
CANADA / JUDGMENT

J.W.K. v. E.K.

2014 BCSC 1635

COURT

Supreme Court of British Columbia

DECIDED

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2014 BCSC 1635 J.W.K. v. E.K.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

J.W.K. v. E.K.,

2014 BCSC 1635

Date: 20140826

Docket: E132919

Registry: Vancouver

Between:

J.W.K.

Appellant

And

E.K.

Respondent

Before: The Honourable Mr. Justice R. Punnett

On appeal from: An order of the Provincial Court, dated September 4, 2013

(K. v. K., Surrey Registry #F32559)

Reasons for Judgment

Counsel for the Appellant:

M.E. Campbell

Counsel for the Respondent:

K.L. Pollitt

Place and Date of Appeal:

Vancouver, B.C.

April 23-24, 2014

Place and Date of Judgment:

Vancouver, B.C.

August 26, 2014

[1] In this family law matter, the appellant father appeals, pursuant to s. 233 of the Family Law Act, S.B.C. 2011, c. 25 [FLA], from a Provincial Court of British Columbia order respecting the issues of guardianship, parenting time, child support and retroactive child support. In particular, the appellant says that the trial judge erred in law by terminating his status as a guardian of the parties' two children, and by retroactively imputing a full-time income to him for the purposes of child support.

Background

- [2] The parties were married for 13 years. Their two children are now 14 and 7. They separated in 2010, primarily as a result of the parties' experimentation with drugs, which led to the appellant father's addiction. In 2011 the respondent mother and the children moved to Olympia, Washington where her parents and sister reside. The father has had limited supervised access to the children since then.
- [3] In 2013 the mother applied to the Provincial Court for an order terminating the father's status as guardian of their two children pursuant to s. 51(1)(b) of the FLA. The basis for the application was the father's ongoing struggle with both drug and alcohol addiction. It is not in issue that the appellant has such addictions and that he relapses regularly. However, despite his addiction issues, the father still has a close relationship with his children, who both indicate that they wish to spend more time with him and consider him to be an important part of their lives. The trial judge found that this close relationship had continued, at least in part, because of the mother's efforts to shield the children from their father's drug addiction.
- [4] The trial judge granted the order terminating guardianship, concluding that it was in the children's best interests to do so. He commented that this was one of those "exceptional" cases where circumstances required that a parent lose their status as a guardian of their children. The judge observed that "a guardian of the child must be able to demonstrate that they can make decisions that will promote only the safety, security, and best interests of the child" and that the father had demonstrated that he could not make such decisions safely for

himself, thereby undermining the court's confidence that he could do so for the children.

- [5] The trial judge particularly emphasized an incident where the father missed a video chat with the younger child due to a drug relapse, and then promised the child that he would "never, ever, miss another video chat"; a month later he missed another chat as a result of a relapse. The judge acknowledged that terminating J.W.K.' guardianship would "probably not" stop such a thing from happening again, but stated that "until such time that J.W.K. can get some kind of control over his addiction so that he is not making these very poor decisions to promise things he cannot deliver, he does not have the kind of judgment that a guardian of a child must have."
- [6] The judge concluded that:
- [65] the single most important and persuasive factor in considering [the children's] best interests is section 37(2)(f) being Mr. [K.] ability to exercise guardianship responsibilities over his children. For the reasons I have already articulated he cannot exercise, and cannot be trusted to exercise, guardianship responsibilities while he continues in his active addiction to drugs and alcohol.
- [7] During closing submissions the trial judge suggested to the mother's counsel that, instead of terminating guardianship, the court could "assign all of the parenting responsibilities" to the mother, so that both parents could remain guardians but the mother could make all necessary decisions about the children's welfare, thereby (presumably) mitigating the concerns related to the father's addiction. At para. 55 the judge reports that the mother's counsel argued that this approach "would reduce the meaning of Mr. [K.] guardianship of the children to a word. In other words, he would have guardianship of the children in name only and not with any meaningful responsibility", with counsel further suggesting that this would be "misleading" as J.W.K. would not be exercising or fulfilling any guardianship role in his children's lives. The trial judge appeared to accept this argument and as a result declined to consider any potential reallocation of parenting responsibilities.
- [8] I note that, in concluding his reasons on guardianship, the trial judge expressed the opinion that after he rendered his decision, the FLA would no longer govern decisions relating to the children. "I believe that their habitual residence has changed and that they are now habitually resident in Olympia," he noted (para. 61). As a result, he concluded that the father's ability to oppose any future proposed relocation -- an ability lost with the termination of guardianship -- was not a factor that weighed in favour of maintaining his guardianship status.

- [9] While the termination of guardianship meant that the mother was the sole parent with status to exercise parenting responsibilities under the FLA, the mother consented to an order that would require that she keep the father informed about the children's education and health. The trial judge also made a number of additional orders concerning the father's contact with the children. That portion of the decision is not under appeal here and I will not go into any detail respecting the contact order.
- [10] Finally, the trial judge granted an order imputing an income of \$40,000 per annum to the father, retroactive to July 2011. In November 2010 the parties had entered into Minutes of Settlement and a consent order that ordered the father to pay \$1,627 in spousal support and \$1,299 in child support each month. The father paid until June 2011 but had not paid any child support from that date to the date of trial. (Indeed, he had not paid any child support as of the time of this appeal.) In February 2012 a judge of the Provincial Court set aside the consent order, on the basis that it was unconscionable and that the father had entered into the order under duress. At that point, there was no court order dealing with child support. Due to his addictions, the father had been unemployed from 2010 until the period just before the trial, when he had obtained employment paying \$40,000 per annum.
- [11] The mother sought an order that the father pay child support backdated to June 2011, with income imputed at \$88,000 (the amount the father had earned before his addictions ended his employment in 2010). The trial judge declined to impute income at that amount but found that it was appropriate to impute \$40,000 per annum in retroactive income under s. 19 of the Child Support Guidelines, SOR/97-175. The judge then calculated child support payments and arrears on that basis.

Preliminary Matters

- [12] The respondent, on a preliminary motion filed on three days' notice, sought to have the appeal dismissed on the grounds that the appellant has failed to pay child support since June 2011. I will discuss the import of this application below.
- [13] The respondent also sought to introduce new evidence on the appeal. The new evidence in question consists of supplemental reasons issued by the trial judge on February 25, 2014 after the appeal in this matter was filed. She says that these reasons should be admitted into the appeal record, while the appellant opposes that application on the basis it is new evidence on the appeal. Very briefly, the supplemental reasons concerned the mother's application to reopen the trial to enter new evidence, consisting of medical records detailing the father's relapse and hospitalization in August 2013. The trial judge granted the application to re-open, considered the medical records, and determined that they were relevant to the contact order. He suspended an unsupervised contact order until such time as the father could produce evidence that he had sought treatment for substance abuse and could produce a psychiatric report confirming that his mental health is stable.

[14] It is not clear to me that this truly qualifies as "new evidence", despite the fact that the supplemental reasons were issued after the appeal was filed. It appears to me to be a part of the trial record, so that it is a part of the material available for my review on the appeal as a whole. I will discuss this issue further at the conclusion of these reasons.

Role of Appellate Court

[15] Section 233 of the FLA governs appeals from the Provincial Court:

233 (1) A party may appeal to the Supreme Court an order of the Provincial Court made under this Act, except an interim order.

(3) After hearing the appeal, the Supreme Court may do one or more of the following:

- (a) confirm or set aside the order of the Provincial Court;
- (b) make any order that the Provincial Court could have made;
- (c) direct the Provincial Court to conduct a new hearing.

Order under appeal remains in effect

234 Despite any other enactment, if an order made under this Act is appealed, the order remains in effect until the determination of the appeal unless the court that made it orders otherwise.

[16] As the Supreme Court of Canada discussed in *Van de Perre v. Edwards*, 2001 SCC 60, there is a "narrow scope for appellate review" in family law matters (para. 11). In *Hickey v. Hickey*, [1999] 2 S.C.R. 518, L'Heureux-Dubé J. stated that "trial judges must be given considerable deference by appellate courts" when reviewing family law decisions, due to their fact-based and discretionary nature. That discretion is "best exercised by the judge who has heard the parties directly," so that an appellate court should only intervene when there is a material error, a serious misapprehension of the evidence, or an error in law (paras. 10, 12). In *Van de Perre* the Court went on to comment that these concerns applied even in the area of child custody: "[t]he narrow power of appellate review does not allow an appellate court to delve into all custody cases in the name of the best interests of the child where there is no material error" (para. 12).

[17] The appellant appeals on the basis that the trial judge erred in law in making the guardianship and income decisions. I shall first consider the issue of the termination of the appellant's guardianship.

Guardianship

[18] The concept of "guardianship" in the FLA is a new one: it replaces both the concept of custody and the concept of guardianship as they existed under the predecessor statute, the Family Relations Act, R.S.B.C. 1996, c. 128. Rather than providing parents with custody of their children, the FLA presumes that parents are generally guardians (see s. 39) and then permits the court to allocate parenting responsibilities and parenting time between the guardians.

[19] Section 40 of the FLA, which governs parenting arrangements, provides as follows:

40 (1) Only a guardian may have parental responsibilities and parenting time with respect to a child.

- (2) Unless an agreement or order allocates parental responsibilities differently, each child's guardian may exercise all parental responsibilities with respect to the child in consultation with the child's other guardians, unless consultation would be unreasonable or inappropriate in the circumstances.
- (3) Parental responsibilities may be allocated under an agreement or order such that they may be exercised by
 - (a) one or more guardians only, or
 - (b) each guardian acting separately or all guardians acting together.
- (4) In the making of parenting arrangements, no particular arrangement is presumed to be in the best interests of the child and without limiting that, the following must not be presumed:
 - (a) that parental responsibilities should be allocated equally among guardians;
 - (b) that parenting time should be shared equally among guardians;
 - (c) that decisions among guardians should be made separately or together.

Section 42, dealing with parenting time, says this:

42 (1) For the purposes of this Part, parenting time is the time that a child is with a guardian, as allocated under an agreement or order.

- (2) During parenting time, a guardian may exercise, subject to an agreement or order that provides otherwise, the parental responsibility of making day-to-day decisions affecting the child and having day-to-day care, control and supervision of the child.

- [20] A guardian bears a legal responsibility for their children. As set out in the sections discussed above, that status forms the basis for, in addition to other rights, their entitlement to parenting responsibilities and parenting time. There are no presumptions respecting what parenting responsibilities or parenting time is in a child's best interests. All agreements and orders relating to guardianship, parenting arrangements and contact are subject to the best interests of the child, as set out in s. 37.
- [21] The FLA sets up a presumptive approach to guardianship: parents who have lived with their children prior to separation remain guardians after separation (s. 39(1)). However, that presumptive status is not necessarily permanent, as the court may intervene: s. 39(2) states that "an order made after separation may provide that a parent is not the child's guardian", while s. 51(1)(b) provides that upon application a court may "terminate a person's guardianship of a child." The application for termination in this case was heard under s. 51(1)(b).
- [22] There have been a number of cases in the Provincial Court and the Supreme Court that have considered the concept of guardianship under the FLA, the test for termination, and the relationship between guardianship and parenting responsibilities.
- [23] In *D. v. D.*, 2013 BCPC 135, Judge Merrick said that it will rarely be in a child's best interests to terminate guardianship and thereby turn a parent from a guardian into a person with contact. Where there are concerns about one guardian's parenting capacity, the court should first consider whether a reallocation of parenting responsibilities can eliminate any risk to the child's best interests arising from the parent's continued guardianship. If so, the court should refuse to terminate. This approach allows the child to safely retain the benefit of a meaningful and significant relationship with their parent. Judge Merrick said this:

24 When considering an application to terminate a parent's guardianship, I am of the view that considering the factors enumerated in s. 37(2) of the Family Law Act, termination can only occur in the most extreme situations. The approach to be taken is, first, to ask whether, through an allocation of parenting responsibilities, it continues to be in the best interests of the children that the parent remain a guardian. If it is, guardianship should not be terminated. It must be remembered that once a parent is no longer a guardian, that parent loses all parenting responsibilities and rights and is simply an adult who may have contact with the children.

25 In my view, it will be rare when that is in the child's, or in this case, the children's best interests.

26 By first determining whether a parent guardian can remain a guardian by allocating or reallocating parenting responsibilities, parents will have the maximum opportunity to remain a significant part of the child's life.

[Emphasis added.]

- [24] In *D. v. D.* there were serious concerns about the father's parenting capacity and abilities -- he had committed more than one act of family violence -- but he also had a strong bond with the children, who wished to continue to have a "meaningful relationship" with him. Judge Merrick concluded that a severe restriction of the father's parenting responsibilities would be sufficient to address these concerns. In that case, the reallocation of responsibilities was so extreme that the father only retained the right to receive information respecting the children's health, education and welfare. All parenting time was supervised and the father was prohibited from exercising even the responsibility over day-to-day decision-making during his parenting time.
- [25] The British Columbia Supreme Court has commented favourably on the approach set out in *D. v. D.* In *M.A.G. v. P.L.M.*, 2014 BCSC 126, Madam Justice Fleming cited the case with approval, referring to it as "persuasive authority" and summing up the decision as follows:
- [44] The thrust of the decision is that by allocating or reallocating parental responsibilities to a more capable parent as opposed to terminating guardianship, a child may safely retain the benefit of having a parent remain a significant part of his or her life.
- [26] Applying that approach, she refused to terminate the father's guardianship, instead allocating the majority of responsibilities to the mother (including day-to-day care decisions even when the children had parenting time with the father, at least so long as the father's parenting time was supervised).
- [27] While *D. v. D.* provides the most in-depth discussion on termination, there have been a number of other decisions that have commented on the matter since the FLA came into force. The British Columbia Court of Appeal has confirmed, in *British Columbia Birth Registration No. 2004-59-0201058 (Re)*, 2014 BCCA 137 at para. 60, that the "best interests" test (as set out in s. 37 of the FLA) applies to orders for termination under s. 51(1)(b). In *P.N.K. v. C.L.*, 2013 BCSC 1856, at paras. 94-95 and 105-109 I refused termination under s. 51 on the basis that the children "are entitled to have the benefit of guidance from both their parents" (para. 108).
- [28] There are two other reported Provincial Court decisions. In the first, *J.L.M. v. G.A.T.*, 2013 BCPC 96, the court did order termination of guardianship. In that case the application to terminate guardianship was unopposed, as the father failed to file a reply to the notice of family claim, thereby making "it clear that he has no interest in the outcome of these proceedings or the guardianship of" the child. Further, the father had been violent during the relationship -- he was facing criminal charges for assaulting the mother, who had a "no contact" order against him -- and the child had witnessed that violence.
- [29] In *S.H. v. R.G.*, 2013 BCPC 114, the father sought to terminate the mother's guardianship of the children. Despite some concerns about the mother's parenting capacity, Judge Hamilton refused to order termination, emphasizing the statutory presumption of guardianship under the FLA and commenting that, in enacting the statute, "the Legislature decided to put birth parents who have raised children together before separation on more equal footing than

they have been in the past." The judge said that it appeared, from the scheme of the FLA, that the Legislature intended that orders to terminate guardianship would only issue in "very rare and the clearest of cases where cancelling guardianship was clearly in the child's best interests."

- [30] The cases discussed above recognize that status as a guardian protects or promotes a meaningful or significant relationship between parents and children, post-separation. In *A.J.H. v. L.C.H.*, 2013 BCSC 900 at para. 8, the court stated that the loss of guardian status "effectively render[s] [the parent] no longer one of [the child's] parents." Symbolically speaking, a guardian is a person with the right to play a parental role in a child's upbringing. This is reflected in the FLA: absent guardian status, a parent is simply a person with contact -- a person who may apply to the court for "contact" with a child, which may not even be in person, but in writing, or by telephone. On the other hand, a guardian has "parenting time" with a child (s. 42), even when they are not permitted to exercise parental responsibilities during that time.
- [31] While cases decided under the FRA are not binding, they are useful in interpreting the FLA. Many of the cases decided under that statute also emphasize that guardianship status permits the maintenance or creation of a meaningful relationship between the parent and child. For example, in *Bradford v. Bradford*, 2007 BCSC 1011 at para. 31, the court commented that losing guardian status could have the "effect of further shutting out [the parent] from his children's lives", while in another case, having it gave "the non-custodial parent the opportunity to contribute to the child's upbringing he can make a meaningful contribution to the child's life" (*G.K.G. v. S.S.G.*, 2010 BCSC 20 at paras. 54, 74). Similarly, joint guardianship, rather than sole guardianship, preserves relationships between parents and children (*P.V. v. D.B.*, 2007 BCSC 237 at para. 93), while sole guardianship can deprive the child of the guidance of the non-guardian parent: *Bradford* at para. 31. In *Goldman v. Goldman*, 2010 BCSC 1835, the court commented that an order for joint guardianship could be helpful in re-establishing broken relationships; it would otherwise be difficult for the non-guardian parent "to become and remain involved with the upbringing and care" of the children (para. 20).

Discussion

- [32] In terminating the father's guardianship, the trial judge appears to have accepted the view that a complete reallocation of parental responsibilities is inconsistent with the scheme of guardianship established by the FLA. However, s. 40(4) says that "no particular [parenting] arrangement is presumed to be in the best interests of the child" and specifically says that it should not be presumed that parental responsibilities should be allocated equally among guardians. In my view, this gives the court complete discretion to determine what allocation is in a child's best interests, up to and including a complete allocation of parenting responsibilities in favour of one guardian. There is no indication in the FLA that allocating all responsibilities to one parent would automatically terminate the other parent's

guardianship; hence, doing so is not inconsistent with guardian status.

- [33] Similarly, s. 42(2), the parenting time provision, notes that during parenting time a guardian may exercise the parental responsibility of making day-to-day decisions and having day-to-day care and control of the child "subject to an agreement or order that provides otherwise." As a result it is consistent with a parent's continued status as guardian to make an order that results in a complete restriction of a guardian's exercise of parental responsibilities, even during their parenting time.
- [34] Also consistent with this view is the fact that a guardian who has no parental responsibilities still has legal rights under the FLA that confirm and promote their involvement in their child's life. As the trial judge noted, only a guardian can challenge an application to relocate. This is not an insignificant right. In addition if a child's guardian dies and the surviving parent is not a guardian, they do not automatically become a guardian but must apply for an appointment. Also, s. 49 of the FLA allows a guardian to apply to a court for directions respecting an issue affecting a child. Only a guardian can make such an application. A parent who is not a guardian but with contact has no legal right to challenge the other parent's actions in court. As a result I conclude that even without parental responsibilities, guardianship still has a meaningful legal status. Additionally, as noted earlier, it has a symbolic status: a guardian is seen as playing a "parental" role in a child's life, even when not exercising parental responsibilities.
- [35] The separation in the FLA between guardianship and parenting rights permits a parent to remain a guardian even when the circumstances indicate that it would not be in the child's best interest for that parent to exercise parenting responsibilities.
- [36] I note as well that once guardianship is lost, under the FLA it may be difficult to regain. The process for applying for appointment as a guardian under s. 51 is not a simple one, procedurally or legally. On the other hand, reallocation of parental responsibilities is a comparatively simple matter; the court can reallocate following a regular chambers application. Termination is far less flexible. As such, reallocation is better suited to address shifting familial circumstances.
- [37] At trial the respondent argued that giving the mother all of the parenting responsibilities would be "misleading," as it would reduce guardianship to a word. The judge appeared to accept that argument, and as a result refused to consider whether reallocation could eliminate any risk associated with the father's status as a guardian. With respect, that is an error. As discussed, guardianship exists separate and apart from the parenting responsibilities set out in the FLA.

- [38] The trial judge found as a fact that the father does not contact his children while he is under the influence of drugs. Rather, he withdraws from them in order to avoid subjecting them to the effects of his addiction. The trial judge also found that the father had been clean and sober during all scheduled visits with the children over the past two years. However, as noted earlier, the trial judge found that, due to his addiction, the appellant did not have the judgment necessary to act as a guardian. He stated:
- [65] I have considered section 37 of the F.L.A., which defines the best interests of a child. I have reviewed section 37(2) and the factors I am to apply in considering the best interests of [M.] and [J.]. I accept, as I have stated, that the children want their father more involved in their lives. That is an issue I deal with below in discussing the children's contact with Mr. [K.]. In my view the single most important and persuasive factor in considering [M.'s] and [J.'s] best interests is section 37(2)(f) being Mr. [K.'s] ability to exercise guardianship responsibilities over his children. For the reasons I have already articulated he cannot exercise, and cannot be trusted to exercise, guardianship responsibilities while he continues in his active addiction to drugs and alcohol.
- [66] So, in conclusion on the issue of guardianship, I find that this is one of the rare cases where it is in the children's best interests to terminate Mr. [K.'s] deemed guardianship pursuant to section 51(1)(b) of the F.L.A. and I so order[.]
- [39] It is an error to state that the appellant has no capacity to exercise any parenting rights. The trial judge found that he was working but continued to have relapses with his addiction. The evidence does not indicate that he lacked the ability to exercise guardianship responsibilities when he was not impaired.
- [40] In finding that the father's addiction affected the parent-child relationship to such a negative extent that his guardianship should be terminated, the trial judge particularly focused on the fact that he missed three video chats with the children, promised not to miss another chat, but then did so anyway. However, the trial judge acknowledged that the loss of guardianship status would likely have no impact on this issue.
- [41] Termination of guardianship should be a final recourse only and then only where no other means of protecting the best interests of the children (particularly, by reallocation of parenting responsibilities) is available.
- [42] Clearly when the appellant relapses he is not capable of making sound decisions respecting the children. However, with restrictions on his parenting responsibilities and parenting time, it is difficult to see how a risk arises from his continued status as a guardian. This particularly so when one considers that both parents as guardians must act in the best interests of the children.
- [43] In addition, it is not true to say that simply because a parent cannot always make good decisions for themselves they cannot make good decisions for their children. The father acknowledges he is an addict. At the same time he appears competent when he is not

relapsing. He is employed. He is clearly capable of making sound decisions but for when in relapse. Aside from the fact that the appellant does not contact the children at the scheduled time when he relapses, it appears that the imposition of terms for the father's parenting time can address any concerns that might exist if he does relapse when exercising parenting time.

- [44] I therefore conclude that the appeal respecting guardianship should be allowed. The parties shall remain guardians of the children.
- [45] With regard to parenting responsibilities, I am of the view that there is no need to disturb the outcome of the trial, which saw the parenting responsibilities allocated entirely to the mother. As noted above, that reallocation eliminates any risk to the children that may arise from the father's struggles with addiction.
- [46] As noted, the trial judge made a number of orders related to contact between the father and the children. Given that I have allowed the appeal of the termination of guardianship any time the father spends with the children now qualifies as parenting time, not contact. However, there was no appeal from the contact order and I see no reason or basis for interfering with the terms of the contact order set out by the trial judge. The parties shall simply treat any order regarding contact as if it was an order regarding parenting time.
- [47] I should note that I have some concerns that this Court's jurisdiction over these children has been lost. The trial judge noted this possibility, stating that the children's habitual residence had changed and stating that he was unable to see how the FLA would continue to govern now that the children are resident in the USA. This is not an issue raised on this appeal. However, notwithstanding the jurisdiction issue resolution of the issue of guardianship may have significance for any enforcement proceedings or applications brought in Washington State.

Child Support and Income Appeal

Effect of Appellant's Failure to Pay Support and Ordered Costs

- [48] As noted at the beginning of these reasons the respondent filed an application requesting that the appeal be dismissed given the appellant was in breach of an earlier order for costs against him of \$1,000 and for his failure to pay child support. The appellant objected to the application, saying that insufficient notice had been given. I am of the view that the lack of notice is not relevant -- nor, for that matter, was an application required -- as the issue is one that it is open to the court to raise given it arises from a request for relief from an appellant who is in breach of an existing court order.
- [49] The appellant has paid no child support since June 2011. Nor has he made any payments under the order under appeal, despite the fact that he is now employed. It was only during the week of the hearing of the appeal that he paid the costs award of \$1,000.

- [50] It is troubling that he professes to understand the importance of acting in his children's best interests, yet fails to meet his financial obligations to them and appears content to let others assume those responsibilities. The appellant's argument is that when he is sober he is responsible and capable of acting as a guardian, particularly with certain aspects of parenting. The fact that he has yet to make any maintenance payments, despite the fact that he has been working for almost a year now, militates against an ability to put the children first. He has apparently had the funds for his own use, putting his personal needs ahead of those of the children. (I acknowledge that he has apparently spent funds pursuing this litigation, which he views as being in the best interests of his children). While maintenance and guardianship/parenting are not directly linked, that does not prevent the court from drawing inferences from his failure to pay support.
- [51] His counsel conceded that she had instructed him to make payments.
- [52] Because an ongoing relationship with the appellant is in the children's best interests, I am not inclined to dismiss the guardianship appeal because of the breach of the support order. However, the situation differs with respect to the maintenance appeal, where the father has challenged the trial judge's decision with regards to imputed income under the Child Support Guidelines.
- [53] While his behavior has not been as egregious as that of the respondent in *Wu v. Sun*, 2011 BCCA 239, it is still deserving of rebuke. In *Wu*, the father was more than \$75,000 in arrears on his support payments and had offered the court "no reasonable explanation for failing to abide by the support orders" (para. 21). The court refused to entertain an appeal against the support orders, finding that the appellant had previously "flouted or ignored court orders" and that as a result he could not "invoke the jurisdiction of the Court to review an order he has largely ignored" (para. 22). The court cited a number of other cases in support of the proposition that a court should not hear an appeal where the appellant has ignored the terms of the order under appeal and failed to give a convincing explanation as to why it was impossible to comply with the order. As noted in *Berry v. Berry*, 2002 BCCA 129, a party who wishes to appeal a support order "should make the payments ordered pending the hearing of the appeal" (para. 1). The rule is not an absolute one, and in cases where the interests of justice require it, the court may hear the appeal.
- [54] In this case, the appellant has provided no good excuse for not making any maintenance payments. He has not even made partial payments, as one might expect he would do if the only difficulty with payment was with the amount of income imputed by the trial judge. The evidence fails to establish that it was impossible for the appellant to have made payments. Had he made partial payments, it may have been in the interests of justice to hear the appeal of the maintenance order.
- [55] The appeal of the appellant with respect to the support order and the imputed income is dismissed. However, in the event I am incorrect in ordering dismissal on that basis, I will address the appeal of the support order.

Imputing Income

- [56] The parties entered into Minutes of Settlement and a consent order in November 2010. That order provided that the appellant pay child support of \$1,299 per month and spousal support of \$1,627. He paid that support until June 2011 but made no payments thereafter. The Minutes of Settlement and the consent order were set aside by the Provincial Court in February 2012, on the basis that the agreement was unconscionable and that the father had entered into it under duress. As a result, there was no order in place from February 2012 until the order under appeal was made in September 2013.
- [57] At the provincial court trial the respondent sought an order imputing income of \$88,000 per annum to the appellant. That was his income before he lost his employment due to his addiction. The respondent also sought an order for child support retroactive to June 2011.
- [58] At trial the respondent relied on *Hutchison v. Gretzinger* (2007), 48 R.F.L. (6th) 167, 162 A.C.W.S. (3d) 1000, (Ont. S.C.J.), where Justice Quinn considered an appeal from a trial decision where the trial judge refused to impute a minimum wage income to the father due to the father's serious drug addiction. In allowing the appeal, Justice Quinn held as follows:
- [22] To the extent that drug addiction is properly viewed as an involuntary illness, the initial drug use is voluntary and, therefore, it is intentional. It is wrong in law (and contrary to public policy) that a parent be exempted from his or her child support obligation because of drug addiction.
- [59] The trial judge in this matter agreed with that reasoning, although he noted that in *Hutchison* the imputed income was only at a minimum wage level, rather than the \$88,000 salary the mother sought to impute to the appellant. He also noted that he had to consider the fact that J.W.K. was in a fragile situation:
- [107] He has only recently started working full-time. He continues to relapse which places his employment in jeopardy. If I order the retroactive support as requested by Mrs. [K.], I will place Mr. [K.] under an enormous debt obligation which could place Mr. [K.] under stress that will lead him to further relapses and possibly losing his job. It is in the children's best interests that Mr. [K.] is gainfully employed. His child support payments will assist Mrs. [K.] in meeting the children's needs.
- [108] I have to balance the competing claims before me. Mr. [K.] has returned to work and in his first job he has commanded a salary of \$40,000.00 annually. I am of the view that it is appropriate to impute an income to Mr. [K.] of \$40,000.00 and that he should pay child support to Mrs. [K.] based upon that income commencing July 1, 2011 given that his last child support payment was in June, 2011.

- [60] The judge found that it would not be reasonable to expect J.W.K. to earn his full professional income while struggling with his addiction, and settled on \$40,000 as an appropriate amount. "It may be that his initial use of drugs was voluntary and intentional, but thereafter his addiction spiralled out of his control and left him unable to work in his chosen profession," (at para. 109). He found that if J.W.K. had attempted to find work in 2011, he could have found work paying \$40,000 annually.
- [61] Prior to trial, the appellant had been out of the workforce since November 2010. However, by the time of the trial in 2013 the appellant had commenced working as a Software Tester and Systems Analyst and was, as the judge notes, earning \$40,000 per year. Since the reasons were issued following trial, the appellant has remained employed, but has required some absences from employment due to relapses. His reported income has been less than \$40,000 due to his relapses.
- [62] The appellant submitted that the trial judge erred at law when he imputed income under s. 19(1) of the Guidelines by considering the appellant's unemployment due to addiction to be voluntary. As noted the trial judge relied on *Hutchison*, where the court held that the father could not be permitted to avoid his child support obligations by voluntarily ingesting addictive drugs. Such behavior was equated with self-induced under-employment or unemployment. At para. 22 the appeal judge said:
- [22] The trial judge accepted the affidavit of the legal assistant to counsel for the respondent as evidence that the respondent was addicted to drugs, including cocaine. In my view, it was an error to do so: better evidence was required. However, even if one were to accept that the respondent is a drug addict, his addiction is not a defence to a support claim. When one first consumes illicit drugs, one must be taken to know that addiction can result: addiction is a reasonably foreseeable consequence, as is the resultant loss of income or employment.
- [63] *Hutchison* was considered in *Lindsay v. Jeffrey*, 2014 ONCJ 1. In *Lindsay* the father had indicated that he was a drug addict and that as a result he had been essentially unemployed for a two year period. He claimed that his unemployment was justified due to his drug addiction and that the court should not impute income for the purposes of child support. The court then noted that there was "conflicting case law as to whether substance abuse is a justifiable excuse for unemployment or underemployment" (para. 37), and reviewed both *Hutchison* and *Kalanuk v. Michelson*, 2010 SKQB 394. In *Kalanuk* the court accepted that the payor spouse had a serious drug addiction issue that adversely impacted his ability to work, and reduced the arrears of support. In that case the court noted that "[a]lcoholism and drug addiction are viewed as illnesses requiring treatment rather than unacceptable conduct based on individual choice" (para. 14) and held that the father was not intentionally underemployed during the periods he was in treatment facilities. However, the court then said:

- [15] the petitioner's addictions issues should not absolve him from all responsibility. At least some of what little income he earned over the past four or five years appears to have been squandered on choices unrelated to the acquisition of cocaine. He should remain responsible for those choices.
- [64] In Lindsay, the court adopted the approach from Kalanuk, saying as follows:
- [39] The ravages of drug and alcohol addiction are observed weekly in this court in custody/ access and child protection cases. Many parents who love their children very much and are very motivated to play an important role in their children's lives have their roles in their lives profoundly reduced or even eliminated because they have a substance addiction over which they have little control. This court views substance addiction as a health issue. With proper evidence, this court is willing to consider that substance addiction is a reasonable health need of a parent that can justify underemployment or unemployment, pursuant to clause 19(1)(a) of the guidelines. [Emphasis in original.]
- [65] However, the court found that the requisite evidence was not available in the case before it, noting that it was not enough for a parent to come to court and say, "I am a drug addict and this is why I haven't worked" (para. 40). Instead, "[c]ogent medical evidence in the form of detailed medical opinion should be provided by the payor in order to satisfy the court that his reasonable health needs justify his decision not to work" (para. 39).
- [66] I need not determine whether drug addiction is voluntary or whether it is a health issue or disability that can justify underemployment or unemployment for the purposes of s. 19(1)(a) of the Guidelines. A decision on the issue is unnecessary in this instance because the evidence before the trial judge was insufficient to meet the burden on the appellant to establish that his underemployment was required by his health. The evidence at trial of the appellant's addiction consisted of the evidence of the parties. There was no expert evidence addressing the issue. As in Lindsay, there was no corroborative evidence as to how the drug use adversely affected the father's ability to work, or what period of time it prevented him from working to his full capacity.
- [67] The appellant relied on *Battlefords and District Co-operative Ltd. v. Gibbs*, [1996] 3 S.C.R. 566, for the proposition that the appellant had a disability arising from his addiction and that the trial judge discriminated against him by ignoring that disability for the purposes of imputing income. That is not of assistance because it assumes that a disability due to addiction has been proven.
- [68] That the appellant had a drug problem was not in issue. Even if it is incorrect to say that drug addiction is voluntary in the sense used by the trial judge, the evidence before the trial judge did not include any expert evidence addressing the effects of the addiction on the appellant and whether or not his regular relapses were involuntary. As a result the appellant has not established that the appellant's lack of employment since June 2011 has been involuntary. Given the lack of evidence on the point, I see no error in the trial judge's assessment of the arrears payable.

New Evidence

[69] Given the conclusions I have reached, the contents of the supplementary reasons from the trial judge are not relevant. Whether one considers them new evidence or simply a part of the trial record, the material contained in the reasons is only relevant to the parenting time issues. As noted above, the effect of this appeal is simply to convert any orders for contact (including the order issued as part of the supplemental reasons) into orders for parenting time. I have not interfered with those orders in any other way and as a result they continue in force as set out by the trial judge.

Costs

[70] Given the parties divided success on the appeal I am inclined to order that they each bear their own costs. However, if counsel wish to make submissions on costs they may do so in writing.

"Punnett J."

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