
CANADA / JUDGMENT

P.E.R. v. C.A.R.

2018 BCSC 339

COURT

Supreme Court of British Columbia

DECIDED

6 March 2018

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2018 BCSC 339 P.E.R. v. C.A.R.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

P.E.R. v. C.A.R.,

2018 BCSC 339

Date: 20180306

Docket: 11060

Registry: Prince George

Between:

P.E.R.

Claimant

And:

C.A.R.

Respondent

Before: The Honourable Mr. Justice G.C. Weatherill

Reasons for Judgment

Counsel for the Claimant:

K. Pavao

Counsel for the Respondent:

C.G. Fletcher

Place and Dates of Trial:

Prince George, B.C.

February 19-23, 2018

Place and Date of Judgment:

Prince George, B.C.

March 6, 2018

Introduction

- [1] The issues for determination in this trial are whether the parties' daughter, T.E.R., now 32 years old, remains a "child of the marriage" as defined by the Divorce Act, R.S.C. 1985, c. 3 (Supp.) and, if so, the amount if any that the respondent is obliged to pay in child support.
- [2] The claimant mother's position is that T.E.R suffers from mental illness, requires day-to-day supervision and is unable to function independently.
- [3] The respondent father maintains that T.E.R.'s inability to withdraw from the charge of her parents is a creation of her own willful acts, including the use of illicit drugs and substance abuse as well as her refusal of treatment.

Background

- [4] The parties were married on August 13, 1985. They separated on August 13, 1999 and were divorced on April 4, 2001.
- [5] There are three children of the relationship. T.E.R. is the eldest. She was born on January 18, 1986 and is now 32 years old.
- [6] The respondent is a radiologist. After the parties' separation, he moved to West Virginia, U.S., where he has carried on his practice as a radiologist.
- [7] The parties entered into a separation agreement in early 2004. The claimant conceded on cross-examination that she received sufficient funds from the division of property to live comfortably. The respondent agreed to pay child support to the claimant in the amount of \$7,075 USD per month.
- [8] In 2002, the claimant decided to improve her education and obtain a degree in psychology. She enrolled in the University of Northern British Columbia ("UNBC") and, by 2010, received a Bachelor of Science Degree with Honours in Psychology.
- [9] On December 17, 2007, the parties entered into a Consent Order ("Consent Order") to reflect the then status of their children. They agreed, inter alia, that the respondent's child support obligation would be reduced to \$4,295 per month. They also agreed as follows:

1c) The [respondent] shall pay, in addition to the monthly child maintenance of \$4,295.00 per month, the following amounts on the following terms:

ii) Reimbursement to the [claimant], on account of all expenses paid by the [claimant] on behalf of [T.E.R.], after September 1, 2007 with respect to her telephone bills, Shaw cable bills, and BC Hydro bill, forthwith upon the [claimant] providing the [respondent] with confirmation of those payments being made by the [claimant];

iv) The [respondent] shall continue to pay all of [T.E.R.]'s reasonable living expenses directly to [T.E.R.], for so long as she continues to be a Child of the Marriage as defined by the Divorce Act, (Canada), including the purchase of a computer for her post secondary studies;

v) The [respondent] shall pay for three round trip flights for [T.E.R.] to return home to visit the [claimant] during her fifteen month course;

vi) The [respondent] shall reimburse the [claimant] for any monies reasonably expended by her directly related to the living expense of [T.E.R.] forthwith upon the [claimant] providing the [respondent] with documentation of such and confirmation of payment.

[10] The respondent has not made any support payments in respect of T.E.R. since 2008.

[11] Upon receiving her Bachelor Degree in 2010, the claimant began working for an organization that tutored children with learning disabilities. Her work was, essentially, charitable.

[12] The claimant attempted to obtain a Registered Psychiatric Nursing Designation but was unable to do so due to financial constraints. She lost her home in foreclosure, in part because of the expenses associated with her education pursuits and in part because of the cost of having to care for T.E.R.

[13] The claimant is currently employed by the Northern Health Authority as a mental health clinician at the UNBC Hospital. She earns approximately \$43,000 per year.

[14] The respondent currently earns approximately \$487,000 USD per year.

[15] In January 2015, the claimant filed a notice of application ("Application") seeking an order varying paragraph 1(c) of the Consent Order retroactive to its date of December 17, 2007 as follows:

1(c) the [respondent] shall pay in addition to the monthly child maintenance of \$4,295.00 per month, child support for the child [T.E.R.] in an amount in accordance with the Child Support Guidelines, payable on the 1st of the month and every month thereafter, for as long as [T.E.R.] remains a Child of the Marriage as defined by the Divorce Act (Canada).

[16] By consent, the Application has proceeded by way of trial.

T.E.R.'s Troubled History

- [17] The claimant testified that T.E.R. was an anxious person throughout her high school years but was able to function independently relatively well.
- [18] Between September 2005 and June 2007, T.E.R. attended the UNBC in pursuit of an English degree. She continued to be anxious and discontinued that pursuit in June 2007.
- [19] T.E.R.'s youngest sister, T., testified that from approximately 2006 to 2013, she moved from Prince George to live with her father, the respondent, in West Virginia. T. testified that, prior to her departure, T.E.R. was very witty, smart and was someone that she looked up to.
- [20] In July 2007, T.E.R. began attending an 18-month program at the Art Institute of Vancouver ("A.I.") where she lived on her own. The claimant testified that T.E.R.'s anxiety seemed to increase, her marks declined, and it became apparent to her that T.E.R. was not able to cope or take care of herself properly on her own. Her apartment was filthy and she was not eating well. The claimant learned that she was using drugs.
- [21] In October 2008, despite being close to finishing the 18-month program, T.E.R. dropped out of A.I. and returned to Prince George. The claimant learned that T.E.R. was pregnant. She had an abortion in November 2008.
- [22] T.E.R. admitted to the claimant that, while she was attending A.I., she was regularly using crystal methamphetamine, ecstasy, speed and marihuana. She also told the claimant that she had used heroin.
- [23] In December 2008, T.E.R. travelled to West Virginia to visit her father and T. T. testified that she first noticed T.E.R. acting unusual during this visit. T. said that T.E.R. had attended a party hosted by their father and T.E.R. called her at approximately 8 a.m. extremely distraught, acting very strangely, and speaking in a "weird way".
- [24] Upon her return from West Virginia in February 2009, T.E.R. obtained periodic part-time employment. She began dating a man named "Billy", whom the claimant described as a "bad person". His nefarious activities included taking both T.E.R.'s and the claimant's cars and not returning them until police intervention was threatened. Billy also "pistol-whipped" T.E.R.
- [25] The claimant conceded on cross-examination that T.E.R. told her that Billy was involved with the Hells Angels and organized crime, ran an escort service and was a drug user. After T.E.R. broke up with him, Billy began to threaten T.E.R., the claimant as well as other members of their family in an attempt to persuade T.E.R. to return to him. The claimant agreed on cross-examination that she and her family were living in fear of this man.

- [26] In October 2009, T.E.R. admitted herself to the UNBC Hospital, apparently after calling an ambulance and complaining that she was having paranoid ideation, was delusional and hallucinating. The clinical records of that hospital visit indicate that she advised the attending physician that she had used crystal methamphetamine and was using marihuana on an ongoing basis. T.E.R. remained in the psychiatric ward of the UNBC Hospital for six days.
- [27] Following her discharge, T.E.R. attended a drug and alcohol addiction counselling program. The claimant testified that she and her family members did their best to support T.E.R. and help her make better, healthier choices in her life. However, T.E.R. continued to demonstrate what the claimant described as "bizarre and psychotic behaviour" and rituals that the claimant believed was instigated by T.E.R.'s fear for the safety of her and her family.
- [28] In March 2010, T.E.R. was demonstrating such bizarre behaviour and paranoia that she was re-admitted against her will to the hospital's psychiatric ward, pursuant to the provisions of the Mental Health Act, R.S.B.C. 1996, c. 288. She remained there for 46 days. She began to be treated by a psychiatrist, Dr. Johannes Giede. She has been under Dr. Giede's care ever since.
- [29] In January 2011, T.E.R. was again admitted to the UNBC Hospital's psychiatric ward, this time for 21 days. She tested positive for opiates in her system. One of the conditions of her release was that she have "weekly urine drug screens for next 3 months at team discretion". However, it appears that only sporadic drug screening was performed.
- [30] In May 2011, T.E.R. was admitted to the psychiatric ward of the UNBC Hospital for the fourth time for five days.
- [31] In early 2012, T.E.R. applied to the Ministry of Social Development ("Ministry") to be designated a "Person With Disabilities" ("PWD") under the Employment and Assistance for Persons with Disabilities Act, S.B.C. 2002, c. 41. The application was prepared with the assistance of the claimant, T.E.R.'s counsellor and Dr. Giede.
- [32] On June 5, 2012, the Ministry advised T.E.R. that her application had been approved, effective July 1, 2012, and that she was entitled to receive disability benefits.
- [33] On June 20, 2012, T.E.R. overdosed on methadone and amphetamines, including crystal methamphetamine. The claimant testified that the overdose was precipitated by T.E.R.'s association with "bad people" from whom she was able to obtain drugs, including a man named "Lyle" who had provided her with the methadone. Shortly before T.E.R.'s overdose, a dead body was found on Lyle's property. He and others with whom T.E.R. had associated were subsequently convicted of murder.
- [34] The claimant took steps to curtail T.E.R.'s association with those people and attempted, with some success, to restrict T.E.R. leaving the house on her own. However, the claimant conceded on cross-examination that, from the June 20, 2012 overdose incident until well into 2014, she suspected that T.E.R. was continuing to use illicit drugs. Dr. Giede testified that he did not consider it necessary to perform additional drug screening on T.E.R. because he had

established a clear pattern of behaviour for T.E.R. and was aware of what she was like when she was on drugs. Although T.E.R. may have had the occasional relapse into using methamphetamines, in Dr. Giede's judgment, T.E.R.'s primary issue was a mental disorder and he was comfortable with how she was being managed clinically.

- [35] T. testified that, when she returned from West Virginia to Prince George in October 2013, T.E.R. was very different than she had been when T. left. T. testified that T.E.R. was almost "child-like", could not properly care for herself, and required constant supervision and care. T. found a glass pipe in T.E.R.'s purse, the type of pipe used for the consumption of illicit drugs. T.E.R. denied that the glass pipe was hers.
- [36] Both the claimant and T. described their relationship with T.E.R. as very close. All of them, along with T.'s boyfriend, R.B., live together in the house that was formerly owned by the claimant but which is now owned by R.B.
- [37] The claimant and T. testified that T.E.R. has "good days" during which she is generally able to perform personal hygiene and some household tasks although she requires prompting and supervision. They also testified that T.E.R. has noticeably "bad days" when she does not seem to remember things and is incapable of performing even the smallest of tasks, appears overwhelmed, withdrawn, becomes anxious and delusional, and spends most of her time in bedroom. The claimant testified that T.E.R.'s bad days seem to be triggered by stress.
- [38] T.E.R. is rarely left alone in the house for more than two hours because she often forgets to turn off the stove burner and has, on occasion, lit candles that have resulted in items catching on fire. The claimant, T., and their respective boyfriends coordinate their respective schedules to ensure that T.E.R. is not alone in the house.
- [39] T.E.R. is unable to take public transit on her own. She does not work, drive or attend school. In approximately 2011, T.E.R. enrolled in one vocational course but found that she was unable to read or keep her focus and she withdrew. The claimant purchased a computer software program ("COGPAC") to help T.E.R. with her concentration and focus.
- [40] T.E.R.'s activities include hiking with the claimant's boyfriend, her art work, collecting rocks, and shopping.
- [41] T.E.R.'s initial PWD benefit was \$531.42 per month. It is currently \$758.42 per month. In addition, commencing September 2017, the claimant receives \$300 per month towards T.E.R.'s rent, which the claimant uses primarily to pay for T.E.R.'s wants and needs. The claimant does not control the use by T.E.R. of her disability money but does try to monitor her spending, generally without much success. T.E.R. typically withdraws all of her benefit monies upon receipt, spending it on clothing, make-up, art supplies and fast food. She does not budget her spending well.

- [42] T.E.R. does not contribute to the household expenses or many, if any, of the household responsibilities. She has trouble performing errands on her own. Her appearance and attire is "unconventional", and includes very bright-coloured make-up and hair, and excessive amounts of jewellery. She occasionally wears inappropriate clothing for the weather conditions. The claimant testified that T.E.R. dresses more conservatively on her good days.
- [43] T.E.R. has not attended any rehabilitation or occupational therapy programs. She has not been subjected to drug screening or testing since June 2012.
- [44] T.E.R. has a small group of friends that previously included some "unsavory" people who abused and took advantage of T.E.R. She has a friend named Justin who she would spend time with at his house, but her visits would not be for more than two hours each time.
- [45] The claimant agreed on cross-examination that, despite T.E.R. being unable to handle alcohol, she allows T.E.R. to have a "glass of wine" when she asks in order to help her sleep.
- [46] The claimant testified that T.E.R.'s behaviour appears to have stabilized although she continues to be prone to stress and conspiracy ideations. T. testified that T.E.R. appears to be much more stable when she takes her prescribed medications.

Dr. Johannes Giede

- [47] Dr. Giede has been practicing psychiatry since 1999. He is the director of the adolescent unit of the psychiatric ward at UNBC Hospital in Prince George. He is also the director in charge of the training of psychiatry residents at the hospital and the psychiatrist in charge of Prince George's street clinic which deals with mental illness and addiction.
- [48] T.E.R. has been under his care since May 2010.
- [49] Curiously, the claimant did not call Dr. Giede as an expert but rather as lay witness to provide evidence as to his interactions and treatments of T.E.R. During the course of Dr. Giede's evidence, it became apparent that both counsel were eliciting from him opinion evidence under the guise of his observations and assessments. It also became apparent that, on May 12, 2017, counsel for the respondent conducted a full cross-examination of Dr. Giede on the affidavit he swore on December 14, 2016 in support of the order sought by the claimant in this matter. Counsel for the respondent put that affidavit to Dr. Giede during his cross-examination at trial. It was marked as Exhibit "7". The text of Dr. Giede's affidavit evidence, in its entirety, is as follows (Exhibits omitted):

I, DR. JOHANNES GIEDE, psychiatrist, of Mental Health and Addictions Services, 1444 Edmonton Street in the City of Prince George, in the Province of British Columbia, SWEAR (OR AFFIRM) THAT:

1. I am the treating psychiatrist of the Claimant's daughter, [T.E.R.], and as such have personal knowledge of the facts and matters hereinafter deposed to, save and except such facts and matters as are stated to be based upon information and belief, and where so stated, I verily believe same to be true.
2. I am a duly qualified psychiatrist in the Province of British Columbia.
3. I am now actively carrying on my profession as a psychiatrist at Mental Health and Addictions Services of the Northern Interior Health Unit.
4. I have been [T.E.R.]'s treating psychiatrist since May 19, 2010 when she was referred to the Northern Health Authorities Early Intervention Program with psychotic symptoms.
5. I have continued to see [T.E.R.] regularly throughout the years. Specifically, I met with [T.E.R.] on the following occasions:
 - a. June 30, 2010;
 - b. August 4, 2010;
 - c. January 25, 2011;
 - d. February 2, 2011;
 - e. May 2, 2011;
 - f. May 18, 2011;
 - g. January 25, 2012;
 - h. February 22, 2012;
 - i. March 28, 2012;
 - j. November 14, 2012;
 - k. December 19, 2012;
 - l. January 23, 2013;
 - m. March 20, 2013;
 - n. September 11, 2013;
 - o. April 2, 2014; and
 - p. June 4, 2014.

A. PSYCHIATRIC HISTORY

6. During my initial consultation with [T.E.R.] on May 19, 2010, [T.E.R.] and her family advised me of her psychiatric history.

7. As a teenager, [T.E.R.] experienced some mood swings. On one occasion, she trialed on the medication, Paxil, and had a bad reaction. There were also some substance use concerns during [T.E.R.]'s late teens, mostly relating to marijuana and alcohol.
8. Since about the age 19, [T.E.R.] experienced anxiety, nervousness and difficulty coping. However, she attended school and was an A or B student.
9. [T.E.R.]'s family began to see more anxious symptomatology from [T.E.R.] and were concerned when she moved to Vancouver around June of 2007.
10. After [T.E.R.] moved to Vancouver, her anxiety increased and her ability to care for herself started to unravel. She started to have memory problems and her attendance and school performance declined.
11. [T.E.R.] turned to substances, including Crystal Meth, Heroin, Ecstasy, marijuana and alcohol to help her feel better and became addicted to a number of different agents.
12. [T.E.R.] returned home to Prince George in August of 2008 but did not return to her previous level of functioning. Even with the help of family, she was too nervous, could not find or sustain employment or take care for herself.
13. [T.E.R.]'s psychotic situation worsened when she became pregnant and had an abortion in November of 2008.
14. By October of 2009, [T.E.R.]'s moods and anxiety were very erratic. She drifted towards a more difficult crowd and her drug use became heavier.
15. [T.E.R.] then had a full psychotic break and was hospitalized in the psychiatric ward of the Prince George hospital from October 30, 2009 to November 4, 2009. She recovered fairly quickly in terms of the psychosis, but not in terms of functioning and anxiety symptoms.
16. After her hospitalization, [T.E.R.] continued a dysfunctional relationship with her boyfriend. At one point, he beat her quite severely with a pistol.
17. [T.E.R.]'s psychotic symptoms began to develop again and she believed the Hell's Angels were out to get her. [T.E.R.] was hospitalized in the psychiatric ward of the Prince George hospital from March 13, 2010 to April 28, 2010. She was tentatively diagnosed in the schizophrenia spectrum, although the possibility of substance induced psychosis was also raised.
18. Medically, [T.E.R.] has been stable with the exception of a motor vehicle accident in February of 2010, in which she may have sustained some concussive effects.
19. When I first saw [T.E.R.] in May of 2010, she was experiencing hallucinations, auditory hallucinations and vivid dreams. She would stare blankly and was vacant and disorganized. She was unable to retain information when reading. She was flat and withdrawn, although depression was not a particular feature of her symptomology.

B. DIAGNOSIS

20. After the May 19, 2010 consultation and a discussion with the Early Intervention Team, I diagnosed [T.E.R.] with a significant psychotic disorder. My opinion at the time was that she was schizophrenia spectrum, likely schizoaffective. However, I could not rule out a diagnosis of bipolar with substance use combined or just a substance disorder itself as [T.E.R.] had a poly-substance dependence on Crystal Meth and Ecstasy at the time. Attached hereto and marked EXHIBIT "A" to this my Affidavit is a true copy of my May 19, 2010 Assessment.
21. My plan was to continue to observe [T.E.R.] and gauge what symptoms dominated in order to confirm a diagnosis.
22. Over the next months and years, it became evident that [T.E.R.] suffers from schizoaffective disorder with significant brain damage and that her psychosis was not purely substance induced. [T.E.R.]'s substance dependence is secondary to her Axis I mental illness. Attached hereto and marked as EXHIBIT "B" to this my Affidavit is a true copy of the Northern Health Authority Early Psychosis Intervention program monitoring reports from June 30, 2010 to June 4, 2014.
23. While it is difficult to determine the exact date [T.E.R.]'s illness started, I believe she began to experience mental health issues around the age of 16 or 17.
24. [T.E.R.]'s psychotic disorder initially manifested as some dysfunctionality and anxiety. The disorder may have been exacerbated or accelerated by [T.E.R.]'s early marijuana use.
25. The course of [T.E.R.]'s disorder has been quite severe. She has experienced a significant decline in cognitive function and intense psychotic symptoms, exacerbated by her ongoing substance use and the chaotic scenarios she finds herself in as a result of her poor judgment caused by her mental illness.
26. [T.E.R.] had demonstrated some stabilization as of May 21, 2015, likely because she had been able to stay clean from substance use.
27. However, my diagnosis of [T.E.R.] with a primary schizoaffective disorder and secondary substance dependence issues remains true today.

C. CAUSATION

28. I cannot say that one thing has caused [T.E.R.]'s illness. Instead, it is my opinion that her mental illness is a result of genetic risk combined with a number of stressors in her life and the use of substances.

D. PROGNOSIS

29. Overall, the prognosis for [T.E.R.] is poor and I do not believe that she will fully recover from the brain damage she has sustained.

30. [T.E.R.] is very vulnerable to be misled by others and continues to make poor decisions as result of her mental illness.
31. In time, her psychotic symptoms may improve and she could possibly be symptom free. Her creativity had begun to return as of May 21, 2015.
32. My treatment recommendation going forward is for [T.E.R.] to be compliant with her medications and avoid substances.
33. Initially, it was difficult for [T.E.R.] to be compliant with her medications. [T.E.R.] has poor insight into how ill she is and she does not believe the medications help with her illness. However, with the assistance of her mother, [T.E.R.] has been able to be compliant with her medications and is mostly clean from substance abuse. It is a continuous struggle to keep her compliant and any non-compliance is usually a result of her mental illness.
34. [T.E.R.]'s treatment plan deteriorates when [T.E.R.] goes back to substance use.
35. I have discussed treatment centres with [T.E.R.] in the past, but this option is difficult to access for patients in Northern British Columbia. While we could send [T.E.R.] to Burnaby, she is not willing to do that at this point.

E. CARE REQUIREMENTS

36. [T.E.R.] is functionally disabled by her condition. She is unable to live by herself and needs full time care of some sort. [T.E.R.] can function day to day if there is a safe environment provided for her and she has family checking on her regularly. She can do some basic things in life. For example, she enjoys art and some social events. However, she cannot do self-care or care for her own living environment.
37. [T.E.R.] can not manage her personal finances. There is a high risk she will use the money on substances or have the money taken from her, as she is vulnerable and easily abused.
38. Based on my knowledge of [T.E.R.]'s mental disorder I believe that if her mother had not taken over her care, [T.E.R.] would likely be living on the streets.
39. [T.E.R.] currently receives support from her mother, family members, family friends and her mental health team. Without this support system, [T.E.R.] would likely experience rapid deterioration again and have to be housed in a mental health facility. It is my opinion that [T.E.R.] could not function with her mental illness without her mom and family's support.

F. EMPLOYMENT PROSPECTS

40. It is my opinion that it would be very detrimental for [T.E.R.] to be employed at this time. It is best to keep [T.E.R.]'s environment as stress free as possible as she is just starting to experience some resolutions of her symptoms.

41. It is possible that in a year or two, we could try exploring work through our rehabilitation program. However, I need to see further recovery with stability for a much longer period of time before considering employment.
42. At this time, I predict that [T.E.R.] will not ever be employable.
- [50] It was at trial and remains my view that Dr. Giede's professional assessment and diagnosis of T.E.R. is essential to the court's determination of the central issue in the action, namely, whether T.E.R. suffers from mental illness, requires day-to-day supervision and is unable to function independently. Accordingly, pursuant to Supreme Court Family Rule 13-7(6)(c), I exercised my discretion to allow Dr. Giede to provide opinion evidence despite the requirements for such evidence not having been complied with by the claimant. I did so on the basis that the interests of justice required it and on the basis that counsel for the respondent conducted an extensive cross-examination of Dr. Giede well in advance of the trial. However, I also did so on the condition that, if requested, the trial would be continued at a later date in order to give the respondent an opportunity to obtain a rebuttal expert report. The respondent declined that opportunity.
- [51] Dr. Giede's viva voce evidence at trial was that, initially, his focus as well as that of various intervention team members was to help T.E.R. deal with her drug addiction. However, Dr. Giede testified that, upon receipt of a report prepared by a psychologist, Dr. Cochrane, his observations and assessment of T.E.R. were confirmed. His diagnosis is that T.E.R. suffers from a schizoaffective disorder of a bipolar type.
- [52] Dr. Giede testified that T.E.R. has stabilized since he first began to treat her in 2010. She is generally pleasant, not aggressive and she has much fewer significant psychotic events. She is very creative and has a keen interest in art. However, she continues to struggle with psychotic disorders, cognitive impairment (including an inability to pay attention, poor memory, and a lack of insight, motivation and drive), difficulty controlling her impulses and low grade paranoia (feels that people are out to get her), all of which tend to flare up when she is stressed. The flare-ups are not as severe as they were initially.
- [53] Dr. Giede has prescribed various medication for T.E.R. including Clonazepam, Epival, Minocycline and Abilify. When T.E.R. does not take her medication, she has problems sleeping and becomes agitated which results in a further deterioration of her ability to function. During the past six months, T.E.R. has resisted taking her Minocycline, which has resulted in her being much more withdrawn, edgy and irritable. She has also become less creative and has increased difficulty looking after herself.

- [54] Dr. Giede testified that, ideally, he would have a psychiatric session with T.E.R. approximately once every month. However, she continues to be disinterested in the sessions and does not see any point to them because she does not believe that she has a problem. When she does attend, she presents with an "emptiness" and "distance" about her. Her conversation is "shallow", "flat" and "lacking in emotion". She has difficulty grasping or remembering their discussions and she cannot seem to be able to plan for future goals.
- [55] The principal focus of Dr. Giede's treatment of T.E.R. is keeping her away from illicit drugs and ensuring she complies with the medication regime he has prescribed. He testified that there are very limited resources available in the Prince George area for rehabilitation programs that would accept T.E.R. and he does not feel that she would do well in them as they would require that she maintain a new schedule and learn new tasks, which Dr. Giede believes is beyond her present capability. He testified that T.E.R. continues to resist the idea of rehabilitative treatment.
- [56] Dr. Giede does not believe that T.E.R. is able to attend school because of her difficulty interacting with others and her continued propensity to exercise poor judgment in day-to-day life.
- [57] When asked by the Court, Dr. Giede confirmed that the opinions set out in his December 14, 2016 affidavit have not changed.

The Respondent's Case

- [58] The respondent did not call any evidence at trial.

Applicable Law

- [59] The relevant section of the Divorce Act is as follows:

2(1) In this Act,

"child of the marriage" means a child of two spouses or former spouses who, at the material time,

...

- (b) is the age of majority or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessities of life.

- [60] The onus for establishing that a child of the age of majority or over continues to be a child of the marriage rests with the asserting party, in this case the claimant: T.A.P. v. J.T.P., 2014 BCSC 2265, at para. 21.

Analysis

Is T.E.R. a Child of the Marriage?

- [61] At the opening of argument, counsel for the respondent conceded, wisely, in my view, that T.E.R. is a child of the marriage by virtue of her disability.

[62] The evidence in this case is uncontroverted and overwhelming that T.E.R. is and has, since late 2008, been unable by reason of illness, disability and/or her drug use to live on her own without supervision. Since at least her high school years, she has suffered from anxiety in varying degrees. She began taking illicit drugs while attending A.I., which led to a downward spiral and her association with people of ill repute, all of which culminated in her overdosing on methadone and amphetamines in June 2012. Since then, the claimant, together with her family, have done their best to keep T.E.R. away from drugs and those who could influence her to use them. The evidence shows that the medication prescribed by Dr. Giede has helped stabilize T.E.R., although she continues to have bad days brought on by stressors. I accept the evidence of the claimant and T. that, despite T.E.R.'s condition having stabilized, she continues to be unable to function on a day-to-day basis without prompting or to leave the home unsupervised. I also accept the claimant's evidence that T.E.R. was unsuccessful in the vocational course she enrolled in because she was unable to read or focus.

[63] I also accept the evidence of Dr. Giede that T.E.R. suffers from schizoaffective disorder with significant brain damage and that her drug dependence is secondary to her mental illness.

What Amount of Support is Appropriate in this Case?

[64] The relevant sections of the Federal Child Support Guidelines [Divorce Act Regulations, SOR/97-175] ("Guidelines") are as follows:

3(2) Unless otherwise provided under these Guidelines, where a child to whom a child support order relates is the age of majority or over, the amount of the child support order is

- (a) the amount determined by applying these Guidelines as if the child were under the age of majority; or
- (b) if the court considers that approach to be inappropriate, the amount that it considers appropriate, having regard to the condition, means, needs and other circumstances of the child and the financial ability of each spouse to contribute to the support of the child.

...

4. Where the income of the spouse against whom a child support order is sought is over \$150,000, the amount of a child support order is

- (a) the amount determined under section 3; or
- (b) if the court considers that amount to be inappropriate,
 - (i) in respect of the first \$150,000 of the spouse's income, the amount set out in the applicable table for the number of children under the age of majority to whom the order relates;

(ii) in respect of the balance of the spouse's income, the amount that the court considers appropriate, having regard to the condition, means, needs and other circumstances of the children who are entitled to support and the financial ability of each spouse to contribute to the support of the children; and

(iii) the amount, if any, determined under section 7.

[65] The objectives of the Guidelines include the establishment of a fair standard of support for children that ensures that they continue to benefit from the financial means of both spouses after separation: Guidelines s. 1(a).

[66] In advocating for an order that the respondent be required to provide child support under s. 3(2)(a) of the Guidelines, counsel for the claimant submits that the respondent has had and continues to have ample means to support T.E.R. His income for Guideline purposes for the applicable years (converted from USD to Canadian dollars at a rate of 1.27), together with the corresponding Guideline support amount, is as follows:

Year

Guideline income (in Canadian Dollars)

Monthly Guideline support (in Canadian Dollars)

2018-2013

\$533,749

\$4,295

2014

\$633,999

\$4,904

2015

\$556,497

\$4,331

2016

\$603,235

\$4,677

2017

\$609,000

\$4,938

- [67] Some British Columbia cases have determined that the receipt by a child of the marriage of disability benefits pursuant to a PWD designation may be sufficient to displace the "one-size-fits-all" approach under s. 3(2)(a) of the Guidelines and that the approach to be used is that set out in s. 3(2)(b) of the Guidelines: *Briard v. Briard*, 2010 BCCA 431, at para. 30; *C.L.C. v. B.T.C.*, 2012 BCSC 736, at para. 75; *Poehlke v. Poehlke*, 2012 BCSC 1029, at para. 50; *Ross v. Ross*, 2004 BCCA 131, at para. 14, *Carten v. Carten*, 2015 BCSC 19, at para. 21; *T.A.P.*, at paras. 42-44.
- [68] More recent cases have pointed out that the approach to be taken where the child is receiving PWD Benefits is to determine the amount of assistance that is appropriate from the non-custodial parent, the primary focus being on the needs and circumstances of the child. In *Wright v. Frederickson*, 2017 BCSC 1062, which also involved a child over the age of majority with disabilities. Mr. Justice Grauer stated, at paras. 88-91:
- [88] Mr. Frederickson contends that B's needs are limited because of his disability, pointing to the monthly expenses outlined by Ms. Wright and B's receipt of benefits of \$1,000 per month. The monthly expenses outlined by Ms. Wright, which were, I find taken somewhat out of context and do not reflect the true extent of those expenses, consisted of food, supplements, clothing, medical supplies, hygiene products, then maintenance and insurance, and entertainment, and total approximately \$1,765.
- [89] Mr. Frederickson submits that he should be responsible for no more than the remainder of \$765 after deducting the PWD benefit. He relies upon *Kollmuss v. Kollmuss*, 2015 BCSC 1101, where Mr. Justice Voith undertook a thorough review of the law:
- [38] In summary, these five cases [*Briard v. Briard*, 2010 BCCA 431; *C.L.C. v. B.T.C.*, 2012 BCSC 736; *Poehlke v. Poehlke*, 2012 BCSC 1029; *Ross v. Ross*, 2004 BCCA 131 and *Carten v. Carten*, 2015 BCSC 19] establish that the receipt of PWD benefits is often considered sufficient to trigger a s. 3(2)(b) analysis. This will particularly be so where, as in this case, the incomes of the parties are modest. Further, these cases apply the *Wesemann* approach [*Wesemann v. Wesemann*, [1999] B.C.J. No. 1387 (S.C.)]: the court must ask itself (1) whether the claimant has proven that the usual Guidelines approach is inappropriate, and (2), if not, what amount is appropriate, "having regard to the condition, means, needs and other circumstances of the child and the financial ability of each spouse to contribute to the support of the child".
- [39] The party requesting the change has the onus of establishing that the usual Guidelines approach is inappropriate. It may be inappropriate where the child's circumstances differ from the circumstances upon which the usual Guidelines approach is based. Some disability benefit cases have held that the receipt of the benefit itself renders the usual Guidelines approach inappropriate; *Briard* at para. 22; *Poehlke* at para. 51; *Ross* at para. 25. Others engage in an initial consideration of the financial significance of the benefit amount in the context of the case; *C.L.C.* at para. 62; *Carten* at para. 21.

- [40] In considering an appropriate amount or level of support, the court engages in the usual condition, means, needs and other circumstances analysis; however, in these cases, the reasonable ability of the child to contribute to those needs is also incorporated, or factored, into the analysis. Ultimately, a court will calculate a child's reasonable costs and deduct the amount of the disability benefit in order to quantify the relevant shortfall. The court will then consider the parents' incomes and the usual table amount. The child's shortfall is then often divided in proportion to the parents' respective incomes.
- [41] In term of financial reporting, courts have generally been prepared to work with rough budget amounts, or budgets lacking significant detail, so long as they were able to determine the reasonable costs of the child.
- [90] As this passage makes clear, the onus is on Mr. Frederickson to establish that the usual Guidelines approach is inappropriate. In my view, given the quite extraordinary needs of B, which go well beyond the items that made up Ms. Wright's estimate of expenses, he has failed to do so.
- [91] As Voith J. pointed out, the cases are inconsistent in their approach to the effect of PWD benefits. In Poehlke, the parties had already agreed to reduce child support by the amount of the benefit, and one party sought to renege from that agreement. The decision in Ross turned in part on the means of the parties, and the benefit in question was more than double the amount of the benefit here. Briard reminds us that the question is not one of offloading the responsibility for care on to the state, but rather inquiring as to what assistance is appropriate from the non-custodial parent. The primary focus must be on the needs and circumstances of the child.
- [69] I accept Dr. Giede's opinion that T.E.R. is unlikely to fully recover from her mental disorder and that she is not currently employable. She is wholly dependent on the care and support of the claimant. Although T.E.R. receives a disability benefit each month, I find that, because of her disability, she is not capable of properly managing those monies in a way that would allow her to live on her own.
- [70] I find that, provided T.E.R. takes her prescribed medications and is not under stress, her condition is stable and she is able to do relatively well, although she continues to require supervision and prompting in respect of her choices. If T.E.R. does not take her medications or is under stress, she does not do well and is not capable of performing the day-to-day requirements of a healthy life.
- [71] Although there is ample evidence of what T.E.R. cannot do, there is a dearth of evidence regarding what she is capable of doing. No vocational assessment has been performed. Dr. Giede's opinion is that T.E.R. will not be capable of entering a rehabilitation program until there has been further recovery, with stability, for a much longer period of time.
- [72] The claimant deposes in her Form F8 Financial Statement filed January 19, 2018 that the expense she incurs for or on behalf of T.E.R. is \$1,412 per month.

- [73] In my view, the circumstances of this case necessitate a tailored solution that reflects the condition, means (including disability benefits), needs and other circumstances of T.E.R. as well as the respective financial ability of the parties to contribute to T.E.R.'s support.
- [74] In my view, an appropriate order is that the respondent pay the Guideline amount of \$3,000 per month. This amount takes into consideration the Guideline support of \$4,938, the exigencies and contingencies of the conversion between U.S. currency and Canadian currency, a deduction for the PWD benefit received by both T.E.R. and the claimant totalling \$1,058, and the claimant's evidence that her current financial need to support T.E.R. in the amount of \$1,412 per month. In making this award, I have also taken into consideration the evidence that T.E.R.'s activities are severely limited and restricted, and that she is presently unable to work, socialize with others or attend rehabilitation.

Rehabilitation Assessment

- [75] I am also ordering that a vocational assessment of T.E.R. be performed by a qualified occupational therapist upon T.E.R.'s clinical psychiatrist advising the claimant that T.E.R. is capable of participating in such an assessment. The cost of the assessment will be shared equally by the claimant and the respondent. Upon receipt of the assessment, either party is at liberty to apply for an order varying the support order I have made.

Retroactivity

- [76] The Supreme Court of Canada in *D.B.S. v. S.R.G.*, 2006 SCC 37 articulated four factors that must be considered in deciding whether to award retroactive child support at paras. 100-116:
- whether there exists a reasonable explanation for why retroactive child support was not sought earlier;
 - the conduct of the payor parent;
 - the circumstances of the child; and
 - any hardship that would be occasioned by a retroactive award.
- [77] Fairness to the parties is also a consideration: *DBS*, at para. 96.
- Delay
- [78] The Court in *D.B.S.* stated, at paras. 101-104:
- [101] Delay in seeking child support is not presumptively justifiable. At the same time, courts must be sensitive to the practical concerns associated with a child support application. They should not hesitate to find a reasonable excuse where the recipient parent harboured justifiable fears that the payor parent would react vindictively to the application to the detriment of the family. Equally, absent any such an anticipated reaction on the part of the payor parent, a reasonable excuse may exist where the recipient parent lacked the financial or emotional means to bring an application, or was given inadequate legal advice: see

Chrintz v. Chrintz (1998), 41 R.F.L. (4th) 219 (Ont. Ct. (Gen. Div.)), at p. 245. On the other hand, a recipient parent will generally lack a reasonable excuse where (s)he knew higher child support payments were warranted, but decided arbitrarily not to apply.

- [102] Not awarding retroactive child support where there has been unreasonable delay by the recipient parent responds to two important concerns. The first is the payor parent's interest in certainty. Generally, where the delay is attributable to unreasonableness on the part of the recipient parent, and not blameworthy conduct on the part of the payor parent, this interest in certainty will be compelling. Notably, the difference between a reasonable and unreasonable delay often is determined by the conduct of the payor parent. A payor parent who informs the recipient parent of income increases in a timely manner, and who does not pressure or intimidate him/her, will have gone a long way towards ensuring that any subsequent delay is characterized as unreasonable: compare *C. (S.E.) v. G. (D.C.)*, [2003 BCSC 896]. In this context, a recipient parent who accepts child support payments without raising any problem invites the payor parent to feel that his/her obligations have been met.
- [103] The second important concern is that recipient parents not be encouraged to delay in seeking the appropriate amount of support for their children. From a child's perspective, a retroactive award is a poor substitute for past obligations not met. Recipient parents must act promptly and responsibly in monitoring the amount of child support paid: see *Passero v. Passero*, [1991] O.J. No. 406 (QL) (Gen. Div.). Absent a reasonable excuse, uncorrected deficiencies on the part of the payor parent that are known to the recipient parent represent the failure of both parents to fulfill their obligations to their children.
- [104] In deciding that unreasonable delay militates against a retroactive child support award, I am keeping in mind this Court's jurisprudence that child support is the right of the child and cannot be waived by the recipient parent: *Richardson [v. Richardson]*, [1987] 1 S.C.R. 857, at p. 869. In fact, I am not suggesting that unreasonable delay by the recipient parent has the effect of eliminating the payor parent's obligation. Rather, unreasonable delay by the recipient parent is merely a factor to consider in deciding whether a court should exercise its discretion in ordering a retroactive award. This factor gives judges the opportunity to examine the balance between the payor parent's interest in certainty and fairness to his/her children, and to determine the most appropriate course of action on the facts.
- [79] There is no evidence that the claimant lacked the financial or emotional means to file a formal application for child support in respect of T.E.R. prior to her doing so in January 2015. The hearing of that Application was delayed until this trial for various reasons, including many unfulfilled requests by the respondent for T.E.R.'s medical records and related documents.
- [80] The evidence shows that the claimant first raised the issue of support for T.E.R. on the basis that she continued to be a child of the marriage as early as 2009 when T.E.R. was first admitted to the hospital's psychiatric ward. The issue has been alive between the parties

since that time. Between 2009 and 2015, the parties took numerous steps through their respective counsel to resolve the issue. There were many requests from the respondent for disclosure of documents that took the claimant considerable time and effort. I am satisfied that, in all of the circumstances facing the claimant during that period, most significantly, the need to deal with T.E.R. and to cope with all that was happening with T.E.R., there is reasonable explanation for why it has taken until 2018 for the issue to come to court for resolution.

b) Conduct of Respondent

[81] Counsel for the claimant submits that there is blameworthy conduct on the part of the respondent because, throughout the period 2009 until the end of the evidence at trial, he unnecessarily required the claimant to prove the requirements of s. 2(1)(b) of the Divorce Act.

[82] This is not a case of a payor parent consciously choosing to ignore his/her support obligations. Rather, it is a case of the parent wishing to determine what his support obligations were. Indeed, in September 2009, his counsel filed a Notice of Motion seeking an order for a determination of his obligations. It was that pleading that raised the issue which ultimately led to this trial.

[83] In my view, the unique circumstances of this case are such that it was reasonable for the respondent, living as he was in the United States with little, if any, first-hand knowledge of T.E.R.'s disabilities, to take the steps that he did.

[84] Accordingly, I do not ascribe blameworthy conduct to the respondent.

c) T.E.R.'s Circumstances

[85] It is impossible to bestow retroactively on T.E.R. the standard of living she would have had if the respondent had conceded in 2009 that T.E.R. continued to be a child of the marriage: D.B.S., at para. 111. However, the evidence demonstrates that, since at least June 2012, T.E.R. has suffered significant hardship with her illness and that the claimant struggled to attend to her needs.

d) Hardship on the Respondent

[86] The respondent did not lead any evidence regarding he would suffer undue hardship if a retroactive award was made. However, the retroactive award sought by the claimant of approximately \$500,000, when considered against the respondent's financial circumstances as disclosed in his Form F8 Financial Statement sworn January 12, 2018, would be a sizeable portion of his net worth.

e) The Appropriate Amount of Retroactive Support

- [87] T.E.R. returned to the claimant's care in October 2008. In December 2008, she travelled to West Virginia where she lived with the respondent until February 2009. When she returned, she engaged in behaviour that was unpredictable and volatile. She was in and out of the claimant's care until she was admitted to the UNBC Hospital on October 30, 2009.
- [88] During the period from November 2009 to June 2012, T.E.R. associated with disreputable people, took illicit drugs and was in and out of hospital. It was not until she overdosed on June 20, 2012 that the claimant "clamped down" and took charge of T.E.R., restricting her social circle and her previous questionable activities.
- [89] The claimant and T.E.R. commenced receiving PWD benefits on July 1, 2012, initially \$531.42 per month and now \$758.42 per month. The claimant now receives as additional \$300 per month as a contribution towards T.E.R.'s rent.
- [90] Taking all of the foregoing into consideration, including fairness to the respondent, I find that it is appropriate to award the claimant a lump sum amount in respect of retroactive child support for T.E.R. for the period from July 1, 2012 to the date of judgment, less a reasonable allowance for the receipt of PWD benefits over that period of time.
- [91] I assess that award in the lump sum amount of \$275,000.

Conclusion

- [92] The Consent Order dated December 17, 2007 is varied as follows:
- commencing April 1, 2018, the respondent will pay to the claimant child support for T.E.R. in the amount of \$3,000 per month;
 - the respondent will pay to the claimant retroactive child support in the lump sum amount of \$275,000;
 - there will be a vocational assessment of T.E.R. performed by a qualified occupational therapist upon her clinical psychiatrist' advising the claimant that T.E.R. is capable of participating in such an assessment. The cost of the assessment will be shared equally by the claimant and the respondent. Upon receipt of the assessment, either party is at liberty to apply for an order varying the support order I have made.
- [93] To the extent that the claimant's Amended Notice of Application filed January 26, 2017 requires amendment to reflect the foregoing relief, leave is granted for such amendment(s).
- [94] The claimant is entitled to her costs at Scale B.

"G.C. Weatherill J."

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