# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *R.R.H. v. B.K.,*
2011 BCSC 948

Date: 20110620
Docket: E36214
Registry: New Westminster

Between:

R.R.H.

Claimant

And:

B.K.

Respondent

Before: The Honourable Madam Justice Fisher

## Oral Reasons for Judgment

In Chambers

| | |
|---|---|
| Counsel for Claimant | M.L. Gendreau |
| Counsel for Respondent | A.E. Thiele |
| Place and Date of Hearing: | New Westminster, B.C.<br>June 6 & 8, 2011 |
| Place and Date of Judgment: | Vancouver, B.C.<br>June 20, 2011 |

[1] THE COURT: In this family law case the parties make cross-applications. The claimant, R.R.H., seeks an order varying the child support obligations contained in a separation agreement. The respondent, B.K., seeks an order that R.R.H. post security for payments of prospective child support. For simplicity I will refer to R.R.H. as the father and B.K. as the mother.

[2] The main dispute is with respect to the father's income and the amount of support that should be required for the parties' 20 year old daughter, who is pursuing post-secondary education at a local college.

### Background

[3] The parties separated in 2003 after a 15-year marriage. They have two daughters, now aged 15 and 20. They entered into a separation agreement on March 2, 2004, which was quite comprehensive. They agreed to joint custody and joint guardianship, with primary residence to the mother. The father agreed to

pay child support in the amount of $1,600 per month and an additional $400 per month for extraordinary expenses. This was based on a *Guideline* income of $110,000 to the father and $11,000 to the mother.

[4] The father was, until late last year, a self-employed businessman who operated a car dealership in Vancouver. From 1992 to 2005 his business employed eight people and had an inventory of 80 to 95 pre-owned vehicles. He made a substantial income from this business.

[5] In 2003 he purchased a commercial property on Hastings Street and in 2005 decided to move his dealership business there. He had a new building constructed and in 2006 began operating on a smaller scale, employing only one other employee and maintaining an inventory of 25 to 30 vehicles. His income from this operation as reported in his tax returns was less substantial than his previous operation. He reported incomes from a low of $34,364 in 2006, when it started up, to a high of $114,399 in 2010.

[6] In about November 2010, the father decided to take some time away from work due to stress and burnout. He closed his business. Since at least April of this year he has been in California. He deposes that he does not intend to stay there permanently, but there is no evidence as to when he intends to return to British Columbia. The property on which his business operated is for sale. If the father is not able to sell it, he will lease it. His counsel advised that the net revenue for the building would likely be approximately $60,000 per year. The father also has about $800,000 in investments which yield income to him.

[7] The mother works as a realtor, a career she started when the parties separated. She has been able to increase her income quite significantly since 2004. Her counsel acknowledged that the actual income available to her is in the $50,000 range. She also owns two rental properties with her father which yield revenue to her of about $17,500 per year.

[8] The oldest daughter, S.H., has available to her $36,511 from a registered education plan, the contributions which were made by the father during the marriage. She received $12,400 from the plan in 2009 and is eligible to receive $8,000 per year for the following three years. She is presently in her second year of studies in a four-year program. She is a little behind due to some health problems and plans to graduate in 2014. She also hopes to carry on with her education beyond this. In addition to attending school, S.H. works part-time and has been able to earn between $4,000 and $4,700 per year. She and her younger sister still live with the mother.

[9] The father was of the view that his income did not justify the amount of child support he was paying. In April of 2010, he unilaterally stopped paying child support to the mother and took steps to bring this matter to court. In October 2010, his counsel negotiated an arrangement with the Family Maintenance Enforcement Program, and he paid $13,000 to be held in trust by FMEP until this matter is resolved. In November 2010, he resumed paying child support. He does so through his counsel, who remits the funds to FMEP.

[10] The separation agreement of March 2nd, 2004, specified that the father expected to earn an income similar to $110,000 in the future. It also contained a provision permitting either party to request a review of child support in a number of circumstances, including a material change of circumstances, a child ceasing to

be eligible for support, and a child's need for support changing by reason of reaching the age of majority.

[11] In his materials, the father sought an order declaring that S.H. was no longer a child of the marriage, but Mr. Gendreau conceded in argument that S.H. continues to be a child of the marriage because she is attending school. He says, however, that the *Guideline* table amount of child support is no longer appropriate given the education funds that are available to S.H., as well as her own income.

***Guideline*** Income

[12] Section 19 of the *Federal Child Support Guidelines* permits the court to impute income to a spouse in appropriate circumstances. Such circumstances include:

> (a) the spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the spouse;
>
> [...]
>
> (e) the spouse's property is not reasonably utilized to generate income; and
>
> [...]
>
> (g) the spouse unreasonably deducts expenses from income.

[13] Mr. Gendreau submitted that the father's income should be imputed at $50,000 to $60,000 per year, although he acknowledged that the father will be able to earn about $85,000 if he were to lease his Hastings Street property and earn an average 3 percent return on his investments.

[14] Ms. Thiele submitted that the father has not shown that there has been a material change in his income-earning ability since separation. She says that the father should be able to earn about $108,000 without working if he leases his Hastings Street property and earns an average 6 percent rate of return on his investments. She pointed out that the father has always been in control of the money he pays himself, and says that his corporate earnings have supported an annual income at $110,000. Moreover, any decreases in his income have resulted from his own decisions to downsize his business and then to leave a successful operation. She questioned the evidence about the father's depression and burnout and suggested that the medical evidence is not sufficient to support his decision to close his business.

[15] The father is seeking a change retroactively to April 1, 2010. However, in 2010 the father's income was over $110,000. His tax return shows a total income of $114,399 made up of $63,698 in employment income, $33,000 in other employment income, which counsel advised was a draw from the company, and about $17,700 in interest income and capital gains. Prior to 2010, the evidence does show income levels lower than $110,000, particularly in 2006 when the father was starting his downsized business. However, the gross profits and net income of the company grew steadily from 2006.

[16] The father deposed that he decided to close his business and take some time to revitalize himself and find another occupation. He stated that he began to wind the business down in December 2010. His family doctor provided a medical report, unsworn, which outlines several visits in November and December 2010 where the father reported symptoms of depression and "difficulty coping with personal interactions at his

place of work." The doctor stated that at the last visit, on December 6, 2010, the father reported ongoing difficulties with interactions with clients. It is significant, in my view, that there is no mention of the father's intention to close his business altogether. Rather, the impression apparently left with the doctor is that the father was continuing to work, although he reported "partial disability at work." Importantly, there is no medical opinion that the father is unable to work, and the doctor was optimistic that he would have a full remission of his depression and be able to successfully continue with his usual work duties.

[17] I am not satisfied that the father has shown a material change to his income-earning ability. There is no medical basis for his decision not to work at all. The evidence clearly shows that he is intentionally unemployed and remains capable of earning an annual income of $110,000. Even without working, the father is capable of earning an income of at least $85,000 from his capital investments without encroaching on the capital. I consider that estimate to be quite conservative.

[18] I have considered the evidence of the lower incomes in previous years, but I do not consider this particularly relevant because the father is not seeking any relief prior to April 2010. Ms. Thiele submitted that the corporate financial statements show that during these years there was more money available to the father for child support purposes than he was paying to himself by way of salary. For example, the company reported no rental income but amortized lease payments. It may very well be that this expense item should not be considered when assessing available corporate income. The father explained that he did not record rental payments because the income he paid to himself was comprised of all the services he provided to the company, which included rent.

[19] As none of this evidence was addressed comprehensively by counsel at the hearing, it is not possible to make specific findings about available corporate earnings, nor is it necessary to do so.

[20] It is also not necessary to consider the father's assets, valued at approximately $2 million. It is because he has these assets that he is able to earn an income without working.

[21] There is no question that the father has worked very hard for many years. He has supported his family and been able to accumulate a considerable asset base. He is certainly free to make his own decisions, but his obligation to support his children remains a constant. In my view, there is no basis on the evidence before me to vary the father's *Guideline* income of $110,000 as set out in the separation agreement.

## Child over the age of majority

[22] Section 3(2) of the *Federal Child Support Guidelines* provides that where a child is at the age of majority or over, the amount of child support payable 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.

[23] The father concedes that S.H. is still a child of the marriage, but submits that the approach of applying the *Guideline* table amount is not appropriate. Mr. Gendreau referred me to a line of cases where courts have found it inappropriate to order the table amount of support for children over the age of majority attending post-secondary institutions: *Wesemann v Wesemann* (1999), 49 R.F.L. (4th) 435 (B.C.S.C.); *Johnson v. Johnson,* [1998] B.C.J. No. 1080 (S.C.) (QL); *L.J.M.1 v. E.W.D.M.*, 2005 BCSC 76; and *Neufeld v. Neufeld*, 2005 BCCA 7.

[24] In *Wesemann,* Martinson J. held that s. 3 of the *Guidelines* allows the court some discretion to move away from the *Guidelines* if it considers that approach (not the amount) to be inappropriate. She discussed the basis for the usual *Guidelines* approach at paras. 16 to 18:

> [16] The usual *Guidelines* approach is based on certain factors that normally apply to a child under the age of majority. That is, the child resides with one or both parents. The child is generally not earning an income and is dependent on his or her parents.
>
> [17] The usual *Guidelines* approach is, in most cases, based on the understanding that, though only the income of the person paying is used to calculate the amount payable, the other parent makes a significant contribution to the costs of that child's care because the child is residing with him or her.
>
> [18] The closer the circumstances of the child are to those upon which the usual *Guidelines* approach is based, the less likely it is that the usual *Guidelines* calculation will be inappropriate. The opposite is also true. Children over the age of majority may reside away from home and/or earn a significant income. If a child is not residing at home, the nature of the contribution towards the child's expenses may be quite different.

[25] In *Johnson*, Pitfield J. said this at para. 12:

> [12] Where, as in the present case, an individual only remains a child because of his pursuit of post-secondary education and he lives at home or away from home depending upon the time of year, convenience, affordability and need, I consider it appropriate to refrain from making an order for child support computed by reference to the tables. Rather, the burden cost of education should be shared in proportion to the ability of the child and the parents to contribute to it. The child should contribute the amount he reasonably can to the cost of his education. The balance should be shared by the parents in proportion to their incomes computed with regard for the *Guidelines*. In my opinion the burden cost or expense of post-secondary education in the circumstances with which I am concerned is comprised of tuition and institutional expenses, room and board or equivalent expenses, books, travel and miscellaneous expenses reasonably attributable to or arising from the pursuit of that education.

[26] In *Neufeld,* the Court of Appeal referred to these decisions, and others, which addressed child support for students living away from home. At para. 42 Levine J. concluded that support for an adult child who is entitled to child support because of her attendance at a post-secondary institution generally should be determined under s. 3(2)(b). This is because the table amount contemplates contribution by the non-custodial parent to the expenses borne by the custodial parent in providing a home and does not contemplate the child's contribution. She noted as well that s. 3(2) does not preclude a specific award for special or extraordinary expenses under s. 7 of the *Guidelines*.

[27] In determining what amount of child support is appropriate under s. 3(2)(b), the court should consider

(1) the reasonable needs of the child, (2) the ability and opportunity of the child to contribute to those needs, and (3) the ability of the parents to contribute to those needs. The reasonable needs of the child include accommodation, food, clothing and other similar expenses as well as actual post-secondary expenses. While children have an obligation to contribute to their education, it does not necessarily follow that all of the income they earn must be applied to their education. They should have the opportunity to experience some personal benefit from their labour: see *Wesemann*, paras. 20-22.

[28] In this case S.H. continues to live with the mother, which brings the circumstances closer to those on which the usual *Guidelines* approach is based. However, S.H. is able to contribute to her education costs with the funds from the education plan, and she is able to contribute to her expenses with her part-time income. These are important factors that should be taken into account. An analysis of the factors in s. 3(2) should be undertaken in order to determine if the father is paying an appropriate amount of child support for S.H. under the terms of the separation agreement.

[29] Mr. Gendreau submitted that S.H.'s monthly living expenses are about $1,200 and she should be able to contribute $400 per month for her support based on the education funds and her part-time income. He says that child support should be based on the parties sharing proportionately the remaining $800 a month.

[30] Ms. Thiele submitted that S.H.'s monthly expenses were considerably higher than $1,200, closer to $2,200. She says that the table amount of support remains appropriate given the amount of support required and there is no practical reason to deviate from the usual *Guideline* approach, which the parties used to establish the support set out in the separation agreement.

### 1. The reasonable needs of S.H.

[31] The expenses set out in the mother's financial statement show that S.H.'s reasonable needs for accommodation, food, clothing and transportation are about $2,000 a month, or $24,000 annually. Mr. Gendreau's calculation does not include many of the expenses S.H. is paying herself. I do not think that this is the appropriate starting point when considering S.H.'s needs. Her contribution should be considered after determining her reasonable needs, which leads me to the second point, S.H.'s ability to contribute.

### 2. S.H.'s ability to contribute

[32] S.H. earns a very modest annual income of $4,000 to $4,700 from part-time employment. She should be able to have some of this income for her own enjoyment. She does pay for many of her personal expenses, including most of her clothing, accessories, entertainment, personal grooming, gas and cell phone. These contributions reduce her needs to some extent. In my view, she should be contributing $2,000, to reduce her accommodation and other related expenses to $22,000 annually.

[33] S.H.'s expenses for full-time tuition and institutional expenses, books and supplies are approximately $6,000 a year when she goes full-time. I base this on the evidence about her expenses in 2009. I realize that she is taking a slightly lighter course load, but she will take an extra year to complete her studies. The education fund that is available to her will cover these costs until she completes her first degree in 2014.

### 3. The parents' ability to contribute

[34] I have already addressed the father's *Guideline* income at $110,000.

[35] The mother reported a *Guideline* income of $60,000 in her latest financial statement. However, her net income from real estate commissions as reported in her 2010 tax return is considerably less than that. She reported gross business income of $92,307 and net after expenses of only $15,056. Ms. Thiele conceded that an income of $50,000 would be appropriate when the considerable business expenses are considered. To this she would add the rental income of $17,500 for a total *Guideline* income of $67,500.

[36] Mr. Gendreau submitted that the mother's *Guideline* income should be considered at $77,500 based on $60,000 of employment income as set out in her financial statement and the $17,500 in rental income.

[37] I would assess the mother's income at $67,500 as submitted by Ms. Thiele. The mother has consistently deducted considerable business expenses and her income has fluctuated over the years, with gross profits ranging from about $52,000 to $100,000 and net income ranging from about $10,000 to almost $30,000. An income at $50,000 takes into account that more money is available for some of the family expenses than the net figures indicate.

[38] *Guideline* child support based on the father's income is $1,572 for two children. He pays $1,600 under the terms of the separation agreement. The father acknowledges his obligation to continue to pay *Guideline* support for his younger daughter. The *Guideline* amount for one child is $988. The difference between the table amount for one child and the $1,600 the father is currently paying is $612. Accordingly, the father is presently contributing $7,344 to S.H.'s annual expenses.

[39] In addition to this he pays $400 per month for special expenses for both children. With half of this allocated for S.H., the father is contributing a further $2,400 a year. This additional amount increases the father's total annual contribution towards S.H.'s expenses to $9,744. This is less than half of the actual cost, not including S.H.'s contributions from employment and the education fund of $22,000. This is less than his proportionate share when the mother's income is considered.

[40] This analysis shows that the father is paying a very modest amount of child support for S.H. under the terms of the separation agreement. Accordingly, there is in my view no basis on the evidence to reduce his child support payment.

[41] The father's application to vary the amount of child support payable under the separation agreement is dismissed.

## Security

[42] The mother seeks an order that the father post security for payments for prospective child support and special expenses pursuant to s. 12 of the *Federal Child Support Guidelines* and s. 30.1 of the *Family Maintenance Enforcement Act*, R.S.B.C. 1996, c. 127. I note that the other relief sought in that application was not pursued at the hearing. Was that the only relief you were seeking?

[43] MS. THIELE: That's the only section I refer to?

[44] THE COURT: No, no. You were only seeking security. You asked for other things in your application, but you did not pursue them. Is that right?

[45] MS. THIELE: That's correct.

[46] THE COURT: Section 12 of the *Guidelines* provides that the court may require in a child support order that the amount payable under the order be secured in a manner specified in the order.

[47] Section 30.1(1) and (2) of the *Family Maintenance Enforcement Act* provides:

> (1) Whether maintenance is in arrears or not, the director, or if an order is not filed with the director, the creditor, on notice to the debtor, may apply to a court for an order under subsection (2).
>
> (2) On hearing an application under subsection (1), the court may order that, as security for payments in arrears or subsequent payments, the debtor provide security for maintenance payments in any form that the court directs.

[48] Ms. Thiele advised me that the director of Family Maintenance Enforcement has filed a charge against the father's Hastings Street property. The mother is concerned that in addition to closing his business, the husband has listed his property for sale and has left British Columbia for an indeterminate period of time. Ms. Thiele seeks an order that security for costs be paid from the proceeds of sale when the Hastings Street property is sold. She has calculated the amount of security at $117,391, which is based on a *Guideline* child support of $1,572 a month for two children to 2014, $988 for one child to 2015, and $13,375 for one half of the cost to bring the younger child's registered education fund to $40,000 to pay for her post-secondary education. This latter amount is in lieu of the $400 per month the father pays for special expenses.

[49] Mr. Gendreau submitted that an order for security should not be made because it has not been shown that the father has deliberately refused to pay maintenance or is likely to refuse to pay in the future. He relies on *Witherow v. Witherow*, [1994] B.C.J. No. 2124 (B.C.S.C.), which states this proposition. He says that the matter of security should be left to the director under s. 26 of the *Family Maintenance Enforcement Act*.

[50] Ms. Thiele submitted that orders for security for prospective maintenance have been made in a variety of circumstances, not restricted to those described in *Witherow*. That may be so, but to order security for prospective child support there must be a need for this based on the evidence. Such a need is usually established where there are concerns that payments may not be made in the future.

[51] For example, in *Braich v. Braich*, [1997] B.C.J. No. 1764 (B.C.S.C.), the court was not satisfied that the father had put his obligations to pay maintenance first in his financial priorities and ordered security to ensure timely payment. The father had dissipated his considerable assets and had claimed he was bankrupt. He had stopped making maintenance payments, alleging that he did not have the financial ability to do so. The judge was satisfied that notwithstanding that his present income may not have allowed him to pay maintenance, his future income would, and he had the means or financial ability to meet his obligations. In *Griffiths v. Griffiths,* 2006 BCSC 1077, security was ordered until the court was able to review the matter, as

there was uncertainty about the income that was available to the payor.

[52] Given the fact that a charge has been filed against the father's Hastings Street property, I am concerned that this application may be premature. Section 26(10) and (12) of the *Family Maintenance Enforcement Act* allows the court to impose conditions as to security on an application to discharge a charge on the payor's property. The need for security should really be determined at that time. In fact, *Witherow* was a case decided under what is now s. 26(10). In addition, it does not appear that the mother can apply under s. 30.1(1), because an order has been filed with the director. It is only where this is not the case that the creditor may apply for security under ss. 2.

[53] Ms. Thiele urged me, however, to consider this application now in order to reduce the need for the parties or the director to come back to court. Despite my concerns, I am prepared to make this order under s. 12 of the *Guidelines*, because I consider the application for security to be justified on the evidence. It will, however, include a term giving the father liberty to apply to vary it or set it aside if the circumstances have changed by the time this property is sold. The onus will be on him to show that alternative security is no longer necessary to protect the interests of the children of the marriage, and in that regard I refer to *B.D. v. L.D.B.*, 2003 BCCA 189, which cited the *Witherow* decision.

[54] Both s. 26(12) and s. 30.1, as well as s. 12 of the *Guidelines,* give the court fairly broad discretion to order security for maintenance payments. The father did unilaterally stop making any child support payments in April 2010, and since then his payments have been made only through his counsel to the Family Maintenance Enforcement Program. Although he had paid regularly before that, these actions are cause for concern, particularly when I consider the evidence that he has not worked since late 2010 and has been out of the country for some time now. The father deposed that while he did not intend to move to the United States permanently, he would like to be able to live part of the year in Vancouver and part of the year in Los Angeles. He also stated that he intended to stay in Los Angeles "a while longer," until his spirit and health improved. He gave no indication when he planned to return to Vancouver.

[55] In order to ensure that future child support payments are made, I am prepared to order that security for costs be paid from the proceeds of sale when the Hastings Street property is sold, in the amount proposed by Ms. Thiele. I consider the amount to be reasonable given that the father has valued the property at over $900,000 and counsel advises me that there is no mortgage secured against it.

[56] As I said before, the father will have liberty to apply to vary or set aside this order if the circumstances have changed at the time the property is sold. My only question to counsel at this point is who is to hold the security and where is it to be paid in trust?

[57] MS. THIELE: I have spoken to my friend, but I have no difficulty if Family Maintenance will hold it, but I think that the problem is that they won't hold it on interest-bearing terms. So can we – Mr. Gendreau, do you want a moment to think about that? I'm happy to hold it in trust. You know, if my friend is uncomfortable with that, I will go to the director and see if they can hold it and provide an interest-bearing ability to hold it.

[58] MR. GENDGREAU: Well, my preference naturally would be for FMEP to hold it. Whether they will do

so on interest-bearing terms I don't know. Perhaps my friend and I can work it out. I don't anticipate, but could be proven wrong, that we would not be able to work out some suitable arrangement if the director does not have any capacity to pay interest. Whether it's held in my friend's trust account or my trust account, I don't see that as an overly difficult issue.

[59] MS. THIELE: I trust my friend as well, My Lady.

[60] THE COURT: Well, then I will just say that the security will be held in a manner –

[61] MS. THIELE: As agreed between counsel?

[62] THE COURT: -- to be agreed by the parties, or by counsel.

[63] MR. GENDREAU: That sounds fine.

[64] THE COURT: I will leave that up to you.

[65] MS. THIELE: My Lady, do you have time to deal with costs? I know you have a trial starting.

[66] THE COURT: Well, there is also going to be an order by consent on the terms requiring the mother to disclose that information. Do you want me to read it into the record? It is on this piece of paper.

[67] MS. THIELE: I think we're fine, My Lady. I think it's basically my friend's motion.

[68] THE COURT: Right. Well, maybe just for completeness I will just read it in since I have read the rest of it. This is the order that will go by consent. The mother will disclose to the father:

> A copy of confirmation of the enrolment confirmation in a post-secondary educational institution as each of S.H. and T.H. secure such enrolment forthwith as each is issued from the post-secondary educational institution from time to time for so long as they continue to pursue post-secondary education.
>
> A copy of all transcripts of marks for each of S.H. and T.H. forthwith as each is issued from the post-secondary educational institution from time to time for so long as each continues to pursue post-secondary education.
>
> Prompt notice of either of S.H. and T.H. discontinuing any course for which she is enrolled for so long as each continues to pursue post-secondary education.
>
> Prompt notice of any change to the employment status of each of S.H. and T.H. from time to time and immediate disclosure of copies of their periodic employment pay stubs as they are issued from time to time for so long as either of them continues to pursue post-secondary education.
>
> A copy of all T4 and/or T5 income tax records received by S.H. and T.H. annually forthwith upon receipt for so long as each continues to pursue post-secondary education.
>
> A copy of all income tax returns filed by S.H. and T.H. annually forthwith after filing, together with a copy of the corresponding Canada Customs and Revenue Agency notice of assessment, forthwith upon receipt for so long as each of them continues to pursue post-secondary education.

[DISCUSSION RE COSTS]

[69] THE COURT: You are both very reasonable counsel and I have complete confidence that you will be able to sort this out.

[70] MR. GENDREAU: We're going to try because, you know, the cost of this is really not –

[71] THE COURT: I would encourage you to take that into account, but in any event, the mother should be entitled to costs of the application, however long it took.

[72] MS. THIELE: Thank you, My Lady.

"Fisher J."