
CANADA / JUDGMENT

S.K. v. G.R.

2018 BCSC 1758

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Supreme Court of British Columbia

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2018 BCSC 1758 S.K. v. G.R.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

S.K. v. G.R.,

2018 BCSC 1758

Date: 20181012

Docket: E130791

Registry: Vancouver

Between:

S.K.

Claimant

And

G.R.

Respondent

Before: The Honourable Mr. Justice Branch

Reasons for Judgment

Counsel for Claimant:

P. Sheppard

Counsel for Respondent:

S. Specht

Place and Date of Hearing:

Vancouver, B.C.

August 21, 2018

Place and Date of Judgment:

Vancouver, B.C.

October 12, 2018

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I. INTRODUCTION

[1] The claimant applies to vary the terms of a final consent order granted on November 21, 2013 (the "Final Order"). Specifically, she seeks to amend a term which provided that the respondent would not have to contribute to the cost of private school education for their child. The claimant also seeks an order for production of documents to assist in the calculation of basic child support under the Final Order. Finally, an order is sought for the use of pseudonyms.

II. BACKGROUND

[2] The claimant and the respondent are the parents of I.Z., who was born in 2009.

[3] The parties met in 2005 and married in 2006. They separated in May 2012 when I.Z. was nearly three years old.

[4] The claimant is a family physician. She worked part-time when I.Z. was younger and later returned to full-time work. She is 48 years old.

- [5] The respondent is an engineer and also operates a property development business. He is 55 years old.
- [6] As the court noted in its decision on an earlier variation application brought by the respondent seeking an increase in parenting time, the Final Order is detailed and comprehensive: 2017 BCSC 1753 (the "2017 Decision"). In addition to parenting orders, it includes a divorce order, child support orders, and divides all family assets.
- [7] Prior to the Final Order, the parties had entered into a more limited separation agreement dated June 14, 2013 (the "Separation Agreement"). The Separation Agreement permitted the claimant to move from Coquitlam to Vancouver with I.Z. The Separation Agreement also provided as follows:
3. [The claimant] may, in her sole discretion, enroll [I.Z.] in private school in Vancouver, and, in her sole discretion, will make the decision as to what school [I.Z.] shall attend. Without limiting the generality of the foregoing, [the claimant] may enroll [I.Z.] in [the Private School] for junior kindergarten commencing September, 2013.
4. [The claimant] and [the respondent] acknowledge and agree that tuition, uniform fees, textbook, workbook and supply fees, parent's association fee, chronicle fee, outdoor education fees, and any mandatory donations, payable and/or incurred by [the claimant], in connection with [I.Z.]'s attendance at private school, are not a special or extraordinary expense as defined by the Child Support Guidelines.
- [8] I.Z. began attending kindergarten at the chosen private school (the "Private School") in the fall of 2013. The tuition and related costs for the 2018-2019 school year will be approximately \$25,000.
- [9] The relevant provisions of the Final Order for this application are as follows:
21. Commencing June 15, 2014 and on the fifteenth day of June each and every year thereafter the quantum of Child Support will be reviewed by the Claimant and the Respondent (the "Review"), who shall exchange their most recent Income Tax Returns (personal and business), Notices of Assessment (personal and business) and any other document relevant to the determination of the Child Support for the Review no later than June 1st each year, commencing June 1, 2014.
23. The following are agreed to be special or extraordinary expenses pursuant to section 7 of the Federal Child Support Guidelines:
- (a) Daycare and preschool expenses up to August 31, 2013;
- (b) Beginning September 1, 2013, child care expenses incurred as a result of the Claimant's employment, illness, disability or education or training for employment, including before school care, after school care, and camps/daycare during summer and other school breaks;

- (c) That portion of medical and dental insurance premiums attributable to [I.Z.] including but not limited to any incremental cost associated with maintaining MSP coverage for [I.Z.];
- (d) Health related expenses that exceed insurance reimbursement by at least \$100.00 annually, including but not limited to any medical or dental costs for [I.Z.] not covered by the parties' respective plans;
- (e) School expenses other than those set out in paragraph 28 herein, such as school supplies and field trips;
- (f) Expenses of computer, I Pad [sic] and other electronic equipment needed for school, provided that such devices shall travel freely between the parties' households;
- (g) Expenses of athletics activities (including, but not limited to, soccer and dance), music activities, reading club, arts/crafts lessons and language lessons;
- (h) Expenses of birthday parties for [I.Z.] for her friends to attend;
- (i) Expenses for post-secondary education; and
- (j) Such other expenses as the parties may agree from time to time.

(the "Section 7 Expenses")

- 24. Commencing November 1, 2013, and subject to paragraph 25 of this Order, the Claimant and the Respondent will share the ongoing Section 7 Expenses in proportion to their respective incomes. Currently, the Respondent's share is 48% and the Claimant's share is 52%.
- 28. Tuition, uniform fees, textbooks, workbook and supply fees, parent's association fee, chronicle fee, outdoor education fees, and any mandatory donations payable and/or incurred by the Claimant, in connection with [I.Z.'s] attendance at private school, shall not be considered a special or extraordinary expense as defined by the Federal Child Support Guidelines.

[Emphasis added.]

- [10] The Final Order set the parties' initial incomes for the purposes of the Federal Child Support Guidelines, SOR/97-175 calculations. The claimant was found to have a Guidelines income of \$89,920 per year and the respondent was found to have a Guidelines income of \$81,569.47 per year. The respondent's actual 2013 income reported at line 150 of his Income Tax and Benefit Return was lower, at \$58,115.39.
- [11] Both parties' incomes have increased since the Final Order. In 2016, the claimant says that her income was \$197,206 and the respondent's income was \$375,220. In 2017, the claimant's income was approximately \$230,000 and the respondent's child support calculation was based on an income of \$291,319. A good portion of the respondent's increased income comes from his personally-controlled property development business, Artha Construction Ltd. ("Artha").

- [12] Although he has sometimes been late in doing so, the respondent has provided his own income tax returns and financial statements for Artha as required. Artha's 2015 and 2016 financial statements refer to real estate ventures such as "Hillside" and "Aura". The claimant seeks more information about these ventures.

III. USE OF INITIALS

- [13] The parties consent to the use of initials in the style of cause and in all reported decisions.
- [14] In *C.W. v. L.G.M.*, 2004 BCSC 1499 [C.W.], the court stated:
- [7] I begin my analysis by recognizing the important principle that generally speaking the court must administer justice in public. In order to maintain public confidence in our system of justice it is critical that the proceedings of the court be open to the public and not conducted in secret. Public scrutiny protects the integrity of the process and promotes respect for and confidence in the judicial system.
- [8] The principle of open courts and the right of the public to obtain information about the courts is tied to the right of freedom of expression guaranteed in s. 2(b) of the Charter (*Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480).
- [9] I am satisfied, however, that this important principle of the openness of the court process is subject to an overarching principle: the fundamental object of the court is to see that justice is done between the parties. There are circumstances where the principle of the open court must give way in order to achieve justice. The question is what those circumstances are and, if they exist, how far the principle of an open court must yield in order to ensure that justice may be done.
- [15] If the parties themselves were the only individuals involved in this matter, I would have refused the application for the use of pseudonyms. Neither party is alleged to be a victim of sexual misconduct. There are no medical issues involved. The parties allowed their names to be used during the earlier phases of this family law proceeding. The fact that they may now be embarrassed by their ongoing disputes is an insufficient basis for the use of pseudonyms.
- [16] However, given that the application involves a child, who is not a party, I am prepared to issue the order to protect her identity. As stated in *C.W.*, the provision of anonymity is justified when it "is necessary to protect innocent persons and little public benefit would be served by disclosure of the names of the innocent" (para. 25). See also *D.J.D. v. M.L.D.*, 2016 BCSC 1515 at para. 2; *H.S.S. v. S.H.D.*, 2016 BCSC 1300 at para. 2.

IV. DOCUMENT PRODUCTION

- [17] The claimant seeks production of the following documents:
- a) T2 corporate tax returns for all corporations, partnerships or joint ventures from which the Respondent or entities on his behalf receive income;

- b) Notices of assessment for all corporations, partnerships or joint ventures from which the Respondent or entities on his behalf receive income;
- c) Financial statements for all corporations, partnerships and joint ventures in which the Respondent or entities on his behalf receive income, including without limitation Artha Construction Ltd.; and
- d) General ledgers for all corporations, partnerships and joint ventures from which the Respondent or entities on his behalf receive income, including without limitation Artha Construction Ltd.

[18] The claimant relies on ss. 21 and 25 of the Guidelines, the material aspects of which I set out below:

21 (1) A spouse who is applying for a child support order and whose income information is necessary to determine the amount of the order must include the following with the application:

- (a) a copy of every personal income tax return filed by the spouse for each of the three most recent taxation years;
- (b) a copy of every notice of assessment and reassessment issued to the spouse for each of the three most recent taxation years;
- (f) where the spouse controls a corporation, for its three most recent taxation years
- (i) the financial statements of the corporation and its subsidiaries, and
- (ii) a statement showing a breakdown of all salaries, wages, management fees or other payments or benefits paid to, or on behalf of, persons or corporations with whom the corporation, and every related corporation, does not deal at arm's length;

25 (1) Every spouse against whom a child support order has been made must, on the written request of the other spouse or the order assignee, not more than once a year after the making of the order and as long as the child is a child within the meaning of these Guidelines, provide that other spouse or the order assignee with

- (a) the documents referred to in subsection 21(1) for any of the three most recent taxation years for which the spouse has not previously provided the documents;
- (8) A provision in a judgment, order or agreement purporting to limit a spouse's obligation to provide documents under this section is unenforceable.

[19] The evidence is clear that the respondent controls Artha. But in calculating basic child support, the respondent has included his pre-tax corporate income from Artha, and increased his support accordingly. Moreover, when Artha suffered a loss in 2015, this amount was not deducted from his income for child support purposes.

- [20] I am prepared to order that the respondent provide Artha's financial statements, some of which have already been provided.
- [21] The claimant also seeks greater detail about the underlying property development ventures in which Artha has participated. The respondent's legal description of how those investments were made or managed is unsatisfactory. What is clear is that these investments are generally done in conjunction with a company called Noura Construction ("Noura"). The evidence before me is that the respondent does not control this separate entity. The available evidence also suggests that Artha's investment is passive, in that it does not control the actual development of the properties. Noura allegedly involves an array of investors such as Artha in its real estate projects.
- [22] However, the nature of Artha's relationship with Noura remains unclear. Throughout the materials, the relationship is variously described as an "investment", a "joint venture", and as the ownership of "shares". The lack of clarity regarding the nature of the legal relationship that has governed Artha's involvement in its development projects with Noura justifies an order that the respondent produce documents in its possession or control setting out: (1) the legal nature of Artha's relationship with Noura and (2) any documents that detail how Artha's financial participation in the developments' profits or losses is calculated. I do not make any order requiring production of documentation by or from Noura, particularly given that Noura was not served with this application.
- [23] Pursuant to s. 21(1)(f)(ii) of the Guidelines, I also make an order that the respondent produce a statement showing a breakdown of all salaries, wages, management fees or other payments or benefits paid to, or on behalf of, persons or corporations with whom Artha, and every related corporation, does not deal at arm's length. Again, I understand that some or all of the information that may so qualify has been produced.
- [24] The respondent expressed certain confidentiality concerns regarding the production of documents. Given this concern and for the sake of completeness, I note that any documents produced as a result of these orders are subject to the implied undertaking rule, that is, they may not be used outside of this litigation.
- [25] Although the Final Order refers to a requirement to produce "any other document relevant to the determination of the Child Support", I find that a reasonable interpretation of this term is guided by the Guidelines production provisions, which I have outlined above. I do not find that it justifies a right to documents that greatly exceed those mandated by the Guidelines, absent special circumstances that do not exist on the record before me.
- [26] Of course, this determination does not foreclose the claimant from seeking disclosure from Noura directly if she is concerned that the information provided by the respondent is inaccurate or insufficient. However, she will bear the costs and adverse costs risk associated with any such application.

- [27] I also note that nothing in this production order forecloses the claimant from seeking a declaration regarding the proper income calculation applicable to the respondent's support obligations. While there was no such application before me, much of the claimant's submissions were driven by a suggestion that the respondent's support obligations are currently being determined on the basis of an incorrect income calculation.

IV. THE TEST FOR AMENDING ORDERS

- [28] As noted, the claimant seeks to amend the Final Order as it relates to the Private School expenses. In *Williamson v. Williamson*, 2016 BCCA 87, the Court of Appeal stated the following in interpreting the power to amend orders under s. 47 of the Family Law Act, S.B.C. 2011, c. 25:
- [31] Although this Court has yet to consider s. 47 of the FLA, the Supreme Court has consistently interpreted this provision as requiring a material change in circumstances: see for example, *Gilmour v. Herrick*, 2013 BCSC 1591 at para. 13; *Bradley v. Bradley*, 2015 BCSC 1587 at paras. 21-23; and, *J.D.C. v. K.L.M.F.C.*, 2014 BCSC 2182 at paras. 261-262. Given the reasoning of this Court in *Boychuck and M. v. M.*, and the similarities between s. 47 of the FLA and s. 20 of the FRA, I conclude that a material change in circumstances is required under s. 47 of the FLA.
- [32] The first step in the analysis set out in *Gordon v. Goertz* is to "determine whether there has been a material change in circumstances since the making of the prior order": *Boychuck* at para. 14. The Court in *Gordon* explained what is necessary to establish a material change in circumstances:
- [11] The requirement of a material change in the situation of the child means that an application to vary custody cannot serve as an indirect route of appeal from the original custody order. The court cannot retry the case, substituting its discretion for that of the original judge; it must assume the correctness of the decision and consider only the change in circumstances since the order was issued....
- [12] What suffices to establish a material change in the circumstances of the child? Change alone is not enough; the change must have altered the child's needs or the ability of the parents to meet those needs in a fundamental way. The question is whether the previous order might have been different had the circumstances now existing prevailed earlier. Moreover, the change should represent a distinct departure from what the court could reasonably have anticipated in making the previous order.
- [Emphasis in original.]
- [33] At para. 13, the Court summarized what the applicant must establish before proceeding on the merits of the application:

[13] It follows that before entering on the merits of an application to vary a custody order the judge must be satisfied of: (1) a change in the condition, means, needs or circumstances of the child and/or the ability of the parents to meet the needs of the child; (2) which materially affects the child; and (3) which was either not foreseen or could not have been reasonably contemplated by the judge who made the initial order.

[34] Absent a material change in the needs or circumstances of the child, the inquiry can go no further. It is only after this threshold is met that the judge on the new application can embark on a fresh inquiry into the best interest of the children.

[Emphasis added.]

[29] The parties agree that the Divorce Act applies to this application. However, this Court has found that the tests under the two acts are the same: *D.J.S. v. J.M.D.*, 2013 BCSC 2302 at para. 5.

[30] Section 17(4) of the Divorce Act states:

Before the court makes a variation order in respect of a child support order, the court shall satisfy itself that a change of circumstances as provided for in the applicable guidelines has occurred since the making of the child support order or the last variation order made in respect of that order.

[31] The material portion of s.14 of the Guidelines states:

14. For the purposes of subsection 17(4) of the Act, any one of the following constitutes a change of circumstances that gives rise to the making of a variation order in respect of a child support order:
 - (b) in the case where the amount of child support does not include a determination made in accordance with a table, any change in the condition, means, needs or other circumstances of either spouse or of any child who is entitled to support.

[32] The leading case on the interpretation of s. 17(4) is *Willick v. Willick*, [1994] 3 S.C.R. 670 where the majority of the court stated:

20 In deciding whether the conditions for variation exist, it is common ground that the change must be a material change of circumstances. This means a change, such that, if known at the time, would likely have resulted in different terms. The corollary to this is that if the matter which is relied on as constituting a change was known at the relevant time it cannot be relied on as the basis for variation

[Emphasis added.]

[33] In *Dedes v. Dedes*, 2015 BCCA 194, the court commented as follows:

- [24] The focus of the chambers judge was on whether Ms. Daniel knew or reasonably foresaw that she would marry Mr. Daniel and move to Ontario. This, however, is not the question to be asked. The questions are: was the proposed move of the children to Ontario a change in circumstances that was actually contemplated at the time the agreement was entered into, and if not, is it in the best interests of the children to move to Ontario?
- [25] As articulated in *L.M.P.*, the test for material change is based not on what one party knew or reasonably foresaw, but rather on what the parties actually contemplated at the time the order was entered by agreement. A function of the material change threshold is to prevent parties from re-litigating issues that were already considered and rejected; in such cases, an application to vary would amount to an appeal of the original order (see *Gordon* at para. 15). As was stated by *L'Heureux-Dube J.* in *Willick* at p. 734, "the diversity of possible scenarios in family law dictates that courts maintain a flexible standard of judicial discretion which does not artificially limit the adaptability of the Divorce Act provisions".

IV. APPLICATION OF THE MATERIAL CHANGE TEST

- [34] In the 2017 Decision, the court found that a material change had occurred that justified an alteration of the parenting arrangements set out in the Final Order. The court found that the parties had contemplated that the claimant would exercise her parenting powers with greater insight and awareness, and that at the time of the Final Order there was no expectation of the degree of conflict that had developed in the interim. Finally, the respondent's relationship with I.Z. had materially developed and grown since the Final Order. Those elements were sufficient to justify a modification of the order's parenting provisions. The court concluded that if the current circumstances were known when the 2013 Order was made, the parenting terms and the dispute resolution terms would have been different. In the result, the court made a series of adjustments generally providing the respondent with a greater role in the parenting of I.Z.
- [35] The issue of whether there has been a material change must generally be assessed vis-à-vis the element of the order that the claimant seeks to change. The 2017 Decision says as much when the court concluded that "if the current circumstances were known when the [Final] Order was made, the parenting terms and the dispute resolution terms would have been different [emphasis added]". As such, the 2017 Decision is not determinative of the application before me. The parties did not argue otherwise.
- [36] The respondent's income has clearly increased by a material amount since the Final Order was made. However, that is not the end of the inquiry as it relates to the private school expenses. Based on the legal principles discussed above, the core question for this case is: what was in the reasonable contemplation of the parties and the court when the specific term regarding private school fees was adopted?

- [37] The claimant relies on *D.B.S. v. S.R.G.*, 2006 SCC 37 at para. 66, where the court stated that "[a]n increase in income that would alter the amount payable by a payor parent is also a material change in circumstances: s. 14 of the Guidelines". However, the Final Order here was designed such that an increase in income would not change the amount payable by the respondent for private school because private school costs were expressly excluded from the Section 7 Expenses. As such, an increase in the respondent's income alone is not sufficient to establish the requisite material change in the context of this case.
- [38] In assessing the question of reasonable contemplation of the parties, I look first to the Final Order itself. The order can be relevant to the required analysis insofar as it establishes "what the parties actually contemplated at the time the order was entered by agreement": *Morey v. Morey*, 2015 BCSC 2340 at para. 87; *Turpin v. Clark*, 2009 BCCA 530 at paras. 49-50.
- [39] Looked at as a whole, the Final Order illustrates that the parties contemplated the potential for the respondent's income to change, and what should happen if that occurred. The order incorporated a specific escalator clause that increased the basic child support obligations and the level of contribution to the agreed Section 7 Expenses if his income increased.
- [40] Although this is a relatively common term, it is nonetheless evidence that the parties contemplated changes in income, and specifically provided for how such changes would impact the child support obligations and contributions to Section 7 Expenses. I note that as a result of the application of the escalator clause, the respondent's child support obligation has increased from \$9,156 annually to nearly \$30,000 annually. The parties clearly contemplated that a substantial increase in income should result in a substantial increase in child support. The key question is what their reasonable contemplation was in relation to private school fees.
- [41] Most importantly:
- a) The Final Order carefully segregates the issue of private school fees from the other agreed Section 7 Expenses, and specifically provides that such costs will be borne by the claimant alone (para. 28 of the Final Order); and
 - b) Paragraph 23(e) of the Final Order specifically provides that the respondent will pay for "school expenses other than those set out in paragraph 28 herein, such as school supplies and field trips". [Emphasis added.]
- [42] The fact that the claimant and respondent agreed to his pro rata contribution to an array of expenses and, in particular, school expenses other than private school fees, shows a very careful degree of contemplation and consideration.
- [43] I note that the claimant was represented by counsel throughout the negotiations leading to the Final Order.

[44] The claimant suggests that the unique treatment of private school fees in the Final Order should be afforded less weight because the original clause was negotiated prior to the Final Order as part of the earlier Separation Agreement. I accept that this lessens its weight somewhat, but it certainly does not negate it. The claimant does not plead that the Settlement Agreement was executed under duress. She retained the power to renegotiate the private school clause as part of the broader array of trade-offs made by the parties in relation to the full range of issues addressed in the Final Order. In *Powell v. Levesque*, 2014 BCCA 33 at para. 25, the court stated:

The Court [in *L.M.P. v. L.S.*, 2011 SCC 64] further confirmed that the threshold test for variation is the same whether or not the previous support order incorporated provisions from an agreement between the parties. It reiterated (at para. 36) that the question remains: "Has a material change of circumstances occurred since the making of the order? (See *Willick*; *G.(L.)*; *Leskun v. Leskun*, 2006 SCC 25, [2006] 1 S.C.R. 920.)"

[45] In *R.M.A.F. v. P.A.M.*, 2018 NSSC 167 at para. 17, the court stated:

The requirement of a material change is the same whether an order incorporates an agreement or not: *LMP v. LS*, 2011 SCC 64 at 36. However, where an agreement is incorporated into an order it's "necessary to consider what additional effect is to be accorded to this fact": *Willick*, 1994 CanLII 28 at 17. The agreement may answer the question of whether there's been a material change and "predetermine who will bear the risk of any changes that might occur": *LMP v. LS*, 2011 SCC 64 at 38.

[46] Hence parties may agree that a particular event is, or is not, a material change for the purpose of a variation. Where the consequences of a change are described in detail, this is evidence that the parties contemplated the situation and the court should give effect to their original agreement: *L.M.P. v. L.S.* at para. 39.

[47] The claimant relies on *P.G. v. D.D.G.*, 2017 BCSC 724, where the contemplated educational expenses for the child turned out to be much higher than expected, and the court varied the terms in the order to ensure a specific level of contribution from the respondent. However, the terms of the orders at issue in that case were far less specific and directive than those negotiated here. The court summarized the applicable terms in *P.G.* at paras. 36-37:

[36] Paragraph 10 of the 2015 Consent Order provides the following regarding S.G.:

10. The current arrangements for the support of [S.G.] shall continue, pursuant to paragraph 3 of the Consent Order of November 10, 2010, a copy of which is attached as Schedule B, such that the parties shall each make their own arrangements directly with [S.G.] for the payment of [S.G.'s] post-secondary educational and living expenses.

[37] Paragraph 3 of the Consent Order of November 10, 2010 states:

3. Each party will make their own arrangements with [S.G.] for the payment of her post-secondary educational and living expenses. Failing an agreement, either party may seek directions from this Honourable Court upon the completion of [S.G.'s] first year of studies at the University of Manitoba.

[48] Returning to the present case, the evidence beyond the terms of the Final Order, on balance, also supports the view that the potential for an increase in the respondent's income was in reasonable contemplation when the claimant agreed to the private school term.

[49] The claimant suggests that she did not expect the respondent's income to increase so substantially. However, this is inconsistent with her earlier sworn testimony. In the claimant's affidavit #4 dated June 6, 2016, she stated:

In March 2012, [the respondent] took employment working for Paramount Refund Management on a consulting basis. He later obtained a better position with Paramount Refund Management, working 3 days a week in November 2012, shortly after I moved out of our marital home. [The respondent] was still working for CCT as well and continues to do so to the present day as far as I know. He was still looking into investment opportunities and with the extent of his business experience, I had faith that he would be able to do well. We also had almost \$1 million dollars in the bank and I felt that some of those funds could be used to help pay for [I.Z.'s] schooling if needed until such time as we had a higher income. I was also prepared to work a little more once [I.Z.] started school, but I never agreed at that time to pay the full cost of [I.Z.'s] schooling contrary to paragraph 44 in [the respondent]'s affidavit #1. I expected that [the respondent] would continue to try to find better employment and pursue other investment opportunities and increase his income to contribute towards [I.Z.'s] educational costs.

It was also stated in the June 14, 2013 agreement that I would be responsible for all of [I.Z.'s] schooling costs which is currently close to \$20,000 per year and will likely be close to \$30,000 per year by the time she graduates. This was a great financial concession for me as I knew that [the respondent]'s financial state would continue to improve given his business acumen, but I was left with no choice as if we did not accept this spot for [I.Z.], we would likely never be offered a spot there for her again.

[The respondent] still had his approximately \$425K share of the proceeds from our Richmond home, just as I did. This would have allowed him to proceed with whatever business venture he was involved in at the time. Alternatively, [the respondent] could have waited to proceed with projects through Artha Construction until things were more settled, as he was working at Paramount Refund Management and with CCT and so had good sources of steady income.

In November 2013 [the respondent] and I were able to come to a resolution. I did not during any of those meetings or at any other time ever say that the settlement/Order was a "safety net" or that I was expecting that we wouldn't follow the provisions in it. There were extensive discussions, negotiations, and back and forth on it and a lot of thought, time, energy and money were spent creating the Final Order.

[Emphasis added.]

[50] As noted, a good portion of the respondent's increased income has come from Artha. The claimant was aware of this business before the Final Order. The company was incorporated in October 2011 (before the separation), and the parties appreciated that the plan was to invest in real estate ventures. Until the Final Order, the claimant was a shareholder and director of Artha. While the company had not made a material profit by the time of the Final Order, it is well known that making profit in property development takes time, and occurs in lumps. I find that the fact that this venture might begin to earn profits in the future must have been in contemplation. Making profit is the purpose of incorporating a business.

[51] The respondent deposes that:

the Claimant had been involved in my projections and plans for Artha from the beginning such that she would have clearly contemplated Artha making a profit in the future. This was in fact our future family plan prior to separation with a view of being able to afford to move closer to or back into the City if we chose, even with a rising real estate market.

[52] Although she disclaims any deep knowledge of Artha's operations, the claimant also deposes that:

I knew [the respondent] wished to make Artha into a profitable business based on our discussions.

[The respondent] and I moved because he wanted to start a business (which later became Artha) and wanted to free up capital in the Richmond home to invest in that business.

[53] There was an understanding by the claimant that the respondent's income could increase. The fact that the exact magnitude of the increase was unknown is not surprising as no one can predict the future. The inability to foresee the precise amount by which the respondent's income would increase was, however, contemplated by the escalator clause, which had the effect of precisely capturing any increase in income for the purposes of basic child support and contributions to Section 7 Expenses. By contrast, the Final Order discloses a clear intention to exclude private school expenses from the adjustments required as a result of changes in income.

[54] Further, to the extent that the parties' contemplation driving the private school clause could be framed as having been made in consideration of their relative incomes at the time of the Final Order, I find that the materiality of any suggested change is largely undercut by the substantial increase in the claimant's own income over the same period.

[55] Finally, there is the evidence of the specific contemplation of who would pay for private school and why. The respondent deposes as follows:

I was of the view that private school education was not necessary, nor was I in a position to afford it then or in the future. The Claimant and I had a child later in life. I already had a child whom I was support [sic] and who's [sic] college education I had to fund.

[Emphasis added.]

[56] This suggests that while the respondent's financial situation was part of his objection to contributing to a private school expense, he also maintained a broader concern about the necessity of the expense.

[57] There is some evidence of discussions about private school before the Final Order, but all of these discussions appear to be:

- a) conversations and investigations that did not result in agreement;
- b) agreements that were conditional on the claimant bearing the financial burden of the decision; or
- c) offers that were conditional on reaching a broader agreement.

[58] Several of these exchanges took place after the separation. These conversations are evidence only of a series of trade-offs and "to and fro" negotiations which occurred during the necessary effort to unwind the parties' relationship. As such, it is difficult to derive parties' specific intentions from such exchanges.

[59] For example, the respondent sent an email on November 6, 2012 that stated:

The bottom line is the [sic] so far as I am concerned, [I.Z.] can attend public school and that your desire to have her attend private school boils down to a personal preference, one that I do not have the resources to contribute towards. All that said, I was prepared to support this effort given how important it was to you. I was equally clear that I did not, and would likely never again have the financial resources to support the costs associated with private school particularly in light of the fact that I am now 50 years old and well past my peak earning years with virtually no hope of every [sic] seeing anything even close to what I earned up to 2008. You are well aware of this fact. Your response to that was that it did not matter and that as a Physician you would be well able and willing to cover the required costs.

Needless to say I was surprised to see private school tuition listed as a section 7 special expense in the draft separation agreement that you had prepared. I therefore don't know what to do here. Continuing to support the effort to get [I.Z.] enrolled can be construed as me agreeing to accept financial responsibility for private school and I am not prepared to do that. I am prepared to move forward with this parent interview and any other interviews that may need to take place but only if you honour the original premise and commit to take private school tuition off the table as a section 7 expense.

...I will agree to attend the parent interview at [the Private School] and to put in my best effort if you agree to make the change as I have indicated.

[Emphasis added.]

[60] This email was sent after the separation. It was clearly sent as part of an ongoing negotiation. There is an express reference to the discussions arising as a result of "the draft separation agreement that [the claimant] had prepared". Further, it only signals a willingness to allow private school registration if "[the claimant] honour[s] the original premise and commit[s] to take the private school tuition off the table as a section 7 expense." I find that it is difficult to place much, if any, weight on positions taken during the course of aggressive and difficult negotiations.

[61] Stepping back from the "cut and parry" of the negotiation period, and considering the discussions that took place prior to separation, the respondent deposes that:

An application was put into Meadowridge private school in Maple Ridge with me having agreed based on the Claimant's promise to cover private school tuition. I was clear then, as I am now, that I considered public school to be perfectly acceptable. Part of that discussion also centered around my concerns. Specifically, I was concerned about how the greater affluence associated with children attending private school could in some situations, become problematic. This is what ultimately led to [my other daughter's] expulsion from [a private school] as she had greater exposure to and access to expensive drugs and alcohol. Although I am certainly not suggesting that the wonderful children that attend private school are more likely to experience substance abuse, my experience with [my other daughter] certainly left me sensitive to and concerned about how things could go wrong.

[Emphasis added.]

[62] Again, this evidence supports the conclusion that the private school term in the Final Order was based in at least some measure on social concerns, and not solely his current income level. There is no evidence that these social concerns were not genuinely held, or that they have materially changed.

[63] In sum, the Final Order itself, as well as the evidence underlying the Final Order, lead to the following conclusions:

- a) The private school term was carefully negotiated as part of an array of trade-offs between the parties;
- b) The term was agreed to in reasonable contemplation of increases in the respondent's income, given that this potential was expressly considered in other clauses, and was acknowledged by the claimant; and
- c) The private school term necessarily contemplated that any increase in income would not impact the agreement that the claimant would bear the cost of the private school expense on her own.

[64] The claimant accepts that she can afford to keep I.Z. in private school given her own level of income. As such, a decision not to grant the amending order will not result in a detrimental change in I.Z.'s circumstances, even assuming that private school is in her best interests.

V. IS PRIVATE SCHOOL A PROPER EXTRAORDINARY EXPENSE?

[65] In the alternative, had I concluded that the material change test was met, the claimant accepted that she would still need to establish that private school is an appropriate extraordinary expense.

[66] I find that the applicable test is not met.

[67] Under s. 7(1.1) of the Guidelines, "extraordinary" expenses are those that:

- a) exceed those that the spouse requesting payment can reasonably cover, taking into account that spouse's income and the amount that the spouse would receive under the applicable table; or
- b) where paragraph (a) is not applicable, expenses that the court considered are extraordinary taking into account
 - i. the amount of the expense in relation to the income of the spouse requesting the amount, including the amount that the spouse would receive under the applicable table or, where the court has determined that the table amount is inappropriate, the amount that the court has otherwise determined is appropriate,
 - ii. the nature and number of the educational programs and extracurricular activities;
 - iii. any special needs and talents of the child or children,
 - iv. the overall cost of the programs and activities, and
 - v. any other similar factor that the court considers relevant.

[68] As noted, the claimant does not suggest that she is unable to pay for the cost of private schooling. Hence, she must satisfy the test in s. 7(1.1)(b) in order to establish that private school is an appropriate section 7 expense.

[69] In *L.H.M.K. v. B.P.K.*, 2012 BCSC 435, Justice Brown summarized the authorities as they relate to the treatment of private school fees under s. 7:

[128] Private school fees are generally considered extraordinary educational expenses under s. 7(1)(d) of the Guidelines: *Crofton v. Sturko*, [1998] B.C.J. No. 38 (S.C.). In *Cochrane v. Zarins*, (1998), 36 R.F.L. (4th) 434 (B.C.C.A.), the Court considered the following factors to determine whether or not to allow private schooling fees as extraordinary expenses: (a) the parents' history of private schooling; (b) the children's history of private pre-schooling; and (c) the ability of the non-custodial parent to pay for the expense.

[129] In *Van Deventer v. Van Deventer*, 2000 BCCA 9, the Court allowed private school fees under s. 7 because the parent opposing the expenses was content to have the child attend private school when the parties were together, and there was no change in circumstances to which the opposing parent could point to establish that the expense was no longer necessary or reasonable.

[70] The L.H.M.K. factors apply to this case as follows:

- a) The parents' history of private schooling: Neither parent attended private school.
- b) The children's history of private pre-schooling: At the time of the Settlement Agreement, I.Z. had not yet attended private school. I.Z. was only in private school at the time of the Final Order due to the Settlement Agreement's term forbearing the claimant's right to pursue the respondent for financial contribution to this expense. In L.H.M.K, the children had been in private school for years prior to the separation.
- c) The ability of the non-custodial parent to pay for the expense: I accept that the respondent has the ability to pay his share of this expense, although the income stream from property development can be variable.

[71] The claimant suggests that I should also look to the history of the parties' discussions regarding private school as part of this analysis. I accept that I am entitled to consider this evidence as part of the broader list of factors in the Guidelines. However, given my analysis above regarding the parties' intentions, I find that this factor does not tend to support the acceptance of private school as an appropriate section 7 expense.

[72] Furthermore, there is no evidence that I.Z. has any unique talents or needs that require a private school education. The only need proposed by the claimant was that I.Z. has already built a social network at her current school. But this argument reverses the rule of "cause and effect", because it is only the claimant's decision to put I.Z. in private school at her own expense that created this social network in the first place.

[73] On balance, considering L.H.M.K and the Guidelines' factors, I find that private school does not qualify as an extraordinary expense.

VI. COSTS

[74] Unless there are other circumstances of which I am unaware, I find that the respondent was largely successful on this application given that the key issue was the payment for private school expenses. Hence, he should be awarded costs of this application. If either party wishes to bring other matters to my attention that may affect costs, he or she must provide written submissions of no more than 10 pages within 30 days. The other party shall have 10 days to respond with written submissions of no more than 10 pages.

VII. CLOSING COMMENT

[75] The application record underlying the relatively narrow scope of relief sought in this application contained a total of 1,565 paragraphs of affidavit evidence, and an untold number of exhibit pages. As can be seen above, the result turned on a very narrow band of evidence. Counsel should carefully consider and advance only such evidence as is material to the specific relief sought, rather than backing up an evidentiary "dump truck" of historical, irrelevant, or repetitive material. There is no obligation to respond to paragraphs sworn by the opposing party that are clearly irrelevant to the specific matters at issue. Resist.

"Branch J."

The Honourable Mr. Justice Branch

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