

Case Name:

Kawamata v. Phan

Between

**Maiko Kawamata, Applicant, and
Vi Hun Phan, Respondent**

[2015] O.J. No. 360

2015 ONCJ 32

Court File No. D70769/14

Ontario Court of Justice

S.B. Sherr J.

Heard: January 19 and 20, 2015.

Judgment: January 23, 2015.

(105 paras.)

Counsel:

Roger Rowe, for the applicant.

Respondent: acting in person.

REASONS FOR DECISION

S.B. SHERR J.:--

Part One -- Introduction

1 The primary issue in this case was whether the applicant (the mother) should be permitted to move to Japan with the parties' daughter (the child), who recently had her first birthday.

2 The mother has asked for sole custody of the child. She proposed that the father have contact with the child in Japan by Skype once per month. She asks that any in-person access by the father take place once each year in Japan, for up to one week, with no overnights. The mother seeks orders

to be able to travel and obtain government documentation for the child without the father's consent. She also seeks child support retroactive to the child's date of birth, based on an imputed annual income to the father of \$22,800.

3 In his Answer/Claim, the respondent (the father) sought sole custody of the child. At trial, he took the position that he only wanted sole custody of the child if the mother moved to Japan. He was content that the child be placed in the primary care of the mother if the mother remained in Canada, but sought an order for joint custody and unsupervised access. He asked the court to prohibit the mother from removing the child from Ontario. He sought child support if the child was placed with him. He claimed to have no ability to currently pay child support and asked the court to defer any support obligation. Lastly, he asked the court to make a declaration of paternity pursuant to subsection 4 (1) and section 6 of the *Children's Law Reform Act* (the Act) and require the mother to add his surname to the child's birth certificate.

4 The parties both testified. The mother also called a counselor from a Women's Shelter where she and the child reside.

5 The issues for this court to decide are:

- a) What custody and access orders are in the best interests of the child?
- b) Is it in the best interests of the child to permit the mother to move with her to Japan?
- c) Is it in the child's best interests to make an order dispensing with the father's consent for the mother to travel with her outside of Canada and to obtain government documentation for her?
- d) Does the Ontario Court of Justice have jurisdiction to make a declaration of paternity and order that the father's name be added to the child's birth certificate pursuant to subsection 4 (1) and section 6 of the Act?
- e) Should income be imputed to the father for the purpose of child support?
- f) Should a retroactive support order be made?
- g) If so, what retroactive support order should be made?
- h) If the court order creates arrears of support, how should they be repaid?

Part Two -- Background facts

6 The mother is 34 years old. She was born and raised in Japan. She came to Canada on a work visa in March of 2012. She deposed that she wanted to learn English and experience a new culture. She said that her intention had been to return to Japan.

7 The mother has a degree in economics from Takasaki Economics University in Japan. She was working at a bank in Tokyo before she came to Canada.

8 The mother is unmarried. The child is her only child.

9 The mother was permitted to work in Canada pursuant to her work visa. She worked at Tim Horton's from August of 2012 until March of 2013. Her work visa expired at that time and she has not been permitted to work in Canada since then. The mother trained in Canada and was qualified as a Personal Support Worker in 2013.

10 The mother was able to obtain a visitor's visa in April of 2013. This was extended in February of 2014 for 6 months. The mother applied for a further 6 month extension of her visitor's visa on August 11, 2014 and has not yet received an answer from the federal government. The mother said that, if permitted, her plan is to return to Japan with the child, even if the visa extension is granted.

11 The father is 37 years old. He was born in Vietnam and moved with his family to Hong Kong when he was two years old. He came to Canada with his family when he was about 3 years old. He has lived in Canada since then.

12 The father is unmarried. He presently lives with his father (the paternal grandfather). The home they live in is owned by the paternal grandfather.

13 The father has a certificate from Seneca College in Computer Networking. He attended at McMaster University for three years, but did not attain a degree. He deposed that he has not worked since 2006.

14 The parties began dating in January of 2013. In April of 2013, the parties went on a 10-day vacation to Las Vegas and the mother became pregnant.

15 The parties agreed at trial that the father was involved with the child's pregnancy. He went to doctor appointments with the mother. He bought books about prenatal and infant care. He bought vitamins for the mother and a bassinet, stroller, formula and clothes for the baby.

16 The parties both described having many arguments during the pregnancy. They both described the fights as often becoming physical and each blamed the other party. The mother testified that the father assaulted her on several occasions, usually pushing her around. She said that the father was emotionally abusive to her -- frequently accusing her of using him to gain immigration status in Canada and having affairs. She said this was very stressful for her. The father said that the mother was very physical and would frequently hit him. He said that she would scream loudly at him. He described the mother as "emotionally driven and agitated".

17 The pregnancy was clearly stressful for the mother. She acknowledged threatening to end her pregnancy, punching herself in the stomach several times and threatening to jump down a staircase. She said that she was doing this to see the father's reaction. She acknowledged that she was angry that the father would not marry her. She testified that she was also angry that he was not taking any steps to find work or to find them their own residence.

18 At one point during the pregnancy, the parties planned to move together to British Columbia. The mother had a job arranged there with Tim Horton's. However, this plan did not work out as the mother was unsuccessful in obtaining a work visa.

19 The parties agreed that the father would pay 50% of the mother's hospital costs. Due to her lack of status in Canada, she was responsible for paying these costs of about \$4,400.

20 The parties resided separately prior to the child's birth. The mother testified that she wanted to move into the father's home but the paternal grandfather refused to let her to stay there until she signed a form confirming that she wasn't using the father for immigration purposes.

21 After the child's birth, the mother moved in with the father and the paternal grandfather. She was not required to sign the letter set out above.

22 Four days later, the mother moved with the child into a shelter for abused women. The father had been charged with assaulting her. The terms of the father's criminal release conditions provided that the father have no direct or indirect contact with the mother. He was permitted to have access to the child through a mutually agreeable third party. These conditions remain in force.

23 The mother and child have resided at the women's shelter since January 18, 2014. They have twice been given extensions by the shelter to reside there. However, they must leave the shelter by February 1, 2015.

24 The mother issued this application on July 19, 2014.

25 The father did not seek access to the child prior to the mother starting this application.

26 The father also did not pay any child support to the mother prior to the start of this application. Nor did he pay the mother his share of the hospital costs that he had agreed to pay.

27 The father did not immediately seek access after being served with the court application. Instead, he challenged paternity of the child. This delayed the case for several months. DNA testing was ordered. The results, received in October of 2014, confirmed that he was the child's biological father.

28 The father still did not pay any child support to the mother. He did not pay his share of the hospital fees.

29 On October 17, 2014, Justice Carolyn Jones made a temporary order that the father have supervised access to the child at the Toronto Supervised Access Centre (TSAC), every alternate week for one hour.

30 On November 6, 2014, on consent, Justice Jones made a temporary support order, based on an imputed income to the father of \$22,800 per annum (minimum wage), requiring him to pay the mother \$184 per month, being the *Child Support Guidelines* (guidelines) table amount for one child. The father also consented to an order that he pay the mother \$2,203 for his 50% share of the hospital fees.

31 The father paid the mother his share of hospital fees in December of 2014. He is now paying the mother child support, as ordered.

32 The father had his first supervised visit on December 6, 2014. He testified that it did not go smoothly as the child was crying and sweating profusely. The visit was ended early.

33 The father has had supervised visits on December 20, 2014 and January 17, 2015. Each visit lasted one hour. The father testified that these visits went much better.

34 The father's criminal trial relating to the assault charge is scheduled to be heard in February of 2015.

35 The court heard evidence from a counselor at the women's shelter where the mother and the child reside. She is the mother's primary worker and deals with her on a daily basis. She testified that the mother was trembling and overwhelmed when she came to the shelter in January of 2014. She was scared about being a parent and her future. The worker testified that the mother has made wonderful progress over the past year and is an excellent parent for the child. She has enthusiasti-

cally used all the resources offered by the shelter, is open to advice and is able to positively incorporate this advice into her parenting. The mother has attended a Mom and Me program with the child, and the child has participated in music and swimming programs. The child has recently started at daycare.

36 The counselor testified that the child is thriving in the mother's care. The child is happy, healthy, well-nurtured and meeting all of her developmental milestones. She described the mother as responsible, loving and attentive to all of the child's needs. The child is very close and comfortable with the mother. The mother, she said, is respectful of staff and other residents at the shelter.

37 The counselor deposed that the mother "strives to improve her and her daughter's quality of life in every decision she makes". She said that "the mother does everything for the child".

38 The counselor said that the shelter is intended for short-term stays and the mother's stay cannot be extended any further. She also testified that the mother will not be able to move into

39 The mother also filed evidence from the child's family doctor that confirmed that the child is healthy and that the mother is responsibly attending to all of the child's medical needs.

Part Three -- Legal considerations

40 In any mobility case, the court must first determine the issue of custody. See: *Bjornson v. Creighton* (2002), 31 R.F.L. (5th) 242 (Ont. C.A.).

41 In making any parenting decision, the court, pursuant to subsection 24 (1) of the Act, must determine what order is in the child's best interests. In making this determination, the court should have regard to the best interests considerations set out in subsection 24 (2) of the Act, as well to any violence and abuse in assessing a parent's ability to act as a parent as set out in subsections 24 (3) and (4) of the Act. The court has considered these factors.

42 The Ontario Court of Appeal in *Kaplanis v. Kaplanis* [2005] O.J. No. 275 sets out the following principles in determining whether a joint custody order is appropriate:

1. There must be evidence of historical communication between the parents and appropriate communication between them.
2. It can't be ordered in the hope that it will improve their communication.
3. Just because both parents are fit does not mean that joint custody should be ordered.
4. The fact that one parent professes an inability to communicate does not preclude an order for joint custody.
5. No matter how detailed the custody order there will always be gaps and unexpected situations, and when they arise they must be able to be addressed on an ongoing basis.
6. The younger the child, the more important communication is.

43 Joint custody should not be ordered where there is poor communication and the parties fundamentally disagree on too many issues affecting the child's best interests. See: *Graham v. Butto*, 2008 ONCA 260; *Roy v. Roy* 2006 Canlii [2006] O.J. No. 1872 (Ont. C.A.).

44 Courts do not expect communication between separated parties to be easy or comfortable, or free of conflict. A standard of perfection is not required, and is obviously not achievable. See: *Griffiths v. Griffiths* 2005 CarswellOnt 3209 (OCJ). The issue is whether a reasonable measure of communication and cooperation is in place, and is achievable in the future, so that the best interests of the child can be ensured on an ongoing basis. See: *Warcop v. Warcop*, 2009 CanLII 6423 (ON S.C.).

45 The leading authority on mobility cases is *Gordon v. Goertz*, [1996] 2 S.C.R. 27 (S.C.C.). The law is summarized in paragraphs 49 and 50 of that case as follows:

49 The law can be summarized as follows:

- a) The inquiry is based on the findings of the judge who made the previous order and evidence of the new circumstances.
- b) The inquiry does not begin with a legal presumption in favour of the custodial parent, although the custodial parent's views are entitled to great respect.
- c) Each case turns on its own unique circumstances. The only issue is the best interests of the child in the particular circumstances of the case.
- d) The focus is on the best interests of the child, not the interests and rights of the parents.
- e) More particularly, the judge should consider, inter alia:
 1. the existing custody arrangement and relationship between the child and the custodial parent;
 2. the existing access arrangement and the relationship between the child and the access parent;
 3. the desirability of maximizing contact between the child and both parents;
 4. the views of the child;
 5. the custodial parent's reason for moving, only in the exceptional case where it is relevant to that parent's ability to meet the needs of the child;
 6. disruption to the child of a change in custody;
 7. disruption to the child consequent on removal from family, schools, and the community he or she has come to know.

50 In the end, the importance of the child remaining with the parent to whose custody it has become accustomed in the new location must be weighed against the continuance of full contact with the child's access parent, its extended family and community. The ultimate question in every case is this: what is in the best interests of the child in all the circumstances, old as well as new.

46 These principles apply with necessary modifications to an initial consideration of custody and access and not just to a variation of custody and access (as was the case in *Gordon v. Goertz*). See: *Bjornson v. Creighton*, supra. *Bjornson* also stands for the proposition that the views and wishes of the custodial parent are to be given serious consideration.

47 The Nova Scotia Supreme Court in *N.D.L. v. M.S.L.*, 2010 NCSSC 68 Canlii listed additional factors (in paragraphs 9 and 10) that courts have considered when applying the framework in *Gordon v. Goertz* as follows:

[9] An analysis of cases that have applied these principles provides additional detail to the factors to be considered. Those details are:

- (a) the number of years the parents cohabited with each other and with the child
- (b) the quality and the quantity of parenting time
- (c) the age, maturity, and special needs of the child
- (d) the advantages of a move to the moving parent in respect to that parent's ability to better meet the child's needs
 - (e) the time it will take the child to travel between residences and the cost of that travel
- (f) feasibility of a parallel move by the parent who is objecting to the move
- (g) feasibility of a move by the moving parents new partner
- (h) the willingness of the moving parent to ensure access or will occur between the child and the other parent
- (i) the nature and content of any agreements between the parents about relocations
- (j) the likelihood of a move by the parent who objects to the relocation
- (k) the financial resources of each of the family units
- (l) be expected permanence of the new custodial environment

- (m) the continuation of the child's cultural and religious heritage
- (n) the ability of the moving parent to foster the child's relationship with the other parent over long distances

[10] There have been cases in which judges have remarked that it is in the best interest of a child to be in the care of a parent who is happy and who feels secure and thus the parent should not be "...denied the opportunity to be the most fulfilled person she can be..." (*McCulloch v. Smith*, [2007] N.S.J. No. 225, 2007 NSFC 23 at para. 43)

48 The financial security of the moving parent is a relevant factor in mobility cases. See: *Greenfield v. Garside*, 2003 CarswellOnt1189 (Ont. SCJ).

49 Several cases have recognized that requiring a parent to remain in a community isolated from his or her family and supports and in difficult financial circumstances will adversely impact a child. The economic and financial benefits of moving to a community where the parent will have supports, financial security and the ability to complete their education and establish a career are properly considered in assessing whether or not the move is in the child's best interests. See: *MacKenzie v. Newby*, [2013] O.J. No. 4613, supra, paragraph 53, where, in paragraph 54, Justice Roselyn Zisman also accepted the following passages from *Lebrun v. Lebrun* [1999] O.J. No. 3393 (SCJ) where the court wrote at paragraphs 32-34:

32 The children's need for shelter, food and clothing which could be provided by adequate earnings by the mother must take priority over the disruption of a move, and reduced contact with the father and his family. The intellectual and emotional flowering of these children cannot occur until their basic physical needs are met.

33 The economic realities require that the mother be free to pursue employment which will permit her to escape the welfare rolls. I am confident she will manage the move in a way which promotes the children's best interests.

34 An order restricting the residence of the children would, as in *Woods v. Woods* reflex, (1996) 110 Man. R. (2d) 290 C.A., condemn the mother and children "to a life of penury with a dissatisfied [mother] bereft of work and dignity. The alternative is to empower the [mother] to improve their lives from both a material and psychological standpoint." While the security of the positions offered to the mother cannot be assured, I am satisfied that the prospects of good, full-time employment are much better in southern Ontario. Leave is granted to the mother to move the residence of the children within Ontario.

50 The level of co-operation that the moving parent will provide in facilitating access to the other parent is also a relevant consideration in a mobility application. See: *Orrock v. Dinamarea*, 2003 CarswellBC 2845 (B.C.S.C.).

Part Four -- Analysis

4.1 Custody

51 The father testified that he felt he was a better parent than the mother. He felt that he was capable of making better decisions than her. He felt that she was overly emotional. He deposed that she is not a responsible parent. The father felt that the child was possibly at risk of harm with the mother, because of her threats to hurt the child during pregnancy. He testified about how he has done a lot of research on the internet and has bought books about parenting. He described his active involvement during the mother's pregnancy. At a minimum, he feels that he should have joint custody with the mother. He claims that he is no longer jealous, accepts that the relationship is over and says that he will not accuse the mother of using him for immigration status.

52 This is not a case for joint custody. The relationship between the parties was marked by high conflict and poor communication. Both parties alleged that the other was physically abusive to them. The mother also claimed that the father was emotionally abusive to her. The father currently has a criminal release condition that he not communicate directly or indirectly with the mother. The mother has made responsible decisions for the child. The father has demonstrated minimal parental responsibility since the child was born. He did not seek access or pay support until the fall of 2014. He denied paternity. He has not sought employment to be able to support the child. It is not in the child's best interests to make an order for joint custody.

53 The evidence clearly supports a finding that it is in the child's best interests to grant final sole custody to the mother for the following reasons:

- a) The mother has been the only parental caregiver for the child.
- b) The mother is the centre of this child's universe. She is the person who has been responsible for attending to all of the child's physical and emotional needs. She is the person who the child turns to for security and comfort. It would place the child at a significant risk of emotional harm to be removed from the mother's primary care.
- c) The father has had virtually no involvement with the child. He has only spent 2.5 hours with the child since she was 4 days old. He is a stranger to her.
- d) The father has no knowledge of the child, including her needs, likes and dislikes.
- e) The father conducted a lengthy cross-examination of the mother. His focus was on her conduct prior to leaving him and assessing blame. It was instructive that he asked no questions about the child.
- f) The father's evidence about the mother's parenting was given no weight. He claimed that she was not a responsible parent and that he was the better parent, when he had no direct knowledge of her parenting. It was informative that he gave the mother absolutely no credit for positively parenting the child on her own for the past year. The court has significant concern about his lack of respect for the mother.

- g) The father displayed an alarming lack of knowledge about child development. He felt there would be "no negative effect" for the child if she was removed from the mother and placed with him at this time.
- h) The father's lack of involvement with the child has been primarily due to his own ambivalence and choices. He did not seek access after the child was born. He denied paternity, delaying the start of access until December of 2014.
- i) The child has thrived in the mother's care and has been in a stable home environment. The mother has done an excellent job in raising the child. This was corroborated by her counselor.
- j) The mother has demonstrated significant commitment and responsibility in raising the child. She has sought out help from community resources and has been able to use advice effectively.
- k) The mother presented a clear and well-developed plan for the child. This will be discussed in more detail below.
- l) The positive evidence about the mother's parenting and the child's development has allayed the court's concerns about the mother's ambivalence about having a baby and some self-harming behaviour during her pregnancy.
- m) The father had difficulty at trial describing how he would actually care for the child. It became apparent in cross-examination that he had given this little thought. He was unable to describe what a typical day with the child would look like, other than he would do research about how to care for her. He has not looked into available daycares. He has limited supports. He said that he would rely on the paternal grandfather for help, but he indicated in his Answer (as an excuse for not working) that he is responsible for the paternal grandfather's day-to-day care. He had no viable plan for financially supporting the child. He has not looked for work.
- n) The father expressed a desire to be a good parent. His good intentions have not been matched by his actions. Once he was charged with assault, he chose to financially cut off the mother, despite the fact he had to have known she was scared and alone and that she and the child were vulnerable. He did not pay any support or ask to see the child until late in 2014.
- o) The court preferred the mother's evidence that the father was, at times, inappropriately physical with her. The father, in explaining how the mother's eye was hurt on one occasion, said that he accidentally hit her hard with the heel of his hand (he demonstrated this) when he was trying to hold her back. His evidence was not credible. The court finds that he minimized his

domestic violence. The court also finds that, at times, the mother initiated physical contact with the father, hitting him when she was upset. The mother conceded that she had done this. The court wants to emphasize that it is not making any specific finding as to whether the father did or did not assault the mother on the day of separation. The custody and mobility decision does not turn on this determination.

54 The mother will be granted sole custody of the child.

4.2 Move to Japan

55 The one serious argument that the father had to prevent a relocation of the mother and child to Japan was that it would likely result in his not having a meaningful relationship with the child. The father is of modest means. It will be difficult for him to travel to Japan. He does not speak Japanese. Communication by Skype will likely mean little for the child and the father at this time. English will probably not be the child's first language, which will impair her ability to have a significant relationship with the father. The mother admitted at trial that she remained very angry at the father. She appeared willing at trial to facilitate access, but the reality is, if she has a fight with the father, it might be difficult for him to have or to enforce contact with the child. The court has no illusions about this.

56 It is important to note that the move will likely impair the development of a future relationship with the father. There is no meaningful present relationship between the father and the child.

57 While a court will ordinarily want to maximize a parent's contact with a child, it does not follow that a move to Japan will not be in the child's best interests. All of the factors set out in the mobility case law must be weighed against this factor. See: *Takenaka v. Kaleta* [2006] O.J. No. 623 (SCJ), where the court permitted a mother to move with a 6-year-old child to Japan, even though a father exercised generous access and had a positive relationship with the child.

58 Notwithstanding the impairment to the development of a future relationship between the father and the child, the evidence is overwhelming that it is in the child's best interests to relocate to Japan with the mother.

59 Since the governing question is what is in the best interests of the child, the evidence that was considered in reviewing the custody issue applies to the mobility analysis. The court relies on the findings made in paragraph 53 above.

60 Due to the child's young age, there will be no disruption with her community if she moves to Japan. She has no friends yet. She is too young to express views and preferences.

61 The views and preferences of the custodial parent are entitled to great respect.

62 The mother set out a very detailed plan to care for the child in Japan. She plans to live in her parents' home (a six-bedroom home). The mother deposed that the home is located in a safe neighbourhood, with health facilities, stores and activities nearby.

63 The mother said that her parents will assist her in raising the child. She deposed that she also has extended family to help her, including two brothers and an aunt.

64 The mother identified the daycare that the child will attend in Japan, the location of the local hospital and activities she has planned for the child.

65 The mother's parents own a successful logistics company. She will be able to work with the company with a starting salary of \$51,000 per annum (Canadian) when she returns. She deposed that she will be able to often work from home.

66 The mother was able to describe in detail how she and the child will spend their days together. The mother has prepared for this move in a child-focused manner.

67 The future of the child in Ontario would be very uncertain. The mother has no housing after February 1, 2015. There is a real possibility that she will be required to leave the country. She presently cannot work in Canada and support the child. Canada is still a strange country to her. She is learning how to speak English and required full interpretation at trial.

68 The child's financial security will be better met in Japan, where the mother can work and enjoy a good standard of living. In Canada, it is uncertain if and when she will be able to work. She cannot count on the father to reliably pay child support.

69 It is hardly surprising that the mother wishes to return to Japan. She came to Canada on a short-term basis. She did not expect to become pregnant. She went through a difficult time where she was scared and alone. The evidence has shown that she cannot rely on emotional support from the father. In Japan, she will have emotional and financial security. This can only benefit the child.

70 The court also finds that it is in the child's best interests that the mother's ability to travel with the child and obtain documents for her be unhindered. The court does not have confidence that the father would give the mother approval or sign necessary documents for the child in a timely manner. When questioned, the father would not agree to sign a consent permitting the mother to obtain a passport for the child, as he feared he would not see the child again.

4.3 Access

71 The parties agree that the child is too young to travel for access.

72 The mother has proposed a reasonable access plan, given the obstacles of distance and the child's age. She is agreeable to the father visiting with the child for up to one week each year on 60 days notice, with no overnights. She is agreeable to Skype contact once per month, to be increased when the child is capable of communication. She will update the father twice each year about the child's development, health and school progress. She will notify him in the event of an emergency. She deposed that when the child is older, she will facilitate visits in Canada.

73 The court finds that this plan is in the child's best interests, with the exception that the Skype contact should take place every other week, as opposed to monthly, to familiarize the child with the father. The mother will be able to set out a reasonable date and time for this contact.

4.4 Declaration of paternity

74 The Ontario Court of Justice does not have the jurisdiction to make a declaration of paternity and add the father's name to the child's birth certificate pursuant to subsection 4 (1) and section 6 of the Act as requested by the father. Section 3 of the Act clearly states that only the Superior Court of Justice or the Family Court, in the areas where it has jurisdiction under subsection 21.1 (4) of the *Courts of Justice Act* can make orders under sections 4 and 6 of the Act. The Ontario Court of Justice is not a Family Court as defined by subsections 21.1 (1) and (2) of the *Courts of Justice Act*. This claim is dismissed.

Part Five -- Child support

5.1 Positions and evidence

75 The mother asked the court to make the quantum of the temporary child support order final and make the order retroactive to February 1, 2014. This would require imputing the father's annual income at \$22,800, the minimum wage.

76 The father claimed that he is not really earning any income. He asks that the court defer his child support obligation until he can obtain employment.

77 The father said that he has not worked since 2006. He gave numerous reasons for his unemployment. In his Answer/Claim he said that he could not work because:

- a) He has a learning disability that affects his ability to process and understand verbal information.
- b) He is providing daily care on a full-time basis for his elderly father.

78 In cross-examination the father offered the following reasons for not working:

- a) He has been traumatized by the death of his mother since 2006.
- b) He has been overwhelmed by the requirements of his family and criminal court cases.
- c) He has been depressed.
- d) He had a motor vehicle accident in 2013 and had whiplash for seven months. He also had a motor vehicle accident in 2010, but suffered no injuries.

79 The father reported income of \$6,600 for 2013. He said that any income reported in his income tax returns comes from the paternal grandfather. The father called it an allowance. He said that the paternal grandfather rents out the basement and second floor of his home. The father collects rent, pays expenses and will attend to any necessary repairs in the home on behalf of the paternal grandfather.

80 The father testified that he has not looked for work for about five years. He said that he intends to look for work once his court cases end. He said that he will look for work in the computer field. He deposed that if he can't find work, he will go back to school to upgrade his skills. He said that he also thought that he could do factory work.

5.2 Legal considerations

81 Section 19 of the guidelines permits the court to impute income to the father if it finds that he is deliberately unemployed.

82 Imputing income is one method by which the court gives effect to the joint and ongoing obligation of parents to support their children. In order to meet this obligation, the parties must earn what they are capable of earning. If they fail to do so, they will be found to be intentionally under-employed. See: *Drygala v. Pauli* [2002] O.J. No. 3731(Ont. CA).

83 The Ontario Court of Appeal in *Drygala* set out the following three questions which should be answered by a court in considering a request to impute income:

1. Is the party intentionally under-employed or unemployed?
2. If so, is the intentional under-employment or unemployment required by virtue of his reasonable educational needs?
3. If not, what income is appropriately imputed?

84 The onus is on the party seeking to impute income to the other party to establish that the other party is intentionally unemployed or under-employed. The person requesting an imputation of income must establish an evidentiary basis upon which this finding can be made. See: *Homsi v. Zayya*, [2009] O.J. No. 1552. (Ont. C.A.).

85 Absence of a reasonable job search will also usually leave the court with no choice but to find that the payor is intentionally under-employed or unemployed. See: *Filippetto v. Timpano*, [2008] O.J. No. 417, (Ont. S.C.).

86 The court stated in *Drygala* that there is no need to find a specific intent to evade child support obligations before income is imputed; the payor is intentionally under-employed if he or she chooses to earn less than what he or she is capable of earning. The court must look at whether the act is voluntary and reasonable.

87 Once under-employment is established, the onus shifts to the payor to prove one of the exceptions of reasonableness. When an employment decision results in a significant reduction of child support, it needs to be justified in a compelling way: See: *Riel v. Holland*, 2003 CanLII 3433 (Ont. C.A.), at paragraph 23.

88 The payor must prove that any medical excuse for being underemployed is reasonable. See: *Rilli v. Rilli*, [2006] O.J. No. 4142 (SCJ.). Cogent medical evidence in the form of detailed medical opinion should be provided by the payor in order to satisfy the court that his/her reasonable health needs justify his/her decision not to work. See: *Cook v. Burton* [2005] O.J. No. 190 (SCJ) and *Stoangi v. Petersen* [2006] O.J. No. 2902 (SCJ).

89 Support payors must use reasonable efforts to address whatever medical limitations they may have to earn income. This means following up on medical recommendations to address these limitations. See: *Cole v. Freiwald*, [2011] O.J. No. 3654, per Justice Marvin A. Zuker, paragraphs 140 and 141.

90 The third question in *Drygala v. Pauli, supra*, is: "If there is no reasonable excuse for the payor's under-employment, what income should properly be imputed in the circumstances?" The court must have regard to the payor's capacity to earn income in light of such factors as employment history, age, education, skills, health, available employment opportunities and the standard of living earned during the parties' relationship. The court looks at the amount of income the party could earn if he or she worked to capacity. See: *Lawson v. Lawson*, 2006 CanLII 26573 (ON C.A.).

5.3 Analysis

91 The mother met her onus of showing that the father is deliberately unemployed. The father is capable of working. He indicated that he would do so once the criminal and family cases were over. He has made the choice not to seek work since the child was born.

92 The father did not provide a reasonable excuse for not working. He provided no medical evidence that he couldn't work. He has not applied for accident benefits arising from either of his motor vehicle accidents. He has never applied for Ontario Disability Support payments. The father provided a 1996 letter from a psychologist stating that he had a learning disability that needed to be accommodated for school purposes. Notwithstanding this disability, he attended three years of university at McMaster University and obtained a certificate in Computer Networking at Seneca College. The father also testified that he regularly played poker, once winning a tournament in Las Vegas. The father provided no evidence about how his learning disability might impair his ability to work.

93 The father also testified that he has taken no steps to address any limitations to his employability caused by his learning disability. He has not looked into any programs or learning tools to assist with the learning disability.

94 The father is fortunate that the mother only sought to impute to him a minimum-wage income. The evidence indicates that he is likely capable of earning more money than this, if he made any effort.

95 The father's standard of living does not appear to have been impaired by his lack of reported income. He admitted to traveling four times to Las Vegas to play poker (he said that he does not consider it gambling as he wins). He also plays poker at casinos in Ontario and plays poker on-line. He admitted to his father providing his "stake", for his Las Vegas poker trips, which he said is about \$5,000.

96 The court notes that the father has money to travel to Las Vegas and play poker, but did not have money to pay child support.

97 The father's priorities were made clear when he testified that he could now use the annual \$5,000 given to him by the father to pay for a criminal lawyer (he claims not to have gone to a casino since the child's birth). He submitted that this would help him get acquitted and allow him to get a good job. He did not propose using any of this money to pay child support.

98 The father's income will be imputed at \$22,800 per annum for support purposes. He shall pay child support of \$184 per month, being the guidelines table amount of child support for one child.

5.4 Start date for support

99 The mother issued her application for support on May 1, 2014. Her request for retroactive support starting February 1, 2014 is modest, reasonable and will be ordered.

100 The court has jurisdiction to order retroactive child support payments, and the principles set out by the Supreme Court of Canada in *D.B.S. and S.R.G. v. T.A.R. and L.J.W.*, [2006] 2 S.C.R. 231, structure its discretion. In that decision, the Court articulated two overarching principles governing claims for retroactive child support and retroactive increases in support: 1) Each parent has an obligation to insure that his/her child receives proper support in a timely manner; and 2) courts considering these claims must balance the payor's interest in the certainty of the status quo with the need for fairness and flexibility. The Court set out four factors to be considered in such claims:

1. Reason for the delay in bringing the claim;
2. Conduct of the payor parent;
3. Circumstances of the child;
4. Hardship that may be caused by a retroactive award.

101 The mother moved promptly for support after the separation, considering she had to first settle into shelter life with the child. The father demonstrated blameworthy conduct by not paying child support for the child when he was well aware of his obligations. The circumstances of the child were disadvantaged by the father's failure to pay support as she had to live in a shelter. Any hardship to the father arising from a retroactive order can be addressed through a repayment order. It is clear that the father has access to money when he is motivated to spend it.

102 The father may repay the arrears created by this order at the rate of \$100 per month, starting on March 1, 2015. However, if he is more than 30 days in default of any ongoing or arrears support payment, the entire amount of arrears shall immediately become due and payable.

Part Six -- Conclusion

103 A final order shall go on the following terms:

- a) The mother shall have final custody of the child.
- b) The mother may move the child's residence to Japan.
- c) The mother shall notify the father, through her counsel, when she is going to return to Japan. She shall also provide the father with a contact number or email address when she moves to Japan.
- d) Until the mother moves to Japan, the temporary access order of Justice Jones, dated October 17, 2014, providing for supervised access every other week at the TSAC, shall continue.
- e) The mother may obtain or renew all government documentation for the child, including passports, without the father's consent.
- f) The mother may travel with the child outside of Canada without the father's consent.
- g) Once the mother moves to Japan, the father shall have access to the child as follows:
 - i) He shall have Skype contact with the child once every other week at reasonable times and dates to be set by the mother.

- ii) Once each year in Japan for up to one week. He is to give the mother 60 days notice as to what week he plans to visit. The visits shall not be overnight and shall take place during the days for durations to be reasonably determined by the mother. The mother may also require that any or all of these visits be supervised by a third party to be reasonably approved by her.
- iii) The mother shall update the father twice each year, by email, about the child's health and development and, once the child attends school, school progress.
- iv) The mother will advise the father about any medical emergency about the child.
- v) If the father is not permitted by criminal release conditions to communicate with the mother, the mother will have a third party (such as a family member) communicate with the father for the purpose of arranging this access.
- vi) Such further and other access as the mother may agree to.
- h) The father shall pay child support to the mother in the sum of \$184 per month, starting on February 1, 2014. This is the guidelines table amount for one child, based on the father's income, imputed at \$22,800 per annum.
- i) The father is to be credited with any child support payments made to date as reflected in the records of the Family Responsibility Office. This does not include the amount of \$2,203 he paid to the mother for his share of the hospital costs.
- j) The father may repay the arrears created by this order at the rate of \$100 per month, starting on March 1, 2015. However, if he is more than 30 days late in making any ongoing or arrears support payment, the entire amount of arrears shall immediately become due and payable.
- k) This order will not preclude the Director of the Family Responsibility Office from collecting arrears from any government source, such as HST or income tax returns, or from any lottery or prize winnings of the father.
- l) The father shall, by June 30th each year, provide the mother with a complete copy of his income tax return and notice of assessment.
- m) The father shall immediately notify the mother if he obtains employment, including the name, address and phone number of his employer and a copy of his first two pay stubs.

n) The balance of the claims that are contained in the father's Answer/Claim are dismissed.

o) The father's approval of this order to form and content is dispensed with.

104 [The court staff are requested to expedite issuing and entering this order once it is submitted by counsel for the mother.

105 If the mother chooses to seek costs, she is to serve and file written submissions by February 9, 2015. The father will then have until February 23, 2015 to make written response. The submissions should not exceed three pages, not including any bill of costs or offer to settle. The submissions should be delivered to the trial coordinator's office on the second floor of the courthouse.

S.B. SHERR J.