CASE COMMENT: *KRISTMANSON* v. *KRISTMANSON*

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INTRODUCTION

Michael L. Warsh, who practices family law in Nanaimo, appeared as Counsel for the Respondent, Mr. Kristmanson, in this decision.

Kristmanson v. *Kristmanson*, Docket ED27678 SCBC, Nanaimo Registry, July 12, 2012, Harvey, J.

Child support for adult children is usually a complicated issue when considering the re-qualification of a child as a "child of the marriage" pursuant to the *Divorce Act*, RSC 1985, c. 3 (2nd Supp.) For a child who claims to have disabilities and who is receiving a bursary for tutoring to help her with her disabilities, the matter becomes even more complicated.

FACTS

In *Kristmanson* v. *Kristmanson* the applicant mother sought a declaration with respect to her 25 year old daughter, Brittney, that she be re-qualified as a child of the marriage for support purposes.

The claimant was 52 years of age and disabled as a result of a motor vehicle accident she was involved in, in 2004. The respondent was 57 years of age, employed as a welder for an enterprise he had a ¼ interest in. Both parties re-partnered since divorce.

The child of the marriage, Brittney, had learning disabilities that were well documented in the report of Dr. Penner. In spite of her learning disabilities, she had managed to attain college diplomas from North Island College and Camosun College.

In between obtaining the two college diplomas, Brittney was sharing an apartment with a friend in 2007. She did not reside with the claimant (applicant mother) since 2007.

Following graduation in 2007, Brittney enrolled in Malaspina University-College. After taking a year of courses, she decided to work for Victoria Tourism, and earned $10 per hour.

The respondent obtained a consent order on 19 December 2008, declaring that Brittney was no longer a child of the marriage, effective 1 June 2008, with liberty to Brittney to re-apply if she went back to school.

After working at minimum wage for a year, Brittney decided that her academic credentials were inadequate, not enabling her to earn a decent living, and she and her mother argued that such menial employment did not qualify as obtaining "the necessaries of life."

After completing the first college degree program, she enrolled in a second college degree program – a 2 year business program – commencing September 2009. Brittney was credited with 12 of the required 40 credits to complete the program. She earned $18 an hour as a ticket agent while attending college, to help her meet her budget of $24,000.00 a year.

The claimant, pursuant to s. 3(2) (b) of the *Federal Child Support Guidelines*, claimed that Brittney had regained her status as a child of the marriage and was entitled to a contribution from the respondent for her expenses. The respondent's position was that Brittney was no longer a child of the marriage for support purposes.

According to the *Divorce Act*, the definition of "child of the marriage" means a child of two spouses or former spouses who, at the material time,

> ….is the age of majority or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessaries of life;

Mr. Justice Harvey stated that case law has interpreted "other cause" in the *Divorce Act* definition of child of the marriage, to include an adult child in post-secondary schooling.

Relying on the case of *Farden* v. *Farden* (1993), 48 RFL (3d) 60 (BCSC), Harvey, J. held that the onus rests upon the applicant to establish the child is still a child within the meaning of the *Act*. He also relied on *Farden* to determine whether attendance at a post-secondary institution automatically means the child is a "child of the marriage." Following *Farden*, he held it was not conclusive. Rather, one needed to consider the factors set out in *Farden* to be able to make that determination.

One of the eight factors was whether the student was enrolled in a full-time or part-time course of studies. Justice Harvey found that Brittney's part-time course of studies were to be granted the same status as a full-time course of studies given the learning challenges she had to grapple with.

Lastly, and within the context of the *Divorce Act* section 2(b) (definition of child of the marriage), Justice Harvey had to determine whether Brittney's learning disabilities played a role in her ability to "obtain the necessaries of life" or, in his words, to secure employment.

Mr. Justice Harvey, following the case of *JDC* v. *RBT* 2011, BCSC 488, held that "the issue is not whether a disability had been proven but rather whether the person is 'unable' by reason of disability to withdraw from the charge of his or her parents or to obtain the necessaries of life."

Consequently, Justice Harvey held that Brittney was well equipped to support herself. He found that the fact Brittney only obtained a minimum level of employment in the Victoria tourism industry was more likely the result of lack of effort than due to her cognitive limitations or learning disabilities or lack of appropriate credentials. Moreover, even though Brittney's employment prospects may have been limited by credentials or learning disabilities, it did not mean she was entitled to support as a matter of law. So he held that Brittney was not a "child of the marriage."

COMMENTARY

Without the issue of disability, the facts of this case would fall into the regular paradigm of assessing whether an adult could be re-considered a child of the marriage under the *Divorce Act*.

The fact that Brittney was suffering from a learning disability complicated the assessment of this case on two levels. First, because she was already in attendance at a post-secondary school, the judge relied upon the case of *Farden* v. *Farden* to resolve whether her attendance at a post-secondary institution automatically re-qualified her as a child of the marriage.

Following a *Farden* analysis, it was held that her attendance at a post-secondary institution was not conclusive, but required the analysis of eight factors. One of the eight factors involved the question of whether she was enrolled in a full-time or part-time course of studies. Her learning disability clouded the issue. Harvey, J. held that even though she was in part-time studies taking less than the full complement of courses each term, he considered it full-time studies, given the challenges she faced as a result of her learning disabilities.

So the definition of full-time and part-time studies is a highly elastic concept contingent on the specific facts of each case.

On a second level, Brittney's learning disabilities clouded the issues when considering whether they played a role in her ability to secure employment. Justice Harvey found, following *JDC* v. *RBT* 2011 BCSC 488, that the issue is not whether the disability has been proven, but whether the person is unable, by reason of disability, to withdraw from the charge of his or her parents or obtain the necessaries of life.

The threshold for obtaining the necessaries of life is set quite low. So a person with serious learning disabilities need only engage in the most menial type of employment to qualify as the necessaries of life. The opposing counsel argued $10 per hour did not qualify as the necessaries of life. Nevertheless, Justice Harvey followed *JDC* v. *RBT*, holding that limited employment prospects do not mean a person is entitled to support as a matter of law.

What makes this case particularly interesting is how the issue of a learning disability can wind its way through the different tests incorporated in assessing whether an adult child re-qualifies as a child of the marriage pursuant to the *Divorce Act.*

At the end of the day, just because a person has a learning disability, does not mean they are entitled to endless child support, although it may grant them some leeway in considering whether they are full-time or part-time students.

Over the years, the definition of disability has expanded while the stigma of declaring that one is disabled has diminished. So the courts have to act cautiously in considering the label of disability to prevent it from being used and abused.

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