
CANADA / JUDGMENT

Leach v. Leach

2019 BCSC 1664

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Supreme Court of British Columbia

DECIDED

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2019 BCSC 1664 Leach v. Leach

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Leach v. Leach,

2019 BCSC 1664

Date: 20190930

Docket: E14634

Registry: Nelson

Between:

Tracy Lynn Leach

Claimant

And

Randall Darin Leach

Respondent

Before: The Honourable Mr. Justice Jenkins

Reasons for Judgment

Counsel for the Claimant:

M. Chiu

Counsel for the Respondent:

J. Stein

Place and Date of Trial/Hearing:

Nelson, B.C.

March 11 - 15, 2019

Place and Date of Judgment:

Nelson, B.C.

September 30, 2019

- [1] This family action involves claims for both spousal and child support. The claim for child support rests upon a determination as to whether the parties' twenty-five year old son is a "child of the marriage" being unable to withdraw from the charge of his parents due to disability. There was considerable evidence at trial on the issue of whether the parties' son, whose name is Jamie, is disabled, and may therefore be entitled to child support from his father. Mr. Leach submits that Jamie is able to work so as to place him out of the charge of his parents.
- [2] Ms. Leach now goes by the name of Tracy Johnson which is how I will refer to her in these reasons.
- [3] The claim for spousal support is sought retroactively from June 24, 2016, which is the date a demand for spousal support was made by the claimant, which was approximately twelve years after the parties separated in 2004. Ms. Johnson is unable to work due to disabilities and has been on permanent long-term disability from CPP since 2005. She seeks retroactive support for a period of three years after considering the oft-quoted decision of *D.B.S. v. S.R.G.*, [2006] 2 S.C.R. 231, which generally limited retroactive claims to a period of three years.
- [4] The application for spousal support is an originating application under s. 15.2 of the Divorce Act, R.S.C. 1985, c. 3, as no application was made following the separation of the parties. As this is an originating application for spousal support, the court is to take into account the existing agreement reached between the parties in which any claims for spousal support were released in assessing the application (see *Sandy v. Sandy*, 2018 BCCA 182 ["Sandy"] at para. 54).
- [5] I will categorize evidence relating to entitlement to child and spousal support separately in the following paragraphs.

Spousal Support

- [6] These parties separated in 2004 after an eighteen year relationship. Both parties are currently fifty-three years of age.

[7] In September 2006 the parties entered into a separation agreement ("the Agreement") following a process in which they were both represented by counsel. The Agreement was largely based upon the terms of an offer from counsel for Ms. Johnson contained in a letter dated July 24, 2006, which included an unequal distribution of the proceeds of sale of the former family residence. The former family residence, located in Nelson, B.C., was the only major family asset at the time. It was sold in 2007 with the proceeds of sale being distributed to the parties and Jamie as follows:

- a) \$25,182.27 in trust for Jamie;
- b) \$181,312.33 to Ms. Johnson; and
- c) \$45,328.08 to Mr. Leach.

[8] Other family assets were all divided equally.

[9] The Agreement included several clauses which relate to spousal support including:

· Recital III:

The Wife receives long term disability payments from CPP currently in the sum of \$622.27 per month. Since the separation, she has remained in the family residence and has been in receipt of rental income from a rental suite in the family residence.

· Recital VIII:

The Husband and the Wife each intend this Agreement to be

- 1) The final settlement of spousal support.

· Clause F - Spousal Maintenance:

1. Neither party will claim temporary or permanent spousal maintenance, support or alimony from the other and each party gives up forever any such claim against the other.
2. This Agreement will provide for the self-sufficiency of each of the parties, and each hereby waives and releases the other from any and all claims for alimony or maintenance that he or she may have. Neither party shall commence any action or other proceedings of any kind whatsoever for alimony or maintenance, notwithstanding any subsequent change in the means, needs or circumstances of either party.
3. The parties realize that their respective financial circumstances may change in the future by reason of their health, cost of living, employment or otherwise. No such change will give either party the right to claim support pursuant to the Divorce Act (Canada) or any other legislation whether provincial or federal, currently proclaimed or to come into force hereafter regardless of any change, no matter how catastrophic in the condition, means, needs or other circumstances of either or both parties or for any reason whatsoever, whether such change was foreseeable or not. . . .

- [10] Clause F (3)(a) to (j) continues and lists several events including disability of either party, loss of employment of either party and many more possible catastrophic events.
- [11] Other clauses also recognize that Mr. Leach at the time had lost his employment and anticipated employment insurance benefits. Another clause states that Jamie "suffers from a chronic disability . . . it is expected by this Agreement to address and provide for the financial concerns related to the child's disability". Under another provision of the Agreement, Mr. Leach agreed to pay child support so long as Jamie remained a child of the marriage.
- [12] During negotiations for the Agreement, both parties received independent legal advice and Certificates of Independent Legal Advice were executed by the lawyers with an acknowledgement from the parties as to the statements by the lawyers.
- [13] Finally in connection with the Agreement, it is not specifically stated but the testimony of the parties at trial contemplated that the disproportionate payments as between the parties for the proceeds of the sale of the family residence was intended to provide sustainability in the future to Ms. Johnson in lieu of spousal support.
- [14] With her share of the proceeds of the sale of the former family residence, Ms. Johnson purchased a mobile home in North Nelson for approximately \$87,000 which she continues to live in with Jamie. The mobile home is currently assessed at a value of \$106,000, however, Ms. Johnson testified her home needs substantial repair. She also purchased a Toyota RAV4 for approximately \$41,000 and spent \$6,000 to \$8,000 to replace items lost in a fire.
- [15] The permanent long-term disability pension received by Ms. Johnson from CPP resulted in income to her in 2017 of \$8,977.80. Her only other current income is \$750 per month received by her from Jamie as rent for their residence, ie. the mobile home located near Nelson, B.C. Ms. Johnson's total income approximates \$18,000 to \$19,000. Historically, Ms. Johnson's income between 2009 and 2018 ranged between \$8,000 and her current income. She has received rental income from Jamie for the past three years only. She also receives nominal income from her participation in a band performing occasionally in the Nelson area.
- [16] Ms. Johnson testified at trial that she was suffering from health issues including allergies, eczema, dystonia, celiac, thyroidism and other maladies, some of which she was aware of as of September 2006 when the Agreement was executed. It would appear to be clear that the extent of her medical issues has had a considerable effect on her general well-being since that time. There was extensive evidence at trial regarding the many surgeries and worsening of the above diseases and conditions and the effect those diseases have had on Ms. Johnson. She testified that currently her health issues are debilitating.
- [17] Ms. Johnson also testified that she received "80% of the proceeds of the sale of the family residence and no support", and when asked if that was fair at the time instead of receiving monthly support she stated:

Randy did not want to give me the houses so, yes, it was a fair settlement. At the time, it was fair to get 80% of the house sale money. I didn't think I'd use the \$180,000, I thought I would have Andrew as a partner and did not expect all of the surgeries and diseases. [Andrew was Ms. Johnson's romantic partner at that time]

[18] Since the sale of the former family residence, Ms. Johnson has withdrawn the funds which were to remain in trust for Jamie, i.e. \$25,182.27, and used the same to pay off a letter of credit and Visa debts incurred after separation of the parties.

[19] Finally, Ms. Johnson testified that she "did not properly read the document . . . understands it now . . . but didn't read it carefully enough". Ms. Johnson indicated she was pressured by Mr. Leach to sign the Agreement.

[20] Mr. Leach's income is currently approximately \$62,000 per annum from his employment in a coffee business owned by his sister. He lives in rented accommodation in Calgary, Alberta with his new partner.

[21] Mr. Leach is a part owner with his sister in a warehouse which is utilized in the family coffee business. The warehouse was purchased several years after the Agreement was executed and his investment has little if any equity. He owns a vehicle, pensions and an RRSP valued at slightly over \$100,000.

Applicable Law re Spousal Support

[22] In Sandy, the Court of Appeal found, at para. 37, that "an application for spousal support may be made 'anew' under s. 15.2, even when an order has been made dismissing support".

[23] Section 15.2(1) of the Divorce Act states:

15.2(1) A court of competent jurisdiction may, on application by either or both spouses, make an order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of the other spouse.

[24] Considerations a court is required to consider in an application under subsection (1) are set out in s. 15.2(4) which states:

15.2 (4) In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including

- a) The length of time the spouses cohabited;
- b) The functions performed by each spouse during cohabitation; and
- c) Any order, agreement or arrangement relating to support of either spouse.

[25] Section 15.2 was considered in the oft-quoted decision of *Miglin v. Miglin*, 2003 SCC 24 ["Miglin"] and resulted in the establishment of a two-stage approach on an originating application for support where there is an existing separation agreement. The test involves a consideration of the fairness of the agreement at the time it was made against the current circumstances of the parties. At para. 4 of *Miglin*, the court stated:

[4] a fairly negotiated agreement that represents the intentions and expectations of the parties and that complies substantially with the objectives of the Divorce Act as a whole should receive considerable weight. In an originating application for spousal support, where the parties have executed a pre-existing agreement, the court should look first to the circumstances of negotiation and execution to determine whether the applicant has established a reason to discount the agreement. The court would inquire whether one party was vulnerable and the other party took advantage of that vulnerability. The court also examines whether the substance of the agreement, at formation, complied substantially with the general objectives of the Act. As we elaborate later, these general objectives include not only an equitable sharing of the consequences of the marriage breakdown under s. 15.2, but also certainty, finality and autonomy

[26] In the circumstances in which it was made, was the Agreement obtained fairly?

[27] The Agreement in this case was comprehensive and clearly set out the intention that the Agreement was to be a final settlement on all issues relating to the parties' separation. Included in its terms were the following:

- Recital III reflected Ms. Johnson was receiving long term disability payments from CPP in the amount of \$622.27 per month, she had remained in the family home and was receiving rent from a suite in the home.
- Recital IV stated Mr. Leach's income of \$34,811 and that he had been laid off in August of 2006 and was expecting to receive employment insurance benefits which were anticipated in an amount of approximately \$1,200 per month.
- Recital V acknowledged Jamie suffered from a chronic disability and the Agreement was expected to address financial concerns related to his disability. At the time, Jamie was twelve years of age.
- Recital VI listed the parties' assets, the extent of which has not been questioned in this proceeding.
- Recital VIII reflected the desire of the parties to reach a final agreement regarding all issues relating to Jamie, spousal support, the entitlement to family property and a release of claims against each other's property.
- Clause B1 acknowledged that each party declared their intention the Agreement would apply in spite of the provisions of the then Family Relations Act.

- Clause D was an agreement that after-acquired property would remain the sole property of the parties.
- Clause F contained a release of temporary or permanent spousal support, which acknowledged the Agreement would provide for self-sufficiency and listed ten specific events which would not negate the waiver of spousal support including "temporary or permanent illness or disability, mental or physical, of either party".
- Clause H provides a property settlement which included 80% of the net sale proceeds of the family residence to be paid to Ms. Johnson, after payment of 20% of the proceeds being set aside in trust for Jamie.
- Clause P sets out the mutual obligations on the parties, including being "prepared to abide by the terms of this Agreement in spite of any change of circumstances whether material, severe or catastrophic".

[28] Mr. Leach has referred to the decision of *Chepil v. Chepil*, 2006 BCSC 15 ["Chepil"], in which Mr. Justice Ehrcke declined to set aside a separation agreement stating, in part:

[37] A separation agreement is a contract and is subject to the ordinary law of contract that applies to other agreements. Like any other contract, a separation agreement may be challenged on the basis of duress, undue influence, unconscionability, fraud, or non-disclosure.

...

[41] In the present case, there was economic pressure on both parties in May 2003. I cannot find that Ms. Chepil was under more pressure than Mr. Chepil. There is no evidence that Mr. Chepil used economic force to coerce Ms. Chepil into signing the separation agreement. The agreement was her idea, and she drafted the major terms before she even showed it to him.

[42] Undue influence is another basis upon which a contract may be set aside. This does not require evidence of threats or violence but rather arises where the parties are in a relationship that causes one to place confidence in the other, producing a natural influence which one abuses to his or her own advantage. The mere fact that the parties are spouses does not, by itself, create a presumption of such a relationship: *Saxon v. Saxon*. There is no evidence that Mr. Chepil exerted undue influence over Ms. Chepil.

[29] In *Chepil*, as in the case at bar, the agreements provided financial disclosure, reflected the terms of agreement as proposed by Ms. Johnson's counsel, the agreements were entered into after separations which were approximately the same in duration, both parties had independent counsel's advice and there was no evidence of pressure or coercion prior to execution of the agreement. Ms. Johnson's statement towards the end of her testimony that she was "bullied" by Mr. Leach into signing the Agreement is inconsistent with the other evidence relating to the Agreement and is not credible.

- [30] As in Miglin, the Agreement in the case at bar was fairly negotiated, represented the intentions of the parties and complied substantially with the objectives of the Divorce Act, i.e. an equitable sharing of the consequences of marital breakdown. Ms. Johnson received a significantly higher proportion of the proceeds of the sale of the family residence and other assets were generally shared equally. Ms. Johnson was receiving rent from a tenant of the residence up to the time the residence was sold, had custody of Jamie with child support and acknowledged self-sufficiency. Mr. Leach was to have joint guardianship of Jamie. At the time, Mr. Leach had been laid off from his employment, had applied or was about to apply for employment insurance and faced an uncertain future.
- [31] I conclude the Agreement was obtained fairly.
- [32] Does the Agreement still reflect the original intentions of the parties and the objectives of the Divorce Act?
- [33] Assuming the first stage of the Miglin test is satisfied, stage two calls for a consideration of whether the Agreement still reflects the original intentions of the parties and remains in substantial compliance with the objectives of the Divorce Act (Miglin para. 87).
- [34] Considering the second stage:
- When the Agreement was signed, the parties were aware of Jamie's disabilities as well as those of Ms. Johnson who had begun to receive a disability pension. Ms. Johnson's medical conditions were known and have not changed significantly.
 - Ms. Johnson was not working at the time of the Agreement, had not worked for fifteen years prior to the Agreement and has not worked since save for some nominal income from participating in a band. She relies on her disability income now as she did in 2006.
 - Jamie's disabilities had been diagnosed and continue.
 - By providing in the Agreement for Ms. Johnson to receive 80% of the net proceeds of sale of the former family home, Mr. Leach was providing, to the extent he could at the time considering the assets of the parties, to financial security for Ms. Johnson and Jamie. Likewise, by setting aside 20% of the sale proceeds in trust for Jamie, Mr. Leach was contributing to the financial security of Jamie once he reached the age of majority. Mr. Leach was unemployed in 2006, and although employable, faced considerable financial uncertainty going forward from the date of the Agreement including nominal assets.
- [35] Miglin also requires in stage two an assessment of whether the Agreement continues to reflect the original intentions of the parties and remains in substantial compliance with the objectives of the Divorce Act. I quote from paras 87 and 88 of Miglin:
- [87] Where negotiation of the agreement is not impugned on the basis set out above and the agreement was in substantial compliance with the general objectives of the Act at its time of creation, the court should defer to the wishes of the parties and afford the agreement great weight. Nevertheless, the vicissitudes of life mean that, in some circumstances, parties may

find themselves down the road of their post-divorce life in circumstances not contemplated. Accordingly, on the bringing of an application under s. 15.2, the court should assess the extent to which 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.

- [88] The parties' intentions, as reflected by the agreement, are the backdrop against which the court must consider whether the situation of the parties at the time of the application makes it no longer appropriate to accord the agreement conclusive weight. We note that it is unlikely that the court will be persuaded to disregard the agreement in its entirety but for a significant change in the parties' circumstances from what could reasonably be anticipated at the time of negotiation. Although the change need not be "radically unforeseen", and the applicant need not demonstrate a causal connection to the marriage, the applicant must nevertheless clearly show that, in light of the new circumstances, the terms of the agreement no longer reflect the parties' intentions at the time of execution and the objectives of the Act. Accordingly, it will be necessary to show that these new circumstances were not reasonably anticipated by the parties, and have led to a situation that cannot be condoned.

[Emphasis added.]

- [36] It is submitted by Mr. Leach that there is no significant change in the parties' circumstances from what could reasonably be anticipated at the time of negotiation. I agree. Ms. Johnson was disabled and unable to work in 2006 and remains so today. She receives a disability pension as she did in 2006. Jamie likewise remains disabled and it was anticipated his disabilities were permanent. He receives a disability pension. It was also anticipated that there would be a trust account of approximately \$25,000 maintained for Jamie, which was to have been invested and hopefully grown to assist him as he reached adulthood. It should not lie at Mr. Leach's feet that Ms. Johnson cashed in the trust account to pay her expenses.
- [37] Contrary to Ms. Johnson's submissions that her current situation was not reasonably anticipated by the parties in 2006, the Agreement provided certainty for the parties and for financial independence. Ms. Johnson is in the same situation as 2006, when she negotiated and signed the Agreement. Ms. Johnson was always unable to work and had not worked since 1990. She continues to receive her disability pension and \$750 per month from Jamie towards the cost of living. While living in the former family residence, she had received rental income. Any changes in her financial situation appear to have been due to her handling of her finances.
- [38] It was also anticipated that Jamie would require financial assistance due to his disabilities which is why the trust fund was established. Jamie's position has changed in that he is no longer the twelve year old boy he was in 2006, but a young man receiving a disability pension and working part time. This again would have been anticipated in 2006. Further evidence regarding Jamie's status will be discussed in the section involving child support.

[39] For the reasons set out above, I conclude that the application by Ms. Johnson that the Agreement be set aside must fail, as must her application for spousal support under s. 15.2 of the Divorce Act.

Claim for Child Support

[40] Jamie is currently 25 years old and lives with his mother near Nelson. He is working part time at a small general store in the community near Nelson where they live, earning approximately \$1,000 per month. In addition he receives disability benefits of \$1,185.42 per month or \$14,225.04 per annum. His total income is in the range of \$26,000. He testifies to having expenses of \$27,091 per annum which includes \$750 per month in rent paid to Ms. Johnson.

[41] There is some dispute between the parties over the extent of Jamie's disabilities and conversely his abilities. However, whether they be disabilities related to his work capacity or his other activities, there is no doubt Jamie does have disabilities and has been receiving a disability pension as a result. There is tension between Jamie and his father over the extent of Jamie's disabilities. Based upon the testimony of the parties and Jamie, it would appear any misunderstanding is likely a consequence of poor communication.

[42] The issue, relative to this application for child support, is whether or not Jamie's limitations prevent him from withdrawing from the care of his parents.

[43] Jamie testified at length regarding his disabilities and the effect of the same on his daily activities. Jamie testified, among other things, to the following:

- Anxiety which is attributed to his autistic spectrum disorder. He testified how dealing with strangers "spooks me out". He said he has called on his mother to help him in stressful situations at work and that he is not ready to apply for a driver's license as he has too many anxieties.
- Jamie testified that transit systems are confusing to him and gave an example of a time in Calgary when he became lost. He says he is unable to concentrate or to comprehend how to assimilate information.
- Jamie also testified of his challenges in communicating. He has difficulty managing time and schedules and arranging and attending medical appointments. He says that in his social life he is extremely isolated; he has a few friends, but he "has difficulty understanding social clues" and trouble concentrating.
- One of the disabilities Jamie suffers from is his dopamine-responsive dystonia diagnosis which, he testified, makes "movement challenging". He said that "in the one-half kilometre walk home I feel cramps and pain", that stiffening occurs overnight, and that "my muscles stiffen due to not knowing how to react to a movement". He testified how the heavy work required when he worked at a Walmart was too physically demanding.

· Jamie testified that if he were able to work to earn more than \$1,000 per month, the amount over \$1,000 per month would be deducted from his disability payments. He added that "when I work more I am stressed", and said "my employer knows my limits".

- [44] From the summer of 2012, after he completed high school, to 2015 when he returned to Nelson, Jamie lived with his father in Calgary. During that time Jamie attended Southern Alberta Institute of Technology and obtained certificates in graphic design and web design over a period of two years of night classes. He testified to having received two certificates but did not receive a diploma. On completion, when he sought out work in those fields, he testified how he "had no skill to reach out", "had no idea where to start" and would have needed a diploma to get work.
- [45] Jamie performed some basic work for his father's coffee business but he testified it led nowhere.
- [46] While in Calgary, Jamie worked part time as a sales associate for one year at a shoe store known as SoftMoc. He was able to do the work but testified that "communication was a challenge". He was offered a position as assistant manager but declined the offer, saying the job was "stressful". He also briefly worked as a janitor.
- [47] In 2014, Jamie travelled alone to England to meet with a romantic interest. He stayed for three weeks, was assisted by his friend's family by keeping him at a hotel and stayed with friends. He stated he had to call his mother when he had trouble with customs which caused extreme stress.
- [48] He returned to Calgary to live with his father and obtained work at Walmart in late 2014 receiving stock from the warehouse and stocking shelves. He remained at Walmart for seven months, some of that time in a full time working capacity.
- [49] In the summer of 2015, Jamie moved back to Nelson.
- [50] Jamie discussed how while in Calgary he considered he was more of a roommate, as opposed to family, with his father and his father's girlfriend. He added that his father believed since Jamie was of adult age, he should function as an adult and deal with responsibility. He said he had to live by "Dad's rules" and relied on his mother for support.
- [51] Clearly there were stresses between Jamie and his father who was pressing Jamie to work and otherwise conduct himself as an adult. Jamie is of the opinion that his father does not appreciate the effect of his disabilities on his ability to function normally as an adult.
- [52] Jamie stated he cannot live independently: "I would not be able to keep up with the responsibilities of an adult". He said he often forgets things (e.g. to brush his teeth, to do dishes, to cook, to shower), and if "mom is away overnight, mom gets me a lifeline with friends in the mobile home park and does meal planning for me". He added that if his mother passes away, he would not know what to do, he needs company and support.

- [53] Dr. Brian Woodward has been Jamie's family doctor for approximately three years. He testified as to how Jamie presents as anxious, has difficulty expressing himself and has difficulty with execution and timing of tasks. Dr. Woodward said Jamie "has difficulty following through on his plans".
- [54] Dr. Woodward also testified how Jamie would have difficulty working full-time due to his lack of concentration and his anxiety over small details.
- [55] Jamie is clearly very fragile and experiences anxiety when he is outside a secure "comfort zone". He has received considerable counselling, however, it is not clear whether his limitations are receding. His current employment is minimum wage work with an employer near his home. He is dependent on his mother for specific tasks and would obviously have difficulties living on his own. The issue, however, is whether he is able to withdraw from the control of his parents.
- [56] After observing Jamie and his mother both testify, it is clear that Ms. Johnson's pain and frustration is contributing to Jamie's stress. I agree with counsel for Mr. Leach that Jamie is effectively supporting his mother, paying \$750 per month for rent and paying other miscellaneous expenses. His mother provides moral support to Jamie when she can but she relies on him financially and, I am sure, emotionally. They are very close.
- [57] Mr. Leach has referred the court to the decision of *Hartshorne v. Hartshorne*, 2010 BCCA 327 ["Hartshorne"] at para. 71 in which the Court of Appeal overturned a decision in which a son with "special needs" was found to be a "child of the marriage":
- [71] However, on the merits of the application, I find the basis upon which the trial judge concluded the son was "special needs" and therefore continues to be a child of the marriage to be unclear. It may be that the trial judge assumed this description from the reference in *Hartshorne BCCA* to the son as having "special needs" (at para. 20), which characterization appears to have been adopted in *Hartshorne SCC* by the statement that "one of whom [the children] has special needs (at para. 4). However, while the son may have "special needs" as a consequence of his diagnosis of ADHD and ODD in October 1997, there is no evidence that I am aware of, which would support a finding, that, by reason of these diagnoses, the son is unable to withdraw from the respondent's charge or provide himself with the necessities of life. In fact, the evidence would suggest otherwise. The son has the ability to work and support himself, albeit at an entry level wage. This is a situation that is not unique to the son but is experienced by many young persons who have not obtained some form of post-secondary education to increase their skills. I agree with the appellant that, in the absence of evidence of "special needs" that is linked to the son's inability to find employment to support himself, the trial judge's implicit finding of an ongoing dependency by the son by reason of his ADHD and ODD as the basis for the award of ongoing prospective child support amounts to palpable and overriding error.

- [58] Jamie is unlikely to be able to advance, in terms of employment, beyond a minimum wage position. He is also trapped in a system that provides him disability payments (which are completely justified) and allows only a minimum employment income before his disability pension is "clawed back" with the result that his total income will likely not increase at all if he works more. It is unlikely that Jamie would be able to care for himself on a fully independent basis. I suspect after hearing Mr. Leach's testimony, that he is of the opinion that by providing child support to Jamie he would be effectively supporting Ms. Johnson.
- [59] Mr. Leach has testified that Jamie would always be welcome in his home, although Jamie is of the opinion that his father has not been supportive of his "special needs" and even if he were to want to move to Calgary to be closer to his father, he would not do so out of loyalty to his mother. Jamie has never lived on his own except when he travelled to England but even in that situation, he was dependent on his mother and on his friend's parents for assistance.
- [60] Jamie earns an income of approximately \$26,000 per annum including disability benefits; he has been able to travel; and he held employment with Walmart, with the shoe store in Calgary, and elsewhere. However, it is not just Jamie's ability to find minimum wage work and disability benefits that will allow him to withdraw from his parent's care. He requires assistance, especially emotional support and practical advice which a young man not suffering his maladies would not have to worry about to be able to function in society. Currently, Jamie receives emotional support and direction from his mother.
- [61] Counsel for Mr. Leach has pointed to several government programs for which Jamie may be able to apply and receive additional funding. If he has not already done so, Jamie should take whatever steps possible to find what additional funding may be available.
- [62] Having heard Jamie's testimony at trial, I find him to be very anxious, cautious and concerned over his future. His mother, upon whom he relies emotionally, is in poor health which contributes to his anxiety regarding the future.
- [63] I find, based on all of the evidence relating to Jamie's ability or inability to withdraw from the charge of his parents, that Jamie is currently able to withdraw from his mother's charge. I base this decision on his current ability to earn an income and support himself. However, I recognize that without his mother's emotional and practical support his ability to cope would be impaired.
- [64] As in Hartshorne, there is no evidence that Jamie's disability has caused an inability to find employment to support himself. Although Jamie's disability may prevent him from working full-time, he does hold a job, and has held jobs in the past. In addition, Jamie receives disability benefits intended to address the limits on his ability to work.
- [65] I conclude that Jamie is no longer a "child of the marriage". However, if his mother is unable to provide emotional support and direction in the future, Jamie may no longer be able to support himself and deal with the daily responsibilities of adulthood. As such, at some future date, he may once again be considered a "child of the marriage".

Summary

[66] The application to set aside the Agreement, and for spousal support under s. 15.2 of the Divorce Act is denied.

[67] The application for child support is also denied. Jamie does not qualify as a "child of the marriage" at this time.

"Jenkins J."

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