
CANADA / JUDGMENT

J.M.S. v. G.L.S.

2009 BCSC 1803

COURT

Supreme Court of British Columbia

DECIDED

7 October 2009

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2009 BCSC 1803 J.M.S. v. G.L.S.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

J.M.S. v. G.L.S.,

2009 BCSC 1803

Date: 20091006

Docket: 40535

Registry: Vernon

Between:

J.M.S.

Plaintiff

And:

G.L.S.

Defendant

Before: The Honourable Mr. Justice Barrow

Oral Reasons for Judgment

In Chambers

October 6 and 7, 2009

Counsel for the Plaintiff:

K.R. Fiddes

Counsel for the Defendant:

E.J. Woolley

Place and Date of Hearing:

Vernon, B.C.

September 1, October 6 and 7, 2009

Place and Date of Judgment:

Vernon, B.C.

October 6 and 7, 2009

- [1] THE COURT: There are two applications before the court. The first is that of G.L.S. and it was filed March 17, 2009. By that application, he seeks a retroactive reduction of his child support obligation; a determination of his ongoing child support obligation which he maintained, at least initially, should be fixed at an amount less than his Guidelines obligation on the basis of undue hardship; a reduction or cancellation of arrears of child support; and an order that, "The defendant's obligation to pay spousal support be cancelled."
- [2] The second application is that of J.M.S. and it was filed August 13, 2009. By it, she seeks an order that, "The Defendant pay arrears of child support forthwith," and an order that G.L.S. pay:

arrears of the children's extraordinary expenses and ongoing extraordinary expenses for counselling, learning assistance, daycare, dental and extracurricular activities.

- [3] The parties were married in May 1996 and separated in January 2006. They have two children: O. born August 29, 1998, and now 11 years old; and C. born July 1, 2000, and now 9 years old. Both children have been in J.M.S.'s care since the parties' separation. When the parties married, G.L.S. was 28 and J.M.S. was 25. The parties are now 41 and 37, respectively.
- [4] For most if not all of the time the parties were together, G.L.S. was self-employed in the metal recycling business. He is employed in that field today. He does that as a sole proprietor of [G.S.M.R.]. He contracts with Richmond Steel Recycling Limited and uses that company's equipment to bail tin and other metal recyclables in landfills throughout the British Columbia Interior. Historically, he has worked away from home from between several weeks to a few months each year at landfills that are beyond a comfortable commuting distance from Vernon. He does most of the work himself, although from time to time he hires others to assist. I infer that he simply enters into contracts with Richmond Steel Recycling and invoices that company pursuant to those contracts as he performs the work.

- [5] J.M.S. was operating a hair salon when she met and married G.L.S. Shortly after the marriage, she enrolled in the Okanagan University College in the Bachelor of Arts program. She completed the first year of that program, but in August 1998 when O. was born she discontinued her studies. She remained in the family home caring for O. thereafter, and eventually caring for both of the parties' children until they separated in January 2006. In addition to her domestic responsibilities, J.M.S. also performed administrative work for G.L.S.'s business. Following their separation, J.M.S. remained in the family home with the children. In February 2006, she began a course of studies leading towards her qualification as a real estate agent. She obtained that qualification later that year, but it was not until 2007 that she generated any income through those efforts.
- [6] After the separation, G.L.S. continued to pay the mortgage and other expenses relating to the family home as well as J.M.S.'s vehicle expenses. In addition, he paid her \$1,500 a month. That remained the situation until April 2006 when the parties entered into a separation agreement. By that agreement, G.L.S. agreed to pay both child support and spousal support. His spousal support obligation was fixed at \$3,000 a month which he agreed to pay that amount for a maximum of five years.
- [7] In May 2007, J.M.S. began this action. In her statement of claim, she pleaded the separation agreement noting that it dealt with child custody, guardianship, access, and residency, as well as child and spousal support and the division of property. Although she sought relief in relation to all of those matters, it appears that she was content to have that relief simply mirror the terms of the separation agreement.
- [8] G.L.S. filed a defence and counterclaim. In his counterclaim, he referred to the separation agreement and pleaded that:

he entered into such agreement by the use of undue influence rendering the contract to be unfairly made and unconscionable.

He opposed the making of an order for spousal support and sought an equal division of property. J.M.S., in defending the counterclaim, noted the separation agreement contained a provision obliging the parties to share the costs of dental and childcare expenses and pleaded that G.L.S. had failed to pay his share of those expenses. The separation agreement was filed in this court on June 19, 2007, pursuant to the provisions of s. 122 of the Family Relations Act.

- [9] The only order of relevance to the present applications was pronounced by Mr. Justice Cole on April 28, 2008. G.L.S. had applied for a divorce and for an order that "all other matters in the within action are preserved." In his affidavit in support of that application, he deposed that he wanted a divorce because he planned to remarry in the summer of 2008. He also deposed that he wished to "keep the balance of [his] claim open for hearing".
- [10] Cole J. granted the divorce, fixed G.L.S.'s child support obligation at \$1,811 a month, and adjourned all other matters generally. That is where matters stood until the present applications were made.

Spousal Support

- [11] While ordinarily it is appropriate to deal with child support prior to addressing spousal support, in this case, because initially there was a claim of undue hardship, it is reasonable to deal with the spousal support issue first. The separation agreement provides at paragraph 7.02:

The Husband will pay to the Wife for the Wife's support the sum of \$3,000 per month ("Spousal Support") commencing on the 1st day of each month following the sale of the Family Residence until the first to occur of the following events:

- (a) the Wife dies;
- (b) the Husband dies;
- (c) 60 months from the date of the first Spousal Support payment;
- (d) the Wife remarries or enters into a marriage-like relationship;

when the Spousal Support will end.

- [12] The matrimonial home was sold on June 27, 2007, and the first spousal support payment was made July 1 of that year. Although the motion seeks an order that, "The Defendant's obligation to pay spousal support be cancelled", what G.L.S. really wants is a judicial determination that J.M.S. is not entitled to spousal support. That issue is open having regard to the pleadings and the specific provision in Cole J.'s order adjourning all issues except for the divorce itself.
- [13] There are three issues to be resolved in relation to the spousal support claim. First, G.L.S. takes the position that J.M.S. had entered into "a marriage-like relationship" with Mr. H. Because of that, she is no longer, by the terms of the agreement, entitled to spousal support. Second, he argues that the separation agreement was the product of undue influence or is otherwise unconscionable and thus of no force or effect in any event. Finally, he argues that if the separation agreement is valid and if by its terms he is still obliged to pay spousal support, the court should reduce or terminate that obligation because circumstances have changed to such a degree that J.M.S. is no longer entitled to that support. I will deal with each of these issues in turn.
- [14] The evidence relating to J.M.S.'s relationship with Mr. H. is brief. Mr. H. does home renovations. He was hired by G.L.S. and J.M.S. to renovate their home prior to their separation. According to G.L.S., J.M.S. began a relationship with Mr. H. and that is what led to the parties' separation. The balance of the evidence touching on whether J.M.S. and Mr. H. are in a marriage-like relationship is found in G.L.S.'s affidavits and in an affidavit of his sister. In his second affidavit, he deposed:

The Plaintiff has been in a relationship with [Mr. H.] now for over three years and I believe them to be in a marriage-like relationship. Both of them have separate residences, but they spend nearly all of their time together at one residence or the other.

The Plaintiff has recently begun renovating her house with the work being performed by [Mr. H.].

- [15] The renovations Mr. H. is doing relate to the construction of a basement suite in J.M.S.'s house. In his third affidavit, G.L.S. deposed that Mr. H. has had a crew at J.M.S.'s house "... on a regular basis for a considerable period of time".
- [16] Finally, G.L.S.'s sister, S.K., who lives just four houses down the street from J.M.S., has deposed that she saw Mr. H.'s crew at J.M.S.'s house "... every day for two or three weeks doing renovations on the house." S.K.'s affidavit was filed late, so much so that J.M.S. did not have an opportunity to respond to it. The parties have agreed, however, that I can consider the response that she would have deposed to had she had an opportunity, and that is to the effect that the renovations were to complete a basement suite so that it could be rented and that Mr. H.'s crew came to install the floor, but was not there as long as S.K. maintains.
- [17] For her part, J.M.S. has deposed that she and Mr. H. are dating. She says that they maintain separate residences and live separate and apart. She denies that they are in a marriage-like relationship.
- [18] The phrase "marriage-like relationship" is most commonly considered when determining whether a party is a "spouse" within the meaning of the Family Relations Act. I think it a reasonable inference that G.L.S. and J.M.S. and their lawyers used the phrase "marriage-like relationship" in a similar sense, namely, to mean when J.M.S. would have become a spouse as that term is understood in the Family Relations Act.
- [19] Whether someone is in a marriage-like relationship depends in part on how that person views the relationship. As was pointed out in *Gostlin v. Kergin* (1986), 3 B.C.L.R. (2d) 264 (C.A.), the starting point for the analysis is whether, if asked, the people in the relationship would consider themselves to be in a committed long-term financial and moral relationship. If so, then the relationship is properly characterized as marriage-like. As also pointed out in *Gostlin*, there may be objective circumstances which are relevant to the determination of the issue. Among other things, if the parties refer to each other as spouses, that can be significant. So, too, can their living arrangements: if they live together, that is significant; if they live apart, that, too, is important. If they own their accommodation jointly, that is of significance. So, too, is the question of whether they share other property in joint tenancy. If they share their finances and bank accounts or take common vacations or, in other respects, share their lives, those are matters to be taken into account. If they entertain jointly or have an exclusive sexual relationship, those too can be hallmarks of a marriage-like relationship (see generally *Conquergood v. Dalfort*, 2007 BCSC 1556, at para. 46). No single feature of the relationship is likely determinative of its character. Further, there is no "checklist" of characteristics that must be found in a relationship to elevate it to the status of marriage-like (*Austin v. Goerz*, 2007 BCCA 586).

- [20] The onus is on G.L.S. to establish that J.M.S. is in a marriage-like relationship. He need only establish that on a balance of probabilities. The evidence in this case conflicts in some measure, but I am satisfied that the issue can be resolved on the affidavit material. G.L.S., in support of his position and in addition to the evidence I have just outlined, refers to some additional information that I ordered disclosed following the initial hearing in this matter. That information related to the bank accounts of J.M.S. and the renovations. All of that information is said to be relevant in two respects. First, it is supportive, so argues G.L.S., of the conclusion that the relationship between J.M.S. and Mr. H. is something more than mere boyfriend and girlfriend. Secondly, it is suggested that it casts into doubt J.M.S.'s credibility more generally in as much as, to some degree, it is inconsistent with that which had been disclosed prior.
- [21] The evidence establishes that the renovations being done on J.M.S.'s home have a value of approximately \$12,000. It further establishes that about \$1,800 of that expense has been paid in addition to a \$400 payment made in September of this year. Further, it shows that there is an arrangement for J.M.S. to pay off the remainder at \$400 a month. Mr. Woolley argues that this is suspicious and telling against J.M.S.'s credibility for two reasons. First, the renovations were initially described as minor in J.M.S.'s materials and this disclosure reveals that they were anything but. Second, the materials show that no invoices for labour were issued until the latter part of July 2009, long after this process was underway and this issue was front and centre in the parties' minds. That too is said to be suspicious.
- [22] I have no doubt that the renovations on the home are substantial. I have no doubt that Mr. H. is likely prepared to underwrite them either by forgiving labour costs or forgiving much of the cost of the renovations generally. That, however, does not satisfy me that the relationship between Mr. H. and J.M.S. is necessarily marriage-like, and there is simply no other evidence to support that conclusion. They are living separately. They are in a romantic relationship, but that is not the same as being spouses for purposes of proceedings such as that which we are about at this moment.
- [23] Having considered all of that evidence, I am not persuaded that J.M.S. is in a marriage-like relationship with Mr. H. and, as a result, by the terms of the separation agreement, G.L.S. remains obliged to pay spousal support.
- [24] The next issue is whether the separation agreement is a valid and legally binding agreement. The evidence on this issue is also brief. Indeed, during oral submissions, Mr. Woolley effectively withdrew his argument that the separation agreement was the product of undue influence or otherwise unenforceable. In spite of that concession, I note that the only evidence in support of the proposition is found in G.L.S.'s second affidavit where he deposed:

At the time of the negotiation of the Agreement I was dealing with the terminal illness of my father who had been diagnosed on February 28, 2006 and passed away on April 15, 2006, three days prior to the Separation Agreement being forwarded by the Plaintiff's counsel. Over this period of time, the Plaintiff constantly badgered me with regards to signing the Separation Agreement and I finally relented in order to get it over with.

[25] For her part, J.M.S. deposed, and G.L.S. has not denied, that although the agreement was initially proposed when G.L.S.'s father was ill, he responded to the initial proposal as it related to spousal support suggesting a change, specifically a change in the commencement date of that support. J.M.S. agreed to that change and G.L.S. eventually signed the agreement on May 29, 2006. I also note that G.L.S. and J.M.S. both were represented by counsel at the time. G.L.S.'s lawyer then, as now, was Mr. Woolley. He completed the Certificate of Independent Legal Advice which is appended to the agreement. In it, he certified that G.L.S.:

stated to me, and it appeared to me, that he had entered into the said Agreement willingly and not under any duress or stress by the other party, [J.M.S.], without any pressure or undue influence or deception on the part of the said [J.M.S.], or anyone on her behalf.

[26] In addition, G.L.S., when he signed the agreement, signed a separate document stating that he read over the Certificate of Independent Legal Advice and that the statements in it were true. I am not satisfied that G.L.S. has established that the separation agree was void or voidable as a result of any undue influence or pressure brought to bear by J.M.S. or anyone else. Further, and for reasons that will become apparent in a moment, I am not satisfied the agreement is otherwise unconscionable.

[27] The final issue relating to spousal support is whether G.L.S. is entitled to an order terminating the obligation he would otherwise have under the separation agreement. There have been no previous orders in relation to spousal support and thus, in the words of Bastarache J. in *Miglin v. Miglin*, 2003 SCC 24, this is:

an initial application for spousal support inconsistent with a pre-existing agreement.

The Miglin analysis involves two stages. At the first stage, the court is to examine the circumstances under which the separation agreement was executed and negotiated with a view to determining whether there is any reason to discount it. Among other things, the court in Miglin recognized that people in the midst of marital breakdown will typically be vulnerable. In addition, the court noted the importance of professional assistance in counteracting or compensating for emotional or financial vulnerabilities. For the reasons noted in relation to the argument based on undue influence or unconscionability, I "consider the agreement as a genuine mutual desire to finalize the terms of the parties' separation and as indicative of their substantive intentions" (Miglin at para. 83).

- [28] The second part of the first stage of the analysis requires the court to consider the substance of the agreement with a view to determining the extent to which it takes into account the factors and objectives of the Divorce Act as they relate to sharing equitably the economic consequences of a marriage and its breakdown. In making a spousal support order, the court is obliged to consider the length of the parties' marriage and the functions they performed during it. A support order is intended to recognize any economic advantage or disadvantage apportioned between the spouses, any financial consequences arising from the care of children of the marriage, relieve any economic hardship associated with the breakdown of the marriage and, in so far as practicable, promote economic self-sufficiency within a reasonable time. The Divorce Act further recognizes and, in fact, invites spouses to determine their own affairs and accords significant weight to agreements that they reach. In comparing the terms of the separation agreement to the objectives set out in the Divorce Act, a court is not to look for perfect symmetry with those objectives, but rather to determine whether the agreement was in substantial accord with them.
- [29] The separation agreement entered into by J.M.S. and G.L.S. provided for an equal division of the family home after it was sold. Ultimately, G.L.S. and J.M.S. both realized about \$95,000 as a consequence. It also provided for an equal division of their Canada Pension Plan credits, and they acknowledge that they divided the contents of their home to their mutual satisfaction. G.L.S. kept his Dodge truck and a holiday travel trailer as well as his RRSP. J.M.S. kept an interest in a life insurance policy, a motor vehicle, and her RRSP. Of some significance, G.L.S. kept all of the assets, limited though they may be, of his proprietorship. Further, G.L.S. had earned just under \$70,000 through that proprietorship in 2005. In addition, he had paid J.M.S. just over \$40,000 from the business for her administrative assistance. J.M.S. was unemployed at the time the agreement was entered into and had just begun to pursue her real estate licence.
- [30] In summary, the parties likely anticipated that G.L.S. would continue to earn an income in the neighbourhood of \$100,000 or more a year and J.M.S. would earn little income until she developed a clientele in her real estate sales business. Further, she continued to be responsible for the day-to-day care of the children. In this context, they agreed that G.L.S. would pay \$3,000 a month for five years. In my view, the agreement was in substantial compliance with the general objectives of the Divorce Act at the time it was signed. As a result, according to Miglin at para. 87, the court should afford "great weight" to it.
- [31] The second stage of the analysis is intended to take account of the vicissitudes of life going forward. Among other things, the court is to assess the extent to which the enforcement of the agreement still reflects the original intention of the parties and the extent to which it is still in substantial compliance with the objectives of the Act. It is to this aspect of the Miglin analysis that G.L.S.'s submissions have been directed. This stage of the Miglin analysis involves a determination of whether the circumstances as they have unfolded since the signing of the agreement were reasonably anticipated by the parties at the time the agreement was entered into. The obligation is on the party attempting to avoid the

consequences of the agreement to show that new circumstances have arisen which were not reasonably anticipated and would result in a situation that cannot be condoned if the agreement is enforced.

- [32] In Miglin, the court acknowledged that some degree of change is always foreseeable. Further, the court noted that separation agreements are prospective in nature and usually entered into when there is significant uncertainty as to the future. The court said that changes such as fluctuations in the housing market and business downturns or upswings are the kinds of things that separation agreements by their nature anticipate. Ultimately, the court's focus is to be on whether the agreement continues to correspond with the parties' original intentions and the overall objectives of the Act.
- [33] G.L.S. has deposed that he had difficulty honouring his spousal support obligations in the immediate aftermath of signing the agreement. Since then, the economy has declined and, as a result, he has had difficulty maintaining employment and earning the level of income he was earning when the agreement was entered into. In addition, he has deposed that his debt load has increased dramatically, debts that he had to incur because of his business and, as a result of all of the foregoing, he is simply unable to honour his spousal support obligation. Finally, he notes that for about six weeks over Christmas 2008, he was laid off and, although he secured another contract after the layoff, that contract expired in March 2009 (when he swore his second affidavit).
- [34] In support of his contention that the business is suffering, G.L.S. exhibited to his affidavit an undated letter addressed "To Whom It May Concern" from Ms. Kaetler, the Interior buyer of Richmond Steel Recycling Ltd. In it, she notes that the market for recycled metal declined significantly in the six weeks before her undated letter. As a result of this, she wrote that G.L.S.'s position was "terminated". She also noted, however, that he was a long-term and valuable contractor for their company and that they would do the best they could to secure further contracts. She wrote that they would monitor the situation "every month." There is no further information from Richmond Recycling and thus I have no idea what the current situation is, although it is clear G.L.S. is back working for them and has been for some time.
- [35] Turning to G.L.S.'s financial circumstances, his line 150 income for 2005 was just over \$67,000. That was generated on gross business income of \$243,000. In addition, he paid J.M.S. just over \$40,000. In 2006, his line 150 income was just over \$113,000. Gross income from his proprietorship that year was just over \$245,000. Because he and J.M.S. had separated throughout 2006, he did not pay her any income. In effect, his income for 2006 was the same as it had been in 2005. In 2007, his line 150 income was \$161,000 generated on gross sales of \$369,000. In 2008, his line 150 income was \$94,769. That year, the proprietorship has gross income of just under \$300,000. From that gross income, he paid his new wife \$10,000. Thus, his family unit received just under \$105,000 from his business in 2008. He earned that income notwithstanding that, according to his fourth affidavit, he was laid off during November and December. G.L.S.'s income thus far in 2009 shows gross sales from his business to the end of August of \$216,000. If you extrapolate that to the end of the

year, the gross income will come to \$324,000. If, however, you assume a layoff of some duration during either November or December, the income from the business might be \$300,000 or perhaps a little less.

- [36] On the income aspect of this inquiry, it appears that G.L.S. earned just under \$105,000 in 2008, almost precisely what the family earned from the business in 2005, the year before the agreement was signed and the last year for which information would have been available at the time it was signed. In addition, in the intervening years, G.L.S.'s income was substantially increased, albeit only briefly.
- [37] The other matter to which G.L.S. points is the significant increase in his debt load. Much of that relates to acquisitions in 2007 and 2008. In 2007, he acquired a 2002 Avalanche. In March, he purchased a 2007 Mirage trailer. In September, he acquired a 1993 Chevrolet. In May of 2008, he acquired a 2008 Silverado and, in July, a 2008 Tahoe. The Silverado was a diesel pickup with dual wheels and said to be "loaded". The 2008 Chevrolet Tahoe was also an expensive vehicle which G.L.S. estimates to be worth \$40,000. His vehicle acquisitions in 2007 and 2008 amount to just over \$100,000. The debt for the Silverado is said to be \$85,000. There is no explanation for why these expenses were necessary. I infer that these vehicles were purchased in part because of the substantial increase in income that G.L.S. was enjoying in 2007. I do not overlook the fact that he purchased an all-terrain vehicle in 2008 for just under \$20,000 and spent a significant amount on furniture. Even into the spring of 2009, he was spending up to \$250 a month on cable television.
- [38] Returning to Miglin, the court said:
- Parties must take responsibility for the contract they execute as well as for their own lives. It is only where the current circumstances represent a significant departure from the range of reasonable outcomes anticipated by the parties, in a manner that puts them at odds with the objectives of the Act, that the court may be persuaded to give the agreement little weight.
- [39] I am not persuaded there is any basis upon which to conclude that the separation agreement is at odds with the Divorce Act objectives either when it was signed or now and, as a result, G.L.S.'s application for an order terminating his spousal support obligation is dismissed.
- [40] G.L.S. is in arrears of his spousal support obligation in the amount of \$33,000. J.M.S. seeks an order that those arrears be paid forthwith. No submission was made on that point, and, more specifically, on whether the arrears should be repaid over time or paid in a lump sum now. I will fix the repayment arrangements if the parties are unable to work that out. I say simply that I would be inclined to impose a lump sum payment, followed by monthly payments, which would, in any event, result in the retirement of all of the arrears prior to the end of the obligation, which is presently.

Child Support

- [41] G.L.S. is current in his child support obligation. There are, therefore, no arrears of child support to be reduced or cancelled. He asks, however, that his child support obligation be varied retroactively. G.L.S.'s obligation to pay child support was set by the order of Cole J., in April 2008, in the sum of \$1,811. The order does not say what G.L.S.'s income was. However, that amount of child support corresponds to a Guidelines income of \$129,000 a year.
- [42] As already noted, G.L.S.'s line 150 income for 2008 was \$94,769. That, however, does not include the \$10,000 that he paid to his spouse, and which I am satisfied ought to be included for purposes of calculating his child support obligation. In addition, he deducted \$4,800 from his gross income as rent notionally paid on his home office. Further, he claimed telephone expenses of approximately \$8,500 and motor vehicle expenses of \$83,500. Finally, he deducted approximately \$22,000 by way of capital cost allowance on various motor vehicles that he presumably uses in his business.
- [43] Section 19(1)(g) of the Federal Child Support Guidelines permits the court to impute income to a spouse, if the court considers it appropriate to do so, on the basis that the spouse has unreasonably deducted expenses from his or her income. In my view, the following amounts should be added to G.L.S.'s line 150 income for purposes of calculating his child support obligation: \$3,000 of his home office rental deduction should be added back; \$2,500 from his telephone expense should be added; \$5,000 from the combined capital cost allowance and his motor vehicle expenses should be added.
- [44] As for the rental expense, I note that it is not a real expense that G.L.S. incurs. I accept that some allowance for a home office is appropriate, but not the entire amount claimed. As for the telephone expenses, they simply seem excessive. There is no explanation advanced as to why, given the nature of his business, he incurs \$700 a month for telephone expenses. I consider that \$500 a month is reasonable, if not generous, recognizing that that is necessarily a somewhat arbitrary figure.
- [45] As to the motor vehicle expenses, they, too, seem excessive. I recognize the need for capital cost allowance, but also note that that is not a cash expense. The \$83,000 in motor vehicle expenses, in my view, begs an explanation and none is forthcoming.
- [46] As a result, I consider it appropriate to impute \$10,500 in income to G.L.S.'s other income, which, given what he paid his spouse, amounts to \$104,769. In the result, his total income for 2008, and for child support purposes, is \$115,269. Child support for two children on that income amounts to \$1,640 a month. I fix that as G.L.S.'s child support obligation effective April 1, 2009, the date of effective notice of this application.
- [47] I pause to note that G.L.S. abandoned his claim to have his child support obligation reduced on the basis of undue hardship. That was a prudent concession, given that, in my view, the claim was bound to fail in any event.

- [48] The final issue relates to special and extraordinary expenses of J.M.S. and G.L.S.'s children. J.M.S. is seeking to enforce the parties' separation agreement, which provides in paragraph 6.04, as follows:

The parties will share the costs of dental expenses and childcare expenses in proportion to their respective adjusted Guideline income.

- [49] J.M.S. maintains that G.L.S. has not contributed to the daycare and dental expenses of both children for the years 2007 and 2008. In addition to the expenses the parties agreed to share, J.M.S. wishes to recover a portion of the counselling costs that have been incurred in connection with their daughter O. in 2007 and 2008, as well as the costs of swimming lessons for both children in 2008 and learning assistance and extracurricular activities in that year. G.L.S. opposes paying some of these costs, because he was not consulted about them before they were incurred.
- [50] For purposes of fixing the parties' proportionate responsibility for special and extraordinary expenses in 2007, I am satisfied that J.M.S.'s income was \$54,357. G.L.S.'s income for that year was \$161,152. In 2008, G.L.S.'s income was \$115,269. J.M.S.'s income was \$35,100. Accordingly, the parties' proportionate obligation to contribute to special and extraordinary expenses in 2007 and 2008 is 75 percent to G.L.S. and 25 percent to J.M.S. In 2007, the children's daycare costs amounted to \$2,014. Their dental costs were \$192. In 2008, those costs were \$1,281 and \$699 respectively. G.L.S. is responsible for 75 percent of those costs, or \$3,139. Assuming he has paid child support at the rate of \$1,811 a month since March 1, 2009, he has, given the obligation I have fixed for this year, overpaid the sum of \$1,050. That sum is to be offset against the arrears due on the special and extraordinary expenses.
- [51] The other expenses that J.M.S. is seeking contribution towards are counselling, which total \$790 and \$100 respectively; learning assistance, which I gather is in the nature of tutoring, and totals \$460 and \$1,230 respectively; eyeglasses, which the expenses are \$238; music lessons, \$120; and swimming lessons, \$226 and \$316 respectively; baseball at \$70; cross-country skiing at \$58; and school fees of \$76. G.L.S. does not dispute that those expenses have been incurred, but he argues that he is not responsible for them under the terms of the agreement, and, while he may have been prepared to contribute to them, he was not consulted in the past and feels he should not be obliged to retroactively be compelled to pay them.
- [52] G.L.S. is responsible to contribute to the cost of the eyeglasses. He cannot seriously argue that, if consulted, he would have refused to have that expense incurred. In any event, he should contribute to it. I am not satisfied that he should contribute to the other expenses in 2007 and 2008. He did not agree to pay those expenses in the separation agreement and the order of Mr. Justice Cole is silent on the matter. He may or may not have agreed to contribute to them had he been asked, but he was not asked. In future, however, he is obliged to pay towards all special and extraordinary expenses in accordance with the parties' income.

[53] J.M.S. is to advise G.L.S. in writing of any expenses other than medical, daycare, and eyeglasses expenses. She is to seek his agreement to contribute towards them. If he refuses, she can apply to the court for an order to that effect. If the expenses for tutoring, for example, and if that is something that is recommended by the children's teachers or another responsible professional, and if that expense is not agreed to by G.L.S. and if J.M.S. is required to apply as a result, a penalty in costs is always available to encourage the parties to take reasonable positions with one another.

Summary and Costs

[54] In summary, G.L.S.'s application to have his spousal support obligation terminated is dismissed. I fix the arrears of his spousal support obligation at \$33,000 on the basis that he has not paid spousal support from and including December 1, 2008, to and including October 1, 2009. Actually, I think that comes to \$30,000. It is 10 months, in any event.

[DISCUSSION RE SPOUSAL SUPPORT ARREARS]

[55] THE COURT: I am going to leave them at \$33,000. I calculated that on the basis that he paid November, but did not pay last December, and he has paid every month up to and including October, and that comes to 11 months and that is \$33,000.

[56] In summary, G.L.S.'s application to have his spousal support obligation terminated is dismissed. I fix the arrears of spousal support at \$33,000 on the basis that G.L.S. has not paid spousal support since November 2008.

[57] His obligation to pay child support is set at \$1,640 a month effective April 1, 2009, and that is based on a Guideline income of \$115,269.

[58] He is obliged to pay \$3,139 towards the dental and daycare costs for 2007 and 2008, and that number represents 75 percent of the total of those costs. I note in passing that he is responsible for his proportionate share of those expenses for 2009. I cannot fix that amount, however, because I do not know what those expenses have been to this point. Finally, he is obliged to pay \$178 towards the eyeglasses expense for 2008.

[59] J.M.S. is entitled to her costs in relation to the spousal support aspect of this matter. The parties have enjoyed divided success on the child support issues, and in my judgment ought to bear their own costs in relation to those matters. I fix J.M.S.'s entitlement to costs at 75 percent of that which would otherwise be recoverable under Scale B, on the basis that the majority of this application was consumed with issues relating to spousal support.

[60] THE COURT: There are a couple of things I will say. First of all, I do not dispute that the expenses are being incurred or that they can properly be deducted from the perspective of income tax, and perhaps that is not G.L.S.'s concern. The point is, however, that the Child Support Guidelines and the jurisprudence that has developed under them do not correspond perfectly with the income tax deductions that may be permitted for purposes of calculating an income tax obligation. It may be that there are other explanations for some of those

expenses. First of all, the net change in his child support obligation for, for example, the telephone expense, not all of which I have added back in, I have only added back in \$2,500, the net change would not be significant. Secondly, it seems to me, and the underlying assumption I made, is that G.L.S. is deducting all of his telephone expenses. A person who works for a company pays their own telephone expenses and it is on that basis that the Child Support Guidelines dictate the amount of money you pay for child support, and because of that, if you are in a situation where you have the ability to deduct things that people working for a wage could not deduct, the court is permitted to add back in. So even if you were to advance further explanations, they would not likely offset the entirety of what I have added back in and may not offset any of it. Finally, however, I have made my decision and I am not prepared to consider any additional material. The time for doing that would have been prior to the hearing, so that is where the matter remains.

[61] Is there another concern you have, Mr. Woolley?

[62] MR. WOOLLEY: I am going to need to clarify some of the points, but I will do that with the transcripts whenever that shows up, I guess, or the clerk's notes.

[63] THE COURT: I am just going to return to the issue of the payment of the arrears. Mr. Woolley, you are correct. I did not fix a payment schedule and simply left it to the parties to see if they can agree. What I did do is express my view as to what I would be inclined to order, subject of course to any material that was put before me if I was called upon to make such an order. I simply set out my view in order that the parties might get to or begin with a reasonable sort of approach, in the hope that that might assist them in coming to an agreement.

[64] The arrears are \$33,000, exclusive of FMEP penalties and interest.

[65] The current obligation that G.L.S. has to pay child support, and to which he agreed in the separation agreement, extends to June 1, 2012. If I were enforcing, or asked to set a repayment schedule for the arrears, I would bear in mind that the whole point of this spousal support was to, in effect, bridge J.M.S. over the time during which she is trying to re-establish herself and earn an income. That is the point of it, and because of that I would be fairly strongly inclined to direct repayment of the arrears over or within the period presently set for ongoing spousal support. That is to say, the outer parameter of the order I would be inclined to make would be that all of the arrears would be paid off by June 1, 2012. In addition to that, I would likely order some kind of a lump sum payment reasonably quickly and then consider spreading the balance over the remaining months of the obligation.

- [66] I am not saying that that is exactly what I would order, but I would be inclined to that conclusion for the reasons I have attempted to just express, and I simply offer that in the hope that it may serve to focus the negotiations towards coming to an agreement, but if you cannot agree, I will set it, and what I will say is this. I am seizing myself of any applications to fix the repayment of the arrears, and I will simply remain seized of that issue for the next six months.
- [67] I am happy to deal with it by telephone. You can simply file a requisition, saying, "Here is my client's affidavit" setting out any other additional financial information you want to set out which touches on his ability to repay the arrears. J.M.S. would then get that affidavit. She would have an opportunity to respond to it, if she wants to. That affidavit can be filed and then you simply file a requisition inviting me to set it, and if you give each other seven days' notice that seems reasonable and I will deal with it by telephone.
- [68] The point of all of that is to do two things. First of all, it keeps the court costs down, because you do not have to file a motion; and secondly, it is cheaper for you if we simply deal with it in this fashion. If you think that is unrealistic, you are welcome to set it down in the ordinary course and I will hear it when it can be scheduled by the trial coordinator. I will hear it on a telephone basis outside of regular court hours, and that is to say at nine o'clock in the morning of any morning that you can get before me through the Trial Coordinator.

Barrow J.

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Prepared on 28 October 2026 · Esheria