

CANADA / JUDGMENT

Manley v. Lund

2009 BCSC 903

COURT

Supreme Court of British Columbia

DECIDED

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2009 BCSC 903 Manley v. Lund IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Manley v. Lund, 2009 BCSC 903 Date: 20090706 Docket: F970449 Registry: Vancouver Between: Maria Elaine Manley Plaintiff And John Haakon Lund Defendant Before: The Honourable Mr. Justice Goepel Reasons for Judgment Counsel for the Plaintiff: M.E. Manley appearing in person on her own behalf Counsel for the Defendant R.A. Hatch Date and Place of Trial/Hearing: January 5-6, 2009 February 26-27, 2009 Vancouver, B.C. Written Submissions: Defendant Plaintiff April 17, 2009 May 15, 2009

INTRODUCTION

- [1] These applications concern child support for the parties' child, Luke Anthony Manley, who was born on June 5, 1998. These applications are but the latest in many that have been brought by these parties.
- [2] The first application heard in 1998 challenged paternity. Subsequent applications have dealt with child support, custody and access. Since 2005, Ms. Manley has filed 21 affidavits, and Mr. Lund has filed nine. Most of those affidavits were before me on this application. They filled five large black binders. In addition, Mr. Lund gave viva voce evidence at the hearing and was cross examined by Ms. Manley.
- [3] Ms. Manley's notice of motion of September 18, 2008 seeks 27 forms of relief. The relief sought includes the imputation of income to Mr. Lund back to January 2002, an order for lump sum retroactive child support, an order setting ongoing child support, claims for retroactive and ongoing expenses pursuant to s. 7 of Federal Child Support Guidelines, S.O.R./97-175 (the "Guidelines") and an order that Mr. Lund be held in contempt for non-disclosure.
- [4] Mr. Lund submits that a review of support paid, compared to income earned, shows that he paid more in support than required under the Guidelines. He further submits that he has made full disclosure as required. Pursuant to his notice of motion of November 17, 2008, he seeks 10 forms of relief including directions spelling out future disclosure obligations.

- [5] The hearing was set for two days. It lasted four. Ms. Manley commenced her closing submissions at 2:00 pm on February 27, 2009. Those submissions lasted approximately two hours. Because this matter had been so long outstanding, I agreed to sit late to complete submissions. Mr. Hatch, counsel for the defendant, finished his submissions at approximately 5:25 pm and Ms. Manley then made reply submissions until 5:50 pm.
- [6] On March 3, 2009, Ms. Manley wrote to the court seeking permission to file written argument. In her requisition, she indicated that because of the manner in which the hearing had been extended she had not had an adequate opportunity to reply to the defendant's submission.
- [7] On March 13, 2009, after hearing submissions from the parties, I granted leave to Ms. Manley to file a written reply. That submission was to be filed by April 3, 2009. Mr. Hatch was to have until April 17, 2009 to file a response.
- [8] On April 17, I was advised in correspondence from Mr. Hatch that Ms. Manley's reply had not been filed. Ms. Manley's submission was not filed until May 15, 2009. It was 120 pages long. While the submission is not limited to reply I have reviewed the entire submission, albeit I have not referenced all matters raised in the submission in these reasons.

BACKGROUND

A. Overview

- [9] Ms. Manley is now 42 years old. Mr. Lund is 51. The parties had a 14-month relationship that ended several months before Luke's birth.
- [10] Pursuant to the order of Mr. Justice Silverman dated July 20, 2006 Ms. Manley has sole custody, with Mr. Lund entitled to access as detailed in that order. The parties share joint guardianship.
- [11] In order to put this application in context, it is first necessary to review in some detail Mr. Lund's work history, his earnings, his support payments, and some of the earlier court proceedings. B. Work History
- [12] Throughout his working life, Mr. Lund has found employment in various fields. From 1997 through 2001, he worked as a freelance children's book illustrator earning between \$30,000 and \$40,000 per year.
- [13] In early 2001, his work began to slow down. Many projects were postponed or cancelled. After the events of September 11, 2001, he was unable to find any work as an illustrator. He sublet his apartment and moved in with his parents because he could no longer afford to pay rent.

- [14] Mr. Lund began to seek other work. He considered a career in law enforcement. He took training as a security guard at the Justice Institute of British Columbia and throughout much of 2002 he worked intermittently as a security guard.
- [15] In January 2002, he applied to the Delta police force. He passed the initial selection process and wrote an entry level examination. In April 2002, he attended a job interview. In June 2002, he was advised that his application was unsuccessful.
- [16] On January 17, 2003, Mr. Lund made an assignment in bankruptcy. His filed statement of affairs listed \$1,800 in assets and \$33,671.47 in liabilities. His major creditor was the law firm that had acted for him in earlier applications in this proceeding.
- [17] One of the debts disclosed in the bankruptcy was \$5,000 to David Hart, Ms. Manley's former counsel. That debt represented the balance owing from a cost order made by Master Bolton in October 1998 in this action. Mr. Lund was discharged from bankruptcy on October 18, 2003. One of the orders Ms. Manley seeks on this application is a declaration that the debt arising from the cost order survived Mr. Lund's bankruptcy.
- [18] In September 2002, Mr. Lund obtained work as a production assistant on a feature film. He discovered he could apply his skills as an illustrator to the role of storyboard artist in the film and television industry. A storyboard artist works with the script of a movie, television program or commercial and illustrates panels which tell the story of the script through pictures.
- [19] Mr. Lund's first employment as a storyboard artist came in January 2003. The bulk of his initial work was for television commercials through small independent production companies whom he invoiced for his services. He did, however, do some work for television production companies for work outside the union. As he was not at that time a permittee of the film unions, he could not be registered as a crew member or paid through payroll companies as union members are.
- [20] Mr. Lund testified that initially he worked sporadically as a story book artist. When not working, he spent his time networking and building contacts in the industry. He developed a portfolio which he could show to prospective clients. In 2003 and 2004, his earnings were limited. By 2005, he began to reap the rewards of his networking efforts and his income increased substantially.
- [21] In 2005, Mr. Lund became a permittee of the film unions. From that point forward, his film and television work has been paid through timesheets submitted to the payroll companies which process payments to union workers. He continues to invoice for work he does on television commercials, which is outside the union framework. As he has developed his reputation as a storyboard artist, his focus has shifted towards film and television work and, accordingly, he now does less work on television commercials. The commercial work is reported as business income while the film and television work, through the unions, is reported as employment income.

- [22] Over the last several years, Mr. Lund has been successful in building up his business. His income remains subject to significant fluctuations as the film and television industry can be vulnerable to disruptions due to labour disputes or government policies. For example, from September 2004 to March 2005, there was virtually no work while the industry was at a standoff with the B.C. government over tax policy. In the fall of 2007, a writers' strike shut down the industry for over four months.
- [23] In the years since Luke's birth, Ms. Manley has worked but sporadically. From September 1998 until May 2001, she attended Capilano College where she obtained a diploma in Academic Studies. In September 2001, she commenced full-time studies at UBC. In November 2006, she graduated from UBC with a double major in Arts History and English Literature. Since graduation, Ms. Manley has sought employment with limited success. Her income for 2007 was less than \$8,000. C. Mr. Lund's Earnings
- [24] Since 2000, there have been significant variations in Mr. Lund's earnings. His Line 150 income for the years 2000 to 2007, as disclosed in his tax returns, is as follows: 2000 2001 2002 2003 2004 2005 2006 2007 20,046.03 6,993.00 11,495.00 14,861.60 18,409.95 67,760.00 108,401.11 76,561.12
- [25] Mr. Lund must pay union, professional and similar dues. In addition, for the last several years he has claimed various other employment expenses. Taking his expenses into account, he submits that his income for Guidelines purposes is as follows: 2000 2001 2002 2003 2004 2005 2006 2007 20,046.03 6,933.00 11,203.00 14,768.56 18,326.19 57,549.81 93,246.58 62,021.76 D. Prior Proceedings
- [26] Ms. Manley's initial application for child support was brought before Master Bolton in October 1998. Mr. Lund was at that time working as a children's book illustrator. Master Bolton recognized Mr. Lund's earnings would fluctuate and could not be predicted with great certainty, since they depend on obtaining contracts to illustrate particular books. He imputed income to Mr. Lund of \$36,000 per year. Child support was set at the sum of \$310 per month plus \$250 as his contribution towards daycare expenses.
- [27] By order of Mr. Justice Thackeray dated October 3, 2000, Mr. Lund's proportionate contribution to daycare expenses was increased to \$267 per month. That order was made by consent. A term of that order was that Mr. Lund would provide Ms. Manley with his income tax returns and Revenue Canada assessments by May 15 of each year.
- [28] In August 2001, as Mr. Lund's work as an illustrator began to dry up, he applied to reduce his child support payments. In the first five months of that year, he had earned but \$11,000. Mr. Justice Hunter accepted that Mr. Lund's income had been reduced. Based on his earnings to date, he set Mr. Lund's Guidelines income at \$25,300 and ordered that he pay \$224 per month in child support commencing September 1, 2001. His proportional share of daycare costs was reduced to \$232 per month. He was ordered to advise Ms. Manley of any increase in his income over \$27,000.

- [29] In June 2002, Mr. Lund sought a further reduction in his child support obligations given his reduction in income. That application was dismissed by Madam Justice Brown on July 2, 2002. She ordered an increase in Mr. Lund's share of childcare expenses to \$252 per month.
- [30] The orders of Mr. Justice Hunter and Madam Justice Brown remain in force. Ms. Manley first applied to vary those orders in July 2006. The parties have, on various occasions, attempted unsuccessfully to have the variation application heard. E. Support Payments
- [31] The records of Family Maintenance Enforcement Program ("F.M.E.P.") indicate that Mr. Lund has made the following annual payments: 2001 \$4,852.00 2002 \$3,214.00 2003 \$5,782.00 2004 \$6,820.50 2005 \$6,508.46 2006 \$5,670.49 2007 \$7,066.00 2008 \$7,450.00
- [32] While the amount paid is not an issue, how the monies were allocated over the years is not readily apparent. Pursuant to the orders of Justices Hunter and Brown, Mr. Lund was to pay a total of \$476.00 per month (\$5,712 per year) of which \$252.00 (\$3,024 per year) was in regard to childcare expenses. Over the years, childcare expenses have decreased. Material filed by Ms. Manley indicate that her childcare expenses net of government subsidies received were as follows: 2002 \$288.52 2003 \$3,588.52 2004 \$2,337.00 2005 \$757.76 2006 \$700.16 2007 \$700.88 2008 \$426.00 TOTAL: \$8,798.84
- [33] The court orders indicate that Mr. Lund was to pay his proportionate share of childcare costs. What is not clear from the material is how that proportionate share was to be determined. For example, I note that pursuant to the order of Mr. Justice Hunter of August 30, 2001, Mr. Lund was to pay \$232.00 per month as his proportionate contribution. The material before me indicates that during the months of January - April 2002, \$232.00 was the entire amount owing net of the government subsidy.
- [34] Madam Justice Brown increased Mr. Lund's monthly contribution to childcare commencing August 1, 2002 to \$252.00. I note that the daycare costs for the months of May - August 2002, were \$187.00, \$143.00, \$161.40 and \$216.60 respectively. During those months, it appears that Mr. Lund was, pursuant to the court order, paying more than 100 percent of the daycare costs. In September 2002, the daycare costs were \$301.88 per month, increasing in October 2002 to \$316.88. Daycare costs remained greater than Mr. Lund's contribution through to mid 2004. Thereafter, daycare costs have been for most months well under the amount that Mr. Lund, by court order, was ordered to contribute.
- [35] As will be set out below, in determining whether or not Mr. Lund has met his obligations, I intend in the first instance to attribute all monies he has paid to basic child support and will make a subsequent adjustment to take into account his daycare obligations.
- [36] As Mr. Lund's income has increased, he has voluntarily increased his support payments. He testified he has determined the amount he should pay by taking the average of his prior three years earning. Since August 1, 2008 he has been paying \$650 a month in child support.
- FINDINGS RE INCOME

- [37] Ms. Manley challenges Mr. Lund's income as disclosed in his income tax returns. She submits that during the period 2002 - 2004 Mr. Manley failed to earn what he was capable of earning and that the court should impute income to him for those years.
- [38] Ms. Manley submits that Mr. Lund has failed to disclose all his income. She further submits that child support should be based on his Line 150 income without regard to his claimed expenses. To the extent that the court concludes that Mr. Lund's income is greater than that set out in his income tax returns, Ms. Manley seeks an order of retroactive support. A. Imputation of Income 2002-2004
- [39] Pursuant to s. 19(1)(a) of the Guidelines, the court can in certain circumstances impute income. That section reads: 19(1) The court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following:
- (a) the spouse is intentionally underemployed or unemployed, other than where the under-employment or the unemployment is required by the needs of a child of the marriage or any child under the age of majority or by reasonable education or health needs of the spouse.
- [40] In *Hanson v. Hanson*, [1999] B.C.J. No. 2532 (S.C.), Martinson J., at paras. 14-17, set out the principles that a court considers in determining whether to impute income:
- [14] The following principles apply when determining capacity to earn an income. (See Dr. Julien D. Payne, *Imputing Income, "Determination of Income; Disclosure of Income"*, Child Support in Canada, Danrab Inc., August 3, 1999.)
1. There is a duty to seek employment in a case where a parent is healthy and there is no reason why the parent cannot work. It is "no answer for a person liable to support a child to say he is unemployed and does not intend to seek work or that his potential to earn income is an irrelevant factor." (Van Gool at para 30.)
 2. When imputing income on the basis of intentional under-employment, a court must consider what is reasonable under the circumstances. The age, education, experience, skills and health of the parent are factors to be considered in addition to such matters as availability of work, freedom to relocate and other obligations.
 3. A parent's limited work experience and job skills do not justify a failure to pursue employment that does not require significant skills, or employment in which the necessary skills can be learned on the job. While this may mean that job availability will be at the lower end of the wage scale, courts have never sanctioned the refusal of a parent to take reasonable steps to support his or her children simply because the parent cannot obtain interesting or highly paid employment.
 4. Persistence in unremunerative employment may entitle the court to impute income.

5. A parent cannot be excused from his or her child support obligations in furtherance of unrealistic or unproductive career aspirations.
 6. As a general rule, a parent cannot avoid child support obligations by a self-induced reduction of income.
- [15] Professor James G. McLeod has commented on the concept of attributing income when a parent changes jobs or a career. (See Annotation, 45 R.F.L. (4th) 2.) In his opinion, courts have been too willing to attribute income without regard to whether a parent can actually earn money within the immediate future.
- [16] He suggests that a court should attribute income following a career/job change only if the change was unreasonable in the circumstances or undertaken to defeat support. He argues that in attributing income, courts expose a paying parent to quasi-criminal sanctions if he or she cannot make the payments. He says that a court should not expose a person to such sanctions without some evidence that he or she has acted improperly or at least unreasonably.
- [17] I agree that income should not be imputed when a change was reasonable in the circumstances. Reasonableness must be assessed in light of the joint obligation of parents to maintain their children and the requirement that a parent must earn to his or her ability. The general principles relating to income earning capacity, set out above, must be applied.
- [41] It is clear that during the years 2002 - 2004 Mr. Lund earned little. That in itself, however, is not a basis for imputing income. Mr. Lund's lack of income did not result from intentional unemployment. He had worked for several years successfully as an illustrator. Beginning in early 2001, his work began to dry up. After September 11, 2001, it stopped almost completely. Mr. Lund did not, however, stay home, but sought alternative means of employment. His initial plan was to work in law enforcement. To that end, he obtained training as a security guard and was shortlisted when he applied for employment with the Delta police force.
- [42] In the fall of 2002, Mr. Lund learned that he could apply his skills as an illustrator to the role of storyboard artist in the film and television industry. By 2004, he was beginning to earn significant sums of money in his new career. There was virtually no work from September 2004 to March 2005 while the industry sought tax concessions from the B.C. government. Since that dispute ended, Mr. Lund has, in his new career, earned amounts far in excess of what he had earned as an illustrator.
- [43] I accept that if Mr. Lund had not chosen the path that he did, he might well have earned more in the years 2002 -2004. Instead, he used those years to learn new skills and lay the groundwork for his career as a storyboard artist. That was a reasonable decision. As a result of that decision, he has, since 2005, earned considerably more than he ever did as an illustrator.

- [44] This is not a case of intentional underemployment or persistent work in un-remunerative employment. Mr. Lund was forced to change careers when he could no longer earn a living as an illustrator. His new career has, in fact, proven to be quite successful and, as a result of his increase in income, he has been able to increase his child support payments. In the circumstances of this case, it is not appropriate to impute income to Mr. Lund for the years 2002 - 2004. B. Disclosure of Income
- [45] Ms. Manley alleges that Mr. Lund has failed to disclose all his income. She reaches this conclusion as a result of a painstaking analysis and parsing of Mr. Lund's income tax returns, his Form 89 disclosures, and the numerous invoices he has submitted in regard to work he has performed. In doing so, she has mixed and matched information and drawn conclusions not warranted by the evidence.
- [46] A prime example concerns Mr. Lund's 2004 income. Mr. Lund's tax returns are based on a December 31 year end. In his Form 89, sworn September 26, 2005, Mr. Lund includes a financial statement for the period September 1, 2004 to August 31, 2005. The statement discloses business income in that period of \$38,767, a monthly average of \$3,230. In fact, almost all the money was made in 2005 as the film industry was basically dormant in the last four months of 2004.
- [47] Ms. Manley then analyzes Mr. Lund's 2004 income as disclosed by invoices. To that sum, she adds \$11,192.40 representing the monthly average disclosed in the Form 89 for which there are no invoices and claims that Mr. Lund has failed to disclose all his 2004 income. The reality, however, is that almost no money was made in the last four months of 2004. All of the income set out in the September 26, 2005 Form 89 formed part of Mr. Lund's 2005 income and was reported on his 2005 tax return.
- [48] Mr. Lund's Form 89 and tax returns are not consistent because they do not cover the same financial periods. Having considered the affidavit material and the explanations given by Mr. Lund, I find that his income tax returns accurately report the income he has earned. In that regard, I note that Mr. Lund's 2003 and 2004 tax returns were audited by Revenue Canada and subject to only a minor variation. There is no basis in fact for Ms. Manley's allegations that Mr. Lund has hidden or failed to disclose all income that he has earned. C. Deductions of Expenses
- [49] Ms. Manley submits that child support should be calculated on the basis of Mr. Lund's Line 150 income. That submission is not consistent with the Guidelines. The Guidelines allow an individual to deduct reasonable employment and business expenses from income. Pursuant to the Guidelines, the reasonableness of an expense deduction is not solely governed by whether the deduction is permitted under the Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.). I have reviewed the deductions set out in Mr. Lund's material and find that the deductions are reasonable and proper. I find that Mr. Lund's income for Guidelines purposes is as set out in the table at paragraph 25 of these reasons. DISCLOSURE

- [50] Ms. Manley makes numerous complaints of non-disclosure, in particular, about the failure of Mr. Lund to promptly advise of his increase in income. Given Mr. Lund's self-employed status, his income tax returns need not be filed until June 15 of the following year. At paragraph 18 of her affidavit #21, sworn on November 24, 2008, Ms. Manley has set out the dates of disclosure of Mr. Lund's tax returns and Notices of Assessment. Ms. Manley's affidavit does not support her contention that Mr. Lund has unduly delayed reporting his increases in income. In each taxation year, other than 2004, Mr. Lund provided Ms. Manley within weeks of filing his income tax return either the income tax return or his Notice of Assessment. The only year that appears not to have occurred was in regard to Mr. Lund's 2004 income tax return. I note that his income that year was less than \$20,000.
- [51] It was only in 2005 that Mr. Lund began to earn income in excess of \$25,300 per year, being the Guidelines amount found by Mr. Justice Hunter in 2001. His 2005 income tax return disclosing his increase in income was provided to Ms. Manley on July 17, 2006.
- [52] The purpose of disclosure is to allow a party to know whether an existing support order should be varied. While disclosure in this case may not have been perfect, I find that Mr. Lund advised Ms. Manley in a timely manner of the increases in his income such that she could have the appropriate information to bring an application to increase child support.
- ORDER FOR CHILD SUPPORT
- [53] The evidence indicates that Mr. Lund's income fluctuates from year to year. The amount he earns is dependent upon activity in the industry in which he works. In the circumstances of this case, it is appropriate to average his income over three years to determine his ongoing child support obligations.
- [54] Mr. Lund's three-year moving average adjusted income commencing in 2002 is as follows:
2002 2003 2004 2005 2006 2007 12,727.34 10,968.19 14,765.92 30,214.85 56,374.19 70,939.38
- [55] Taking his income for the years 2005-2007, Mr. Lund's three-year average in 2007 for purpose of the Guidelines is \$70,939.38. Based on that sum, he should be paying child support of \$662 per month.
- [56] As Mr. Lund need not file income tax returns until June 15 of each year and child support will continue to change dependent on his earnings, it is appropriate that child support be varied effective September 1 of each year. That date will give the parties sufficient time to disclose financial information and determine the new level of support.
- [57] Since August 1, 2008, Mr. Lund has been paying child support in the sum of \$650 per month. Effective September 1, 2008, child support should have been paid in the amount of \$662 per month. The shortfall over the past 11 months is \$132 and that amount should be paid on or before August 1, 2009.

- [58] Child support shall remain at \$662 per month until September 1, 2009. I order the parties on an annual basis to exchange their income tax returns no later than July 15 of each year. In addition, they shall deliver to each other within 14 days of their receipt their Notices of Assessment.
- [59] Child support will be varied commencing September 1 of each year based on the average of Mr. Lund's last three years income. Child support commencing September 1, 2009 will be based on the three-year average of Mr. Lund's earnings taken from his 2006, 2007 and 2008 income tax returns. Retroactive Child Support
- [60] Ms. Manley claims retroactive child support based on Mr. Lund's increased income commencing in 2005. In determining whether a court should award retroactive child support, "the court should strive for a holistic view of the matter and decide each case on the basis of its particular factual matrix": D.B.S. v. S.R.G., 2006 SCC 37 at para. 99, [2006] 2 S.C.R. 231.
- [61] In this case, the factual matrix must take into account that Mr. Lund was ordered to pay child support in 2001 based on a Guidelines income of \$25,300. In fact, as set out in the table at paragraph 24, his earnings in the years 2001-2004 were well below that amount.
- [62] As set out in the table below, Mr. Lund, based on his actual Guidelines income, has since 2003 paid \$17,871.45 more in child support than required under the Guidelines. The three-year average earning amount used in the table is taken from the table at paragraph 54 and represents Mr. Lund's three-year average earnings in the three immediately preceding years.
- | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
|--------------------------------|------|-----------|------|-----------|------|-----------|------|-----------|------|-----------|------|-----------|--------------------------|----------|----------|----------|----------|----------|----------|-----------|-----------------|----------|----------|----------|----------|----------|----------|-----------|-------------|----------|----------|----------|----------|--------|----------|-----------|
| OVERPAYMENT 3-Yr Avg. Earnings | 2003 | 12,727.34 | 2004 | 10,968.19 | 2005 | 14,765.92 | 2006 | 30,214.85 | 2007 | 56,374.19 | 2008 | 70,939.38 | Total Guideline Payments | 1,212.00 | 1,164.00 | 1,464.00 | 3,324.00 | 6,312.00 | 7,944.00 | 21,420.00 | Actual Payments | 5,782.00 | 6,820.50 | 6,508.46 | 5,670.49 | 7,060.00 | 7,450.00 | 39,291.45 | Overpayment | 4,570.00 | 5,656.50 | 5,044.46 | 2,346.49 | 748.00 | (494.00) | 17,871.45 |
|--------------------------------|------|-----------|------|-----------|------|-----------|------|-----------|------|-----------|------|-----------|--------------------------|----------|----------|----------|----------|----------|----------|-----------|-----------------|----------|----------|----------|----------|----------|----------|-----------|-------------|----------|----------|----------|----------|--------|----------|-----------|
- [63] As of December 31, 2002, F.M.E.P. recorded child support arrears of \$3,760.50. Subtracting that amount leaves an overpayment of \$14,110.95.
- [64] That figure does not take into account Mr. Lund's childcare obligations. As noted, Ms. Manley paid childcare in the sum of \$8,798.84. Even if Mr. Lund was responsible for all childcare payments, a doubtful proposition, Mr. Lund has still paid \$5,312.11 in excess of his Guidelines obligations.
- [65] Given the above calculations, I find that Mr. Lund has met his support obligations pursuant to the Guidelines and it would not be appropriate to order retroactive child support. Special Expenses

- [66] Ms. Manley seeks an order that Mr. Lund pay his proportionate share of Luke's expenses for extracurricular activities incurred by the plaintiff for Luke's benefit from April 1, 2005. The extracurricular activities include lessons in martial art, piano and diving, gymnastics, attendance at multisports, kayaking and hockey camps, and hockey equipment. The expenses total \$6,950.38. She further seeks an order that Mr. Lund pay his proportionate share of Luke's ongoing extracurricular activities.
- [67] A significant difficulty with this part of the application is Ms. Manley's failure over the years to earn any significant amounts of income. Extraordinary expenses are to be shared by the parties in proportion to their income. As set out in Hanson, both parents have an obligation to support their child and if a party elects not to earn income, the court may impute income. Ms. Manley's decision to attend school for some eight years does not excuse or lessen her obligation to support her child. Ms. Manley has fairly acknowledged this obligation and for that reason has submitted that extraordinary expenses should be divided equally between the parties.
- [68] A second problem with the application is that some of the activities do not appear to be extraordinary expenses but rather matters that should be covered in the normal course under the support paid pursuant to the table amounts. The evidence led on the application makes it most difficult to determine which of the activities fall under s. 7 of the Guidelines.
- [69] Mr. Lund has custody of Luke for almost one-third of the days of the year and when Luke is with him he covers all Luke's expenses. While he acknowledges that he should pay some amount for extracurricular activities, he is concerned that he is not consulted about the programs or activities in which Luke is enrolled and that the extracurricular activities in which Luke has been enrolled have at times been excessive and duplicative. He also notes that the plaintiff often enrolls Luke in scheduled activities which conflict with Mr. Lund's access times.
- [70] At the outset of the hearing, Mr. Lund sought an order fixing the amount that he would pay for extracurricular matters at \$100.00 per month. In his closing submissions, he indicated he was no longer seeking such an order and submitted that the plaintiff should consult with him with respect to proposed activities and expenses and Mr. Lund would exercise his judgment as to whether, and to what extent, he would contribute.
- [71] Given the history of difficulties between these parties, it is unlikely that any meaningful consultation will take place between them in relation to Luke's activities, although it would certainly be beneficial. Given Mr. Lund's initial suggestion that he pay \$100 per month towards extracurricular activities and Ms. Manley's position that such costs be divided equally between them, I order that Mr. Lund reimburse Ms. Manley for one-half of her contribution to Luke's extracurricular activities up to a maximum contribution of \$1,200 per year. If Luke's extraordinary activities exceed \$2,400 per year, the additional cost will be to the account of Ms. Manley.

- [72] Given Mr. Lund's overpayment of basic support, I am not going to order Mr. Lund to contribute to any past extraordinary expenses. Contempt of Court
- [73] Ms. Manley seeks an order that Mr. Lund be held in contempt of court. Among other matters, she submits that Mr. Lund misled F.M.E.P. as to his income, made false statements to Revenue Canada on his tax returns, wilfully and fraudulently misrepresented his income and means and sources of income in affidavits and sworn financial statements filed in these proceedings, wilfully and without legal justification altered or obliterated financial documents in order to conceal relevant financial information, failed to produce all relevant documents in a timely manner, lied under oath in relation to various paragraphs of certain affidavits, has habitually disobeyed the court's orders with respect to disclosure of income and the payment of child maintenance and s. 7 expenses, and obtained a discharge from bankruptcy under false pretences or fraud.
- [74] I do not intend to individually review each of the plaintiff's allegations. They are without legal foundation or merit. There is no evidence that Mr. Lund has wilfully defied the court. There is no basis to find him in contempt. The application to hold Mr. Lund in contempt is dismissed. Bankruptcy Debt
- [75] In October 1998, Master Bolton awarded Ms. Manley costs arising from her initial application for child support. As of May 1, 2002, \$5,755 of the cost award remained unpaid. In late 2002, Mr. Lund was contacted concerning the outstanding cost award by a collection agent working for David Hart who had acted as counsel for Ms. Manley in the proceedings that led to the cost award. When Mr. Lund declared bankruptcy in January 2003, he listed a \$5,000 debt to Mr. Hart. Mr. Hart filed a proof of loss in the bankruptcy claiming the outstanding costs.
- [76] On October 29, 2003, Mr. Lund was discharged from bankruptcy and released from all debts except those matters referred to in s. 178(1) of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 (the "BIA"). Section 178(1)(c) reads: 178 (1) An order of discharge does not release the bankrupt from...
- (c) any debt or liability arising under a judicial decision establishing affiliation or respecting support or maintenance, or under an agreement for maintenance and support of a spouse, former spouse, former common-law partner or child living apart from the bankrupt
- [77] The cost debt arose pursuant to a judicial proceeding respecting support for a child. A cost award with respect to a support order is part of a support award for the purposes of the BIA and survives the bankruptcy: *Lees (Bankruptcy of)*, 2002 BCSC 570, 35 C.B.R. (4th) 150; *S.L.M. v. D.R.M.*, 2003 BCSC 1094, 47 C.B.R. (4th) 77. In the result Mr. Lund remains liable to pay the cost award. Ongoing Disclosure
- [78] The parties do not agree regarding what ongoing disclosure must be made by Mr. Lund to comply with his obligations pursuant to the Guidelines and have asked the court for guidance in the hope of minimizing further disputes.

- [79] I have already ordered that the parties exchange copies of their tax returns no later than July 15 of each year and copies of their Notices of Assessment within 14 days of receipt. The plaintiff also asks that Mr. Lund provide copies of his time/reports or Crew summaries on a regular and ongoing basis. She seeks that information on the grounds that it is imperative for herself and F.M.E.P. to have all relevant payroll information including the name and address of each and every payroll company providing services to the film industry, should the defendant fall into arrears.
- [80] Ms. Manley also seeks an order that Mr. Lund provide true copies of invoices for work performed on a freelance basis and copies of his contracts and U.S. statements of royalties on the various published media he has worked on and any other income information necessary to determine the amount of financial support. She also seeks an order that there be an annual review of child support before a judge of the Court in order to ensure that the defendant fulfills his disclosure requirements.
- [81] Mr. Lund submits that the income information required for the assessment of Mr. Lund's support obligations is solely contained in his annual tax returns. He submits that the plaintiff's demand for production of all his business receipts is more than is required by court rules.
- [82] On a going forward basis, the only matters for determination are the parties' respective incomes. This information is available from their income tax returns. In addition to the income tax return, Mr. Lund shall also provide Ms. Manley with a breakdown of the expenses he is claiming to reduce his income. He need not, however, provide individual receipts for those expenses. Absent a claim of hardship by either party, additional financial information of the nature set out in the Form 89s is not required.
- [83] Once the parties have exchanged their financial information, they should be able to agree on Mr. Lund's 2008 and subsequent years' income which, in turn, will lead to an automatic adjustment in support payments. If the parties cannot agree, they will of course have to apply to Court. I will remain seized of any applications dealing with Luke's ongoing support.
- Service of Documents
- [84] On October 5, 2006, Madam Justice Loo ordered that service of documents upon the plaintiff is to be effected by means of email. Ms. Manley submits that service of documents by email is no longer an appropriate means of delivery. She submits she has had difficulty opening attachments.
- [85] Electronic delivery of documents tends to be faster and more efficient than any other method. I am not inclined to interfere with Madam Justice Loo's order save and except I will order that in addition to sending documents electronically, the defendant should also serve Ms. Manley by fax at a fax number that she shall provide and keep current. Similarly, Ms. Manley must advise of any changes in her electronic address for service. Pleadings

- [86] Ms. Manley submits that Mr. Lund has made a number of unnecessary, scandalous, frivolous, or vexatious statements in the course of these proceedings. She seeks to strike out his pleadings. There is no basis to make such an order. The only matter with which the Court is concerned is the appropriate level of support. That matter is not subject to pleadings and Ms. Manley's application is misguided. It is dismissed. Costs
- [87] Mr. Lund has been substantially successful on almost all issues. In the course of her submissions, Ms. Manley has accused him of fraud and lying under oath. I have found those allegations to be without merit. In the normal course, a party who makes such unfounded allegations is subject to an order for special costs. I have considered such an order, but have decided against it because Ms. Manley is self-represented. She may well not understand the consequences that flow from such unfounded allegations.
- [88] I award Mr. Lund one set of costs on Scale B arising from the applications before me. Those costs are payable forthwith after taxation. In making this award, I appreciate that Ms. Manley did succeed on the matter arising out of the 1998 cost award. That matter took a minuscule part of the total time involved in these proceedings. Mr. Lund will be entitled to set off from the amounts owing under the 1998 cost order the costs awarded on this application.
- [89] In summary therefore, I make the following orders:
- (a) Mr. Lund's Guidelines income is set effective September 1, 2008 at \$70,939;
 - (b) As of September 1, 2008, Mr. Lund shall pay child support of \$662 per month;
 - (c) Arrears of child support as of July 1, 2009, are set at \$132;
 - (d) Arrears of child support shall be paid on or before August 1, 2009;
 - (e) The parties will exchange complete tax returns and other financial information as set out in these reasons by July 15 of each year;
 - (f) The parties will exchange Notices of Assessment within 14 days of receipt;
 - (g) Child support shall be varied September 1 of each year based on the three-year average of Mr. Lund's earnings as disclosed in his income tax returns;
 - (h) The application for retroactive child support is dismissed;
 - (i) The application to find Mr. Lund in contempt is dismissed;
 - (j) Madam Justice Brown's order of July 2, 2002 is varied to eliminate the requirement that Mr. Lund contribute to child care expenses;
 - (k) Ongoing s. 7 expenses are set at \$2,400 per year. Mr. Lund will pay one-half of that amount on receipt of invoices. Any extraordinary expenses in excess of \$2,400 will be paid by Ms. Manley;

- (l) Madam Justice Loo's order of October 5, 2006 is varied so that service of documents on the plaintiff will also be made by fax.
- (m) The costs arising from Master Bolton's order of October 28, 1998, were not discharged from Mr. Lund's bankruptcy;
- (n) Costs of these applications to Mr. Lund is payable forthwith after taxation;
- (o) I remain seized of any further applications concerning support for Luke. "R.B.T. Goepel J."

The Honourable Mr. Justice Richard B.T. Goepel

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