

CANADA / JUDGMENT

Atkinson v. Atkinson

2006 BCSC 625

COURT

Supreme Court of British Columbia

DECIDED

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2006 BCSC 625 Atkinson v. Atkinson IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Atkinson v. Atkinson, 2006 BCSC 625 Date: 20060420 Docket: 31044 Registry: Kamloops Between: John Rexford Atkinson Plaintiff And Elizabeth Ann Atkinson Defendant Before: The Honourable Mr. Justice Powers Reasons for Judgment Counsel for the Plaintiff D.C. Dundee Counsel for the Defendant C.C. McLeod Date and Place of Trial/Hearing: March 31, 2006 Kamloops, B.C.

INTRODUCTION

- [1] This decision deals with the amount of support that Ms. Atkinson, the defendant should be required to pay to Mr. Atkinson, the plaintiff for the support of their child, Laura born in June of 1985. The parties were divorced by an order granted August 1, 2003. Ms. Atkinson's Federal Child Support Guideline (the "Guidelines") income was found to be \$72,528.00 and the amount of support was set at \$585.00 per month. The amount of child support payable when the child began university was to be determined by a court application if the parties were unable to agree. Laura did commence university September of 2003. The parties have not been able to agree as to the appropriate amount for child support. Mr. Atkinson's notice of motion seeks an increase in child support and that increase being made retroactive to and including September 1, 2003.

BACKGROUND

- [2] Ms. Atkinson complied with the divorce order which was made by consent up to and including September 1, 2005. There was a brief period of time when payments were made directly to the child instead of Mr. Atkinson. The last payment was made September 1, 2005 when a direct payment was made to Laura. Subsequent to that between October and December, 2005 Ms. Atkinson paid directly to Laura the sum of \$715.00. Ms. Atkinson has set aside money to pay support when it is fixed by the court but because of the inability of the parties to agree on the amount she made no payments other than the small amounts that I referred to from September 2005. I directed at the hearing that she pay \$2,795.00 which would be the amount pursuant to the order from October 1, 2005 to and including March of 2005, less the amount already paid. Mr. Atkinson and Laura will cooperate with Ms. Atkinson, provide her with the information necessary to allow her to claim the tax

deductions that she might be entitled to regarding the contribution towards Laura's education for 2004, 2005 and 2006. The tax deductions do not appear to have been claimed by anybody at this point.

- [3] I pointed out during submissions that in my opinion it was inappropriate for a parent to simply cease making payments all together because there is a dispute between the parties as to the appropriate amount to be paid. The payor should pay the amount required pursuant to the order unless there is no financial means to do so, and make an application to vary the order if they feel that it should be revised downward. The least I would expect a parent to do is pay the amount that they felt was appropriate, but they should be aware if they do so, that they are falling into arrears.
- [4] During submissions it became clear that Mr. Atkinson was seeking a variation of the order effective January 1, 2005 and not before.
- [5] Ms. Atkinson does agree that she and Mr. Atkinson should both contribute to the cost of their child's education and support while she is pursuing her undergraduate degree and that their child should do what she can to contribute to the cost of her own education. They disagree as to what are the reasonable costs of their child's education and what amount each of them should contribute.
- [6] The parties agree that the appropriate section of the Guidelines that would be applied is s. 3(2)(b):
 - (2) Unless otherwise provided under these Guidelines, where a child to whom a child support order relates is the age of majority or over, the amount of the child support order is
 - (a) the amount determined by applying these Guidelines as if the child were under the age of majority; or
 - (b) if the court considers that approach to be inappropriate, the amount that it considers appropriate, having regard to the condition, means, needs and other circumstances of the child and the financial ability of each spouse to contribute to the support of the child.
- [7] Also in determining the amount I must consider s. 7(1)(e) of the Guidelines: 7.(1) In a child support order the court may, on either spouse's request, provide for an amount to cover all or any portion of the following expenses, which expenses may be estimated, taking into account the necessity of the expense in relation to the child's best interests and the reasonableness of the expense in relation to the means of the spouses and those of the child and to the family's spending pattern prior to the separation:
 - (e) expenses for post-secondary education; and
- [8] The parties agree that Laura continues to be a child of the marriage as she continues in full time attendance at a university. The parties also agreed that the following principles correctly set out the law in British Columbia. WHAT AMOUNT IS "APPROPRIATE"?

- [9] The *Wesemann v. Wesemann*, [1999] B.C.J. No. 1387 case suggests the court should consider:
- (a) the reasonable needs of the child at school, including accommodation, food, clothing, and other miscellaneous expenses as well as the child's actual post-secondary expenses;
 - (b) the ability and opportunity of the child to contribute to those needs; and
 - (c) the ability of the parents to contribute to those needs.
- [10] In considering the ability of the child to contribute financially, the court must keep in mind that:
- (a) the availability of student loan money does not require the child to obtain the loan (see: *Louise v. Scheuer* (1985), 15 B.C.L.R.)
 - (b) student loans do not defray the cost of education, they merely defer it (see: *Wesemann v. Wesemann*, [1999] B.C.J. No. 1387);
 - (c) just because a child has an income, he or she does not necessarily have to apply all of that income to his or her education (see: *Wesemann*);
 - (d) part-time work during school may interfere with studies (see: *Darlington v. Darlington*, [1997] B.C.J. No. 2534 BCCA and *Wesemann*);
 - (e) it is well known that the cost of post-secondary education is high and the availability of well paid employment for students is scarce (see: *Darlington*).
- [11] It may be appropriate to apportion the parents' contributions in the same manner as s. 7 (see: *Wesemann*). RETROACTIVE VARIATION
- [12] The court has discretion to vary support orders retroactively. The leading case is *L.S. v. E.P.*, 175 D.L.R. (4th) 423. Factors which favour retroactive effect include:
- (a) the need of the child/recipient and an ability to pay by the payor;
 - (b) some blameworthy conduct by the payor, usually as regards disclosure;
 - (c) the need for the recipient to encroach on capital; and
 - (d) that the payor has notice of an intention to pursue (more) support.
- [13] Both parties acknowledge the difficulty in determining what is an appropriate amount in this case. They disagree as to what the appropriate expenses are for their child attending university, what amount the child should contribute to those expenses and how the balance should be apportioned between the parents. MR. ATKINSON'S CIRCUMSTANCES:

- [14] During the marriage and up until sometime in 2005 Mr. Atkinson was self employed as a real estate appraiser. The four years before 2005 his average income was \$25,500.00. His best year was 2004 with an income of \$36,661.00. In 2005 his income was only \$15,000.00 because he decided to leave the appraisal business and take training as a real estate sales person. He has completed his course and his exams to become a real estate sales person and is presently awaiting the results of his exams. It is not clear what his income might be in 2006.
- [15] Ms. Atkinson takes the position that Mr. Atkinson is capable of earning more money than he has in the past if he would simply apply himself. He is remarried and his common-law spouse has a steady income. Ms. Atkinson's position is that Mr. Atkinson is spending more time than he should, taking holidays with his new spouse when he should be applying himself to earning or generating more income. Ms. Atkinson also states that it was unreasonable for Mr. Atkinson to change employment at the time that he did.
- [16] Mr. Atkinson agrees that for the purposes of calculating child support obligations, it is reasonable to attribute income to him based on what his prior income was. While he was not working, he supplemented his income by drawing down on his RRSP's and also used those monies to help support Laura's education. There was discussion whether his income to be attributed to him should be the average of his last three years, or his best years' income, which was 2004; that is \$36,661.00. For the purposes of this decision, I am satisfied that it is appropriate to attribute income to him of \$37,000.00. It is alleged that he could have earned more if he applied himself, but I have no evidence that would assist me in determining what a reasonable income might be for an appraiser in Kamloops.
- [17] Mr. Atkinson has filed a property and financial statement January 27, 2006 and states that his expenses are \$6,252.10 per month or approximately \$75,025.00 per annum. Included in those expenses \$1,900.00 per month for payments for Laura.
- [18] Under Utilities he has an unspecified "other" \$100.00. Under Health and Drugs he has \$150.00. Under Personal Education \$75.00 and other unspecified \$150.00. It is not clear what, if any adjustments should be made. It is obvious, however, that these are estimates of his expenses rather than the actual amount of his expenses. I do not have the details of his present spouse's income, but his expenses should be reduced by at least her reasonable share of those expenses.
- [19] He also has unsecured debts for which he pays \$787.00 per month. Unsecured debts include credit cards and lines of credit and total approximately \$70,000.00 of which almost \$30,000.00 is credit card debt. He has some equity in his home which shows total assets of \$370,500.00 and liabilities of \$265,370.00, of which \$195,000.00 is the mortgage on his home. His net position is about \$105,000.00. He is 58 years of age and clearly his financial circumstances are not good. MS. ATKINSON'S CIRCUMSTANCES:

- [20] Ms. Atkinson lives in Burnaby, British Columbia and works for a credit union, but I assume at an executive level, based on her income. Tax returns indicate that her employment income was as follows: 2002: \$80,574.00 2003: \$86,150.00 2004: \$93,476.00 2005: \$94,436.00
- [21] It is reasonable to assume that her income in 2006 will be comparable to her income in 2005; that is approximately \$94,000.00. The original order was based on a lower amount of income that she actually earned, but in addition to the amount of support pursuant to the order she provided Laura with a cell phone (\$100.00 per month) and purchased a computer for her, on which she is still making payments (\$71.00 per month). Ms. Atkinson also made some other contributions directly to Laura from time to time.
- [22] Ms. Atkinson's property and financial statement was filed February 21, 2006. Her expenses are claimed at \$9,693.91 per month for an annual total of \$103,654.92.
- [23] These expenses include housing expenses of about \$2,600.00 per month. Ms. Atkinson's mortgage on her town house or condominium is approximately \$213,000.00.
- [24] Her expenses include payments on a line of credit and credit cards and for an RRSP for a total monthly payment of \$1,055.11 against a liability of \$93,185.00.
- [25] The expenses also include payments on a fridge, barbeque and microwave of \$270.98 per month, and vacation of \$100.00 per month.
- [26] The expenses also include child care of \$500.00 per month (the purposed amount of support), clothing for the child \$100.00 per month, laptop computer payment \$71.50 per month. Her expenses are significant because of the high cost of living in the Lower Mainland, especially regarding housing in the Lower Mainland.
- [27] Her net financial position after considering her total assets of approximately \$450,000.00, liabilities of \$306,000.00 leaves \$143,000.00 - \$144,000.00.
- [28] Ms. Atkinson is approximately 57 years of age and her financial circumstances are also poor despite the fact she earns a good income.
- [29] Both Mr. and Ms. Atkinson are in the position where they do not receive pensions through their employment and must be providing for their own future including the attempts to retire debts and acquire savings. LAURA'S CIRCUMSTANCES:
- [30] Laura is in her third year at the University of Victoria in a Bachelor of Arts program. In her first year Laura received a student loan advance of \$9,350.00. In her second year, again a student loan of \$9,350.00. She also had employment income during the year 2004 of \$6,141.00.
- [31] Mr. Atkinson married his present spouse in 2005 and because of his spouse's income Laura no longer qualified for student loans. She did receive a grant of \$2,500.00. She was having some difficulties and did not work that year other than earning the nominal amount of \$528.00.

- [32] Mr. Atkinson estimates Laura's reasonable expenses as follows: Expense Yearly Monthly
Living Expenses-Housing \$ 6,600.00 \$ 550.00 Personal \$ 1,800.00 \$ 150.00 Food \$ 3,000.00 \$
250.00 Transportation \$ 4,800.00 \$ 400.00 Subtotal: \$16,200.00 \$1,350.00 Books \$ 1,000.00 \$
83.33 Tuition \$4,846.77 \$ 403.90 TOTAL: \$22,046.77 \$1,837.23
- [33] Ms. Atkinson takes the position that those expenses are excessive particularly with regard to the amount allocated for transportation at \$400.00 per month and the amount allocated for food at \$250.00 per month. She argues that a more realistic approach to these expenses are estimated in the application of Advanced Education Student Financial Aid form a document which is page 17 of Mr. Atkinson's Affidavit of January 25, 2006. These reflect a student's moderate standard of living and single student away from home as follows: Shelter (2 bedroom apartment shares, including utilities) \$507.00 Food (Agriculture Canada's Nutritious Food Basket) \$207.00 Miscellaneous (personal/health care, clothing, household cleaning, communications) \$208.00 Local public transportation \$ 64.00 Total Allowance: \$986.00
- [34] Rounded to \$1,000.00 per month this is equivalent to \$12,000.00 per annum rather than \$16,200.00. Ms. Atkinson agrees that the tuition is approximately \$4,800.00 to \$5,000.00 per annum suggests that the books be less than \$1,000.00 per annum. She points out that a bus pass included in the tuition and books should be approximately \$190.91 per semester or \$382.00 annually.
- [35] Laura is able to walk to school from her place of residence, but uses her car to attend to her part time employment. It should be obvious that there is not enough money available to cover all of those expenses. Some expenses are necessary and I find that the reasonable expenses are as follows: Living Expenses \$12,000.00 Tuition \$ 5,000.00 Books \$ 1,000.00 Total: \$18,000.00
- [36] During 2005, Laura was only able to contribute approximately \$3,000.00 through grants and employment earnings towards her education and living expenses leaving approximately \$15,000.00.
- [37] Laura's circumstances have changed according to this application. She now has part time employment which she expects will be full time during the summer. She is working in a retail store about 20 hours a week. Wages and commissions are approximately \$10.00 - \$12.00 per hour which equals \$200.00 - \$240.00 per week, and during the school year of approximately 33 weeks which equals approximately \$6,600.00 - \$7,920.00. During the summer period of approximately 17 weeks, she expects to work about 40 hours a week earning approximately \$400.00 - \$480.00 per week for an estimate of \$6,800.00 - 8,160.00. I assume there may be approximately two weeks of each year when she may not be able to work because of time spent with family or studying.
- [38] Hopefully Laura will continue to earn grants as she did in 2005 for approximately \$2,500.00.

- [39] Therefore her total income is being estimated at approximately \$13,400.00 - \$16,080.00 plus the \$2,500.00 grant. Both parties agree that Laura should be paying a significant contribution towards her expenses. Mr. Atkinson argues, however, that she should also be able to enjoy some of the benefits of her work and not commit all of her income to her education expenses.
- [40] Ms. Atkinson was of the view that it would have been more responsible for Laura to attend university in Kamloops where her father is or in Burnaby where Ms. Atkinson lives. Ms. Atkinson's evidence is that she was prepared to find accommodation for Laura in Burnaby if she chose to attend school in Burnaby. Mr. Atkinson's position is that Laura went to the University of Victoria because of the course selection there and did not think it would be practical for her to live with her mother because they did not always get along. Ms. Atkinson does not agree and believes that she could have provided additional emotional support and stability for Laura.
- [41] When Laura originally went to the University of Victoria she was staying with her boyfriend's parents; that ended sometime in 2005. She then obtained a basement suite which she now shares with her boyfriend. They each pay their own share of the expenses.
- [42] I agree with Ms. Atkinson that it would have made economic sense for Laura to attempt to go to school where either of her parents could provide residence for her with little additional cost to themselves. The result of choosing to attend school away from home is that Laura will either have to compromise her lifestyle to some extent or contribute more to her own expenses as her parents do not have the means to finance all those expenses for her. They must begin providing for their own future as well as Laura's.
- [43] Laura should be able to contribute something to her own expenses; perhaps as much as \$10,000.00. This would leave approximately \$8,000.00 that her parents could assist her with. If Mr. Atkinson's income is approximately \$36,000.00 to \$40,000.00 and Ms. Atkinson's \$94,000.00 per annum, then she has approximately 70% to 72% of the aggregate income. If the \$8,000.00 expense were apportioned between them based on that, Ms. Atkinson's contribution would be approximately \$5,600.00 per annum; a little under \$500.00 per month. She has suggested that a reasonable amount for child support would be \$500.00 per month. I find that this is appropriate commencing as of April 1, 2006.
- [44] The question then is what amount, if any, should Ms. Atkinson have been paying from January 2005 up to and including March 1, 2006, a total of fifteen months? The current order is \$585.00 per month, which Ms. Atkinson will have complied with when she pays the monies that I have ordered earlier. The question is should it be more than that? Laura was unable to contribute very much to her education in 2005 and earned very little money. Her father, therefore, paid the majority of her expenses. If Ms. Atkinson were to pay 70% of the approximate \$18,000.00 in expenses, this would be \$12,600.00, or just over \$1,000.00 per month. If Ms. Atkinson were required to pay the Guideline amount based on her income of \$94,000.00, the amount would be approximately \$716.00 per month. I find that in this case

an appropriate amount for Ms. Atkinson to have contributed during the period from January of 2005 until and including March 1, 2006 is \$700.00 per month. This means that there are arrears owing of \$1,725.00.

- [45] I should point out that I consider 2005 to be an exception. Laura was unable to work or contribute to her own expenses, and she did not qualify for student loans. She had anticipated being able to qualify for student loans which would have allowed her to contribute a reasonable sum to her expenses, even though she was residing away from home. Had this turn of events been expected, it would have made sense for her to register at a university closer to one of her parent's homes simply to reduce her costs. Her parents are willing and can contribute something to her expenses, but given their age and their financial circumstances must also provide for their own future, as I have said earlier.
- [46] Unless counsel seek to address the matter, the parties will each bear their own costs. "R.E. Powers, J." The Honourable Mr. Justice R.E. Powers

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