
CANADA / JUDGMENT

Olsen v. Chinniah

2012 BCSC 139

COURT

Supreme Court of British Columbia

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2012 BCSC 139 Olsen v. Chinniah

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Olsen v. Chinniah,

2012 BCSC 139

Date: 20120130

Docket: E111561

Registry: Vancouver

Between:

Dave Olsen

Appellant

And

Leela Chinniah

Respondent

Before: The Honourable Mr. Justice Blair

in Chambers

On appeal from a decision of the Provincial Court of British Columbia

dated April 11, 2011, Vancouver Registry, Docket No. 07-21571

Reasons for Judgment

Dave Olsen appeared on his own behalf

Counsel for the Respondent:

C.R. Lewis

Place and Date of Hearing:

Vancouver, B.C.

November 21 & 22, 2011

Place and Date of Judgment:

Vancouver, B.C.

January 30, 2012

- [1] The appellant, Dave Olsen, appeals the April 11, 2011 decision of the Honourable Judge B.K. Davis, of the Provincial Court of British Columbia that the respondent, Leela Chinniah, have sole custody and sole guardianship of the parties' six year old child, Anicca Rosalia Chinniah, and that Mr. Olsen's time with Anicca include mid-week access, alternating weekends, and further access during school holidays.
- [2] The trial judge further directed that Mr. Olsen pay retroactive child support of \$280 a month for the period October 2009 to March 31, 2011, and child support of \$370 a month commencing April 1, 2011, the latter sum based on Mr. Olsen's income which the trial judge imputed to be \$40,000 a year. The trial judge also ordered that the parties share equally the cost of the report by psychologist, Dr. Rebecca St. Clair England, prepared pursuant to s. 15 of the Family Relations Act, R.S.B.C. 1996, c. 128 [FRA].
- [3] In this appeal, Mr. Olsen seeks either a new trial or the alteration by this court of most, if not all, of the trial judge's conclusions found in his 25-page reasons for judgment filed April 11, 2011. The result sought by Mr. Olsen from this appeal would be an order that the parties have joint guardianship and joint custody of Anicca, that a shared parenting program would be imposed whereby Anicca would spend alternating weeks with each parent, that pursuant to Dr. England's suggestion a parenting coordinator be appointed to assist in resolving future conflict between the parties, and that the shared parenting program would require that child support be determined based on the parties' incomes pursuant to s. 9 of the Federal Child Support Guidelines (the "Guidelines"). I infer from Mr. Olsen's submission that the trial judge's orders imputing his income and directing retroactive support ought also to be set aside.
- [4] Mr. Olsen contends the trial judge drew erroneous conclusions from the evidence and applied incorrect legal principles, contentions which he canvassed extensively in his oral and written submissions at the hearing of this appeal. The relief sought by Mr. Olsen is extensive as he seeks reversal of the trial judge's findings and replacement with conclusions consistent with what Mr. Olsen views as the correct interpretation of the evidence and the correct legal principles. If this court declines to make the alterations sought by Mr. Olsen, he

seeks in the alternative that a new trial be ordered to provide him with a further opportunity before another provincial court judge to obtain the outcome that he had anticipated receiving at the trial from which he appeals. Section 16(6) of the FRA provides that on an appeal, the court may confirm or set aside the order, make an order that the provincial court judge could have made or direct the Provincial Court to conduct a new hearing.

- [5] There are limits to an appellate review and these are succinctly expressed in *Chera v. Chera*, 2008 BCCA 374 by Madam Justice D. Smith writing for the court at para. 10:
- [10] The scope of appellate review in regard to final support orders (*Hickey v. Hickey*, [1999] 2 S.C.R. 518, 172 D.L.R. (4th) 577), and final custody orders (*Van de Perre v. Edwards*, 2001 SCC 60, [2001] 2 S.C.R. 1014), is a narrow one that limits appellate intervention to where there is shown to be a material error. A material error is said to exist where conclusive or relevant evidence has been ignored or misunderstood, erroneous conclusions drawn from it, or where incorrect legal principles have been applied. The stated rationale for this approach to appellate review is that it "promotes finality in family law litigation and recognizes the importance of the appreciation of the facts by the trial judge" (*Hickey* at para. 12) as "[t]he Court of Appeal is not in a position to determine what it considers to be the correct conclusions from the evidence. This is the role of the trial judge." (*Van de Perre* at para. 12) [Emphasis included].
- [6] Pursuant to *Chera*, the appellant must establish that the trial judge made material errors or applied incorrect legal principles from which appellate intervention might follow. Ms. Chinniah's position is that the trial judge made no material errors, nor did he apply incorrect legal principles. Her counsel submits that in his appeal Mr. Olsen is attacking the trial judge's findings of fact, rearguing the issues and, on occasion, introducing arguments not made at trial.
- [7] Mr. Olsen represented himself at both the trial and on the appeal. The trial judge, at para. 5 of his reasons, noted that Mr. Olsen, although unrepresented, was well-prepared both as to providing the exhibits he wished filed and in his list of authorities. I would add that Mr. Olsen was also well-prepared for the hearing of the appeal, including the material required to proceed and the authorities upon which he relied.

Background

- [8] The parties commenced living together in or about 2001, their daughter Anicca was born on April 10, 2005, and the parties separated in March 2007, following which Anicca lived primarily with Ms. Chinniah.
- [9] Mr. Olsen has a bachelor's degree and a master's degree in environmental studies and is self-employed in various fields, including ethical environmental consulting. Ms. Chinniah obtained a bachelor's degree in anthropology and since 2002 has worked for a Vancouver-based radio station.

- [10] The parties' differences with respect to the parenting of their daughter resulted in the filing of many motions in Provincial Court, particularly by Mr. Olsen, although Ms. Chinniah occasionally sought judicial relief. Mr. Olsen, on December 4, 2007, brought the first application, that being for custody of Annica, followed by another motion brought January 14, 2008 in which he sought custody, guardianship, and a restraining order, to which Ms. Chinniah responded by applying for custody and guardianship. The Honourable Judge Ferbey of the Provincial Court on March 12, 2008 made an interim order that the parties share joint custody, that Annica reside primarily with Ms. Chinniah, and that Mr. Olsen have access two days a week and alternating weekends.
- [11] Other orders followed in the 18 months after Judge Ferbey's March 2008 decision as the parties turned to the court to address their differing views regarding the parenting of their daughter. However, Judge Ferbey's order regarding custody, guardianship and access remained in place until September 28, 2009, when the Honourable Judge Bowden, then of the Provincial Court, in response to Ms. Chinniah's motion and in the absence of Mr. Olsen, ordered that she have sole custody and sole guardianship of Anicca, further defined Mr. Olsen's access and provided that if Mr. Olsen failed to return Anicca to Ms. Chinniah, as required by his order, that Ms. Chinniah had liberty to apply without notice to Mr. Olsen for an order that the RCMP apprehend Anicca and return her to Ms. Chinniah.
- [12] Judge Davis, on November 3, 2009, dismissed Mr. Olsen's motion to set aside Judge Bowden's September 28, 2009 order. On September 24, 2010, Judge Davis heard Ms. Chinniah's application for an interim order suspending Mr. Olsen's weekday access or for an order ensuring that Mr. Olsen would take Anicca to kindergarten during his weekday access to his daughter. Judge Davis on September 27, 2010 ordered that Mr. Olsen's weekday access would be suspended if he did not take Anicca to school as ordered. The trial commenced before Judge Davis on November 9, 2011.
- [13] I have referred to some of the judicial involvement in the parties' difficulties prior to the trial, in part to illustrate the extent of the parties' ongoing conflict resulting from their differing approaches to parenting Anicca. However, my consideration of the orders of Judge Bowden and Judge Davis also provides background to one of the grounds upon which Mr. Olsen bases his appeal. I will turn next to Mr. Olsen's submissions on appeal which will include a more extensive review of the orders made by Judge Bowden and Judge Davis.

Grounds of Appeal

Section 15 Report

- [14] In his opening on the appeal, Mr. Olsen asserts that the trial judge erred in failing to follow recommendations made by Dr. England in her s. 15 report, specifically that the parties should have joint custody and joint guardianship of Anicca, together with a proposed access schedule for the father.

- [15] A s. 15 report is generally of considerable assistance to a trial judge when addressing questions of custody, guardianship and access in the context of a family law trial. Dr. England's report, taken in its entirety, provided the trial judge with an insight from the perspective of a professional and highly trained psychologist with respect to the parties, including their personalities, their abilities, their parenting skills and the overall dynamics surrounding the parties and their child Anicca. The trial judge referred to and quoted from the report in his reasons. Further, certain of his findings appear to reflect matters discussed in Dr. England's report.
- [16] However, contrary to submissions made by Mr. Olsen, the trial judge is not bound to accept the recommendations made by the author of a s. 15 report, and to come to different conclusions with respect to custody, guardianship and the father's access to Anicca is not an error. In Chera, Smith J.A. wrote at para. 66 with respect to a s. 15 report prepared by Dr. Elterman:
- [66] I find no error in the trial judge referring to, or relying on, Dr. Elterman's report to substantiate his findings. It was open to the trial judge to accept all, part or none of Dr. Elterman's report. As already noted, the Final Order awarded the appellants significantly more access to the child than recommended by Dr. Elterman.
- [17] It was the trial judge's obligation to determine questions of custody, guardianship and access relating to Anicca based on the findings that he reached from all of the evidence, including the evidence adduced by Dr. England in her report, and bearing in mind the legal principles applicable to custody, guardianship and access.

Best Interests of the Child

- [18] In addressing custody, guardianship and access, the trial judge, at paras. 34-36 of his reasons, referred to the factors for consideration found in the FRA followed by references to the Court of Appeal's decision in *Robinson v. Filyk*, (1996) 28 B.C.L.R. (3d) 21 in which Huddart J.A. described the approach to be taken when determining the best interests of the child:
- [34] In arriving at any decision involving the child one must take into account section 24 of the Family Relations Act.
- 24 (1) When making, varying or rescinding an order under this Part, a court must give paramount consideration to the best interests of the child and, in assessing those interests, must consider the following factors and give emphasis to each factor according to the child's needs and circumstances:
- (a) the health and emotional well being of the child including any special needs for care and treatment;
 - (b) if appropriate, the views of the child;

- (c) the love, affection and similar ties that exist between the child and other persons;
- (d) education and training for the child;
- (e) the capacity of each person to whom guardianship, custody or access rights and duties may be granted to exercise those rights and duties adequately.

[35] There are a number of cases that have set out in that the best interest test applies to determining custody, guardianship and access and how that is to be applied. The B.C. Court of Appeal in *Robinson v. Filyk*, [1996] BCJ No. 2519 sets it out in an easily [understanding] way starting at paragraph 23:

23 The concept of the best interests of a child has been called ephemeral. Certainly it is difficult to apply. However transitory it may appear, this concept is nonetheless the only test for guardianship and custody of a child available to a court in British Columbia.

25 Section 24 of the Family Relations Act sets down the factors the court is to consider in assessing the best interests of the child. They include the health and emotional well being of the child, the views of the child where appropriate, the ties that exist between the child and other persons, education and training for the child, and the capacity of the available adult resources. Consideration of material well-being is relevant to guardianship of the estate of the child. Consideration of conduct is limited as in the Divorce Act.

26 In a country where there is no common parenting philosophy it may not be surprising that the legislatures have chosen to mandate individual enquiries into the individual child's best interests, rather than to impose a community view of parenting by laying down stricter guidelines for the exercise of a court's authority to decide what is in a child's best interests when parents cannot. The analysis of the child's needs and resources will be contained by the particular child's extended family and community.

27 Any thought that an enquiry into a child's best interests is to be "undertaken with a mindset that defaults in favour of a preordained outcome absent persuasion to the contrary" was dispelled in *Gordon*, supra at 58. Writing for the majority, McLachlin J. emphasized the individual nature of every enquiry at 58:

But Parliament did not entrust the court with the best interests of most children; it entrusted the court with the best interests of the particular child whose custody arrangements fall to be determined. Each child is unique, as is its relationship with parents, siblings, friends and community. Any rule of law which diminishes the capacity of the court to safeguard the best interests of each child is inconsistent with the requirement of the Divorce Act for a contextually sensitive inquiry into the needs, means, condition and other circumstances of "the child" whose best interests the court is charged with determining. "[G]eneral rules that do not admit of frequent exceptions can[not] evenly and fairly accommodate all of the varying circumstances that can present themselves": per Morden A.J.C.O. in *Carter v. Brooks*, supra, at p.51. The inquiry is an individual one. Every child is entitled to the judge's decision on what is in its best interests; to the extent that presumptions in favour of one parent or the other predetermine this inquiry,

they should be rejected. "No matter what test or axiom one adopts from the many and varied reported decisions on this subject, each case must, in the final analysis, fall to be determined on its particular facts and, on those facts, in which way are the best interests of the children met": *Appleby v. Appleby*, 21 R.F.L. (3d) 307, *supra*, at p.315.

28 This clearly articulated approach to the enquiry about a child's best interests must extend to the choice between sole and joint custody under the Divorce Act. Madam Justice McLachlin was discussing a presumption in favour of the custodial parent on an application for variation of a custody order upon proof of a material change in circumstances, which in the case before the Court, was the proposed move of the custodial mother to Australia. The view expressed, however, is equally applicable to a presumption in favour of joint or sole custody. There simply can be none, whether the presumption comes from the judiciary as an institution or from the experience of an individual judge. Nor can there be concern about parental rights unless those rights are necessary to advance the child's best interest.

29 The only issue is the child's best interest. "The child's best interest must be found within the practical context of the reality of the parents' lives and circumstances, one aspect of which may involve relocation" (Gordon, *supra* at 59).

Assertions of Legal and Factual Presumptions

- [19] In his submissions, Mr. Olsen submitted that the trial judge erred in ordering sole guardianship and sole custody to Ms. Chinniah "because this was based on legal and factual presumptions created by the interim order of Judge Bowden made on September 28, 2009", contrary to the aforementioned legal principles. Ms. Chinniah had brought the motion before Judge Bowden in response to Mr. Olsen's unilateral implementation of a week on/week off access schedule which was contrary to Judge Ferbey's order made March 12, 2008.
- [20] Judge Bowden proceeded on the evidence that Mr. Olsen had received notice of the September 28, 2009 application and heard Ms. Chinniah's motion in the absence of Mr. Olsen. He ordered that Ms. Chinniah have sole custody and guardianship of Anicca, further defined Mr. Olsen's access, and provided that if Mr. Olsen failed to return Anicca to Ms. Chinniah, as required by his order, that Ms. Chinniah had liberty to apply without notice to Mr. Olsen for an order that the RCMP apprehend Anicca and return her to Ms. Chinniah.
- [21] The significance of Judge Bowden's September 28, 2009 order, insofar as it concerns this appeal, is that Mr. Olsen continues to maintain that the latter order was fatally flawed because he was not present at the hearing. Mr. Olsen further maintains that the trial judge, from which this appeal is taken, erred when he followed Judge Bowden's order and granted sole custody and sole guardianship of Anicca to Ms. Chinniah and in limiting Mr. Olsen's access to his daughter, declining Mr. Olsen's application for joint custody, joint guardianship and a shared parenting arrangement. Mr. Olsen continues to assert that he was unaware of the September 28, 2009 hearing, that Judge Bowden's order lacked a legal basis as there was no affidavit filed specifying that he had been served with Ms. Chinniah's application, and

that he was not present at the hearing because he had not been properly served with the application.

- [22] The transcript of the September 28, 2009 hearing before Judge Bowden included evidence that Ms. Chinniah attended with a Mr. David Takashita at Mr. Olsen's home on Lasqueti Island, and that she delivered to Mr. Olsen copies of her application for sole custody and sole guardianship plus other relief, together with affidavits in support of her application. She testified before Judge Bowden that Mr. Olsen appeared to ignore the documents she delivered to him. Judge Bowden also had before him an affidavit sworn by Mr. Takashita deposing that he witnessed Ms. Chinniah delivering the documents to Mr. Olsen.
- [23] In addition, both Ms. Chinniah and Mr. Olsen signed a memorandum dated September 26, 2009 in which they acknowledged that they knew of the September 28, 2009 hearing and that both would be attending the hearing. The memorandum also included the arrangements being made for Anicca while the parties attended the hearing. In cross-examination at the trial on November 10, 2010, Mr. Olsen testified that he could not remember the memorandum and did not read it, but when queried by the trial judge, he acknowledged signing the memorandum. Mr. Olsen further acknowledged that although he did not read the memorandum, he had written "under duress" above his signature. On the basis of the evidence of service, Judge Bowden proceeded with the September 28, 2009 hearing.
- [24] Judge Davis, on November 3, 2009, dismissed Mr. Olsen's application to set aside Judge Bowden's order of September 28, 2009.
- [25] I have outlined at length, perhaps unnecessarily so, the circumstances of the September 28, 2009 hearing before Judge Bowden and his subsequent order given Mr. Olsen's submissions, at least insofar as I can understand them, that the order lacked validity in the absence of proof of service upon him and his consequent absence from the hearing. I infer from Mr. Olsen's submissions that he viewed Judge Bowden's order as tainted in some fashion and that as a result some negative consideration ought to be attached to it.
- [26] Mr. Olsen submits Judge Bowden's order later formed a factual and legal presumption adopted by the trial judge in granting Ms. Chinniah sole custody and sole guardianship with Mr. Olsen to have specified access, an order somewhat similar to that made by Judge Bowden on September 28, 2009.
- [27] Huddart J.A. in Robinson wrote at para. 30:
- [30] When the decision of a trial judge who has conducted an individual enquiry into the best interests of a child falls to be reviewed by an appellate court, that review will inevitably focus on the process and the presumptions brought to the task. If the reasons reveal a mindset with a pre-ordained default position, then the decision must be reviewed as if that mindset were not there. The trial judge who brings presumptions to the enquiry is not considering the best interests of the particular child in the particular circumstances and will have erred.

- [28] Pursuant to this latter direction, I reviewed the trial judge's reasons with a focus on the process to consider whether he brought any presumptions, legal or factual, to the task of ascertaining how Anicca's best interests might be addressed. In that review, I found nothing to suggest that the trial judge concluded that Ms. Chinniah should have sole custody and sole guardianship of Anicca as a result of any factual or legal presumption. Nor did I find anything in the reasons to substantiate Mr. Olsen's further submission that in ordering sole custody and sole guardianship, the trial judge had erred in law, inferring that the trial judge approached custody and guardianship with a mindset in which he accepted the de facto status quo of sole custody and sole guardianship originating in Judge Bowden's September 28, 2009 order.
- [29] I conclude, contrary to Mr. Olsen's submission, that the trial judge reached his conclusions regarding custody, guardianship and access solely on what he found to be in the best interests of Anicca based on the findings he reached from all of the evidence and upon the application of the appropriate legal principles.
- [30] In his reasons, the trial judge referred to the factors found in s. 24 of the FRA as well as Madam Justice Huddart's decision in Robinson. It was in the context of these legal principles that he embarked on a comprehensive consideration of the evidence as he inquired into Anicca's best interests.
- [31] At paras. 12-27 of his reasons, the trial judge reviewed the evidence and made certain findings with respect to Mr. Olsen's approach to parenting. Although Mr. Olsen asserted a desire to have a collaborative relationship with Ms. Chinniah regarding Anicca's upbringing, the trial judge found the reality seen in the evidence was that if Ms. Chinniah suggested behaviour different from that of Mr. Olsen, the latter would seek a court order or do what he wanted to do. The trial judge, at para. 14, noted that Mr. Olsen complied with court orders if they were beneficial to him and if he agreed with them, specifically referring to what he found was Mr. Olsen's failures to return Anicca at the end of access periods.
- [32] At para. 16, the trial judge noted that Mr. Olsen undercut Ms. Chinniah's authority by not taking Anicca to school during his access periods, because he was opposed to her attending public school as arranged by Ms. Chinniah. At para. 32, the trial judge refers to Mr. Olsen further undercutting Ms. Chinniah's relationship with Anicca with respect to a food reward Ms. Chinniah gave to her daughter. Mr. Olsen told the child the food was not good for her, and when Anicca returned home she told her mother that she no longer wanted the reward. At para. 19, the trial judge concluded from an exchange of emails between the parties that Mr. Olsen provided Anicca with the choice of when she was to return to her mother, even when the court-specified access visit had ended. At para. 21, the trial judge included an email authored by Mr. Olsen, and directed to the other residents in a cooperative housing unit where he stayed when in Vancouver, advising that Ms. Chinniah was "not fully well" and that she "refuses to deal with her own issues". The trial judge found there to be no basis for sending the email and that it reflected the regard Mr. Olsen had for Ms. Chinniah.

- [33] At para. 22, the trial judge found that when Mr. Olsen said he was concerned "about the best interests" of Anicca, what he really means is "in his best interest". He also found that Mr. Olsen had failed to comply with court orders, a finding denied by Mr. Olsen who said there were no orders directing him to take Anicca to school. The orders of September 27, 2010 and November 12, 2010, both directed that he take Anicca to school. Dr. England, at page 6 of her report, noted that Mr. Olsen told her that he had deliberately ignored a court order regarding access. The trial judge found Mr. Olsen lacked credibility.
- [34] In considering the evidence, the trial judge also had Dr. England's report available to him. He included references and extracts from the report at paras. 29-31, which offered background about the parties and including criticism of both individuals, but mainly directed at Mr. Olsen.
- [35] Occupational rent is not a freestanding cause of action, but rather an award "when it is just and equitable to do so
- [36] The trial judge, in his consideration of custody, guardianship and access, was aware of Dr. England's expressed concern about Anicca growing up in two different communities. She noted that the shared parenting program pressed by Mr. Olsen involved a week on/week off arrangement between the parents. Dr. England wrote that such a plan would involve Anicca dividing her time between Vancouver, where her mother lived, and Lasqueti Island, where Mr. Olsen had his primary residence. Dr. England said such an arrangement had the potential of impeding Anicca's ability to develop stability of relationships.
- [37] Mr. Olsen submitted that the trial judge misconstrued the evidence in concluding that his residence was on Lasqueti Island and that was where Anicca would reside when she was with her father. However, the order made by the trial judge clearly took into account that Mr. Olsen's access would work only if Mr. Olsen continued to spend time in Vancouver, during which he could exercise access when Anicca was attending school and residing with her mother.
- [38] The trial judge understood Mr. Olsen's ties with both Lasqueti Island and Vancouver, and in fashioning Mr. Olsen's access, the trial judge's order took into account Mr. Olsen's involvement with both communities. Those were findings available to him on the evidence and are not open to change on this review. There is no material error found in the trial judge's findings in this respect.
- [39] In concluding that Ms. Chinniah would have sole custody and sole guardianship of Anicca, the trial judge, at para. 31 of his reasons, noted that Dr. England in summarizing her report wrote:

It is hoped that this family will be able to move forward and not have long term conflict. The [writer is] mindful however, that in some small proportion of cases, protracted conflict will occur, and ultimately one parent's rights and access will need to be curtailed in order to dampen the negative impact of this. Given the results of the current evaluation, the writer's view is that should there be ongoing conflict, it is more likely to be fueled by Mr. Olsen [than] Mrs. Chinniah.

[40] The trial judge addressed his concerns regarding Mr. Olsen's behaviour in para. 36 of his reasons, writing:

[36] All of the items set out in s.24 of the Family Relations Act have been addressed above and of course in the report of Dr. England. I should perhaps address my concerns regarding s. 24(1) (e). The Father's behaviour is such, that notwithstanding his protestations in argument that he now knows the importance of complying with court orders, in not undercutting the mother and not having the child parrot his ideas, I have concerns that he will not change his behaviour for the reasonable foreseeable future. His position prior to and during the trial leads me to conclude that he ought not have the involvement in the decision making process that joint guardianship would permit. His behaviour in the past may have been best intentioned, but it certainly was not in the best interest of his child.

[41] Mr. Olsen submits that the trial judge's findings about him were not supported by the evidence. I find it unnecessary to address the trial judge's findings with respect to Mr. Olsen beyond concluding that Mr. Olsen has failed to establish that there exist errors in the trial judge's findings about him which might be construed as material errors. Nor has Mr. Olsen exhibited situations in which conclusive or relevant evidence has been ignored or misunderstood, or erroneous conclusions drawn from it. What Mr. Olsen seeks in this appeal is a reconsideration of the evidence with a view to this court reaching conclusions different from those of the trial judge. It is not this court's role to determine the "correct" conclusions from the evidence. That is the function of the trial judge.

Parenting Coordinator

[42] Mr. Olsen submitted that the trial judge erred in not directing that a parenting coordinator be appointed to assist the parties in resolving difficulties that might arise given their differing approaches to parenting. Mr. Olsen testified in favour of the appointment of a parenting coordinator, but it was only addressed briefly by Dr. England in her evidence. Ms. Chinniah testified that she did not see the benefit in the appointment of a coordinator given the cost, but also because there would be no finality to a coordinator's decision as it would form the basis of yet another court application. That essentially was the evidence before the trial judge and it was open to him to ignore the proposal. I am not prepared to conclude that the trial judge's decision to ignore the appointment of a parenting coordinator was an omission that might be termed a material error.

Christmas Holiday Access

[43] Mr. Olsen submitted that the trial judge also erred when he ordered that Anicca spend the first half of every Christmas holiday, including Christmas Day with her mother and the second half of that holiday, including New Year's day with her father. Mr. Olsen at trial submitted that Anicca should alternate Christmas Day between her parents. However, the evidence with respect to how Christmas ought to be divided came principally from Ms. Chinniah who testified that she and her family celebrated Christmas, that Mr. Olsen celebrated New Year, and that it would be best if Anicca spent Christmas Day with her family. She also testified that in 2008 and 2009, Anicca had spent Christmas Day with her. Mr. Olsen acknowledged that Anicca appeared to have had a really good time with Ms. Chinniah and her family on Christmas Day and did not testify that he wanted access to his daughter on alternating Christmas Days. The trial judge determined Christmas access on limited evidence, and his findings are not the result of a material error.

Child Support

[44] On the determination of child support, Mr. Olsen submits that the trial judge erred as follows:

- (a) by imputing to him income of \$40,000 annually under the Guidelines from which Mr. Olsen's child support obligations might be ascertained;
- (b) by not considering s. 9 of the Guidelines given that the parenting schedule he ordered constitutes a shared parenting situation in which he has Anicca more than 40 percent of the time;
- (c) by ordering that Mr. Olsen pay retroactive child support; and
- (d) by dismissing Mr. Olsen's claim for undue hardship as provided in s. 10(b) of the Guidelines due to the costs incurred in exercising his access to Anicca.

(a) Imputed Income

[45] The trial judge in his reasons at paras. 41-82, addresses the evidence and his findings regarding child support, as well as his analysis of the evidence and the legal principles leading him to impute to Mr. Olsen an annual \$40,000 income. His conclusion was founded on s. 19(1) of the Guidelines which allows the court to impute income to a parent as it considers appropriate in the circumstances. He noted that Mr. Olsen's income for 2010 was a negative amount, being the sum of minus \$5,059 and that his line 150 income found on his income tax returns for the years 2007, 2008 and 2009 were respectively \$3,867, \$1,112, and \$1,812. The trial judge noted that Mr. Olsen was self-employed and in that position he was able to determine the time he used to earn income in his various interests, including environmental consulting, computer systems support training, as an educator and in conducting workshops concerning house construction.

- [46] He also referred to Mr.Olsen's education which included both a bachelor's degree and a master's degree. He found at para. 58 that Mr. Olsen was
- [58] ... able and capable of earning a greater income than to provide him with a net loss, or only very little income every year. It would seem to me that a person with his education and skills should be able to earn a reasonable income.
- [47] The trial judge also referred to Mr. Olsen's position at trial that he was unable to take on clients because he did not know what his involvement with his daughter would be, a reference to which is found at para. 59 of the trial judge's reasons as follows:
- [59] The father's underemployment has a consequence for his child, namely, she does not benefit as she should and could, from his earning potential. It appears to me that the father is transferring part of the cost of his decision not to work to his potential and capacity to his daughter. That, in my humble opinion, is not fair to the child.
- [48] Mr. Olsen's involvement in his daughter's life was clear given that Judge Bowden's order of September 28, 2009 provided Mr. Olsen with regular and consistent access to Anicca, and left him with considerable time in which to take on clients thereby further developing his income earning opportunities to allow him to meet his legal obligation to support Anicca by earning what he had the capacity of earning: *Hanson v. Hanson*, [1999] B.C.J. No. 2532, para. 8.
- [49] The trial judge wrote at para. 61 of his reasons that he arrived at the imputed \$40,000 income by using Mr. Olsen's testimony that he could earn between \$25 and \$60 an hour. He roughly averaged those hourly rates and assumed that Mr. Olsen could work at least 25 hours a week thereby providing him with an annual income of approximately \$40,000. Assuming that Mr. Olsen worked 25 hours a week for 48 weeks a year, he would need an hourly rate of just \$33.33 an hour to obtain a \$40,000 annual income. The trial judge further noted that Mr. Olsen appeared healthy and did not indicate any limitations in his area of expertise.
- [50] The trial judge, guided by the legal principles applicable to the evidence, concluded that Mr. Olsen, a well-educated individual, was underemployed as reflected in his income, or lack thereof, during the years 2007 to 2010 inclusive and he could earn \$40,000 a year, a sum sufficient to satisfy the support obligation he owed to his daughter. There are no material errors in the trial judge's findings such as to attract appellate revision.
- (b) Shared Parenting and s. 9 of the Guidelines
- [51] Mr. Olsen asserts that the trial judge erred in not considering or applying s. 9 of the Guidelines, submitting that the parenting schedule he ordered constitutes a shared parenting situation as it gives him access to Anicca approximately 42 percent of the time, a figure in excess of the 40 percent referred to in s. 9 of the Guidelines. Section 9 of the Guidelines provides:

9. Where a spouse exercises a right of access to, or has physical custody of, a child for not less than 40 per cent of the time over the course of a year, the amount of the child support order must be determined by taking into account

- (a) the amounts set out in the applicable tables for each of the spouses;
- (b) the increased costs of shared custody arrangements; and
- (c) the conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought.

[52] The transcript of March 11, 2011 includes Mr. Olsen's closing submissions that s. 9 of the Guidelines would be applicable, anticipating that the trial judge would order a shared parenting arrangement. However, beyond asserting that s. 9 would be applicable, Mr. Olsen did not lead evidence such as to enable the trial judge to respond to the questions raised at s. 9 (a) to (c) of the Guidelines, had the judge first concluded that Mr. Olsen met the 40 percent threshold.

[53] While Mr. Olsen asserts that the trial judge erred in not considering the application of s. 9 of the Guidelines, the trial judge clearly considered s. 9 of the Guidelines. He made three references to support payments in shared parenting arrangements; the first reference occurring at para. 9 of his reasons, where he stated:

[9] At the end of the seven days of trial, the father said, as to the relief he wanted:

"I am seeking ...

...

- 3. a shared parenting schedule,
- 4. a shared custody support arrangement under s. 9 and s. 10 of the Federal Child Support Guidelines,

[54] The second reference is found at para. 70 of the reasons which states:

[70] The mother has requested retroactive maintenance and of course the father has been continuously aware that the mother was seeking support for the child. The father's position clearly was that he anticipated there being a decision favouring shared custody and guardianship on an equal basis and since his stated income was in a minus position, he would not be required to pay any child support.

[55] The third reference to a shared custody support arrangement is found at para. 76 of the reasons which states in part:

[76] ...The father's position appears to have been throughout that he was entitled to share custody of the child and therefore by virtue of the child support guidelines, that he would not be obligated to pay maintenance for his child.

- [56] The trial judge, in addressing the child support payable by Mr. Olsen, was clearly aware of but did not apply s. 9 of the Guidelines, from which I infer that he concluded the access arrangements contained in his order did not provide Mr. Olsen with either a right of access or physical custody of Anicca for 40 percent or more of the time over the course of a year. The Supreme Court of Canada in *Contino v. Leonelli-Contino*, 2005 SCC 63, concluded that s. 9 involved a two-part determination with the first part requiring the establishment that the 40 percent threshold has been met before the court need embark on the second part, that being to determine the appropriate amount of support payable.
- [57] While the trial judge did not expressly state his conclusion that the access arrangement he established did not allow Mr. Olsen to meet the 40 percent threshold required to proceed with the second part of the s. 9 determination, a review of the access provisions leads me to conclude that Ms. Olsen's access, although close to 40 percent, does not meet the 40 percent threshold.
- [58] I have reviewed Mr. Olsen's access schedule expressed in hours over the course of a year largely, but not exactly, as prepared by counsel for Ms. Chinniah. There are 8,760 hours in a year of 365 days, the 40 percent threshold being 3,504 hours.

During the 40 weeks of school attendance, Mr. Olsen would have access to Anicca from 3 p.m. Tuesday to 9 a.m. Wednesday, and 3 p.m. Wednesday to 9 a.m. Thursday, a total of 36 hours on each of the 40 school weeks, totalling some 1,440 hours

Hours

1,440

Alternating weekends from Saturday at 10 a.m. to Monday at 9 a.m., for some 47 hours each weekend for 20 weekends; a total of 940 hours

Hours

940

One week each Christmas break, 24 hours for 7 days, a total of 168 hours

Hours

168

One week each spring break, 24 hours for 7 days, a total of 168 hours

Hours

168

Two uninterrupted weeks in the summer, 24 hours for 14 days, a total of 336 hours

Hours

336

Four weeks in the summer with access from Tuesday at 9 a.m. to Thursday at 9 a.m., 42 hours in each of 4 weeks, a total of 168 hours

Hours

168

Two alternating weekends in the summer from Saturday at 10 a.m. to Monday at 9 a.m., some 47 hours x 2 weekends, a total of 94 hours

Hours

94

- [59] The total number of hours is 3,314 hours which is roughly 37.83 percent of the 8,760 hours in a year, a figure below the 40 percent threshold found in s. 9 of the Guidelines.
- [60] I did not attribute to Mr. Olsen the hours that Anicca spent in school on the Wednesdays during the mid-week periods in which Anicca spent time with her father. There are a number of factors which led me to exclude those hours from Mr. Olsen's access time. This is not a situation in which the parents have joint custody and joint guardianship. Ms. Chinniah has sole custody and sole guardianship and, while Anicca is in school, I conclude that Ms. Chinniah, through the custody and guardianship orders, has sole control over the parties' daughter in the absence of Mr. Olsen.
- [61] In *Maultsaid v. Blair*, 2009 BCCA 102, Saunders J.A. at para. 21 wrote that joint custody and joint guardianship are not criteria for the application of s. 9. However, in the instant case the circumstances are different, the trial judge having ordered that Ms. Chinniah have sole custody and sole guardianship of Anicca, thereby precluding Mr. Olsen's involvement in the decision making process with regard to Anicca that joint guardianship would permit. Further, the sole custody order would ensure Anicca would have stability and continuity in her life.
- [62] The trial judge was aware from the evidence that Mr. Olsen had previously kept Anicca out of school, apparently the result of his expressed disapproval of the public education system. The extent of the trial judge's concerns about Mr. Olsen's attitude towards Anicca attending public school manifested themselves in a lengthy exchange between Mr. Olsen and the trial judge at pages 3 and 4 of the transcript of proceedings on March 11, 2011, during Mr. Olsen's submissions at the end of the trial.
- [63] In his reasons, at para. 44 (3), the trial judge included a provision directed to Mr. Olsen that if Anicca was late for school, or missed a day or portion thereof, without the written approval of Ms. Chinniah, that he would no longer return Anicca to school during or at the end of his access visit, but rather to the home of Ms. Chinniah at 5 p.m. the evening before any school day. I apprehend that this provision reflects the trial judge's continuing concern

that Mr. Olsen not interfere with Anicca attending school unless approved in writing by Ms. Chinniah and that there would be consequences to the father's access if he did unilaterally interfere with the child attending school. Again, I infer from that provision that while the trial judge was prepared to give Mr. Olsen mid-week access to Anicca that when school was in session control over the child's attendance rested primarily with Ms. Chinniah as a result of the order that she had sole custody and guardianship.

[64] While the trial judge's reasons did not directly respond to Mr. Olsen's submission that s. 9 of the Guidelines should be applied with respect to child support, it is not open for an appellate court to intervene merely because the trial judge did not express himself or herself as clearly as might have happened in a perfect world. Nor, said the Supreme Court of Canada in *F.H. v. McDougall*, 2008 SCC 53, at para. 99, did the failure of a trial judge to give adequate reasons provide a free standing basis for appeal.

[65] In the result I conclude that the trial judge did not err either in principle or in fact in declining to apply s. 9 of the Guidelines.

(c) Retroactive Child Support

[66] Mr. Olsen submitted that the trial judge erred in law by ordering him to pay child support of \$280 a month retroactive to October 2009, a sum based on a Guideline income of \$30,000. The trial judge, at para. 71 of his reasons, noted that when Ms. Chinniah filed her reply to Mr. Olsen's application in 2008, Mr. Olsen knew that Ms. Chinniah had assessed his income at \$30,000 a year and that he did nothing to dissuade her differently.

[67] The trial judge, at paras. 79-80 of his reasons, approached retroactive support in the manner described in *C.A.R. v. G.F.R.*, 2006 BCSC 1407, in which Madam Justice Martinson summarized four decisions from the Supreme Court of Canada in which the court confirmed the ability of judges to make retroactive child support orders and provided direction as to how the discretion to do so should be exercised, stating:

- 1) The circumstances when determining whether an order for retroactive support should be made, including the following four factors, none of which are determinative:
 - a. Reasonable excuse for the delay
 - b. Conduct of the payor spouse
 - c. Circumstances of the child
 - d. Hardship
- 2) Determining the amount of the retroactive support after deciding to make a retroactive child support order award:
 - a. Date of retroactivity
 - i. Date of effective notice [to the payor parent]

ii Limit on retroactivity [how far into the past a retroactive order should go]

iii Effective blameworthy conduct

b. Quantum of the retroactive award

[68] The trial judge, at para. 73 of his reasons, concluded that he was satisfied that he should make a retroactive child support order after taking into account the factors under when an order for retroactive support should be made, and bearing in mind that none of the factors were determinative. He acknowledged that Mr. Olsen attempted to provide an excuse for the delay in paying support by asserting that he had incurred \$18,000 in costs in exercising access and looking after Anicca following the parties' separation. The trial judge also acknowledged in para. 75 that after the parties separated they attempted to share the raising of Anicca, and that perhaps the parties impliedly each agreed to look after Anicca and the attendant expenses when she was in their respective care.

[69] The trial judge also acknowledged in para. 76 that Ms. Chinniah did not complain to Mr. Olsen, however, Mr. Olsen did not inquire as to what, if anything, the child required when in Ms. Chinniah's care, the child's primary residence being with the mother following Judge Ferbey's March 12, 2008 order. The trial judge noted that:

[76] The father's position appears to have been throughout that he was entitled to share custody of the child and therefore by virtue of the child support guidelines, that he would not be obligated to pay maintenance for his child. It would seem to me that when the mother was granted sole custody by the Honourable Judge Bowden on September 28, 2009 the father should have been aware that there was an obligation on him to provide support for his child.

[70] The trial judge concluded by ordering a child support order retroactive to October 2009, after Ms. Chinniah obtained sole custody and guardianship of Anicca, that Mr. Olsen knew that Ms. Chinniah was attributing to him an income of \$30,000 annually, and he had not disputed that figure in the pleadings. The Guidelines set child support for one child at \$280 a month based on a \$30,000 income. The trial judge assessed the total retroactive support owing to be \$5,040 for the period October 2009 to March 2011.

[71] In conclusion, I find that the trial judge considered the legal principles applicable with respect to both making an order for retroactive child support and determining the quantum of that retroactive child support. He considered the evidence relating to the imposition of the retroactive support order and exercised his discretion appropriately. I find no error in his conclusions.

(d) Undue Hardship Claim

[72] Mr. Olsen submitted that the trial judge erred in dismissing his claim to reduce his child support obligation as a result of the undue hardship suffered as a result of the unusually high expenses he incurred in exercising access to his daughter. The claim is advanced pursuant to s. 10(1) and (2)(b) of the Guidelines which gives a court the discretion to set child

support at an amount lower than that determined under the Guidelines, if, among other factors, the payor would suffer undue hardship as a result of having to pay unusually high expenses in exercising access to a child.

- [73] At para. 64 of his reasons, the trial judge acknowledged that Mr. Olsen, in his opening submission, said that one of the areas that he would be canvassing and pleading was undue hardship, however, the trial judge then wrote:
- [64] ...No evidence was led that would satisfy me that I should make a finding of undue hardship.
- [65] Similarly in his well-written submissions he says that the hardship he experiences is in exercising access to his daughter "and the cost of travel from my home on Lasqueti Island to Vancouver and maintain a second residence."
- [74] As noted in para. 67 of the reasons, Mr. Olsen testified that his access expenses from September 2009 to the date of the trial exceeded \$18,000, the sum including the travel expenses and the cost incurred in maintaining a residence in Vancouver. In submissions, Mr. Olsen claimed that the \$18,000 in access costs was attributable to the parenting schedule for which Ms. Chinniah was solely responsible. He further asserted that if the parenting schedule of September 2009 been maintained he would have completed his plans to give up his Vancouver residence and the \$18,000 in access costs would not have been incurred.
- [75] I infer from Mr. Olsen's latter submission that the parenting schedule he is referring to is that of the week on/week off schedule which he tried to implement unilaterally in September 2009. It was Mr. Olsen's unilateral action to alter the parenting schedule which resulted in Ms. Chinniah's application before Judge Bowden on September 28, 2009, and led to his order specifying that Mr. Olsen would have access to Anicca Tuesdays and Wednesdays each week, plus every second weekend. Judge Bowden's access order was similar to that specified by Judge Ferbey in her order of March 12, 2008.
- [76] The trial judge acknowledged that Mr. Olsen in his submissions referred to s. 10 of the Guidelines with respect to his claim for undue hardship, but at para. 68 of his reasons he noted the following requirement found in s. 10(3) had not been addressed in the evidence:
- [68] Section 10 of the Child Support Guidelines requires that when there is a plea of undue hardship to take into account the circumstances that may cause undue hardship and I must be aware of the standards of living of the two households and apply the standards of living test. None of that has been put before me and in any event no circumstances have been shown that would, in my opinion cause the parent or child to suffer undue hardship.
- [69] Accordingly then I dismiss the father's claim for undue hardship. ...

- [77] Although Mr. Olsen was aware of the s. 10 undue hardship provision, the trial judge concluded that from the evidence he was unable to find the circumstances such as would cause the parent, Mr. Olsen, or Anicca to suffer undue hardship. The trial judge further concluded that the evidence was not such as to enable him to consider the parties' respective standards of living as required by s. 10(3) of the Guidelines.
- [78] The trial judge considered the legal principles and the evidence relating to s. 10 of the Guidelines and, on the evidence or lack thereof, he was unable to accede to Mr. Olsen's claim for undue hardship. I am unable to conclude that there was a material error in that conclusion.

Setting off Retroactive Support Against Dr. England's Account

- [79] Mr. Olsen asserts that the trial judge erred in law by setting off the order for retroactive child support against Ms. Chinniah's debt owing to him for the payment of one-half the cost of the s. 15 report prepared by Dr. England. Mr. Olsen brought a motion requesting an order that Ms. Chinniah immediately pay to him the \$3,550 for her share of the cost of Dr. England's report.
- [80] The trial judge responded by finding that Mr. Olsen is entitled to the money owed by Ms. Chinniah and that can best be arranged by deducting the sum of \$3,550 from the retroactive support of \$5,040 that Mr. Olsen owed to Ms. Chinniah. He stated in para. 84:
- [84] ...Ordinarily I would not have a debt between the parties used to offset child maintenance, however in this case the mother explained in her evidence that she used her savings to provide for the child, which savings she was keeping as 'protection' for her and the child.
- [85] Therefore, taking into account the father's request, I will order that the monies he owes for retroactive maintenance be paid in full forthwith and from that sum there shall be deducted the sum of \$3,550. The order will be that the father pays to the mother forthwith, the sum of \$1,490.00. This latter sum, I am satisfied the father can pay in full based on his imputed income.
- [81] It is unusual, but not unheard of, to set-off child support owed by the payor to the recipient against a debt owing by the recipient to the payor, particularly as the child support, although payable to the recipient, is due to the child. In *Petroczi v. Petroczi*, 2011 BCSC 1223, Mr. Justice Gaul faced a similar set-off scenario and made a set-off order upon finding that the set-off would have no negative impact on the children's lifestyle or standard of living and would harm them in no way. He noted at para. 70:
- [70] In my opinion, it makes no sense to order Mr. Petroczi to pay Ms. Petroczi child support arrears and then, in a separate transaction, have her pay him his costs. The practical solution given the circumstances of this case is to allow Mr. Petroczi to set-off the costs Ms. Petroczi owes him against the child support arrears he owes her.

[82] I conclude that a similar practical solution without a negative impact on Anicca's lifestyle or standard of living is evident in the Honourable Judge Davis' decision with respect to the monies owed between Mr. Olsen and Ms. Chinniah. I see no material error or any other error for that matter in the manner in which the debts were set-off in the instant case.

Conclusion

[83] I have not referred to every assertion expressed by Mr. Olsen as to errors which he submits were made by the trial judge in the course of reaching his conclusions with respect to the family law dispute over which he presided. I indicated earlier in these reasons that Mr. Olsen took exception to most, if not all, of the findings underlying the trial judge's conclusions.

[84] I am not persuaded that Mr. Olsen's submissions, in their totality, have established that any of the trial judge's findings were the result of material error, either as to legal principles or facts. If there are errors, they are not material or of a nature such that they might lead to the setting aside of the judgment, making an order that the provincial court judge could have made, or directing the Provincial Court to conduct a new hearing.

[85] In conclusion, I dismiss the appeal in its entirety and confirm the order reached by the trial judge.

[86] Success follows the event. Ms. Chinniah has been successful and will have her costs at Scale B of Appendix B.

"R.M. Blair J."

BLAIR J.

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