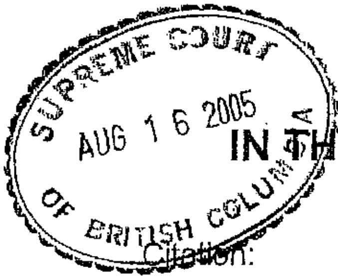

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *B v. D'A*
2005 BCSC 1137

Date: 20050816
Docket: 04/2677
Registry: Victoria

Between:

M B

Plaintiff

And:

P. D'A

Defendant

Before: The Honourable Mr. Justice Johnston

Reasons for Judgment

Counsel for the Plaintiff:	T.T. Luchies
Counsel for the Defendant:	No One Appearing
Date and Place of Hearing:	20050707 Victoria, B.C.

[1] On July 7, 2005, I ordered the defendant to pay child support commencing July 1, 2005, at the Guidelines amount based on income I imputed to him of $120,000 per year. I reserved my decision on the application for retroactive child support back to July 4, 1995, at varying amounts over the intervening years as well as on the matter of arrears that would be created by any retroactive child support order made.

BACKGROUND

[2] The parties cohabited between September and December of 1994 and a child was born to the plaintiff on July 4, 1995. In February 1996 a provisional order was made in the Provincial Court of British Columbia requiring the defendant to pay $350 per month for child support. The defendant was by then living in the Province of Quebec. The provisional order was transmitted to the Quebec Superior Court. In December 1996, with the defendant present, the Quebec Superior Court confirmed the order of the Provincial Court of British Columbia but varied the amount to be paid downward from $350 per month to $50 per month.

[3] The plaintiff has appended documents originating from the Quebec Superior Court, many of which have been filed in the Provincial Court of British Columbia, as evidence of the Quebec Court proceedings. I accept those documents as proof of their contents.

[4] When the provisional order was confirmed and the amount reduced, the notes generated in the Quebec Superior Court indicate that the defendant was ordered to

advise the plaintiff when his studies had finished and he became employed so that he could afford to make more reasonable child support payments.

[5] Further records from the Quebec Superior Court show that on June 27, 1997, the defendant appeared again, at which time an order was granted cancelling the order of December 4, 1996, and abrogating any arrears that had arisen to June 27, 1997. That order was made on the basis of the defendant's assurance to the court that he was about to start an intensive 15 month program at the University of Ottawa towards a Masters of Business Administration degree, and the defendant's undertaking to the court that he would inform the plaintiff when he obtained employment so that he could resume appropriate child support payments.

[6] In April 2000, without disclosing whether he was employed or what income he was earning, the defendant began to make child support payments on a voluntary basis. These were sporadic, usually in the amount of $300 a month, or thereabouts, according to the plaintiff's affidavit, and these were made at least through to April 2004.

[7] The defendant speaks to the child on the telephone twice a month but, given the distance separating them, has had very limited personal access.

[8] The plaintiff has obtained some information about the defendant's income represented by copies of the defendant's income tax returns for the years 2000, 2001 and 2002. Those records show that the defendant was employed in the Province of Ontario for each of those three years and the income reported by him was as follows:

YEAR	INCOME
2000	$57,932.67
2001	74,166.66
2002	90,000.00

[9] It was on the basis of those income figures, showing as they do, a progressive increase in income, that I was persuaded to impute $120,000 annual income to the defendant for the purpose of prospective child support commencing July 2005. I was fortified by the fact that the motion served upon the defendant informed him that the application would be based upon an imputed income in that amount and that the defendant has not responded in any way to the application.

THE LAW

[10] The law relating to retroactive awards of child support is conveniently summarized in the decision of the Court of Appeal in ***Macdonald v. Macdonald***, 2005 BCCA 23.

[11] There, it is said:

> [30] The power to make child support payments retroactive is derived from the 1985 rewording of the ***Divorce Act***. See ***Darlington v. Darlington*** (1997), 32 R.F.L. (4th) 406 (B.C.C.A.), ***Donald v. Donald*** (1991), 33 R.F.L. (3d) 196 (N.S.C.A.) and L.S. v. E.P. (1999), 67 B.C.L.R. (3d) 254 (B.C.C.A.). For convenience of reference I will set out the passage from Madam Justice Rowles's reasons in ***L.S. v. E.P.*** (1999), 67 B.C.L.R. (3d) 254, at paras. 66 and 67 where she lists the factors which militate for and against retroactivity, in a non-exhaustive list, in this way:

> A review of the case law reveals that there are a number of factors which have been regarded as significant in determining whether to order or not to order retroactive child maintenance. Factors militating in favour of ordering retroactive maintenance include: (1) the need on the part of the child and a corresponding ability to pay on the part of the non-custodial parent; (2) some blameworthy conduct on the part of the non-custodial parent such as incomplete or misleading financial disclosure at the time of the original order; (3) necessity on the part of the custodial parent to encroach on his or her capital or incur debt to meet child rearing expenses; (4) an excuse for a delay in bringing the application where the delay is significant; and (5) notice to the non-custodial parent of an intention to pursue maintenance followed by negotiations to that end.
>
> Factors which have militated against ordering retroactive maintenance include: (1) the order would cause an unreasonable or unfair burden to the non-custodial parent, especially to the extent that such a burden would interfere with ongoing support obligations; (2) the only purpose of the award would be to redistribute capital or award spousal support in the guise of child support; and (3) a significant, unexplained delay in bringing the application.

[31] There is an entitlement to prospective child support and it is the entitlement of the child. But, in relation to retroactive child support, the assessment is complicated by the fact that the period in question has passed without the money being available, or at least not being regarded as available, to meet the child's then current needs.

[32] Mr. Justice Davies made these helpful observations on retroactive awards as potentially constituting redistribution of capital or disguised spousal support in ***S.E.C. v. D.C.G.*** (2003), 43 R.F.L. (5th) 41:

> 135 In almost any situation in which a custodial parent seeks an order for retroactive support, such an award may have the effect of awarding the custodial parent funds that will not have to be immediately expended to support the child. That is so because the child will have already lived through the period in question without the benefit of the funds that could or should have been available for his or her support. While the creation of an immediately available pool of capital for the non-custodial parent may be the practical result of a retroactive order, it does not necessarily follow that a retroactive award will constitute capital re-distribution.

> 136 If, as in this case, the custodial parent has borne a disproportionate share of the cost of raising a child, a retroactive order is better viewed as a re-capitalization of the custodial parent rather than as a re-distribution of capital. In such circumstances there is no reason why a retroactive child support order should not be made even though the custodial parent may be the main beneficiary of the award. The award arises not from a re-distribution of capital but rather from the recognition and enforcement of joint parental responsibility for child support. (See: *Cherry v. Cherry* (1996), 24 B.C.L.R. (3d) 158 (C.A.); *Hess v. Hess* (1994), 2 R.F.L. (4th) 22 (Ont. Gen. Div.) and *Collins v. Collins* (1998), 221 A.R. 111 (Q.B.)).

> [33] I would adopt Mr Justice Davies's line of reasoning. In considering whether to make an order for retroactive child support, the starting point is the order being made for permanent prospective child support. Then the actual payments made for child support must be considered. Also to be considered must be the amounts which each parent should have contributed to the support of the children in the interim period, having regard to their joint obligations for child support and having regard to their financial resources and other circumstances. If, with those considerations in mind, it appears that too little was paid by the non-custodial parent to the principal custodial parent to support the children and the result is that the custodial parent has had to call on resources such as capital or debt that should not have had to be used, then it is appropriate for an award of retroactive child support to be made to restore the capital fund or pay off the debt which should not have had to be called on. Similarly, if the children go short of necessaries such as clothing in the interim period, a retroactive award can make that up by an amount sufficient to meet the shortfall. And if, as in this case, the award of permanent child support is designed not only to provide appropriate current support but also to create a fund for major intermittent future expenditures, then the trial judge has a discretion to enhance that fund from a retroactive award. But there is no absolute entitlement to a retroactive award embodying such an enhancement. And, as Madam Justice Rowles said, to the extent that an award of retroactive child support is properly seen as a redistribution of capital or an award of spousal support in the guise of child support, such a retroactive award should not be made.

[12] I now consider the evidence in light of the non-exhaustive list set out in ***Macdonald***. I am satisfied, from the evidence of the plaintiff, that for many years she has had to make do with limited resources and that the child has gone without

some of the things that would have made his life more comfortable. This is in part a result of the lack of financial support from the defendant. I am also satisfied that at some point in or after December 1998, which I take to be when the intensive MBA program came to an end, the defendant became able to pay some support. That the defendant did not disclose when he became employed or what he earned when he became employed, contrary to the assurances he gave to the Quebec Superior Court in that regard, is sufficiently blameworthy conduct. While there may not have been any capital for the plaintiff to encroach upon to meet child rearing expenses, the plaintiff has not been able to accumulate capital in part because the defendant has not been bearing his share of those expenses over the years. The defendant has had notice since the proceedings in 1996 of the plaintiff's need and desire for child support, and the plaintiff cannot be blamed for failing to pursue the defendant in the Province of Quebec, given the defendant's promise to keep her informed of his employment income.

[13] I have no evidence that a retroactive award would impose an unfair or unreasonable burden upon the defendant and, as I have said, if a retroactive award has the effect of creating a lump sum payment in the hands of the plaintiff, for the benefit of the child, there is on the evidence a fairly clear need for some reserve of capital to fund ongoing expenses and to make the child's life more comfortable.

[14] I am therefore satisfied that it is appropriate in this case to order child support on a retroactive basis. I do so at the Guidelines amounts related to the income shown in the tax returns for the years for which that information is available, that is, 2000, 2001 and 2002. For the years 2003 and 2004, I impute income of $100,000 to

the defendant. Child support at the Guidelines amount will be based upon that imputed income for those years. I do not order retroactive child support for the years 1995 through 1998 inclusive. Some of those years, particularly 1996 and 1997, have been subject to orders of the Quebec Superior Court and I will not purport to go behind those orders. I am prepared to infer that for the year 1998, where the defendant was enrolled in school as he suggested to the Quebec Superior Court, and I draw that inference because of the fairly significant income he began to generate in 2000. That says to me that he successfully completed his studies and that successful completion has allowed him to earn significant income increases since the year 2000, at least so far as have been disclosed.

[15] That leaves the year 1999, and on the basis that the defendant would likely have had to seek employment on getting out of school and may well have had other obligations arising out of his education, I impute an income for that year in the amount of $40,000. Child support will be calculated at the Guidelines amount assuming that imputed income.

[16] The defendant shall have credit for any voluntary child support payments he has made in those years, those amounts to be calculated by counsel and submitted as a schedule to a draft order.

[17] The plaintiff has had extraordinary expenses as set out in her affidavit. I decline to award any of the extraordinary expenses prior to 1999. I do order the defendant to pay $2,636 in extraordinary expenses for 1999; $4,537 in extraordinary expenses for 2000; $2,580 in extraordinary expenses for 2001; $1,614 for 2002; and

$3,390 for extraordinary expenses for 2003. These are all for child care daycare expenses actually paid by the plaintiff.

[18] Ms. B shall have her costs at Scale 3.

The Honourable Mr. Justice Johnston