

DATE: 20200206

**SUPERIOR COURT OF JUSTICE**

**HEARD:** January 20, 21, 23, 24 and 27, 2020

- [1] This was a complicated motion to change that was converted by Justice Hockin on April 26<sup>th</sup>, 2019 to an application. The original application was commenced in Chatham by the applicant, father to terminate child support based on the belief that with the child receiving ODSP and earning a small income, there was no further need of child support.
- [2] As a result of a ‘perfect storm’ of failed communication by the respondent mother’s former lawyer, a final order was obtained by the applicant, father with Justice King terminating child support. Significant costs consequences followed as a result of this failed communication.
- [3] That unfortunate determination is now a matter before the Law Society of Ontario. I shall have more to say about that result upon receipt of the reasons for suspending the respondent’s mother’s former lawyer (see Exhibit # 32). Suffice it to say that based on the agreed to statement of fact by the respondent’s lawyer and the Law Society, the respondent, mother Lisa Sutherland, was not appropriately represented by her lawyer.
- [4] While this application shows the mother as the respondent, she is in fact bringing this application to set a proper child support award under s. 3 (2) (b) of the Child Support

Guidelines and to deal with outstanding section 7 expenses past and ongoing, based on the assertion that her daughter has ongoing dependency issues.

- [5] Presently, there is a support order by Justice Hockin in the amount of \$325.00 per month commencing on July 1<sup>st</sup>, 2019 payable by the applicant, father, to the respondent, mother. This support order is subject to a set-off with FRO from a determination in the Chatham application that the applicant had overpaid child support.

**B. Issues**

- [6] There are really but three issues:

- a) Is the child Summer Sutherland born June 16<sup>th</sup>, 1995 a dependent within the meaning of 31 (c) of the *Family Law Act*?
- b) What level of child support is warranted after ascertaining the appropriate imputed income of the applicant, father and given that the ODSP payment exceeds \$10,000.00 mandating a consideration under s. 3 (2) (b) and not under s. 3 (2) a.?
- c) What section 7 expenses qualify as reasonable expenses and what is each parties' proportionate share?

- [7] Counsel for the applicant, father was unpersuaded by the direct and conclusive medical reports and the capacity assessment. Furthermore, despite my many efforts to steer counsel for the applicant down a different path, four of the five days of trial time were consumed to correct this misconception of the evidence before the court.

- [8] In the end, I was and am satisfied that the child was and is a dependent child. The following evidence I accept as indicative of that conclusion.

- [9] Firstly, the evidence of Dr. Clifford, her family physician, who on two occasions because of concern for Summer's ability to meet with him at his office, attended at her residence and stated in June 30<sup>th</sup>, 2018 as follows:

"Summer has a diagnosis of bipolar 1 with rapid cycling, intellectual disabilities, anorexia nervosa, and issues with self-medicating. I have seen and treated Summer **mainly for her depression/anxiety, anorexia, and ongoing concerns from family members regarding her mental health and her suicidal ideation.** Summer engages in risky intravenous drug use during her low moods, along with episodes of self-starvation. **Summer lacks the insight into the physical and medical consequences of these behaviours, even when not actively using, which causes grave concerns for her loved ones.**

Summer struggles with impulse control, poor judgment and the inability to make good decisions for her health and well-being, which resulted in her family

obtaining a capacity assessment in 2016 to support the previous POA for Summer's mother and sister Rachel to be able to provide care when Summer is not capable of caring for herself.

During the past 2 years, I have attended at the family home on two occasions, to assess, support and encourage the patient to seek medical attention and treatment for the substance abuse and self-harming behaviour. Summer did recently attend the CHOPRA Addiction and Wellness Centre in B. C., which was beneficial. I continue to support Summer and her family in providing care. **Summer's current medical condition would be stable, but highly vulnerable without the constant care and support of her mother and her sister Rachel."**

- [10] Additionally, there are two medical reports in the 'Medical Documents Brief', Exhibit # 2 from Dr. John F. Scholz, Summer's present psychiatrist. I will refer only to the second report dated July 10<sup>th</sup>, 2018. Dr. Scholz has been the attending psychiatrist for Summer since taking over this patient file in July of 2013 from her previous psychiatrist, Dr. Susan Hussy and her eating disorder specialist from Bluewater health, Helen Clark. Excerpts from this report is as follows:

**My psychiatric diagnoses have included bipolar type 1 mood disorder, rapid cycling type, a developmental skills disorder, anorexia nervosa, and substance abuse.** The patient has had a lengthy history of admissions to various mental health facilities and has had frequent visits to the emergency department regarding symptoms in the past. My patient has had frequent mood cycles including depressive episodes and manic episodes, anxiety and intermittent psychotic symptoms. **She struggles with self-regulation of her emotions and has frequent suicidal ideation with self-harmful behaviour.** She does have a tendency to make poor decisions and has poor judgment regarding her own care, which resulted in a capacity assessment in January 2016 and an increase in care, which is provided by her mother Lisa and her sister Rachel. Her combined diagnoses have made day-to-day functioning difficult, in terms of sleep regulation, activity level, **and employment** ....

- [11] Tab 10 of the same 'Medical Documents Brief' contains the Capacity assessment by Kelly-Ann Spezowka, which affirms the need for the respondent, mother to utilize, together with her daughter Rachel, a Power of Attorney to assist Summer.
- [12] Finally, I accept the evidence of Summer's mother, Lisa Sutherland with respect to all the mental health issues that have plagued her daughter, which includes her drug use, her poor choice in male companions who at one time appeared to be using Summer in a sexual trafficking activity, and all of the interventions to provide a safe refuge for her daughter.
- [13] The fact that at one point in time, Summer's mother, Ms. Sutherland, purchased a small home for her daughter to provide her with some measure of 'space', 'the 195 Penrose property', does not negate Summer's dependence on her mother.

- [14] The respondent, mother attended daily at this residence to assist Summer with lunch and as well attended at dinner time. I also accept that frequently Summer stayed over at her mother's residence. Any boyfriends Summer may have allowed to stay at this residence without the approbation of her mother, did not and does not attract any conclusion of independence.
- [15] This experiment in attempting to provide Summer with her own place to reside did not work out as desired and the 'Penrose' residence has been sold. The emphasis by counsel for the applicant on and concerning this residence as an indication of independence was at its highest, a '**red herring**'.
- [16] As stated, the child of this union Summer Sutherland born June 16<sup>th</sup>, 1995 is a dependent child and thus qualifies for both child support and section 7 expenses.
- [17] The second issue is a determination of the applicant's father's income. The applicant's own evidence in cross-examination affirms his income from anywhere from \$47,000.00 to \$52,000.00. Why a forensic accountant was retained to assist the court in making this determination is another questionable decision?
- [18] Even the applicant, father, when pressed on this issue agreed that as a busy trucker who grossed from Trimac (the source of his income) the sum of \$135,000.00 for his father-in-law's company B & D Trucking, but made only \$16,097.93 net as per his income tax returns, reflected a higher net income.
- [19] Counsel for the respondent has based his requested order on projected imputed earnings of \$80,000.00. I indicated that I considered that imputed amount to be high in these circumstances.
- [20] However, and with some irony, back in July of 1998, I had the same two parties before me. At that time, the applicant's income was determined to be \$57,000.00 and I ordered that child support was to be set at \$486.00. Twenty-two years later, counsel for the applicant opines that the applicant's income is now \$41,000.00 less than what it had been in 1998!
- [21] I do not believe the basis for determining an appropriate child support order pursuant to s. 3 (2) (b) is on this independent trucker's net income produced and filed with the CRA. Rather as stated by the applicant father, his income is **at least** somewhere between \$47,000.00 and \$52,000.00.
- [22] Furthermore, I am advised that the applicant's father-in-law is no longer drawing employment earnings from this business and is no longer working as a trucker and is otherwise retired. Undoubtedly, there are other expenses of this trucking business including the salary of the applicant's wife Cheri Bueckert (the quasi bookkeeper), who had one time drew a salary of \$11,000.00.
- [23] We are not aware if this business has retained earnings or whether there has been any dividend income derived from this business by the applicant's father-in-law.

- [24] I suggested to counsel that they provide me with a range of suggested incomes that they might settle upon. I doubt whether I will receive a settled amount upon which I might base a child support order.
- [25] With self-employed parties who are tied into a family run business, any determination of imputed income has obvious shortcomings. Considering all the evidence before me, including the financial statements, income tax returns, the evidence of the applicant's accountant and forensic accountant, the evidence of the applicant, and the evidence of the applicant's wife, I fix an imputed income at \$58,000.00 or \$1,000.00 more than what it was in 1998.
- [26] In the case of *Senos v. Karcz*, a decision of the Ontario Court of Appeal, there was a clear indication that when a dependent child received an ODSP payment exceeding \$10,000.00 that a determination under s. 3 (2) (b) was appropriate. All the parties before me agree to that approach.
- [27] I have also reviewed a number of decisions from the Superior Court that have also considered the ODSP payments. It should come as no surprise that each case was determined on the basis of its unique facts.
- [28] In short as part of my analysis, I have to take into consideration the means, needs and circumstances of the child. Presently, I am satisfied that the child is capable of minimum employment and this has been a consistent reality throughout her life. She works a 3 hour shift at Green Café and earns less than \$200.00 per month.
- [29] Counsel for respondent, mother affirms that his client occurs expenses, unrelated to extraordinary expenses, that exceed \$1,000.00 per month after taking into consideration the child's ODSP payments and her small employment earnings.
- [30] Part of these extra expenses occur because of Summer's unique diet concerns arising from both her anorexia nervosa issues and her vegan diet. I accept some of those extra expenses, but I am not satisfied that they amount to the extra \$1,000.00 as claimed by the respondent, mother, especially, **if I accept part of the section 7 extraordinary expense claim as well.**
- [31] I have reviewed counsel for the applicant's father's 'Legal Argument' as filed as Exhibit # 37. Much of this argument is directed at the child's independence and of which I have expressly rejected. Nevertheless, there is a concern raised in this Exhibit that appropriately questions how the respondent, mother justifies the extra expense monies claimed on behalf of her daughter, Summer.
- [32] In the result, I have looked at the evidence in support of this extra claim by the respondent, mother, to determine an amount over and above her daughter's receipt of ODSP payments and small income earnings (see as well, Expense Brief Exhibit #12) and Financial Statement of the respondent, mother.
- [33] To put the allocation of expenses in context, if Summer's rent is fixed at \$1,000.00 payable to the respondent, mother as one scenario, then that leaves very little for clothing, activities,

entertainment and groceries. However, if the rent payable is fixed at \$650.00 per month then there would be additional monies. Bluntly put, this is not an exact science and is a probably an estimate at best.

- [34] Both parties earn approximately the same income and thus proportionately should pay an equal amount towards Summer's needs over and above Summer's receipt of ODSP payments and income earnings. I am satisfied that those extra needs are approximately \$650.00 per month and as such the applicant father should pay an amount of \$325.00 per month effective September 1<sup>st</sup>, 2018 and on the 1<sup>st</sup> of each month thereafter.
- [35] This amount of \$325.00 is less than the table amount under the Guideline but consistent in determining the means, needs, and circumstances of the child, Summer.
- [36] Since this final order runs into the earlier order of Justice Hockin on July 1st of 2019, the accumulated arrears are fixed at 18 months x \$325.00 equally an amount of \$5,850.00 in arrears of child support. This amount shall reduce the amount of the overpayment presently with FRO.
- [37] The respondent, mother at the end of March in each year that Summer receives ODSP must inform the respondent of what Summer received from ODSP in the preceding year and what income she earned through employment.
- [38] Likewise, the applicant, shall produce his income tax return and Notice of Assessment each year that he is paying child support.
- [39] The extraordinary expenses of the child are found in the attachment to the 'Order' sought by counsel for the respondent as found at Exhibit # 36.
- [40] Those section 7 expenses are as follows:
- a) Yearly dietary supplements \$3,415.00;
  - b) EMDR Therapy \$4,420.00;
  - c) Horse Therapy \$3,268.46;
  - d) Brian Littlewood \$2,340.00;
  - e) Lost Wages \$1,688.91;
  - f) In-Treatment Service \$600.00;
  - g) Emergency Dental care \$835.00;
  - h) Emotional Support Dog \$1,479.00.

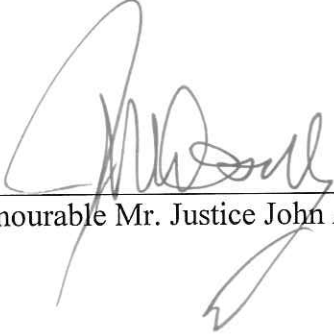
Total \$18,046.84

- [41] I have no difficulty accepting the dietary supplements, the EMDR therapy, and the expenses associated with Brian Little. I cannot and do not accept the five other headings of extraordinary expenses.



- [42] I reject those expenses because either they are a one-time expense, or I consider them to be subsumed within either the present child support or ODSP payments. While the expenses for the emotional support dog and the horse therapy may be helpful to Summer, I consider those expenses as exceptional and not extraordinary and thus they fall outside of the applicant's obligation to provide his share of extraordinary expenses.
- [43] In the result, I fix the extraordinary expenses at \$9,041.46 or the respondent's share at \$4,520.73. If we divide that amount by 12 and round it down, this amounts to an amount of \$376.00 per month. I am prepared to start those payments only as of September 1<sup>st</sup>, 2018, or an amount of arrears of 18 x \$376.00 equally a sum of \$4,512.00. Again, this sum shall be subtracted from any overpayment at FRO.
- [44] The respondent, mother shall advise the applicant, father each December if any of the extraordinary expenses have changed and I am most interested in the expenses associated with Brian Little.
- [45] Also, I am not prepared to consider any other extraordinary expenses of the respondent, mother before trial, including any interventions or attendances at rehab centres, as I am not totally satisfied on a balance of probabilities of what if any these expenses were covered by any of the health plans or by ODSP.
- [46] Finally, with respect to any cost award that was determined to be owing to the applicant, father occasioned by the failure of former counsel to properly represent the respondent, mother in the proceedings out of Chatham Superior Court, any monies owing to the applicant, father shall also be considered by FRO as an overpayment.
- [47] In the result:
- a) Child support is fixed at \$325.00 per month payable on February 1<sup>st</sup>, 2020 and on the 1<sup>st</sup> of each month thereafter. The arrears of child support are fixed at \$5,850.00, which shall be deducted from any overpayment made by the applicant, father with FRO;
  - b) The extraordinary expenses of \$376.00 shall be payable on the first of February 2020, and on the 1<sup>st</sup> of each month thereafter. The arrears of extraordinary expenses I fix at \$4,512, with this same amount deducted from any overpayment by the applicant, father with FRO;
  - c) Any costs awards against the respondent, mother, owing to the applicant, father, shall also be considered by FRO as an overpayment of child support.
- [48] On the issue of costs, my trial coordinator can be approached to fix a date for argument.

[49] The respondent, mother, is bringing a guardianship application to avoid any future problems with Power of Attorney. I am certainly of the view that this is a most appropriate remedy.



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The Honourable Mr. Justice John A. Desotti

**Released:** February 6, 2020

Cases Considered:

S. 3, 7 and 10 of the *Child Support Guidelines*; *Arnold v. Washburn* (2001), 20 R.F.L. (5<sup>th</sup>) 236 (Ont. C.A.); *Coates v. Watson* (2018), 14 R.F.L. (89<sup>th</sup>) 460 (Ont. S.C.J.); *Turner v. Ansell* (2012), 20 R.F.L. (7<sup>th</sup>) 287 (Ont. S.C.J.), *Menegaldo v. Menegaldo* [2012] O.J. No. 2186



**CITATION:** Bueckert v. Sutherland, 2020 ONSC 815  
**COURT FILE NO.:** 8221/18

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

Frank David Bueckert

Applicant

**– and –**

Lisa Ann Sutherland (McAully)

Respondent

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**REASONS FOR JUDGMENT**

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Desotti, J.  
SCJ

**Released:** February 6, 2020