
CANADA / JUDGMENT

R.P. v. H.K.

2015 BCSC 1132

COURT

Supreme Court of British Columbia

DECIDED

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2015 BCSC 1132 R.P. v. H.K.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R.P. v. H.K.,

2015 BCSC 1132

Date: 20150702

Docket: E123759

Registry: Vancouver

Between:

R.P.

Claimant

And

H.K.

Respondent

Before: The Honourable Madam Justice Ballance

Reasons for Judgment

Counsel for the Claimant:

F.C. Lowther

Appearing on his own behalf:

H. Khodavardi

Place and Date of Hearing:

Vancouver, B.C.

November 24-27, 2014

Place and Date of Judgment:

Vancouver, B.C.

July 2, 2015

Introduction

- [1] The principal issues in this proceeding are the retroactive and prospective child support and the special and extraordinary expenses payable by the respondent, H.K., in relation to the parties' young daughter.
- [2] I would make the general preliminary remark that I was unimpressed with the credibility of each party in relation to certain subject areas. By way of example, the respondent was not forthcoming in providing fulsome and accurate financial information in a timely way, and was vague about his past and present living arrangements and future plans with his new spouse. As for the claimant, she gave implausible and inconsistent evidence on several material matters. That said, neither party's credibility was so deeply impugned to cause me to reject his or her evidence across the board.
- [3] I have set out below my factual findings based on my assessment of the probabilities of the evidence as a whole, taking into account my misgivings about the trustworthiness of the parties' evidence on some matters.

BACKGROUND

- [4] H.K. was born in Iran. At age 14, he began working to help support his family and later attended university for a period of time. He immigrated to Canada in 2002 when he was 27 years old.
- [5] After arriving in Canada, H.K. learned English and became accomplished in kickboxing and the martial arts. He has lived throughout the city in various rental accommodations and occasionally with friends. While in Canada he has worked mostly as a painter. Starting relatively recently, he began to work as a nightclub bouncer on a part-time basis to supplement his earnings from painting. At the time of this hearing, H.K. was age 39.
- [6] R.P. is 30 years old. She has worked full-time in the delicatessen of a grocery store chain for 13 years.
- [7] The parties dated for about one year prior to the early fall of 2010. They had an intimate relationship on a casual basis where they saw one another approximately three to eight times a month. From H.K.'s perspective, their relationship was not serious.

- [8] R.P. was taking the birth control pill throughout the relationship. At some point in time she underwent major dental work for which she was prescribed antibiotics. She told H.K. that the antibiotics could impair the effectiveness of her birth control medication and suggested that he use a condom. Her evidence is that he did not want to use a condom and assured her that he was "okay with it if she got pregnant".
- [9] The probabilities of the evidence do not support R.P.'s evidence to the effect that H.K. was "okay" with having a child with her. I find that, at best, on a small number of occasions the parties speculated about what their child might look like were they to ever have one. Their discussions about having a child together went no further than that.
- [10] In November 2010, R.P. learned she was about three months pregnant. I find that the parties had not communicated nor seen one another for several weeks before then.
- [11] Unable to connect with H.K. in person to inform him of her pregnancy, R.P. announced it on her Facebook page. H.K. saw the posting and did not take the news well. He sent text messages to R.P. asking her how she could have become pregnant and to confirm the baby was not his. R.P. responded via text that she was about three months along and was having the baby. H.K. expressed shock and told her that it would ruin his life. In the course of their ensuing text exchanges, H.K. told R.P. he wanted her to have an abortion. She refused. He also asked that there be a paternity test. R.P. agreed to do so, but not when she was three months pregnant, as she was concerned the procedure might harm the baby. When H.K. again raised the suggestion that R.P. have an abortion, she said to forget that he ever knew her or about the baby, and told him "goodbye".
- [12] R.P. says that a short time later, in December 2010, she heard from a mutual friend that H.K. had approached a "big time Iranian gangster" and asked him to "take care of her", but that the gangster had refused to do so. She did not report this information to the police, claiming that she was too afraid to do so.
- [13] R.P. asserts that this disturbing information caused her to fear H.K. and his friends. Despite that, within a matter of weeks, she initiated contact with H.K. to report that she had heard the baby's heartbeat and all was well. He expressed disinterest and told her to stop texting him. Her evidence is that she decided she would not tell H.K. anything further about the baby and instructed her doctor that she did not want him contacted when she delivered.
- [14] Another 15 months or so passed by during which the parties had no contact with one another. In the meantime, on June 3, 2011, the parties' daughter, T.P., was born.
- [15] R.P. took a one-year maternity leave. Sometime in April 2012, R.P. again initiated contact with H.K. and informed him that she wanted legal custody of T.P. At his request, she emailed him some pictures of the baby. He thanked her and commented that the baby was adorable. I find that she did not mention the topic of child support to H.K. at that time or at any earlier juncture.

- [16] It so happened that in June 2012, H.K. was working at a painting job across the street from where R.P. and T.P. were residing. R.P. noticed him and sent a text arranging for him to meet T.P. outside near his jobsite. The baby was approximately 12 months old at the time and was sitting in her stroller. According to R.P., during that encounter the infant looked at H.K. and exclaimed "daddy". Her evidence on that point is patently implausible.
- [17] R.P. confirmed that on this occasion she did not raise the issue of child support with H.K. and gave contradictory evidence as to why she chose not to. On the one hand, her evidence was that her attention was focused on introducing T.P. to H.K. and that the financial side of things was simply not on her mind. At another point in her evidence, she indicated that she was afraid that if she broached the topic with H.K. face-to-face, he may have had her harmed by the gangster friend she had been warned about. The discrepancy is material and troubling.
- [18] R.P. also claims, and H.K. denies, that although she remained silent on the matter of child support, during their get-together in June 2012, H.K. spontaneously offered to pay her \$400 per month. She says she responded to the effect that "we need to do this the right way in court". R.P. elaborated that her comment prompted H.K. to threaten that if she went "after him for custody and support" he would "run away" and that she would never find him. The evidence is clear that H.K. did not pay any child support for approximately 17 months following this meeting.
- [19] I find that H.K. repeatedly expressed skepticism to R.P. about being the father and that either in April or June 2012, the parties agreed that a paternity test would be carried out. R.P. eventually made the necessary arrangements and paid for that testing. For reasons not explored in the evidence, H.K. did not undergo the test at that time.
- [20] Several weeks after the parties' meeting in June, R.P. contacted H.K. and asked him to sign a Canadian passport application for T.P., and he did so. The application form in evidence is undated. It shows that both parties declared that they were T.P.'s "parent or legal guardian", and each signed the form in that capacity.
- [21] It was within this general timeline that R.P. texted H.K. asking that he pick up baby shoes she had placed on hold in a boutique. She told him she would reimburse him for the cost when he brought them by. About a month later, H.K. delivered the shoes to R.P. and absorbed the cost. Still, there was no discussion about H.K. contributing financially to T.P.'s support or to her s. 7 expenses.
- [22] Another month or so went by where the parties did not communicate. When T.P. was about 14 or 15 months old, R.P. contacted H.K. again. This time she invited him to attend T.P.'s gymnastics class. He said he would but did not show up. That was the parties' last communication before these proceedings were instituted.

- [23] On December 14, 2012, R.P. launched this action by filing a Notice of Family Claim (the "Claim"). The Claim alleges that H.K. is T.P.'s father and that R.P. had requested that he pay maintenance. No particulars of her alleged requests are given.
- [24] In the Claim, R.P. asked for sole custody and guardianship of T.P., with H.K. having access as R.P. may allow. She also sought the table amount of child support under the Guidelines retroactive to the date of T.P.'s birth, plus special and extraordinary expenses. As well, she requested an order that H.K. not harass or threaten her or the child, and that there be paternity testing of T.P. and H.K. in the event that he disputed his parentage.
- [25] There is evidence that the process server was unable to personally serve H.K. with the Claim. On January 30, 2013, R.P. obtained an order that H.K. be served substitutionally by taping the Claim to the door of the basement suite where R.P. believed he was residing. Substitutional service of the Claim was effected on January 31, 2013.
- [26] H.K. claims that he had moved out of the basement suite in or about December 2012, and had been staying with a friend until February 2, 2013, at which time he left Vancouver on a planned trip to Tehran. He insists that he was unaware that any documents had been posted to the exterior door of what he says was his former residence.
- [27] Having heard nothing from H.K. in response to the Claim, R.P. swore an affidavit on April 26, 2013 in aid of enforcing H.K.'s support obligations. By then she had learned that he was employed as a bouncer at a Vancouver nightclub. In her affidavit, she deposed that an annual income of \$80,000 ought to be imputed to H.K. She further deposed that he pay table child support in accordance with the Guidelines based on that figure, "back to the time when [T.P.] was born, with [H.K.] having the right to bring the matter back to court and try to prove he has a different income". R.P. also itemized the s. 7 expenses that she had incurred, including a monthly contribution of \$100 to an RESP.
- [28] Notably, R.P. further deposed that, now that she had commenced this legal action and was obtaining court orders, she had reason to fear H.K. She particularized her fear in these terms:
- [H.K.] is of Iranian descent. He has associations and "friends" that concern me. I do not want him to harass or bother or threaten me, as I seek to enforce payment of support. I ask that there be a restraining order.
- [29] It stands out that in her April affidavit, R.P. did not depose that she had been afraid of H.K. since December 2010 due to his alleged attempt to enlist a gangster to harm her. Instead, she indicated that she was worried about how H.K. and/or his "friends" might respond now that she was pursuing child support. In a subsequent affidavit, (which is replete with argument, speculation and statements of R.P.'s position on matters), she deposed that she probably should have mentioned in her April affidavit that H.K. was trying to arrange to have her killed.

[30] R.P.'s April affidavit was filed on June 5, 2013. The matter came before this Court as an undefended family law proceeding. A Final Order was granted on June 11, 2013. It provides, in relevant part, as follows:

- R.P. shall have sole guardianship of T.P. H.K. shall not exercise contact except as permitted by R.P. in writing or by further court order;
- R.P.'s annual income for the purposes of the Guidelines is \$46,000 and H.K.'s is imputed at \$80,000;
- H.K. is to pay child support in the amount of \$748 per month. He shall pay retroactive lump sum support of \$17,952, calculated from the date of T.P.'s birth to May 2013 inclusive;
- Commencing June 1, 2013, H.K. shall pay \$748 per month in child support for so long is T.P. remains a child within the meaning of the Family Law Act, S.B.C. 2011, c. 25 [the "FLA"];
- Section 7 expenses are to be shared by the parties proportionate to their incomes, being 63% by H.K. and 37% by R.P.; and
- H.K. shall pay the lump sum amount of \$4,914 in s.7 expenses, calculated at the rate of \$378 per month for the period of May 2012 through to May 2013, and thereafter shall pay \$378 per month as his proportionate share.

[31] A Protection Order was granted on the same day pursuant to s. 183 of the FLA. It restrains H.K. from communicating with, contacting or following R.P., or attending at or near her residence or place of work.

[32] On September 7, 2013, H.K. was personally served at his place of work with a copy of the Final Order and the Protection Order. He was also served with a notice of application filed by R.P. requesting several orders compelling disclosure by H.K. of his assets, income and banking records. Also sought were orders that H.K. be committed to jail and be imprisoned for up to 30 days so long as he failed to make the child support payments, that he be arrested if he did not attend the hearing, that his wages be attached on a continuing basis to pay child support and that his vehicle be impounded or otherwise disposed of to produce money to pay child support.

[33] Soon after being served, H.K. retained counsel. He filed a Response to the Claim and a Counterclaim to the effect that he was not certain he was the T.P.'s biological father and that, if he is, he wanted parenting time with her. He requested an order that there be parentage testing of T.P. and himself. H.K. also filed an application of his own seeking to set aside the Final Order and the Protection Order on the ground that he had not been served with the Claim.

[34] In about November 2013, DNA testing confirmed H.K.'s paternity of T.P. In December 2013, H.K. began to pay child support in the amount of \$400 per month, and has continued to do so to the present.

- [35] The hearing of the parties' competing notices of application was eventually placed on the trial list.
- [36] From the time that R.P. became aware that H.K.'s annual income was less than the amount imputed to him under the Final Order, she has been prepared to agree to a reduction in child support. Her counsel conceded that this Court has jurisdiction to change the Final Order as it concerns child support pursuant to s. 152 of the FLA. The parties agreed that, for the purposes of this hearing, H.K.'s application to set aside the Final Order would not be addressed, and that this hearing would proceed as his variation application to change the terms of the Final Order as it pertains to child support. The issues of H.K.'s contact and parenting time with T.P. were left for another day.

Discussion

· The Parties' Income

- [37] Unless otherwise noted, all monetary sums referred to in these Reasons have been rounded up or down for convenience.
- [38] R.P.'s line 150 income reported on her income tax returns from 2011 through 2013 are \$33,847, \$43,472 and \$54,225, respectively. She expects her 2014 income to be consistent with the preceding year.
- [39] As mentioned, H.K.'s employment experience in Canada has been confined to working as a painter and, more recently, as part-time nightclub bouncer. His income tax returns from 2009 through 2013 were in evidence. Emblematic of his late financial disclosure, H.K. did not provide a copy of his 2013 return until this hearing was underway. His line 150 income reported in his 2011 tax return was \$40,305, and is reasonably comparable to his 2009 income. His income in 2010 was significantly less than in both of those years, however, there was no cogent evidence to explain the discrepancy. H.K. enjoyed a relatively high income in 2012. I accept his evidence that his reported annual income that year of \$62, 880 is the most he has ever earned.
- [40] R.P. does not contend that income greater than the amounts shown in H.K.'s 2011 and 2012 tax returns ought to be attributed to him for those years. However, the amount of his 2013 and future income for child support purposes is contentious.
- [41] H.K. reported line 150 income of \$38,059 in 2013. Of that figure, \$31,651 were employment earnings. Two events took place in 2013 that had the effect of reducing his income. First, he took a pre-planned, extended trip to Iran. The purpose of the trip was two-fold: to see his mother, who was ill, and to marry a woman there with the hope that she would relocate with him to Canada. He had intended to stay in Iran for three months; however, the trip lasted an additional month because he and/or his new wife faced unanticipated immigration problems of some kind.

- [42] Before he left on his trip, H.K. had amassed savings of more than \$17,000 in his bank account. Just prior to his departure, he withdrew \$13,550. from that account. He applied \$2,137 to his Visa bill and used substantially all of the balance to cover the expenses of his lengthy trip.
- [43] There can be no question but that H.K.'s decision to spend time in Iran adversely impacted his earnings in 2013. R.P. asserts that in 2013 he was on track to match his 2012 income. Her position is that income corresponding to his 2012 earnings ought to be imputed to him for the months in 2013 that he was in Iran on the basis that he was intentionally unemployed during that period and was intentionally underemployed that year. I generally agree.
- [44] In my view, it was reasonable for H.K. to take a limited time away from work in order to visit his sick mother and to marry in his home country. However, his decision to voluntarily withdraw from the workforce in 2013 for a prolonged period was unreasonable in the circumstances. Income ought to be imputed to him for a significant part of his absence.
- [45] The second pertinent occurrence happened on October 30, 2013 when H.K. suffered a serious accident while on the job. He fell three flights of stairs down an interior staircase that had no railings. He suffered significant physical injuries to his scapula, lower back, neck, ankle and ribs requiring three days hospitalization. He also suffered psychological injuries and may have sustained a concussion.
- [46] The evidence indicates that during the months that he worked in 2013, H.K. earned an average monthly wage of roughly \$5,200. That said, however, I accept his evidence that the painting work typically slowed down over the winter months. In the circumstances, I consider it reasonable to impute an additional \$11,000 to his declared earnings of \$31,651, for total employment income of \$42,651 in 2013. To that sum should be added his WCB benefits of \$6,408, grossed-up before the Guidelines are applied, for a total income of \$51,675.
- [47] H.K. credibly recounted that the workplace incident turned his life upside down. He was no longer able to work out at the gym, keep fit, perform his painting job or work as a bouncer. The evidence establishes that the negative effects of his injuries continued to plague him throughout 2014.
- [48] In July 2014, H.K. began seeing a psychiatrist. The cost of his treatment has been covered by the WCB in recognition that he sustained psychological injuries as a result of the accident. The WCB has recently informed H.K. that it considers his psychological condition resolved insofar as it relates to the workplace accident. Even so, he has been told that the WCB will continue to cover his ongoing sessions with a psychiatrist as he transitions through their vocational rehabilitation services. Whether H.K.'s psychological difficulties can be said to be sequelae from the workplace incident or stem from another cause may be material to the WCB, but is quite beside the point in deciding the issues before me. The question is whether they negatively impact his capacity to earn, and if so, to what extent.

- [49] Observing H.K. during this four-day hearing, I noticed that he moved slowly, frequently relying on a cane, and appeared to be fatigued and in pain. He sometimes presented as being muddled in his thinking and even confused. It may be that some of the cognitive difficulties he displayed were due to the effects of the painkillers and anti-anxiety medication that he takes on a regular basis. His courtroom presentation did not appear feigned or exaggerated.
- [50] The state of H.K.'s entitlement to receive future WCB benefits is not clear. There is evidence that the WCB has informed him that it considers his physical injuries to have stabilized, which would bring his temporary wage loss benefits to a close in October 2014. And yet, he was still receiving those wage loss benefits in the amount of \$1,402 bi-weekly at the time of this hearing in late November 2014. Assessing the evidence as best I am able, I conclude that H.K.'s wage loss benefits will cease at the 2014 calendar year-end. Consequently, in 2014 his entire income was derived from his WCB benefits totalling \$36,452, which should be grossed up by \$6,613, for a total income of \$43,065 for child support calculations.
- [51] There is no reliable evidence about the nature and extent of H.K.'s further pecuniary benefits once his wage loss benefits cease. The WCB has told H.K. that it has determined that the workplace incident left him with a permanent condition of "[c]hronic pain multiple sites", which places limitations on his ability to return to his pre-injury employment. He has received a letter from the WCB confirming his entitlement to receive a permanent disability award/benefits. The amount is being assessed by the disability awards department.
- [52] Through no fault on H.K.'s part, there is insufficient cogent evidence before me from which to fairly predict the amount and nature of his disability award or other future WCB benefits, if any into 2015 and his realistic employment opportunities, earning capacity and projected earnings in the near future. I am satisfied that, at this time, he continues to struggle with chronic pain from the accident and has physical limitations that will continue to have an adverse impact - at least in the short term - on his earning capacity. The evidence also supports an inference that his psychological problems are ongoing in that they continue to require treatment by a psychiatrist. Whether it is likely that they will contribute to short term difficulties in obtaining and/or satisfactorily performing full-time work cannot be fairly determined on the evidence as it currently stands.
- [53] R.P. contends that H.K.'s earning capacity in 2015 is over \$60,000 and that an income of \$62,000 ought to be imputed to him. Her reasoning is largely fastened to the fact that WCB has informed H.K. that it considers his accident-induced physical injuries to be resolved. While H.K.'s physical injuries from the accident may be resolved from WCB's perspective, the WCB has, at the same time, acknowledged that he suffers from a permanent chronic pain condition that imposes limitations on him performing his pre-injury employment, that he requires vocational rehabilitation services and is entitled to continued psychiatric treatment for a period of time. More crucially, and in any event, it does not follow from WCB's conclusion, that H.K. is able to simply pick up his employment from where he left off prior to the accident and make an income equivalent to the highest he has ever earned. R.P.

was not able to point to cogent evidence in support of her assertion that H.K. is capable of earning his highest pre-accident income. Indeed, the preponderance of the evidence strongly points the other way.

- [54] The imputation of income is not the product of speculation or guesswork. The party seeking to have income imputed - in this case R.P. - must establish an evidentiary basis for such a finding: *Marquez v. Zapiola*, 2013 BCCA 433. R.P.'s position is extreme and not reasonable on the totality of the evidence. The amount of income attributed to H.K. must be a reasonably realistic reflection of his earning capacity commensurate with his age, experience, skills, education and, most crucially, in light of his permanent chronic pain condition and the restrictions his injuries have placed on his ability to perform certain work tasks.
- [55] Based on the evidence before me, it would be both unfair and unreasonable to find that H.K. is currently capable of earning his highest level of pre-accident income or will be able to do so in the near future. There is no reliable evidentiary foundation to impute that amount or even a similar level of income to him for 2015. H.K.'s re-entry to the workforce will likely be gradual and he require some degree of vocational training and/or rehabilitation to help him attain an income level that is near to his pre-accident income earning capacity. That will take time. It is reasonable to infer that he will initially rejoin the workforce at a relatively low-level job and likely on a part-time basis.
- [56] Taking the pertinent factors into account and assessing the evidence as best I am able in light of the aforementioned uncertainties and gaps, I conclude that H.K.'s 2015 income will be substantially less than it was in 2014. In all the circumstances, it is fair and reasonable to impute a gross income of \$18,500 to him for 2015. Imputation in that amount is made on the understanding that H.K. is not entitled to withdraw himself from the vocational and rehabilitation services offered by the WCB, and that he must take diligent steps to rejoin the workforce as soon as is reasonably practicable in light of any on-going limitations.
- [57] The uncertainties surrounding H.K.'s future employment and earning capacity are sufficiently significant to warrant a review of those issues. The parties are therefore at liberty to apply for a review of H.K.'s income and child support obligations (including his share of s. 7 expenses) at any time after December 31, 2015, without the need of demonstrating a material change of circumstances or any of the other criteria found in s. 152 of the FLA. At least thirty days before the review date, each party must supply the other with an updated financial statement attaching paystubs for earnings in 2015, documents confirming all other benefits received that year and their respective income tax returns, if available. H.K. is also to supply his banking and credit card records for 2015 together with a detailed accounting of his efforts at retraining and attempts to obtain appropriate employment. I am seized of the review.

· Child Support

- [58] R.P.'s position is that H.K. is liable for the table amount of child support under the Guidelines retroactive to the date of T.P.'s birth based on his reported income for tax purposes in 2011 and 2012, an imputed income of \$50,000 in 2013, \$42,998 in 2014, and \$62,000 in 2015, and that the Final Order be varied accordingly. She similarly contends that insofar as the Final Order covers retroactive s. 7 expenses, it should be adjusted only as needed to reduce H.K.'s proportionate share based on his foregoing actual and imputed incomes.
- [59] H.K. maintains that he was unaware that R.P. was seeking child support until he was served with the Final Order in September 2013 and, therefore, he should not be liable for support before then. He further asserts that the imposition of a retroactive support obligation would pose a significant financial hardship to him. He adopts a similar position with respect to his obligation to pay retroactive s.7 expenses. H.K. is prepared to pay the applicable table amount of support based on his considerably lower income and to contribute proportionately to those of the s. 7 expenses that are reasonable and necessary, all on a go-forward basis.
- [60] A child support order can be varied retroactively pursuant to s. 17(1) of the Divorce Act (which does not apply in this case). Section 152 of the FLA empowers the court to change, suspend or terminate a child support order retroactively or prospectively. Section 170(b) of the FLA provides that an order for child support may stipulate that child support be paid respecting any period of time before the date the application for the order is made.
- [61] In *D.B.S. v. S.R.G.*, 2006 SCC 37 [D.B.S.], the Supreme Court of Canada confirmed the court's authority to enforce a parent's past obligation to make child support payments under the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), and the matrimonial legislation of Alberta. The Court in *D.B.S.* explained further that although retroactive awards are discretionary, they are not to be regarded as exceptional. The essential principle is that parents have a joint financial obligation to support their children commensurate with their income. Accordingly, in circumstances where a parent's obligation is unfulfilled, retroactive support may be granted.
- [62] The key factors that inform the exercise of judicial discretion to make or dismiss an award for retroactive child support identified in *D.B.S.* are:
1. The circumstances surrounding the failure to seek support earlier;
 2. Whether the payor parent's conduct, in this case H.K.'s conduct, is blameworthy in the sense that he preferred her own interests over T.P.'s right to an appropriate amount of support;
 3. T.P.'s past and present circumstances, and specifically her standard of living; and
 4. Whether a retroactive award would cause H.K. financial hardship.

[63] All of the relevant factors are to be applied using a broad and holistic approach, and no single factor is determinative. The quantum of a retroactive award is ultimately one of discretion informed by the principles enunciated in D.B.S.

[64] As a general rule, a retroactive child support award should reach back to the date when the recipient parent gave the payor parent effective notice of the intention to seek support. The concept of effective notice does not require that the recipient parent take any formal legal action. All that is necessary is that the topic of child support is broached or that the recipient parent give some other indication that support should be paid. The Court in D.B.S. explained at paras. 122-123:

122 Accordingly, by awarding child support from the date of effective notice, a fair balance between certainty and flexibility is maintained. Awaiting legal action from the recipient parent errs too far on the side of the payor parent's interest in certainty, while awarding retroactive support from the date it could have been claimed originally erodes this interest too much. Knowing support is related to income, the payor parent will generally be reasonable in thinking that his/her child's entitlements are being met where (s)he has honestly disclosed his/her circumstances and the recipient parent has not raised the issue of child support.

123 Once the recipient parent raises the issue of child support, his/her responsibility is not automatically fulfilled. Discussions should move forward. If they do not, legal action should be contemplated. While the date of effective notice will usually signal an effort on the part of the recipient parent to alter the child support situation, a prolonged period of inactivity after effective notice may indicate that the payor parent's reasonable interest in certainty has returned. Thus, even if effective notice has already been given, it will usually be inappropriate to delve too far into the past. The federal regime appears to have contemplated this issue by limiting a recipient parent's request for historical income information to a three-year period: see s. 25(1)(a) of the Guidelines. In general, I believe the same rough guideline can be followed for retroactive awards: it will usually be inappropriate to make a support award retroactive to a date more than three years before formal notice was given to the payor parent.

[65] The preponderance of the evidence indicates that neither party raised the matter of child support or s.7 expenses with the other during the course of their brief get-together in June 2012 or before then. More specifically, I do not accept R.P.'s evidence that, on the June occasion, H.K. offered to pay her monthly child support in the amount of \$400. I find that he never raised the support issue before being served with the Final Order in September 2013. The probabilities of the evidence also establishes that at no time before she substitutionally served her Claim, did R.P. indicate to H.K. that she was seeking child support or contribution to s.7 expenses.

[66] I do not accept R.P.'s evidence to the effect that in December 2010, she became fearful of H.K. and/or his friends or associates. Her conduct in repeatedly contacting H.K. and trying to arrange unsupervised meetings with him and T.P. after she claims to have learned of his criminal plan to have her harmed by a gangster is wholly incompatible with her assertion of

being fearful. Indeed, part of her evidence is that H.K. told her that he would "run away and she would never find him" if she sought to pursue child support. Although I do not find her evidence on that point believable, it indicates how inconsistent her evidence on the whole has been in relation to her alleged fear of H.K. I also find there to be insufficient evidence that R.P. was concerned that H.K. would respond vindictively to the detriment of her and/or T.P. were she to raise the issue of child support with him. To the extent that R.P. offers her assertion of fear as a rationale for not raising the child support issue with H.K. earlier than she did, I conclude it is baseless.

- [67] Additionally, there is no cogent evidence that R.P. lacked the financial or emotional wherewithal to commence her Claim earlier or that she had been given inadequate legal advice that resulted in her not proceeding before she did.
- [68] Given my findings, the earliest effective date as contemplated in D.B.S. would be January 31, 2013, being the date that H.K. is said to have been served with the Claim substitutionally. The latest effective date would be 7-1/2 months or so later in September 2013, when he was personally served with the Final Order. There is no principled basis in the case at hand to conclude that any retroactive award ought to reach back in time before the first effective date of January 31, 2013.
- [69] The amount of basic child support payable by H.K. in 2013 based on his Guidelines income of \$51,675 is \$475 per month. If the effective date were January 31, 2013, the retroactive support owed by H.K. in 2013 would be \$5,225 (11 months x \$475). If, on the other hand, the effective date was the date he was served with the Final Order, then the amount of retroactive support for 2013 would be \$1,425. He paid \$400 that year.
- [70] Based on the grossed-up income from the WCB in 2014, H.K.'s monthly child support under the Guidelines is \$393 for 2014. It follows that the amount of retroactive table support until the hearing date in November that year would be \$4,323. He has paid \$4,400 (11 months x \$400) which is slightly more than that.
- [71] The principles laid out in D.B.S. apply to making retroactive orders for s. 7 expenses: *Semancik v. Saunders*, 2011 BCCA 264.
- [72] In *Bodine-Shah v. Shah*, 2014 BCCA 191 [Bodine-Shah] the Court of Appeal summarized the governing principles with respect to s. 7 expenses:
- [66] Special expenses listed in ss. 7(1)(a)-(c) and (e) are distinct from extraordinary expenses referred to in ss. 7(1)(d) and (f). Special expenses are defined as relating to child care, medical or dental insurance premiums, health-related costs, and post-secondary education. They must be found to be reasonable and necessary. Extraordinary expenses are not defined. Their extraordinariness is determined in the context of the combined income of the spouses, as well as other considerations, including the nature and amount of the individual expense, the nature and number of the activities, any special needs or talents of the child, and the overall cost of the activities. They also must be found to be reasonable and

necessary. Relevant considerations for the tests of necessity and reasonableness include whether the expenses are necessary in relation to the child's best interests, and reasonable having regard to the means of the spouses, the child, and to the family's spending pattern prior to separation. See *McLaughlin v. McLaughlin* (1998), 57 B.C.L.R. (3d) 186 at paras. 81-82 (C.A.). In assessing "means", the court may consider the parties' capital assets, income distribution, debts, third-party resources, access costs, support obligations, receipt of support, and any other relevant factor: *Delichte v. Rogers*, 2013 MBCA 106, 37 R.F.L. (7th) 81 at para. 38. Courts may consider whether the non-custodial parent was consulted regarding the expense, though a lack of consultation does not automatically preclude a finding that the expense is reasonable and necessary: *Delichte* at paras. 39, 44.

- [73] R.P.'s prolonged inaction in broaching the subject of child support with H.K. and delay in pursuing support does not, of itself, eliminate H.K.'s obligation to pay. However, it is a significant factor that I have borne in mind in deciding whether to exercise my discretion in ordering a retroactive award.
- [74] H.K.'s conduct must also be examined. Assuming that service on him was effected on January 31, 2011, which he denies, his withdrawal of a significant portion of his savings to spend on his extended trip to Iran clearly preferred his financial interests over T.P.'s, and had the effect of reducing the amount of his disposable resources from which he could pay support. Such conduct is clearly blameworthy. If, on the other hand, he was not aware of the claim for child support until he was served with the Final Order, that conduct cannot legitimately be characterized as blameworthy within the meaning of D.B.S. It seems to me that the worst case scenario for H.K. would presume effective notice on January 31, 2013. Even then, R.P.'s pronounced delay significantly neutralizes the intensity of his blameworthiness.
- [75] R.P. is a committed mother who, with the help of her own mother, has provided a loving home for T.P. She has ensured that T.P. has participated in age-appropriate and fun-filled activities, as well as receiving the speech assistance that she has come to require. It cannot be reasonably inferred from the evidence that T.P. has been deprived or has suffered during the retroactive period.
- [76] Application of the principles confirmed in *Bodin-Shah* readily shows that several items claimed by R.P. as constituting extraordinary expenses do not qualify as such. At the hearing her counsel clarified that she was not pursuing contribution towards certain dentist costs, diaper cream, wipes and diapers/pull-ups or the \$100 contribution to the RESP. I would put the minor cost of attending Christmas, Easter and Halloween events in 2013 and 2014, as well as the YMCA pass and school supplies and clothing in 2014 in the same category. T.P.'s childcare costs of \$7,200, which R.P. pays to her mother, together with other medical expenses incurred in 2013 and 2014 are reasonable and necessary s. 7 expenses. Given the financial reality of the parties, and in light of the expenses incurred for essential medical items, day care and speech assistance, the cost of T.P.'s participation in extracurricular activities, such as gymnastics classes, music programs and swimming, are unreasonable.

Nor can the parties reasonably afford the substantial costs of T.P.'s enrolment in Extra Steps preschool which amounted to \$3,025 in 2013 and \$4,970 in 2014, plus another \$1,259 for camp and events.

[77] In summary, the allowable s. 7 expenses for 2013 and 2014 respectively are:

2013

Childcare \$7,200.00

Medical expenses \$430.61

Medication (Ventonlin) \$218.34

TOTAL: \$7,848.95

2014

Childcare \$7,200.00

Columbia Speech &

Language Services \$1,682.50

Medication (Ventonlin) \$218.34

Other Medication \$78.44

TOTAL: \$9,179.28

[78] In respect of 2015, R.P. seeks H.K.'s proportionate contribution to the cost of \$5,100 for Extra Steps preschool, \$200 for preschool events and \$1,700 for Extra Steps summer camp. It is not clear whether the preschool cost incorporates expenses for T.P.'s childcare. It would appear as though it does as R.P. has not separately claimed for the latter. Assuming that the preschool costs are not intended to be over and above other childcare costs, those expenses are reasonable. Also necessary and reasonable is the \$510 cost for T.P. to attend a program for speech delayed children.

[79] To recap, T.P.'s 2015 s. 7 expenses that qualify either as special expenses or extraordinary expenses that I find to be reasonable and necessary are:

Columbia Speech & Language Services \$510.00

Extra Steps Preschool \$5,100.00

Medication (Ventonlin) \$218.34

Preschool Events \$200.00

Extra Steps Summer Camp \$1,200.00

TOTAL \$7,228.34

- [80] It is incumbent on the court to assess the totality of the circumstances and make an award that minimizes hardship to the payor parent. In order to determine whether there would be a financial hardship upon H.K. were retroactive awards for child support and/or s. 7 expenses granted, the amount of the potential awards must be assessed in light of H.K.'s income and other financial means.
- [81] H.K. has either managed to squirrel away the sum of approximately \$4,000 or that sum is remaining from the large withdrawal he made from his bank account just before his trip to Iran in February 2013. He plans to apply some of the \$4,000 toward a retainer for an immigration lawyer on his wife's behalf and for a lawyer to represent him in the event that he wishes to appeal the disability award decision of the WCB. Other than that, H.K. has no financial resources to speak of, not even a vehicle. He has access to a line of credit and his overall debt load is small. R.P. is also of modest means. She has a bank account with a respectable balance and has relatively small credit card debt.
- [82] The court may reduce the amount of the retroactive award for fairness on the basis of hardship to the payor parent pursuant to s. 10 of the Guidelines. Another way to adjust for fairness is by shortening the time period capturing the retroactive award, particularly where reliance on the effective date will not yield a fair result: D.B.S. paras 129 and 130
- [83] There can be no question but that a retroactive award of table support and s. 7 expenses back to January 31, 2013 would impose a serious and immediate financial hardship upon H.K. The aftermath of the workplace incident has left him with a permanent disability that imposes restrictions on his ability to do certain types of work and has prevented him from working since late October 2013. I have found that he will re-enter the workforce on a graduated basis and that his future employment is fraught with uncertainty at this time. Given H.K.'s unfortunate personal and financial circumstances, anything other than a modest retroactive award would cause him extreme financial hardship and not yield a fair result overall. I draw this conclusion aware that he had funds of approximately \$4,000, referred to above, and will presumably be in receipt of a disability award/benefits from WCB.
- [84] Weighing the interplay of the relevant D.B.S. factors, I conclude it is fair to significantly abridge the time period captured by the retroactive award for basic support such that it commences on October 1, 2013. Accordingly, H.K. is responsible for payments of \$475 for October, November and December 2013. He is also responsible for monthly payments of \$393 throughout 2014. He has paid the lion's share of that retroactive award by way of his monthly payments of \$400. I further order him to pay the lump sum amount of \$2,000 in retroactive s.7 expenses. That payment is payable in 12 equal monthly installments beginning on July 1, 2015. Commencing on January 1, 2015 monthly child support of \$159 is payable by H.K., together with his proportionate share of the 2015 s. 7 expenses. In the event that H.K. has continued to pay child support after the hearing date at the rate of \$400 per

month, the amount of his overpayment is to be set-off against the retroactive award.

COSTS

[85] If either party wishes to draw my attention to the matter of settlement offers in the course of this litigation, they may do so by arranging with trial scheduling within the next 60 days to appear before me and make submissions. Subject thereto, I consider that the parties enjoyed divided success and that they ought to bear their own costs.

____ "Ballance J." _____

Ballance J.

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