Date:19971230
Docket: DO16392
Registry: New Westminster

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

TACEY KEIGHLEY

PETITIONER

AND:

PETER JONATHAN KEIGHLEY

RESPONDENT

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR JUSTICE LANDER

Counsel for the Petitioner:	Paul G. Kent-Snowsell
Counsel for the Respondent:	Steen K. Jespersen
Place and Date of Hearing:	New Westminster, B.C. December 5, 1997

[1] The petitioner seeks an order as follows:

> Pursuant to Section 96 of the Family Relations Act and Rule 60B(55) of the Rules of Court, a variation of the Order of Judge Drost dated October 2, 1985 awarding maintenance for the children of the marriage, Jonathan Robin Keighley, born April 17, 1978, and Jeremy Graham Keighley, born May 15, 1982, in the amount of $250.00 per month per child, such that the Order is incorporated in the terms of the Decree Nisi of Judge McTaggart dated October 15, 1985 and that such variation in child support be retroactive to January 1, 1997;
>
> Pursuant to Section 17 of the Divorce Act, 1985, that the terms of the maintenance be increased for each child of the marriage in an amount to be determined by this Court pursuant to the Federal Child Support guidelines and an amount to be determined by the Court for extra-curricular activities pursuant to Section 7 of the Child Support guidelines;

[2] As to the child, Jeremy Graham Keighley, counsel have agreed that there should be an order increasing maintenance payments for him to meet the Federal Child support guidelines. That figure is $888.00 per month.

[3] However, there remains a contentious issue as to when such payment should commence. The issue of retroactivity presents itself in both Jeremy and Jonathan's cases.

[4] As to Jonathan the parties have agreed that he has, as of December 1, 1997, ceased to be a child of the marriage.

[5] It is the position of the petitioner that based upon the income of the respondent that he was obliged to pay more than the $600.00 he undertook to pay as of December 2, 1996 for both

children. Counsel for the petitioner says the amount should have been $2,800.00 per month.

[6] I shall deal firstly with Jonathan and whether the amount of maintenance should be retroactive. Was Jonathan in need of this additional amount of maintenance based on his alleged attendance at Douglas College and low income from employment?

[7] There are no records from employment such as tax returns or pay stubs of Jonathan even though the pay stubs have been requested by the respondent.

[8] The petitioner filed an affidavit of December 1, 1997, wherein she deposes Jonathan is to enroll in one course at Douglas College as of December 13, 1997. She further deposes that she has asked Jonathan for his pay stubs from Subway but has not received them. I give this evidence of the petitioner no weight.

[9] Jonathan is of an age where he is expected to have provided the documentation and sworn an affidavit to assist the court.

[10] Referring once again to the December 2, 1996, increase in maintenance, the respondent wrote to the petitioner as follows:

> This acknowledges your letter of November 19th.
>
> The present maintenance order dates from August of 1985, not 1983, and incorporates the terms of the

> separation agreement entered into in June of that year. The agreement and order adopt the Divorce Act definition of "child of the marriage" i.e. offspring under the age of 16 or, over 16, but unable, by reason of illness, disability or other cause, to withdraw from the "charge" of the custodial parent or obtain the necessaries of life. Jonathan has now finished high school and is, I believe, working full-time and attending Douglas College part-time. He buys his own clothing, eats most meals away from home, runs his own vehicle, and, from the admittedly little I know of his circumstances, appears to be financially independent, or at least capable of making a significant contribution toward his own upkeep.
>
> In the interest of compromise, I am prepared to continue paying the sum of $600.00 per month, allocated $450.00/$150.00, Jeremy/Jonathan. I will not deduct these payments effective January 1st, 1997, and you will not be obliged to include them in income.
>
> If this proposal is not satisfactory to you, I will require a full financial disclosure from you and enclose a blank Form 89 for completion. Note the highlighted requirements on the first page. I will also require details of Jonathan's earnings for 1996 and confirmation of his Douglas College schedule for the past and upcoming term.

[11] Nothing was done by the petitioner until the filing of this Notice of Motion on October 8, 1997. The respondent has paid the $600.00 per month since December 2, 1996.

[12] In an application for Child Support under the Divorce Act 1985 the parent seeking maintenance has the onus of proving that a child over 16 years of age is unable to withdraw from her control or is unable to obtain the necessities of life. See ***Farden v. Farden*** (1993), C.R.B.C. 619, 48 R.F.L. (3d) 60, Master Joyce said:

> In an application for child support under the *Divorce Act*, 1985, the parent seeking the maintenance has the

> onus of proving that a child over 16 years of age is unable to withdraw from his or her control or is unable to obtain the necessaries of life. There is no absolute duty under the Act to support a child who is over age 16 and in attendance at a post-secondary institution. In determining whether a child remains a "child of the marriage," the court should consider all the circumstances of the case, including the child's eligibility for student loans; whether he or she is in full-full or part-time attendance at school; his or her age, earning capacity, and past academic performance; the parents' and child's plans; and whether the child, who is mature and has reached the age of majority, has unilaterally terminated contact with the payer parent.
>
> . . .

[13] The evidence provided in support for a increase in maintenance for Jonathan is not sufficient to meet the onus upon the petitioner.

[14] As to Jeremy the court has the jurisdiction to make a retroactive order. The lack of "due diligence" on the part of the petitioner cannot estop a proper claim for retroactive support. See ***Allen (Guardian Ad Litem of) v. Allen*** (1994), CanRepBC 689, 9 R.F.L. (4th) 48.

[15] Final orders should be honoured unless varied on appeal. The petitioner acquiesced as to the offer by the respondent of December 2, 1996. The petitioner's evidence of Property and Financial Statement of October 8, 1997 reveals a monthly deficit of $436.90. The respondent reveals a deficit of $2,134.75 as of November 27, 1997. On consideration of each of these documents reduction of expenses on the part of both parties might have been made.

[16] However, in the circumstances, I find that a retroactive order for Jeremy would not be appropriate. The court dismisses the claim for retroactive increase for both children.

[17] Each party will bear their own costs.

"LANDER, J."

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C.R. LANDER, J.