SUPREME COURT OF YUKON

Citation: *B.J.G.* v. *D.L.G.,* 2010 YKSC 33

Date: 20100625
Docket S.C. No.: 99-D3183
Registry: Whitehorse

BETWEEN:

B.J.G.

Plaintiff

AND:

D.L.G.

Defendant

Before: Madam Justice D. Martinson

Appearances:
Kathleen Kinchen — Appearing for the Plaintiff
Carrie Burbidge — Appearing for the Defendant

REASONS FOR JUDGMENT
DELIVERED FROM THE BENCH

I. INTRODUCTION

A . THE APPLICATIONS

[1] 12 year old K.'s parents, Ms. R. and Mr. G., apply to vary existing custody and child support orders. There are two applications before the Court. The first is the application of Ms. R. filed May 6, 2010 and the second is the application of Mr. G filed May 17, 2010.

[2] In Ms. R.'s application she asks:

1. for retroactive and ongoing child support in accordance with the federal child support guidelines;

2. for extraordinary expenses to be shared in accordance with their incomes;

3. that K. reside with each party on alternating weeks; and

4. Costs

[3] In his response dated and filed May 14, 2010, Mr. G. says he does not oppose the application that K. reside with each party, but opposes the other three. In his own application, filed three days later, he asks for "an order that he shall have custody of K. with generous access to Ms. R or in the alternative that they have joint legal custody."

B. BACKGROUND FACTS

[4] Ms. R. and Mr. G. were divorced in 2000. At that time they consented to an order that Ms. R would have sole custody of K. and they would share joint guardianship. Guardianship was specifically defined and included the requirement that Ms. R. consult with Mr. G. before making decisions.

[5] Child support was fixed at $450 per month which included $300 child support and $150 for day care. It was also agreed that Mr. G. would pay 50% of the net cost of all seasonal clothing, dental, health, educational costs, cost associated with extra-curricular activities and any other major expenses directly related to K. Mr. G's guidelines income was $24,518 at that time.

[6] Some changes to the 2000 corollary relief order have been made by agreement. Beginning in September 2009 K. has been residing with each of his parents on alternating weeks. K. made this request of his mother and she agreed.

[7] On February 25, 2008, it was agreed that Ms. R would receive $300 a month and 50% of the items as set out in the 2000 Order. That is, she agreed to forgo the other $150 as K. was not attending daycare, though she felt they had an agreement that it would become part of the child support payment.

[8] Relevant to the child support issues in this case is the fact that Justice Veale of this Court dealt very recently with the question of Mr. G's income for child support purposes and made payment orders in another action brought by Mr. G.'s second wife: *E.A.G. v. D.L.G*, 2010 YKSC 23. She claimed interim child support for their two children and spousal support. On June 9, 2010, Justice Veale assessed Mr. G.'s income for *Guidelines* purposes at $300,000. He made interim orders requiring Mr. G. to pay $3944 a month for support for the two children and $4300 a month for spousal support, commencing January 1, 2010. He also ordered that Mr. G. pay day care expenses of $1100 per month. The trial, which will lead to final orders, is expected to take place in early 2011.

C. OUTLINE

[9] I have reviewed all of the evidence and considered the submissions of counsel. I will deal first with custody and then child support. It is agreed that for each, the material change of circumstances test has been met.

II. CUSTODY

A. GENERALLY

1. Submissions

[10] The parents` submissions can be summarized this way.

[11] Mr. G says that it would be in K.'s best interests to spend more than half his time with him. He has much to offer him and it is natural for a boy his age to spend more time with his father. Mr. G. submits that he is well placed to prepare K. to eventually take over his business, company N. At the hearing, Mr. G.'s counsel said that his main concern is having a decision making role in K.'s life, which will be in K.'s best interests. Mr. G. says his claim is genuine and he has been thinking about making his claim for some time. It made sense to make the claim now since he was coming to court already as a result of Ms. R.'s application for more child support.

[12] Ms. R. says that the claims are not genuine, and made as part of an effort to deter her from asking for full financial disclosure. She argues that it is in K.'s best interests that they continue with the existing residential arrangement. She submits that co-parenting would not work. She has always been the primary parent and made decisions in accordance with the 2000 Order. Because he treats her and her views with such disrespect, they would never be able to cooperate to make decisions that are in fact in K.'s best interests

2. Legal Principles

[13] The test that I have to apply is found in s. 17 of the *Divorce Act,* R.S.C. 1985 c. 3 (2nd Supp.).The law was summarized by the Supreme Court of Canada, in the context of a mobility case, in *Gordon v. Goertz*, [1996] 3 S.C.R. 27, at para. 49:

> 1. The parent applying for a change in the custody or access order must meet the threshold requirement of demonstrating a material change in the circumstances affecting the child.
>
> 2. If the threshold is met, the judge on the application must embark on a fresh inquiry into what is in the best interests of the child, having regard to all the relevant circumstances relating to the child's needs and the ability of the respective parents to satisfy them.
>
> 3. The inquiry is based on the findings of the judge who made the previous order and the evidence of the new circumstances.
>
> 4. The inquiry does not begin with a legal presumption in favour of the custodial parent, although the custodian parent's views are entitled to great respect.
>
> 5. Each case turns on its own unique circumstances. The only issue is the best interest of the child in the particular circumstances of the case.
>
> 6. The focus is on the best interests of the child, not the interests and rights of the parents.
>
> ...

[14] A parent's past conduct shall not be taken into consideration unless the conduct is relevant to the ability of the parent to act as a parent of a child: s. 16 *Divorce Act.* It follows that past conduct that is relevant to the ability of a parent to act as a parent of a child is relevant to the best interests determination.

[15] Communication difficulties between parents are not necessarily a bar to an award providing for joint decision making. However, there must be evidence that the

parents will be able to communicate effectively in the best interests of the child: *Cuthill v. Cuthill***,** 2009 BCSC 1360; *Windle v. Windle*, 2010 BCSC 18.

3. Decision

[16] In this case the 2000 Court Order was made by consent. Though the Judge who made that Order was not required to make specific findings, the inquiry now is based on the fact that both the parents and the Judge considered that the terms of the order were, at the time the order was made, in K.'s best interests. I must consider this, as required by point 3 in *Gordon v. Goertz*, and the evidence of the new circumstances.

[17] I am satisfied that it is in K.'s best interests to keep in place the existing residency arrangement, that is alternating weeks, with Ms. R. continuing to have sole custody and both parents sharing guardianship as set out in the 2000 order. The residency arrangement was agreed to by both parents and by K. It is in his best interests as its gives him significant and important time with both his parents. The things Mr. G. says he could do with K. if he had more time with him are things they can easily do together under the existing arrangement.

[18] I am satisfied that the changes Mr. G. asks for are not motivated by what is in K.'s best interests. Rather, he has made his application hoping that doing so would discourage Ms. R. from pursuing her application for full financial disclosure and more child support. He is trying to use the court process and the Court as a means of preventing appropriate and legally mandated financial disclosure and the payment of appropriate child support. I will say more about his legal obligations in this respect below.

[19] What he proposes would not be in K.'s best interests. Ms. R. has always been the primary parent and done all of the things a primary parent does. She has made the major decisions affecting K., in consultation with Mr. G. She has been the one to take him to medical, dental and optical appointments. This was the arrangement that they both agreed was in K.'s best interests at the time of the 2000 order. Mr. G. has been content with this arrangement until now. The evidence shows that Mr. G. attended only some parent teacher meetings and never attended award ceremonies even though K. has won awards over the years.

[20] The numerous emails going back and forth between the parties show a pattern of concerning behaviour on the part of Mr. G. in his dealings with Ms. R. When she made a request for financial disclosure that she was legally entitled to make, he threatened to claim full custody of K. if she pursued her request. He was making such threats in an effort to prevent her from finding out what his true income was.

[21] For example, Mr. G. made a request to reduce child support. In a February 25, 2008 email, Ms. R made this request for full financial disclosure:

> I've quickly looked at the attachment provided, and I too would be open for discussion, but at this time I cannot agree to any reduction, without having all the required financial information in which to fairly base that decision ie: full financial disclosure from you; N and any other business(s) in which you have the required interest in; and of course, I would be required to provide you with mine also. For clarification, and to which I can request, full financial disclosure includes such items as: personal income tax returns, corporate returns and financial statement, etc. We could look it up online to see how many years of financial information we'd be required to provide to each other. Also, there are various calculations that would need to be made, etc to fairly determine any possible changes to amounts. (emphasis added)

[22] In his responding email Mr. G. says he wants to avoid going to Court. He states that he will file for full custody if she pursues financial disclosure:

> I can get the court order in place recognized very quickly, and if we do unavoidably go this direction and can not simply work something out between ourselves, and you do pursue financials and go this avenue I will have no alternative but to file for full custody. Lets prevent the unnecessary I'm hoping you will consider my offer.

[23] On August 3, 2009, counsel for Ms. R. made a formal request for disclosure to counsel for Mr. G. The next day Mr. G. sent an email directly to Ms. R. In it he says that he is requesting her to remove the financial disclosure request now and not bother him with it again. He says he has a meeting with his lawyer next week and "if I don't hear back that this issue has been dropped then you leave me with no other choice but to file for full custody of K. next week."

[24] He states that he agrees to what she is being paid now and "any more than that and I will fight for my rights for K. under my roof you may have a lot more to loose than you think while your trying to get more money out of me."

[25] He also says that he has done nothing but move ahead since she left and "if you think for one minute I'm going to give you more money because of my success now your mistakenly wrong."

[26] In the same email he makes a number of comments about Ms. R. and her character:

> I see you must be really evaluating my situation the last while driving around my yard pretending your not paying attention to my assets, you really think your fooling anyone, Mom was right seeing how K. wasn't allowed to be here last

> month you were up to something boy funny how well she knows that character you have.
>
> ...It is really unfortunate you have to be such a bother in our life, [L.] does not want you in our yard any further, none of our family can any longer tolerate your presence, K can be dropped off at the entrance.
>
> ...
>
> Your quite a piece of work [J.], you have such a selfish character its too bad that you have a hard time trying to hide the real person you are, we can all see clearly through you and your not fooling anyone."
>
> ..
>
> I would again suggest you benefit off of your own well doing not sponge off me.

[27] He has insisted that she prove to him that she is spending the money he pays in child support on K. and in an appropriate fashion. He has no legal right to do that. For example, in his August 4, 2009 emails he questions how she spends the child support money:

> I have no problem spending money on K. so long as he is under my roof, I see how you buy him garbage clothing twice the size so you can try saving something or 5 back packs he really doesn`t really need my funds given to you really well looked after.

[28] In response to an allegation by her that he called her a "stunned bitch " in front of K. when he received the lawyer`s letter requesting financial disclosure, he says he did not say that in front of K. but may have said it in front of others.

[29] Then, when Ms. R. did in fact file this application to confirm the existing alternate week residency arrangement, and obtain increased and retroactive child support, his

response was that he agreed to what she proposed with respect to custody; he made no claim for custody. He only challenged the child support claims. Then, three days later, he made his own custody claim.

[30] Mr. G. treats Ms. R. with complete disdain. This treatment of her is abusive. Though K. spends alternate weeks with each of his parents, joint decision making is not in his best interests. The existing Guardianship Order continues to be in his best interests.

[31] This is a case in which Mr. G.'s past conduct is relevant to his parenting abilities. He would not be able to parent cooperatively with her when he treats her and her views with such disrespect. An order directing joint decision making would give Mr. G. the opportunity to continue to treat Ms. R. in this completely unacceptable fashion. It would escalate the conflict between K.'s parents. It would send to K. an inappropriate message about what is and what is not acceptable behaviour.

[32] There is a real danger that Mr. G., based on his past behaviour towards Ms. R., would not communicate effectively with her; rather, it is highly likely that he would continue with his controlling behaviour rather than making decisions that focus on K.'s best interests.

[33] Mr. G. has presented no evidence to show that Ms. R. has not consulted with him or that she has made decisions that are not in K.'s best interests.

[34] During the course of this hearing the Court raised the issue of whether the Court should hear from K. and heard submissions from counsel. I ruled that though K. is

capable of forming his own views, the evidence in this case did not support the conclusion that he has views, or, if he does, that he wishes to express them. I will explain why I raised the issue and why I reached that conclusion in a separate judgment.

III. CHILD SUPPORT

A. INCOME

1. Ms. R.'s Income

[35] It is agreed that Ms. R.'s income for this purpose is $63,026 per year. The Guidelines income for that amount is $583 per month.

2. Mr. G.'s Income

a. Financial Disclosure

[36] I will begin by discussing what Mr. G. was legally required to provide to Ms. R. and the Court, and then deal with what he did provide.

i. Legal Principles

[37] Both ss. 21 to 25 of the *Federal Child Support Guidelines* and Rule 63A of the *Yukon Supreme Court Rules* require full and timely financial disclosure in cases involving child support.

[38] The *Guidelines* say that every spouse against whom a child support order has been made, must, on the written request of the other spouse, and not more than once a

year, provide specific financial information, as long as the child is a child within the meaning of the *Guidelines*: s. 25(1). Once served with the child support application Mr. G., as a spouse who controls a corporation, must, among other things, provide to Ms. R. and the Court the financial statements of the corporation and its subsidiaries, for its three most recent taxation years: s. 22 and s. 21 (1)(f) of the *Guidelines.*

[39] Rule 63A (21) provides that financial information must be kept current. If there has been a material change in circumstances that renders information provided inaccurate or incomplete, Mr. G., as a person required to provide information, must either provide a written statement setting out particulars of the accurate information, or a revised financial statement.

[40] The Yukon Supreme Court has repeatedly emphasized the importance of full and timely disclosure. That point was reinforced by the Yukon Court of Appeal in *Holmes v. Matkovich,* 2008 YKCA 10. There are many compelling reasons for the disclosure requirements in child support cases.

[41] They are in furtherance of the objective of the *Guidelines* of establishing a fair standard of support for children that ensures that they continue to benefit from the financial means of both parents after separation: s. 1(a).

[42] Early disclosure allows the parents to stabilize their financial situation by putting reasonable and timely interim arrangements in place. It also allows them to move towards an early resolution, either by way of settlement, or a timely trial. Information needs to be kept current so that the parents can continue to work on settlement, prepare for trial, or both.

[43] Non-disclosure has a negative impact on both the settlement process and the trial preparation process. When a parent has to spend time, energy and money to obtain the disclosure to which that parent is entitled, that will usually escalate the dispute rather than create a climate where the focus is on settlement. Conflict of this sort can adversely affect children.

[44] Non-disclosure also adversely affects the trial itself. Time that should be used to focus on the merits of the case ends up being used to resolve disputes over disclosure.

[45] Full disclosure is mandatory before a fair and equitable settlement can be reached, that in fact ensures that the children benefit from the financial means of both parents. If that disclosure is inadequate, the agreement reached based on the inadequate disclosure is vulnerable; more costly, time consuming and draining litigation can result.

ii. *Mr. G.'s Disclosure*

[46] It is significant that Mr. G. has not ever disclosed N.'s financial statement for the year ending December 31, 2009. Instead, the evidence discloses the following.

[47] He has provided a letter dated March 10, 2010 from his insurance agent relating to bonding requirements. In that letter the agent says that he "is in receipt of your December 31, 2009 internally prepared year end statement…" That statement has never been disclosed.

[48] Mr. G. prepared a financial statement, sworn May 14, 2010, in these proceedings, which contains the financial statement for the year ended December 31,

2008, but not the one for 2009. I note that the 2008 statement was provided to N. on April 17, 2009. In his May 14, 2010 financial statement Mr. G. swore that he did not anticipate any significant changes in the information set out in the financial statement.

[49] The hearings before Justice Veale on the question of income took place on April 21st, May 31st and June 3, 2010. The 2009 year end statement was not provided to him either. As I have noted, Justice Veale made his decision on June 9th. He did not accept Mr. G.'s argument that his income should be fixed at his draw of $87,100.

[50] Then, on June 18th, in these proceedings, Mr. G. filed a further financial statement which included his additional financial obligations based on the Orders of Justice Veale. He also attached a copy of a document which relates to N.'s year end for 2009. Stamped clearly on every page are the words, "Draft for discussion purposes only". It is a faxed document which shows in its face that it was faxed from the company's chartered accountant, to N. at 13:33 on June 10th, the day after Justice Veale's decision was released. Mr. G. relies on the document to show that N.`s financial situation in 2009 was much worse that is had been previously.

[51] Then, on June 23, 2010, the day before this hearing - a hearing that was set on May 6, 2010 - Mr. G. filed a further affidavit attaching a letter from N.`s accountant, also dated June 23rd. In that letter, the accountant says: "I have had the opportunity to review fiscal 2009 financial information now that the final statements have been finalized." That makes it clear that as of that date, final statements existed. They were not produced in these proceedings. The letter goes on to refer to the content of the

statements; the accountant offers opinions based on the statements about N.`s financial status.

[52] Aside from the fact that the opinions are expert opinions, and the rules relating to experts were not complied with, the opinions have no value at all when the financial statements upon which they are based do not form part of the evidence. The “Draft for discussion purposes only” statement has no evidentiary value.

[53] The end result is that in this proceeding the Court does not have evidence about the financial position of N. in 2009. Mr. G. was required to produce it as part of his obligation to provide full disclosure to the Court. It is no excuse to say that the accountant had not yet prepared the relevant statement. Mr. G. was responsible for making sure it was prepared and produced. He simply says that it is due June 30th and he will give Ms. R. a copy when he gets it. As I noted earlier, the financial statement for the year ended 2008 was, in the ordinary course, prepared on April 17, 2009.

[54] It is also concerning that Ms. R. found out that N. very recently purchased a business, the purchase being registered on June 2, 2010. Mr. G acknowledges, when responding to that suggestion, that it was purchased in June 2010. He says, “I did not disclose this purchase, because it occurred in 2010, and because it is owned by N, not by myself, and I therefore did not think I needed to disclose it.”

[55] This approach to disclosure must be considered together with the approach Mr. G. took to Ms. R.’s requests in writing for financial disclosure that I have already referred to when considering the question of custody.

[56] The evidence shows that Mr. G. discloses selectively, and does so when he wants to and in the format that he wants to use.

[57] Counsel for Mr. G. argues that the circumstances before me are different from those before Justice Veale because he only had the 2008 information. I am left with essentially the same information that was before Justice Veale earlier this month. That is because that is all the information Mr. G. chose to provide to me.

[58] The information summarized in paras. 2 and 3 of Justice Veale's decision in *E.A.G. v. D.L.G* also forms part of the evidence in this case. Company A is company N.:

> [2] D.L.G., the father has a construction company incorporated in 1989, ("company A"). He is the sole shareholder of company A, which primarily works May through November. The father has provided Financial Statements for the year ended December 31, 2008, for the year ended September 30, 2007 and the three months ended December 31, 2007, as well as corporate tax returns from 2005 – 2008. His corporate income from company A before tax, the retained earnings and shareholder's loans are as follows:
>
> | Company A Year End | Income before Tax | Retained Earnings | Shareholder's Loan |
> |---|---|---|---|
> | September 30, 2005 | $328,743 | $539,651 | $269,838 |
> | September 30, 2006 | $333,135 | $684,422 | $350,000 |
> | September 30, 2007 | $69,610 | $711,693 | $338,542 |
> | December 31, 2007 (3 months) | $100,385 | $766,336 | $341,411 |
> | December 31, 2008 | $2,798,029 * | $3,207,451 | $353,877 |
>
> * This year was unusually high because of a gain on the sale of tangible assets of $1,744,222 now held in company B also owned by the father. Subtracting the gain on the sale of tangible assets reduces the income before tax to $1,053,807.
>
> [3] In the result, in three of the four years preceding 2009, N. has income before tax in excess of $300,000.

> [4] In 2003, company A purchased six placer gold mining claims for a price of $198,000. The company rents an office and shop on land (the family home) that is owned by the father. The land has an assessed value of $89,950 (according to the 2007 tax notice) with the building assessed at $593,510. Company A rents its office and shop from the father for $1,031 per month according to the December 31, 2007 financial statement for company A. Company A expensed $26,080 for rent in 2008, but the Notes to Financial Statements do not indicate any payment to the father. The father says that he writes off a portion of the expenses of the family home because the offices of company A are located on the bottom floor of the family home and amount to 2,000 square feet of floor space, plus the shop space which is attached to the family home. Company A employs at least five people at any point in time.
>
> [5] The father is also the sole shareholder of company B. In 2008, company A sold commercial land and fencing for the sum of $2,089,000 to company B. The father indicates that the land in question is in the industrial area of Whitehorse and he is developing the infrastructure for commercial property, which he estimates will have a market value of one million dollars. At this time, company B simply owns the land and earns no income.

[59] In this case, counsel for Mr. G. asked the Court to rely on the evidence of N's insurance agent in the March 10th letter to which I have already referred. The same letter was relied upon before Justice Veale. He deals with it at paras. 6 to 8 and at para, 28.

[60] I have reached the same conclusion he did about the value of this letter. I agree with him that "the possibility that there will be increased capital requirements in 2010 based upon a doubling of corporate revenue should not trump a fair determination of the father's annual income." (at para. 28)

[61] In assessing income under s. 18 of the *Guidelines* I can consider pre-tax income of the corporation. I must apply the legal principles set out by the British Columbia

Court of Appeal in *Hausmann v. Klukas*, 2009 BCCA 32. The Court reviewed the principles set out in the earlier decision in *Kowalewich v. Kowalewich,* 2001 BCCA 450. On the question of onus, the court in *Hausmann* said that the onus is on the payor to provide the necessary evidence that the corporation's pre-tax income is not available to the payor. The judge should not have to ferret out the necessary information from inadequate or incomplete financial disclosure. The evidence of business circumstances must be clear.

[62] Because of his selective, inaccurate and incomplete disclosure, Mr. G. has not met that onus here.

[63] Because he has chosen not to provide the 2009 financial statements, it is appropriate to use the earlier statements. I conclude, as Justice Veale did, that N.s pre –tax income is $300,000. I conclude that Mr. G.s income, for child support purposes under the *Guidelines*, is $300,000.

3. Amount of Child Support Payable

a. Shared Custody

[64] This is a shared custody case. As a result it is s. 9 of the *Guidelines* that applies, not s. 4. Section 4 deals with cases in which the presumptive table amount created by s. 3 would otherwise apply: *Francis v. Baker*, [1999] 3 S.C.R. 250 at para. 1. The *Guidelines* create a different formula with different underlying principles for shared custody cases: *Contino v. Leonelli-Contino*, 2005 SCC 63.

[65] Section 9 of the *Child Support Guidelines* says:

> 9. Where a spouse exercises a right of access to, or has physical custody of, a child for not less than 40 per cent of the time over the course of a year, the amount of the child support order must be determined by taking into account
>
> (*a*) the amounts set out in the applicable tables for each of the spouses;
>
> (*b*) the increased costs of shared custody arrangements; and
>
> (*c*) the conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought.

[66] *Contino* is the leading case. Like Justice Gower in *M.P.T. v. R.W.T* 2008 YKSC 94, I find helpful and have applied Justice Joyce's summary of the relevant legal principles found in *Franke v. Franke*, 2008 BCSC 1145 at paras. 29 and 30.

[67] The table amount for $300,000 for one child is $2516. Using a straight set off as provided for in s. 9, the amount payable is $1933.

[68] In this case there is no evidence that there are increased costs to Mr. G. The time increase has been from 4 days every two weeks to alternate weeks.

[69] I must also consider the condition, needs, means and other circumstances of the Mr. G., Ms. R. and of K. I have considered all of the evidence presented in this respect in the financial statements, including evidence about expenses, and the affidavit material. The evidence of Mr. G. which focused on his undue hardship claim is relevant to this analysis as well.

[70] He says that he finds himself in very difficult financial circumstances. He now has to pay the court ordered support directed by Justice Veale. He is not in a position to take more out of the company that $87,100 and that his reasonable expenses are

significantly higher than that. He is not in a position to shuffle things around. He cannot meet all of his costs. He argues here, as he did on the question of his income, that the Court should not “kill the goose that laid the golden egg.”

[71] He says that Ms. R., on the other hand, is doing well financially. He also argues that K. is well looked after and always has been. He has an appropriate middle class life style. It is consistent with his own lifestyle.

[72] For the reasons that I have already given, I do not accept that the financial situation of the company is dire at all. It has done very well. The evidence is that Mr. G. is thinking about expansion. He has referred to himself as successful in emails to Ms. R.; his only concern is that he does not want her to share in his wealth. As noted above, he said she is mistaken if she thinks “for one minute I’m going to give you more money because of my success now ...”

[73] He makes his claim for custody of K. on the basis that he is well able to take care of his needs. Based on the findings of the Court that he has an income for child support purposes of $300,000, and given that he has chosen not to properly disclose his financial situation, I conclude that he can well afford a significant amount of child support for K.

[74] I have also considered the budget of Ms. R. and find it to be a reasonable budget. She has included only one half of the major household expenses, consistent with a cohabitation agreement signed with her partner.

[75] While K. has had many needs met, he is entitled to the benefit of the income earning ability of both of his parents. It is not in his best interests to have a significantly different lifestyle while in his mother's home as opposed to his father's home.

[76] I have considered the question of Mr. G.'s legal obligation under Justice Veale's interim order. It is just that, a temporary order, meant to bridge the gap between the time the claims were filed and the final resolution. An early trial date is available. Mr. G. is in a position to make arrangements to meet this temporary obligation.

[77] I am being asked to make a final order with respect to K. I need to assess what his entitlement is long term. When the final order is made in the other case, the court can consider the position of the children of his second marriage.

[78] Taking into account all of the circumstances that I have just described, I have decided that the appropriate amount of child support for K. is $1600 per month.

b. Mr. G.'s Undue Hardship Claim

[79] I now turn to the undue hardship claim advanced by Mr. G. under s. 10 of the *Guidelines*. Section 10(1) says that the court may award an amount of child maintenance that is different from the *Guidelines* amount if the court finds that the person required to pay would suffer undue hardship.

[80] There is a two stage test: First the court must find that the person required to pay would suffer undue hardship. If that cannot be shown, that is the end of the matter, and the *Guidelines* amount applies. At the first stage, it is only the circumstances of the person required to pay that are to be considered, not the circumstances of the person

receiving the maintenance. At the second stage, if undue hardship is shown there still must be a standard of living comparison between the household of the person paying maintenance and the household of the person receiving maintenance.

[81] The *Guidelines* set out some of the circumstances that may cause a spouse or child to suffer undue hardship (s. 10(2)):

> ...
>
> (c) the spouse has a legal duty under a judgment, order or written separation agreement to support any person;
>
> (d) the spouse has a legal duty to support a child, other than a child of the marriage, who is
>
> (i) under the age of majority, or
>
> (ii) the age of majority or over but is unable, by reason of illness, disability or other cause to obtain the necessaries of life; and

[82] Showing hardship is not enough. It must be undue hardship. The British Columbia Court of Appeal has decided that the hardship must be "exceptional", "excessive" or "disproportionate in all the circumstances": *Van Gool v. Van Gool* (1998), 59 B.C.L.R. (3d) 395 (C.A.). The person asking for relief based on undue hardship must lead convincing evidence to show why the *Guidelines* amount would cause undue hardship.

[83] Undue hardship claims have been turned down in a number of cases, even though the person required to pay had responsibilities for a second family. While the assumption of new family obligations may create hardship and a lower standard of

living, those factors do not automatically establish undue hardship. See for example *Chong v. Chong* (1999), 47 R.F.L. (4th) 301 (B.C.S.C.); and *McPhee v. McPhee*, [1999] B.C.J. No. 337 (S.C.).

[84] The conclusions the Court reached in the s. 9 analysis, also apply here. Mr. G. has not met the onus upon him to show that he would suffer undue hardship. It is noteworthy in this respect that for several years, while K. resided with Ms. R. most of the time, Mr. G. was paying child support amounts that were well below his ability to pay.

c. Section 7

[85] I agree with the submissions made in this respect by counsel for Ms. R. There will be a sharing of s. 7 expenses proportionate to their income.

d. Retroactivity

[86] I have summarized the legal principles that apply in *C.A.R. v G.F.R*., 2006 BCSC 1407 and will not repeat them here.

[87] Effective notice was given by at least September 2009. The circumstances that I have found to exist were in existence at that time. I agree with the submissions made on behalf of Ms. R. The child support order of $1600 per month will be retroactive to September 1, 2009.

IV. COSTS

[88] Ms. R.s has been successful in her applications and is entitled to her costs.

V. SUMMARY

[89] With respect to Ms. R.'s applications:

1. Mr. G. shall pay to Ms. R. child support for K. in the amount of $1600 per month retroactive to September 1, 2009.

2. Mr. G. and Ms. R. shall share the cost of extraordinary expenses proportionate to their incomes.

3. K. shall reside with each party on alternating weeks; and

4. Ms. R. is entitled to her costs of the proceedings.

[90] With respect to Mr. G.'s applications:

5. Mr. G.`s applications for an order that he shall have custody of K. with generous access to Ms. R. or in the alternative that they have joint legal custody are dismissed.

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MARTINSON J.