establish some propositions which are applicable to this case. First of all, the onus is on the person seeking the assessment to satisfy the court that an assessment should be ordered.

11 In the annotation of the Reports of Family Law, regarding the decision of *Saffin*, the author, Professor McLeod, states at p. 251:

Assessments should not be ordered as fishing expeditions. If there is a real parenting or child care concern that the mental health profession is better equipped to deal with, the assessment should be ordered. It should not be ordered simply to find evidence or make a case, nor should it be used to force settlement on a party.

12 The ordering of a Custody and Access Report must be approached with caution and must be ordered only when necessary and in the best interests of the child. The caution arises, as the cases make it clear, from the fact that a psychological assessment of a child is an intrusive process. That caution requires that I look to the future and consider the appropriateness of access in the circumstances of this case. It is the appropriateness of access or the value of access to the child that makes worthwhile the ordering of a Custody and Access Report.

[55] In *Ms. DS v. Mr. PS*, 2005 BCSC 1047, Allan J., in the context of litigation that appeared to be having a detrimental effect on the well being of the child, considered the best interests of the child and whether the report would provide assistance. With reference to *Symington*, she declined to order a s. 15 report:

[23] The purpose of such a report is to provide the Court with useful information about custody and access issues prepared by a qualified and neutral person. The onus is on the person seeking the assessment to satisfy the Court that it should be ordered. The Court must consider whether a s. 15 Report would be in the best interests of the child in the particular circumstances of the case.

[24] As Mr. Justice Preston stated in *Symington v. Simor* [2000] BCJ No. 2688 at para. 12:

The ordering of a Custody and Access Report must be approached with caution and must be ordered only when necessary and in the best interests of the child. The caution arises, as the cases make it clear, from the fact that a psychological assessment of a child is an intrusive process.

[25] An order for a s. 15 Report is discretionary. In the highly unusual circumstances of this case, I do not believe that such a report is necessary or that it would be in the best interests of FS. It is also difficult to see how a s. 15 Report would assist either the parties or the Court. ...

[56] The present case has a tortuous history. The record indicates that litigation has been ongoing since 2005, when the parties separated. The parties' divergent perceptions as to what is best for the child appear to have been the focus of much of the proceedings. Specifically, the past behaviour of the respondent resulted in an order of joint custody and joint guardianship being changed to grant the claimant sole custody and sole guardianship of the child. I have carefully reviewed the affidavit material filed by both parties. I accept that the child is doing well with the claimant and the material indicates that she is best able at this time to continue to parent the child based on an award of sole custody and sole guardianship. There is no indication that more time with his father is in the child's best interests. The respondent's application for a s. 15 report, to reconsider the foundation of custody and access determinations, attempts to revisit issues already assessed by the Court

after the hearing that resulted in the July 12, 2006 order of Dillon J. The issues that fuel this application are simply variations on themes that have existed throughout this acrimonious litigation.

- [57] The authorities support the Court in this instance declining an order for the report. While the threshold for ordering a report is relatively low, as identified in Gupta, it is nonetheless a matter of judicial discretion informed by the best interests of the child and the purpose a report would serve to the Court. The case of Symington emphasises that a report should only be ordered when necessary and with consideration of the best interests of the child in relation to the preparation of a report.
- [58] I find that a s. 15 report is not necessary in this case. The decision of Allan J. in Ms. DS to decline ordering a s. 15 report, premised on the acrimonious history of the proceedings and the potential detrimental effect on the child of participating in the preparation of a report, is analogous. While the respondent's availability has changed as a result of his accident, there is nothing before the Court to indicate that it is in the best interests of A. to order a s. 15 report with a view to making changes to the status quo.
- [59] As the claimant has sole custody and sole guardianship and the respondent is unrepresented at this point, the respondent is reminded that given the present status regarding the parenting of A. he is not permitted to engage A. in any form of psychological counselling or assessment, or any form of medical examination or treatment without the permission of the claimant, except emergency medical care should the need arise while A. is engaged in access visits with him.

Conclusion

The following is the result of these applications:

1. The respondent's Guidelines income for 2008 and 2009 is to be grossed-up to include the wage replacement portion of his ICBC TTD benefits. The same is to occur for as long as the respondent receives those benefits. The respondent is to provide the claimant with a copy of his filed 2010 income tax return and notice of assessment in accordance with the prior order.
2. The respondent's application to have \$8,674.08 of the present arrears declared as a past overpayment of child support is dismissed, as is his application to have the outstanding arrears reduced or cancelled, with leave to reapply to the Court without showing a further or different change in circumstances when his Guidelines income for 2008 onwards has been determined.
3. The respondent's application for a s. 15 report is dismissed as there is no basis put before the Court at this time to litigate again what is in A.'s best interests.

4. The respondent is to provide two originally executed CRA T1013 authorizations for every year until A. reaches age 19. Two authorizations are necessary each year because an authorization is only valid for six months.
5. As the unsuccessful party the respondent is liable for costs relating to his application payable to the claimant forthwith in the amount of \$750.

"The Honourable Madam Justice E.A. Arnold-Bailey"

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