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S. (J.M.) v. S.(G.A.P.)

2007 BCSC 819

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Supreme Court of British Columbia

DECIDED

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2007 BCSC 819 S.(J.M.) v. S.(G.A.P.)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

S. (J.M.) v. S.(G.A.P.),

2007 BCSC 819

Date: 20070608

Docket: D032239

Registry: New Westminster

Between:

S. (J.M.).

Plaintiff

And

S. (G.A.P.)

Defendant

Before: The Honourable Mr. Justice Kelleher

Reasons for Judgment

Counsel for the Plaintiff:

Raymond E. Drabik

Counsel for the Defendant:

Elaine M. Kurek

Date and Place of Hearing:

April 4, 2007

New Westminster, B.C.

- [1] These are matrimonial proceedings. There are two applications before me. The first is an application by the defendant for an order that the plaintiff's and defendant's three children are no longer "children of the marriage" because they have reached the age of majority. The second is an application by the plaintiff for a retroactive increase in child support.
- [2] The plaintiff and defendant were married on October 6, 1979. They separated on November 1, 1992 and were divorced on April 6, 1995. There are three children, J. who is 22, born November 9, 1984; K. who is 20, born July 10, 1986; and G. who is 19, born August 25, 1987. The original terms at the time of the divorce were by consent. There was joint custody and joint guardianship. The children lived with the plaintiff and the defendant was entitled to generous and liberal access. There was child support payable by the defendant of \$500 for each child, a total of \$1,500 monthly. This was before the Federal Child Support Guidelines. On September 24, 1998, Madam Justice Stromberg-Stein ordered child support of \$1,116 based on the defendant's income imputed to be \$63,000. He was also to look after 68% of extraordinary expenses.
- [3] The defendant is not in arrears of the terms of the Stromberg-Stein order with respect to child support.
- [4] The defendant seeks an order that the children are no longer children of the marriage. In the alternative, he argues that they are entitled to less support.
- [5] The plaintiff seeks an order for a retroactive increase in child support back to 1999.
- [6] The first questions to be determined are those which arise from the defendant's application: whether J., K. and G. are children of the marriage.
- [7] J. enrolled at Kwantlen University College for September 2002, when she was 17. However, on August 30, 2002, she was injured in a motor vehicle accident.
- [8] These injuries interfered with her education. She now has 40 units from Kwantlen College and from Douglas College toward her degree. She has also had financial challenges. She has borrowed money from her mother and grandmother. Her father has told her that he is unable to assist because of his financial constraints.
- [9] J. is presently taking courses at Okanagan University College in Vernon and working part-time. As well, she is taking a distance education course in anthropology from Athabasca University. She hopes to attain her Associate Degree this fall and aspires to a Bachelor's Degree in psychology and possibly a PhD. and a career in providing art therapy for terminally ill children.

- [10] K. enrolled at Kwantlen College at age 18. She struggled academically. She was also injured in a motor vehicle accident which occurred in the fall of 2006.
- [11] She is now enrolled in a professional hairdressing diploma program at Blanche MacDonald School of Hairdressing. In this regard, she has obtained a student loan in the amount of \$13,760 to cover part of her tuition and expenses.
- [12] G. enrolled at Kwantlen University College in the fall of 2006. He is presently a full-time student taking business-related courses. He works part-time and has obtained a student loan.
- [13] The applicable principles in determining whether a person is a "child of the marriage" were articulated in a recent decision of Madam Justice Martinson in *C.(C.L.) v. C.(B.T.)*, 2006 BCSC 1787. She explained that under s. 2 of the Divorce Act "child of the marriage" includes a child who has attained the age of majority but is unable by reason of illness, disability or other cause to withdraw from the charge of his or her parents.
- [14] One of the reasons a child who has attained the age of majority may still be a child of the marriage is because he or she is pursuing post-secondary education. This may constitute an "other cause" rendering a child unable to withdraw from the charge of his or her parents. See e.g. *Farden v. Farden* (1993), 48 R.F.L. (3d) 60 (B.C.S.C.); *N.(W.P.) v. N.(B.J.)* (2005), 36 B.C.L.R. (4th) 330, 2005 BCCA 7, at para. 18. Madam Justice Martinson said the following in *C.(C.L.) v. C.(B.T.)* at paras. 16 and 17:
- [16] The definition of "child of the marriage", referred to above, is relevant here as well. In *W.P.N. v. B.J.N.*, the Court of Appeal approved the factors set out in *Farden v. Farden* (1993), 48 R.F.L. (3d) 60, [1993] B.C.J. No. 1315 (QL) (S.C.) in the context of a university education (at ¶20):
- (1) whether the child is in fact enrolled in a course of studies and whether it is a full-time or part-time course of studies;
 - (2) whether or not the child has applied for or is eligible for student loans or other financial assistance;
 - (3) the career plans of the child, i.e., whether the child has some reasonable and appropriate plan or is simply going to college because there is nothing better to do;
 - (4) the ability of the child to contribute to his own support through part-time employment;
 - (5) the age of the child;
 - (6) the child's past academic performance, whether the child is demonstrating success in the chosen course of studies;
 - (7) what plans the parents made for the education of their children, particularly where those plans were made during cohabitation;

- (8) at least in the case of a mature child who has reached the age of majority, whether or not the child has unilaterally terminated a relationship from the parent from whom support is sought.

[17] The Court said at ¶ 30:

The jurisprudence supports the view that there is a wide range of factors to be considered in the determination of whether a child is a "child of the marriage" and that individual factors will be of varying importance in different cases. All of the relevant factors must be considered. There is no arbitrary cut-off point based on the number of degrees or the eligibility of the student for financial assistance.

[15] Based on a consideration of those factors, J., K., and G. would appear to be children of the marriage. All of them are attending university or other post-secondary programs.

[16] The defendant, however, emphasized the eighth factor in Farden, the child's termination of the relationship. The principle was stated by Mr. Justice Williamson in *Kalenjuk v. Kalenjuk*, [1998] B.C.J. No. 2211 at para. 14 (S.C.) (QL):

...[u]nilateral termination by a mature child of a relationship with one of the parents without any apparent good reason is a factor to be considered in determining whether it would be fit and just that the vanquished parent remain obligated to provide maintenance for that child.

See also *Marsh v. Marsh*, 2005 BCSC 1861 (holding that this consideration does not apply to a child below the age of majority); *Marshland v. Gibb* (2000), 5 R.F.L. (5th) 406, 2000 BCSC 471.

[17] That principle is not applicable here. There is a considerable amount of alienation between the defendant and his children. However, I am unable to say this is based on the unilateral action of any of the children or that there is no "apparent good reason".

[18] The children have all deposed that their father has not taken an interest in them and that he has refused to assist their mother and them, citing his financial inability. However, they have seen him spend money on hobbies and leisure activities and do not accept this.

[19] The defendant's reaction to this attitude on their part is quite remarkable. He is of the view that the children's attitude toward him is based on the plaintiff providing misinformation to them. He does not deny, however, that he has refused to consider assisting them.

[20] Moreover, despite much conflicting evidence, it is apparent to me that he has not taken an interest in them. Much of his affidavit in response to the affidavits filed by the plaintiff and the children contain statements that he was not aware of various facts that are part of the children's lives.

[21] Here, the children are all enrolled in a course of studies; they are all working part-time; they are in their early 20's. Their educational plans appear to be reasonable and tailored to their career goals. Although K. had difficulties academically, she is now enrolled with demonstrated success in a program that will provide her with a career as a hairdresser. She

has a history of employment, which was recently disrupted by reason of injuries suffered in a car accident, and has also taken out a student loan to help defray expenses. J. likewise works part-time and has obtained a student loan, and is pursuing a degree in psychology. G. also has a history of working, and has taken out a student loan. He is pursuing business-related courses full-time and working part-time. I am satisfied that all three are children of the marriage.

- [22] I turn to the issue of child support. There are two issues. The defendant's alternative position is that the child support be reduced. The plaintiff's application is for increased support.
- [23] The plaintiff is seeking increased support for all three children, retroactive to 1999, based on the defendant's Guideline income of those years. She is also seeking the appropriate share of s. 7 expenses set out in Madam Justice Stromberg-Stein's original order based on the actual Guideline income and an appropriate share of post-secondary and orthodontic expenses and the appropriate share of basic medical coverage for the plaintiff. The defendant has not contributed towards this last expense, although the Stromberg-Stein order requires him to pay a proportionate share.
- [24] The court has the power under s. 17(1) of the Divorce Act to vary a child support order retroactively. The issue was addressed by the Supreme Court of Canada in *S.(D.B.) v. G.(S.R.)*, [2006] 2 S.C.R. 231, 2006 SCC 37. Bastarache J., writing for a majority of the court in that case, began with the four core principles which underlie child support obligations (at para. 38):
- (1) child support is the right of the child;
 - (2) the right to support survives the breakdown of the child's parent's marriage;
 - (3) child support should, as much as possible, provide children with the same standard of living they enjoyed when their parents were together; and
 - (4) the specific amounts of child support owed will vary based on the income of the payor parent.
- [25] In *S.(D.B.)* at paras. 68-69, the Supreme Court explained that any order that is back-dated is not truly retroactive - a payor parent always has the obligation to pay child support in an amount commensurate with his or her income, and therefore the court is not imposing that obligation after the fact. There is no legal obligation on a parent to disclose changes to the parent's income: *H.(P.A.) v. H.(J.)* (2004), 244 D.L.R. (4th) 474, 2004 BCSC 306. However, if the payor's income rises and the amount of child support does not, there remains an unfilled obligation that could merit court enforcement: *S.(D.B.)* at para. 59.
- [26] The claim is not retroactive because it does not involve imposing an obligation on a payor parent that did not already exist. The legal prerequisite to the court to have jurisdiction to award retroactive support is that the child in question is a child of the marriage at the time the application was made. See *S.(D.B.)* at paras. 86-89.

- [27] The application here was made on January 16, 2007. All three children were children of the marriage at that time. The court therefore has jurisdiction to order a retroactive award.
- [28] Here, a support order is in place, as varied by Madam Justice Stromberg-Stein. As explained by Mr. Justice Bastarache in *S.(D.B.)* at paras. 62-74, a court order awarding a certain amount of child support is presumptively valid, and a payor who pays that amount must be presumed to have fulfilled his or her support obligations towards the children. While court-ordered support can be varied retroactively where the circumstances underlying the original award have changed, the arguments for predictability and certainty for the payor parent have greater weight where there is a court order in place. However, the presumption that a parent is meeting obligations by paying support in accordance with a court order may be rebutted by a significant increase in income: *R.(C.A.) v. R.(G.F.)*, 2006 BCSC 1407 at para. 43. See also *H.(P.A.)* at para. 9.
- [29] Under the order of Stromberg-Stein J., child support was fixed at \$1,116 per month. The defendant was to pay 68% of extraordinary expenses, which were listed in a schedule to the order, his proportionate share of the plaintiff's basic medical expenses of \$35 per month and his proportionate share of orthodontic expenses beyond what was covered by the plan.
- [30] The Stromberg-Stein order was based on 1998 income of \$63,770. In fact, in 1998, he earned \$82,909 including "gainsharing". Whether the gainsharing portion of his income should be included is discussed below. His income in the years since, and the gainsharing portion are as follows:

Year

Basic Income

Gainshare

1999

\$65,734

\$5,954

2000

\$83,062

\$16,204

2001

\$78,389

\$9,605

2002

\$74,199

\$7,938

2003

\$73,212

\$5,661

2004

\$89,197

\$8,600

2005

\$95,371

\$10,248

[31] The plaintiff has calculated that if the Guidelines were met in those years, instead of paying child support based on the 1999 order, there is a shortfall of \$14,028 or, if gain share is included in income, \$28,100.

[32] The plaintiff's evidence is that her financial position has been precarious in those years. She had part-time employment with the City of Surrey until 1998 when she obtained a full-time job with the White Rock R.C.M.P. detachment. She obtained additional work on a part-time basis with the City of New Westminster.

[33] The plaintiff's income from employment has appeared not to have met her expenses. She has had to redeem RRSP contributions; she has borrowed money from her brother (\$19,000); and her mother (\$45,000). She has re-mortgaged her home on a number of occasions.

[34] The plaintiff also deposes she has attended at the Food Bank and has accepted charity from a church and from her work.

[35] The plaintiff has been unable to obtain additional help from the defendant. He has maintained that his financial circumstances have not permitted him to assist her or the children. He relies in this regard on correspondence he had with various creditors, approximately 12 years ago.

[36] The parties have starkly different views of each other's circumstances.

[37] The defendant has contacted the Family Maintenance Enforcement Program ("F.M.E.P.") asking that they review the status of the children. He has put forward the view that the children do not require further maintenance. He has alleged that K. and J. are working full-time.

[38] In 2006, the defendant asked F.M.E.P. to enquire whether maintenance was still required. In the plaintiff's reply, she referred to an "agreement" she made with the defendant in 2002:

As per our verbal agreement after our eldest child J., graduated from high school in 2002, please remember that the option was given to you to go back to court and have a new order put in place with regard to supporting our children, and the costs incurred for their Post Secondary Education, or to continue status quo.

You were given the option of helping to pay for their Post Education or agreeing to continue to pay maintenance as set out in our Court Order, in order that I may continue to give them a place to reside while they attempted to obtain their Post Secondary Education, both physically, mentally and financially.

You agreed to continue maintenance payments as set out in our agreement as you did not wish to have the maintenance order changed for payments based on your higher income since the current order was put in place in 1995. Nor were you interested in having a judge order that you help pay any school costs for this Post Education. I agreed not to take this matter back to court if you let our children obtain their Education and continue with set Maintenance. This they are trying to do.

[39] The children depose that their relationship with their father is difficult. K.'s evidence is that it deteriorated after he began living with his current partner, T.W.

[40] G. and J. both depose that the defendant is able to buy expensive leisure items for himself but complains about the support payments he is making.

[41] The defendant's response to the plaintiff's evidence about the need to borrow money and her inability to meet her obligations is to assert that he has not heard of this before and that it is due to overspending and extravagance on her part.

[42] The British Columbia Court of Appeal in *L.S. v. E.P.* (1999), 67 B.C.L.R. (3d) 254, 1999 BCCA 393, leave to appeal to S.C.C. dismissed, [1999] S.C.C.A. No. 444 (QL) summarized the considerations in favour of retroactive support and those opposed. The factors in favour include (at para. 66):

- (1) the needs of the children and the non-custodial parent's ability to pay;
- (2) some blameworthy conduct on the part of the non-custodial parent such as incomplete or misleading financial disclosure;
- (3) necessity on the part of the custodial parent to encroach on her capital or incur debt to meet child rearing expenses;
- (4) an excuse for a delay in bringing the application where the delay is significant; and
- (5) notice to the non-custodial parent of an intention to pursue support followed by negotiations to that end.

[43] The court also considered factors against ordering retroactive support at para. 67:

- (1) the order would cause an unreasonable or unfair burden to the non-custodial parent;
- (2) the only purpose of the award would be to redistribute capital or award spousal support in the guise of child support; and
- (3) a significant, unexplained delay in bringing the application.

These factors are consonant with the four factors to be considered in making a retroactive award of child support set out by Mr. Justice Bastarache in S.(D.B.) at paras. 94-116. See also the thorough review of the S.(D.B.) decision by Madam Justice Martinson in R.(C.A.) v. R.(G.F.), 2006 BCSC 1407.

[44] Here, the circumstances demonstrate a need on the part of the children. The non-custodial parent has an ability to pay based on his income. It is significant as well that the plaintiff has encroached on her capital and incurred debt. However, a significant factor is the plaintiff's agreement as reflected in her 2006 letter to F.M.E.P. that she would not seek child support changes as long as the defendant continued to make payments.

[45] That agreement is not determinative. That is because child support is the right of the child: see S.(D.B.) at para. 60. Relevant as well is the fact that the plaintiff was not aware of the defendant's income during this period. Nonetheless, having made that agreement, considering all the factors I conclude it would be unfair for the plaintiff to seek retroactive support while this agreement was in force. The agreement, however, came to an end when the defendant sought a determination on September 8, 2006 that J., K. and G. were no longer children of the marriage.

[46] I conclude that as of September 2006, a new regime of child support is warranted. The next issue is whether the "gainsharing" portion of what the defendant receives from his employer should be part of Guideline income.

[47] The gainsharing program at Finning (Canada) is described in a pamphlet issued by the company. It is a form of profit sharing. It represents sharing with the employees the financial benefits of performance improvement by the employer on a group rather than an individual basis. It will amount to between 6% and 40% of base pay, depending on the salary grade of the employee and the financial success of the company. The criteria for the calculation are earnings of the company and lost time injuries. The gainsharing results are calculated quarterly and paid out annually.

[48] The payout is in February of each year because that is shortly before the deadline for registered retirement savings plan contributions for the previous year. The payments are subject to statutory deduction. The funds are paid to the employee. It is up to the employee to choose whether to place the funds in an RRSP.

- [49] Counsel for the defendant sought to present further information about gainsharing. I ruled that such material could only be presented by way of affidavit and the matter was not pursued.
- [50] Based on the material that is properly before me, I am satisfied that the gainsharing is properly part of Guideline income.
- [51] The child support should now be calculated based on the defendant's 2006 Guideline income. This will include gainsharing.
- [52] I am not persuaded there is any reason to decrease the amount. All three children require support and are pursuing education. The new amount of child support will be retroactive to September 2006. The proportionate share for extraordinary expenses under s.7 of the Guidelines will be based on the proportion calculated based on the plaintiff's and defendant's respective incomes.
- [53] As I explained in *Morgan v. Morgan* (2006), 30 R.F.L. (6th) 413, 2006 BCSC 1197 at paras. 39-40:

The usual rule is that the court must order the amount of child support set out in the applicable table in the Guidelines, plus any amount for extraordinary expenses: see s. 3(1). However, s. 3(2) allows the court to order a different amount when the child is over the age of majority:

- (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.

The court can only depart from the usual approach if it is satisfied that usual approach would be inappropriate. It will be inappropriate if the circumstances of the child are unlike the circumstances upon which the usual Guidelines approach is based. The usual approach is based on the assumption that the child is living in the home of and is dependent upon the recipient: see *Wesemann v. Wesemann* (1999), 49 R.F.L. (4th) 435 at paras. 13-18 (B.C.S.C.).

- [54] See also *N.(W.P.) v. N.(B.J.)* (2005), 36 B.C.L.R. (4th) 330, 2005 BCCA 7 at paras. 32-42, holding that support for an adult child who is attending a post-secondary institution should generally be determined under s. 3(2)(b) of the Guidelines. The court also approved at para. 38 the four-step test for determining the "appropriate" amount of child support under s. 3(2) of the Guidelines as set out by Madam Justice Martinson in *Wesemann v. Wesemann* (1999), 49 R.F.L.(4th) 435 at para. 6 (B.C.S.C.).

- [55] In this case, as in Morgan, I find that continued payment of the table amount under s. 3(2)(a) is appropriate. Two of the children continue to reside with the plaintiff, and are dependent on her to provide food and shelter for them. She therefore incurs costs typically associated with raising dependent children. Given the high costs of post-secondary education and the high costs of the children obtaining their own accommodation, this is a reasonable and sensible arrangement. Additionally, the plaintiff contributes regularly to J. in respect of her living expenses while away from home.
- [56] While all of the children here are earning income, they are clearly not earning enough to be able to contribute much towards their living expenses on top of their education expenses. I find that in this context, the ability of the children to contribute financially to their education through part-time employment and student loans is best taken into consideration in determining the amount of the s. 7 education expenses to be shared by the parents. Section 7(2) expressly permits a court to consider the child's contribution to the expense.
- [57] Extraordinary expenses will therefore include tuition and related post-secondary expenses pursuant to s. 7(1)(e) of the Guidelines. The children should be responsible for one-third of that amount. J.'s living expenses while away from home will not be considered to be an extraordinary expense, having been taken into account by awarding the table amount pursuant to s. 3(2)(a) of the Guidelines.
- [58] The final issue concerns dental work. The original consent order made by Rowan J. on April 6, 1996 provided that the defendant "continue to provide medical and dental coverage for both [the plaintiff] and the children of the marriage on his medical and dental plans at his place[s] of employment for as long as he is able to do so, pursuant to the terms of the plan[s]".
- [59] This order was varied by Stromberg-Stein J. She directed that the defendant pay a proportionate share, 68%, of the plaintiff's basic medical coverage of \$35 per month. The order says the following with respect to orthodontic care:

This court orders that the petitioner shall provide the respondent with receipts for the children of their marriages' orthodontic care and the respondent shall pay the petitioner the respondent's proportionate share of the orthodontic expenses over and above the amount that is paid by the respondent's benefit insurers.

- [60] The present circumstances are explained in a letter to the defendant from Finning dated February 6, 2007. The basic medical coverage ended for each child when they turned 19. The coverage for J., K. and G. ended November 30, 2003, July 1, 2005 and August 31, 2006 respectively.

- [61] Dental and extended health coverage continued and is still in force for K. and G. It ended for J. on January 31, 2006. The plaintiff deposes that all three children have dental needs. J. requires removal of impacted wisdom teeth. K. requires veneers or caps for her front teeth. Both children, according to the plaintiff, needed braces, but the work was not done because of the lack of funds and the defendant's unwillingness to assist.
- [62] G. requires orthodontic work. According to the plaintiff, the defendant has declined to contribute. The defendant's evidence is in fact he discussed this with G. and the plaintiff and that he wanted them to obtain a second opinion about the necessary work and the cost. He urged G. to have the work done while there was some coverage for orthodontics under the plan.
- [63] The plaintiff is entitled to be paid the appropriate percentage of orthodontic and other dental expenses she has incurred for the children. I agree with the plaintiff that this is merely clarification of what the original order provided. This obligation extends to unsecured dental services. The plaintiff is also entitled to payment of her monthly medical plan. The new order will call for such payments to be made on a proportionate basis based on the respective incomes of the parties. The defendant will also ensure that the children's extended health and dental benefits continue so long as they are eligible for them.
- [64] To summarize, I reach these conclusions:
- (1) all three children remain children of the marriage;
 - (2) child support will continue, based on the defendant's 2006 income;
 - (3) the defendant's income includes gainshare payments;
 - (4) s. 7 expenses include dental expenses and two-thirds of tuition fees and other post-secondary expenses such as books and ancillary fees. These will be shared on a proportionate basis.
 - (5) the defendant is to pay a proportionate share of the plaintiff's basic medical coverage, and any arrears owing.
- [65] The plaintiff is entitled to costs of this motion.

"The Honourable Mr. Justice Kelleher"

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