
CANADA / JUDGMENT

Arnett v. Arnett

2018 BCSC 1982

COURT

Supreme Court of British Columbia

DECIDED

9 November 2018

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2018 BCSC 1982 Arnett v. Arnett

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Arnett v. Arnett,

2018 BCSC 1982

Date: 20181109

Docket: E33872

Registry: New Westminster

Between:

Janet Lee Arnett

Claimant

And

Jeffrey John Arnett

Respondent

Before: The Honourable Mr. Justice Affleck

Reasons for Judgment

Counsel for the Claimant:

T. Hoover

Counsel for the Respondent:

P. O'Neill

Place and Date of Trial/Hearing:

Vancouver, B.C.

October 12, 2018

Place and Date of Judgment:

New Westminster, B.C.

November 9, 2018

Background and Positions of the Parties

- [1] The parties, who are divorced, have one child who is now 11 years old. On April 3, 2013, Mr. Justice Wong made an order providing that the respondent pay child support of \$556 monthly based on an imputed guideline income of \$60,000 (the "Order").
- [2] The claimant applies to vary the Order to provide that the respondent pay monthly child support commencing June 1, 2016 of \$698 based on a guideline income \$74,629.51 and pay monthly child support of \$779 commencing January 1, 2017 based on a guideline income of \$83,413.41. The claimant calculates the arrears of child support since the Order at \$3,153. The claimant calculates unpaid special expenses to date at \$3,216.59, which I understand is made up of an unpaid daycare expense of \$84 and the unpaid contribution by the respondent to the cost of Tae Kwon Do.
- [3] The claimant submits the monthly ongoing child support based on the November 2017 guideline amount of the respondent's income is \$797. In addition the claimant submits the respondent ought to pay monthly special expenses of \$135 for Tae Kwon Do and \$44 for medical and dental costs. The total to be paid each month by the respondent would thus be \$937 and, if there are additional special expenses he ought to pay 71% of them. Lastly, the claimant submits that she incurred a dental bill for the child of \$443 for which the respondent should reimburse her because he has in his control the means to claim that sum through his employment dental plan.
- [4] The basis for the claim for Tae Kwon Do as a special expense is that the child has been diagnosed with autism, a learning disorder and an attention deficit hyperactive disorder. It is submitted that Sunny Hill Health Centre for Children has strongly encouraged the child's engagement in a number of activities, including Tae Kwon Do, to improve aspects of his social interaction and peer relationship development.
- [5] The respondent submits that he has not limited his monthly child support payment to the \$556 in the Order. On the contrary, he voluntarily increased his monthly child support to \$656 in June 2016, and to \$689 in August 2017. He then reduced the monthly payment to \$612.50 in June 2018 even though his guideline income had been reduced to an amount that would have obliged him to pay only \$451 monthly.

- [6] He submits the reduction in his income resulted from taking justifiable parental leave following the birth of his child with his new wife. I am told the mother of that child took parental leave for two months following the child's birth and could take no more because she is a dentist with a contract position with a hospital. The respondent intends to take nine months parental leave to be with the newborn child until at age one year the child can be placed in a daycare.
- [7] The claimant is critical of the respondent for taking parental leave in these circumstances. The claimant takes the position the respondent is deliberately underemployed and ought to have an annual income imputed to the level he was earning before he took parental leave, namely \$83,413.
- [8] The claimant has an annual income of about \$33,000, but the respondent submits the claimant ought to have an income imputed to her of \$42,500 because there is evidence she is conducting a home business as a boutique soap manufacturer and distributor.

Discussion

- [9] I am not willing to impute income to either party. The submission of the respondent that the claimant is earning an income from a boutique home business is not persuasive. She strenuously denies that she is earning an income in that fashion and I accept her evidence. I am not persuaded, on the evidence before me, that I should conclude that she has underreported her annual income by the amount in the respondent's submission.
- [10] Furthermore, I am unwilling to criticize the respondent for taking parental leave. During a newborn child's first year of life, the attention at home of one parent is valuable. The respondent's present wife ought not to be required to risk her employment contract with a hospital by staying at home for a year until her child can go to daycare.
- [11] *McCaffrey v. Paleolog*, 2011 BCCA 378, addressed the application of s. 19 (1)(a) of the Federal Child Support Guidelines, which permits a court to impute income where a spouse is intentionally underemployed or unemployed "other than where the underemployment or unemployment is required by the needs of the child of the marriage or a child under the age of majority". Justice Chiasson, writing for the court, stated the following:

49 This Court has concluded that a desire simply to stay home with children is not sufficient to invoke the exception in s. 19(1)(a). There must be evidence of needs of a child which require the parent to remain home and unavailable for employment. The chambers judge agreed with the mother's position that a newborn child has needs beyond the usual as is evidenced by Employment Insurance maternity leave and other maternity leave programs. This may have been the basis of the judge's reference in para. 15 to the "societal requirements for the first needy months following the birth of a child".

53 The Alberta courts appear to treat the imputation of income as somewhat of an anomaly; that is, that it is discretionary and should not occur if a parent falls within the "exceptions" in s. 19. With respect, in my view, this approach does not take into account adequately the positive obligation on a parent to support a child. The court is authorized to impute income to meet that objective. If a parent is intentionally under-employed or unemployed, income may be imputed unless the parent establishes that he or she falls within an exception under s. 19(1)(a); in this case, unless the mother establishes that the needs of other children require her unemployment. She has the obligation of satisfying the court that this is so.

58 In summary in a case like this:

1. income may be imputed to a parent who is intentionally under-employed or unemployed unless the parent establishes under s. 19(1)(a) of the Federal Child Support Guidelines that the needs of a child require the parent to remain at home;
2. it is recognized that generally a newborn child or a child of very young age is a child who needs care at home in the context of s. 19(1)(a), but
3. childbirth does not provide an automatic relief from a parent's child support obligations;
4. the circumstances of each situation must be evaluated using all of the criteria articulated in *Donovan v. Donovan* (2000), 190 D.L.R. (4th) 696 (Man. C.A.) as adopted by this Court in *Watts v. Willie*, 2004 BCCA 600;
5. any period of non-support must be reasonable in the circumstances.

59 In my view, the circumstances to be considered include a consideration of the financial condition of the payor parent's present family. It is the needs of the child of that relationship that are in issue. In some situations the financial circumstances of the first family may be relevant: for example, where the second family is very affluent and the first family is destitute. The circumstances may compel an almost immediate return to work or may provide for full or part-time in-home assistance. Assisted care or day-care may not be available readily or be available only on a limited basis. In considering the applicability of s. 19(1)(a), the court should be given every assistance by the parties so as to take into account all relevant factors that bear upon the reasonableness of a period of relief from child support, always recognizing that in a case like this the burden is on the parent who seeks an hiatus from the obligation to provide child support to prove that a period of underemployment or unemployment is required by the needs of a child.

[12] I accept that, in the circumstance where the mother of the newborn child of the respondent risks losing her contract with a hospital if she takes parental leave beyond two months, which is the time I understand she was contractually entitled to, and where the needs of the newborn child are such that the attention of the respondent as the stay-at-home parent is desirable until the newborn child can be placed in daycare at the age of one year, there ought not to be a finding under s. 19(1)(a) of the Child Support Guidelines Regulation that the respondent is intentionally underemployed.

- [13] The child of the parties has not been in daycare since January 2017. I accept the respondent owes his share of \$84 for that month. I do not accept there are any other arrears of payment for daycare for the child of the parties. The cost of that expense will be split 59% to be paid by the respondent and 41% by the claimant. The respondent owes the claimant \$50 for that unpaid cost.
- [14] The respondent resists paying for Tae Kwon Do as a special expense. I agree that he cannot be compelled to do so. An extracurricular activity is an "ordinary" expense, which is included in the monthly child support payment (see: *S.H. v. L.H.*, 2016 BCSC 353). The evidence that the claimant proffered to elevate the Tae Kwon Do expense out of the category of an ordinary expense into a special expense is a vague recommendation made in a letter over the signature of a physician from Sunny Hill Health Centre for Children. The letter is not sufficient, in my opinion, to transform the cost of Tae Kwon Do into a special expense.
- [15] Further, on the evidence before me I cannot determine there are arrears of child support. On the contrary, I accept the submission of the respondent that he voluntarily increased his child support payments beyond the amount required in the Order.
- [16] The legal obligation on the respondent to pay child support exists independent of any court order (*D.B.S. v. S.R.G.*, 2006 SCC 37 at para. 54). A payor parent is obliged to pay an amount consistent with his or her income and the actual amount owing may fluctuate over time. On the evidence and the submissions of the respondent, I am satisfied he has adhered to the legal obligation imposed on him independently of the Order.
- [17] The respondent has provided a letter from his employer which sets out his income when he returns to work. He submits that based on that letter his guideline income on his return to work on November 9, 2018, will be \$77,317.50. I have no evidence to depart from that amount of income. At present the respondent is paying \$612.50 on an annual guideline income of \$48,000. He is not obliged to pay more until his income increases when he returns to work. The guideline amount will be \$739.
- [18] I make no order regarding the reimbursement of the dental expense claimed by the claimant. I am told that the respondent has given her the information she needs to recover that money. If further assistance from the respondent is needed to obtain reimbursement, he is obliged to provide it. No order should be necessary for him to cooperate in that regard. If he does not, I will hear an application by telephone. If there are medical expenses not covered by insurance the respondent must pay his proportionate share.
- [19] The difficulties between the parties in regard to child support, at least in part, appear to be caused by a failure to share information about their respective incomes. There will be an order that the parties will exchange their income tax notices of assessment no later than the beginning of June of each year until there is agreement to cease doing so, or until a further order of this Court or until the child ceases to be a child of the marriage. There will also be an order that the respondent provide copies of his pay stubs for November and December 2018 to the claimant, no later than January 2019.

[20] The parties will each bear their own costs of this application.

"Affleck J."

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Prepared on 26 October 2026 · Esheria