

No. D087180
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:)	
)	
PARMINDER KAUR SARAN)	REASONS FOR JUDGMENT
)	
PLAINTIFF)	
)	OF MASTER J.W. HORN
AND:)	
)	
JARNAIL SINGH SARAN)	(IN CHAMBERS)
)	
DEFENDANT)	
)	

Counsel for the Plaintiff:	F.G. Potts
Counsel for the Defendant:	J.A.W. Schuman
Date and Place of Hearing:	October 10, 1994 at Vancouver, B.C.

In this case the wife, Parminder Saran, instituted an action under the *Family Relations Act* on February 11, 1993. Amongst other things she sought an order for custody of and maintenance for three children of the marriage. The youngest child, Jessica Saran, was born on January 26, 1991. On March 2, 1993, the husband, Jarnail Saran, instituted proceedings for divorce by petition. In that proceeding he sought interim and permanent custody of the children of the marriage. On April 2, 1993, Master Brandreth-Gibbs made an interim order for payment of \$1,300 a month to the plaintiff without

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4 categorizing the payment as maintenance. This order was made
5 in the *Family Relations Act* action. In the divorce action the
6 wife counter petitioned and the husband filed an answer to her
7 counter petition. In the counter petitioner the wife sought
8 support for the infant children of the marriage. In the
9 answer to the counter petition the husband said this in
10 paragraph 5.2,

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12 The paternity of the youngest child,
13 Jaskiran (Jessica) Saran, born January 26,
14 1991, is in question and a paternity test is
 requested before maintenance be payable for
 the support and benefit of this child.

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16 On August 23, 1993, in the *Family Relations Act* action
17 the wife applied by notice of motion to vary the order of
18 Master Brandreth-Gibbs to increase the amount of child
19 maintenance. The husband filed affidavits in reply and the
20 matter came on before Master Donaldson for hearing on
21 September 15, 1993. Master Donaldson varied the order of
22 Master Brandreth-Gibbs to provide that the husband pay the sum
23 of \$4,000 per month as interim maintenance for the benefit of
24 the three infant children, commencing on October 1, 1993.
25 Nothing in the material before Master Donaldson raised any
26 issue as to the parentage of Jessica. Master Donaldson gave
27 oral reasons which have been transcribed and it is clear that
28 no such issue was raised before him in argument.
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4 The order of Master Donaldson was appealed by the
5 husband and was disposed of on November 26, 1993, by an order
6 of Mr. Justice Hall, which varied the order of Master
7 Donaldson. The reasons for judgment of Mr. Justice Hall have
8 also been transcribed. It is clear from the materials before
9 Mr. Justice Hall and from his reasons that no issue as to the
10 parentage of Jessica was raised on the appeal.
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12 The first time this issue was raised by way of
13 affidavit evidence was in an affidavit by Joan Taylor filed
14 December 10, 1993, in support of an application to amend the
15 statement of defence in the *Family Relations Act* action to
16 deny that Jessica was the daughter of Jarnail Saran. That
17 affidavit revealed that a parentage/kinship test had been
18 undertaken on behalf of the husband on August 23, 1993, and
19 that the result had been conveyed to the husband about October
20 6, 1993. The report revealed that the husband was not the
21 father of Jessica Saran.
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23 On December 16, 1993, an order was granted for the
24 amendment sought and an order was made for D.N.A. testing by
25 the wife and the child and the husband. That testing was
26 undertaken and on February 24, 1994, a report was received
27 which stated that the husband was excluded from the paternity
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4 of Jessica Saran, that is to say, that there is no possibility
5 whatsoever of his being the father.
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7 An application was launched on June 10, 1994, for an
8 order varying retroactively the amount of interim maintenance
9 payable by the husband for the children. The grounds of the
10 application are that the husband was not the father of Jessica
11 and was not, accordingly, obliged to pay anything toward her
12 maintenance. For reasons having nothing to do with any delay
13 on the part of the husband, the matter only came up for
14 hearing in October.
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16 The narrative would not be complete without an
17 observation that the mother has filed no materials in reply to
18 the application.
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20 Since the application was made in June, the husband
21 has paid certain monies into trust anticipating that if an
22 order were made to cancel retroactively the maintenance
23 payable in respect of Jessica then the amounts paid in respect
24 of Jessica might be set off against amounts due in respect of
25 the other two children. At the conclusion of the hearing I
26 ordered those sums to be paid out to the mother indicating
27 that whatever view I might form as to the husband's liability
28 for Jessica and as to his right to have the order varied
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4 retroactively, the order in respect of the other two children
5 should remain in full force and effect and should be obeyed.
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7 Whether it is the order of Master Brandreth-Gibbs or
8 the order of Master Donaldson as varied on appeal by Mr.
9 Justice Hall, which governs does not seem to me to matter very
10 much. Nor does it seem to me to matter that the order
11 happened to have been made in the *Family Relations Act*
12 proceeding rather than in the divorce proceeding. The relief
13 sought under the *Divorce Act* in so far as it related to
14 custody and maintenance was the same as the relief sought in
15 the *Family Relations Act* action. I shall accordingly,
16 consider the matter as though the claim was made under both
17 *Acts*.
18

19 The husband says that he is not the natural father of
20 Jessica. I shall take it that this allegation is proved for
21 the purposes of this motion. The husband contends that he is
22 not obliged to pay maintenance for Jessica because he is not
23 her father.
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25 Counsel for the wife has a number of responses to
26 this. The first response is that the husband is estopped from
27 raising this issue because he knew both before Master
28 Donaldson's order was made and before Mr. Justice Hall's order
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4 was made that Jessica's parentage was disputed by him and he
5 had evidence to support him by October, 1993. This is an
6 interesting argument for which much might be said. Whether
7 the father in this case can raise matters on this application
8 which he might have raised on the wife's application is
9 analogous to the situation where an application for relief has
10 been dismissed and the applicant wishes to renew it. A number
11 of authorities on this issue are set out in *Fraser and Horn,*
12 *Conduct of Civil Litigation in British Columbia*, s. 25.10 and
13 counsel for the wife has referred me to a number of other
14 authorities on estoppel and *res judicata* which, while they are
15 of some application, do not deal with a renewal of a chambers
16 application.

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18 I prefer however to deal with this case upon the
19 second argument raised by counsel for the wife, namely, that
20 whether the husband is or is not the natural parent of the
21 child is irrelevant because he is what might be described as
22 a "statutory parent" under either the *Family Relations Act* or
23 the *Divorce Act*. I deal first with the *Divorce Act*.

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25 Under the *Divorce Act* Jessica is a "child of the
26 marriage" under s. 2(2) if she is the child of one spouse and
27 for whom the other spouse stands in place of a parent. I
28 cannot conceive that there is any question but that Jessica is
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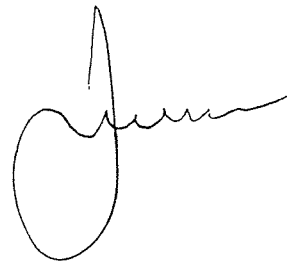
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4 a child of the marriage under this definition. If the husband
5 is not her father, he thought he was her father until
6 recently. She lived in his household and he treated her as
7 his daughter on an equal footing with his other daughters. It
8 may be that he stood in *loco parentis* unwittingly but
9 nevertheless that is where he stood.
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11 If I turn to the *Family Relations Act*, the *Act*
12 provides that Jessica is entitled to support from her parents
13 and "parent" is defined in Part 1 to include a stepfather.
14 The relationship of stepfather is established by one of two
15 means. The first means is by marriage between the stepparent
16 and the mother of the child. In this case the husband did
17 marry the mother of the child. The fact that he married the
18 mother before the child was born does not seem to me to be
19 material. The definition of "parent" in s. 1 of the *Act* under
20 s-s (b)(i)(A) does not indicate that the marriage must have
21 taken place before the child is born. In my view the husband
22 falls under the definition of "parent" in the *Family Relations*
23 *Act* as well as under the *Divorce Act*.
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25 In those circumstances he is obliged to support
26 Jessica and there can be no grounds for setting aside or
27 varying the existing orders.
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4 I specifically do not reach my conclusion on the basis
5 that there has been no change in circumstances. Had the
6 husband learned that Jessica was not his child after the order
7 of Mr. Justice Hall was made, I would be inclined to view this
8 as a change in circumstances which would open up that order.
9 But those circumstances existed before the order of Mr.
10 Justice Hall and were known to exist by the husband. It is
11 not the circumstances which have changed but the facts which
12 the husband chose to place before the court. To this extent
13 and to this extent only I would hold that he is estopped from
14 alleging that there is a change in circumstances when those
15 circumstances were known to him.
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17 Accordingly, the application is dismissed. The
18 dismissal is without prejudice to any trial of this issue and
19 without prejudice to any application to vary which is based
20 upon a change in circumstances other than those dealt with in
21 the materials before me. The wife should receive her costs on
22 Scale 3 in any event of the cause.
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A handwritten signature in black ink, consisting of a large, stylized initial 'D' followed by a series of connected loops and a horizontal tail.

28 Nanaimo, British Columbia
29 November 1, 1994
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