
CANADA / JUDGMENT

Atkinson v. Atkinson

2011 BCSC 1816

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Supreme Court of British Columbia

DECIDED

10 November 2011

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2011 BCSC 1816 Atkinson v. Atkinson

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Atkinson v. Atkinson,

2011 BCSC 1816

Date: 20111110

Docket: D35936

Registry: New Westminster

Between:

Elly Mae Atkinson, also known as Elly Mae Boonstra

Claimant

And:

Charles Ian Gordon Atkinson

Respondent

Before: The Honourable Mr. Justice Schultes

Oral Reasons for Judgment

In Chambers

November 10, 2011

Counsel for the Claimant:

D.J. McLellan

Counsel for the Respondent:

No Appearance

Place and Date of Hearing:

New Westminster, B.C.

October 25, 2011

Place and Date of Judgment:

New Westminster, B.C.

November 10, 2011

Introduction and Background

- [1] Charles Atkinson applies, pursuant to s. 19(7) of the Divorce Act, to have a provisional order concerning child support made by Justice Maddalena of the Ontario Superior Court on March 25, 2011 confirmed in British Columbia.
- [2] Mr. Atkinson and Elly Mae Boonstra, were divorced in 1998. They have two children together: Jody, now 25, and Jeremy, now 21.
- [3] Prior to the order made in Ontario that Mr. Atkinson seeks to have confirmed, the last child support order in effect was the one made by Mr. Justice Preston in New Westminster on June 15, 2003. Pursuant to it, the respondent was to pay \$741.00 per month for the support of the children. No specific provision was made in that order for the payment of special or extraordinary expenses.
- [4] Ms. Boonstra deposes that Mr. Atkinson unilaterally reduced his support, by declining to pay for one of the children as of August 2007 and then ceasing payments altogether one year later.
- [5] The Family Maintenance Enforcement information that Justice Maddalena had available to her indicated that Mr. Atkinson was more than \$17,000 in arrears at the time of his application for the provisional order. By the time of the present application, the materials filed by Ms. Boonstra indicated that the figure was in the area of \$19,000. Counsel for Ms. Boonstra advised during submissions that Mr. Atkinson's current arrears are now slightly in excess of \$22,000.
- [6] After considering the material filed by Mr. Atkinson and noting that the very nature of the application meant that there were no responsive materials, Justice Maddalena made the following provisional orders:
 - 1. Child support payable for Jeremy was to terminate effective September 1, 2008.
 - 2. Child support payable for Jody was to terminate July 31, 2007.

3. Consequent upon these retroactive terminations, Mr. Atkinson's arrears were fixed at \$4,736.23 and made payable at \$250.00 per month.
4. The application to have a lower amount in Guidelines support payable for the amounts of child support that remained owing was dismissed, due to a lack of sufficient evidence from Mr. Atkinson of undue hardship.

Applicable legislation and legal principles

- [7] The relevant provisions of s. 19 of the Divorce Act that govern my consideration of this matter and whether to confirm the provisional order are as follows:

Right of respondent

- (5) In a proceeding under this section, the respondent may raise any matter that might have been raised before the court that made the provisional order.

Order of confirmation or refusal

- (7) Subject to subsection (7.1), at the conclusion of a proceeding under this section, the court shall make an order
- (a) confirming the provisional order without variation;
 - (b) confirming the provisional order with variation; or
 - (c) refusing confirmation of the provisional order.

Guidelines apply

(7.1) A court making an order under subsection (7) in respect of a child support order shall do so in accordance with the applicable guidelines.

...

- [8] Although not explicitly stated, it is obvious that Justice Maddalena's conclusion in making the provisional orders was that both Jeremy and Jody had, as of the dates that she terminated child support in respect of them, ceased to be children of the marriage, as that term is defined in the Divorce Act. The definition of "child of the marriage" in s. 2 of the Divorce Act refers to a child of former spouses who:
- (b) is the age of majority or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessities of life;
- [9] It is clear from the case authorities that "other cause" often includes the pursuit of post-secondary studies, the financial burden of which the young person, although now of the age of majority, is unable to shoulder alone.

- [10] In *Farden v. Farden* (1993), 48 R.F.L. (3d) 60 (B.C.S.C.) Master Joyce (as he then was) identified at para. 15 what have come to be accepted as the relevant factors determining whether this definition continues to be met by an adult child who is attending post-secondary studies.
- [11] The Court of Appeal confirmed the relevance and applicability of the so-called Farden factors in *Darlington v. Darlington* (1997), 32 R.F.L. (4th) 406. Of these factors, the ones that appear to be relevant to the current application are:
- (1) whether the child is in fact enrolled in a course of studies and whether it is a full time or part time course of studies;
 - (2) whether or not the child has applied for, or is eligible for, student loans or other financial assistance;
 - (3) the career plans of the child, i.e., whether the child has some reasonable and appropriate plan or is simply going to college because there is nothing better to do;
 - (4) the ability of the child to contribute to his own support through part-time employment;
 - (5) the age of the child;
 - (6) the child's past academic performance, whether the child is demonstrating success in the chosen course of studies;
- [12] As *Darlington* indicated, at para. 14, there does not need to be evidence with respect to each one of these factors before a court can be satisfied that the child remains a child of the marriage.
- [13] Section 3(2) of the Child Support Guidelines provides:

Child the age of majority or over

- (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.
- [14] Our Court of Appeal has held that s. 3(2)(b), (which involves a broader consideration of the listed factors, rather than just the Guidelines amounts) should generally be used for calculating support for a child who remains a child of the marriage because she is pursuing post-secondary education: *W.P.N. v. B.J.N.* (2005), 10 R.F.L. (6th) 440 at para. 42.

- [15] The purpose of continuing child support payments for a child over the age of majority who is still living at home and pursuing post-secondary education is to recognize that the parent with whom the child resides still incurs costs in providing a home for the child: *Wesemann v. Wesemann* (1999), 49 R.F.L. (4th) 435 (B.C.S.C.).
- [16] However, when the child is able to make a contribution to his or her own education and upkeep through part-time work, that amount should be taken into account when assessing child support obligations. The child is entitled, however, to retain some of his or her earnings: *Glen v. Glen* (1997), 34 R.F.L. (4th) 305 (B.C.S.C.).
- [17] Where a variation of child support is sought under the Divorce Act that would have the effect of reducing or cancelling accumulated arrears of support, the court must be satisfied that there has been a material and long-lasting change of the kind that, had it been known at the time of the original order, would have resulted in a different order: *Earle v. Earle*, 1999 BCSC 283 at para. 19.

Evidence relating to Jody

- [18] Ms. Boonstra concedes that Jody ceased to be a child of the marriage effectively July 1, 2009. She took the proactive and fair step of informing the FMEP that she no longer sought enforcement of the existing order with respect to Jody as of that date.
- [19] It is common ground between the parties that Jody graduated with a Bachelor of Science degree from Simon Fraser University in August of 2009. Mr. Atkinson's position is that Jody ceased to be a child of the marriage about two years before that. He describes her living situation during that period as:
- she moved out of Ms. Boonstra's home in July 2007;
 - she lived independently from then until May 2008, at which point she moved in with Mr. Atkinson until September 2008; and
 - she then lived with Ms. Boonstra until June 2009 when she moved out to live with her partner.
- [20] In 2007, Jody's line 150 income was more than \$12,000 and her tuition was about \$5,000. In 2008, her income was \$10,745, and her tuition was just slightly more than in 2007.
- [21] No income tax information was provided by Mr. Atkinson for Jody for 2009, but he deposed that she received a scholarship that effectively paid her tuition for that year and that, after forgiven amounts are deducted, she had a student loan debt of about \$14,000.
- [22] In contrast, Ms. Boonstra deposes that since Jody left her residence on July 30, 2007, she lived as follows:
- from mid-July to the end of August 2007, she lived at the location of her summer job;

- she lived at Ms. Boonstra's address again until November 2008 at which point she moved in with a friend to be closer to school;
- she moved from there to Mr. Atkinson's residence where she lived until September 2008. Ms. Boonstra says -- and this is not contradicted -- that Jody paid him \$100.00 per month for rent during that time.
- Finally, Jody lived with Ms. Boonstra again until June 2009, when it is conceded she ceased to be a child of the marriage.

- [23] Ms. Boonstra says that during the months that Jody did not live with her, she still paid Jody \$150.00 per month, which totals about \$1,650, according to a spreadsheet attached to her affidavit. In addition, she contributed a total of about \$1,800 for other personal expenses that Jody required while living away. I infer from her material that during the times that Jody lived with her she covered all of Jody's household living expenses. She also purchased a vehicle for Jody at a cost of \$4,000 in August of 2008, it appears to facilitate her continuing post-secondary studies. She also paid medical coverage premiums of \$30.00 per month in respect of both children, half of which, about \$390.00, I would attribute to Jody. The total of these amounts, a rough figure at best, is \$7,840.
- [24] As to the respective incomes and apparent means of the parties, Mr. Atkinson's line 150 income for 2007 was slightly in excess of \$31,000; for 2008 just under \$45,000; with a significant drop in 2009 to about \$18,525.
- [25] Ms. Boonstra has deposed that her income in that regard for 2008 was just in excess of \$42,000; for 2009 just under \$40,000; and for 2010, \$43,504.
- [26] As is obvious from these totals, the income figures provided by the parties do not correspond exactly - there is a year in which they do not overlap.
- [27] Balancing the various Farden factors, I have no difficulty in concluding that Jody remained a child of the marriage until June 2009, as Ms. Boonstra contends. From that point onwards, as Ms. Boonstra concedes, there was a material and long-lasting change such that Jody was no longer a child of the marriage and arrears should cease to accumulate from that point.
- [28] With respect to her status before that, although Jody lived away from Ms. Boonstra for some significant periods, the evidence is clear that, except for the short period in which she lived with her father, these other experiences away from home were intended to facilitate her course of study. In addition, while she has contributed significantly to her own education through part-time work, within the context of her relatively small overall income Ms. Boonstra's contributions to her upkeep were, I find, significant.
- [29] However, as I have said, the Court of Appeal has held that strict Guidelines figures are not an appropriate way of assessing the necessary measure of support in circumstances like this. Although there remains a financial obligation on a parent of a child in post-secondary studies, which I find was properly one that fell to Ms. Boonstra in this case, it is nonetheless

the case that a straight table amount does not reflect the increased degree of financial independence that an adult child may develop and the corresponding shifting of financial responsibility away from a parent.

- [30] Applying s. 3(2)(b) of the Guidelines, I think that, 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, the contribution to Jody's care by Ms. Boonstra is an accurate measure of the required parental contribution. In light of the parties' respective incomes, it would normally be appropriate, had there been no decline in Mr. Atkinson's income, for them to divide Ms. Boonstra's \$7,840 contribution equally between them.
- [31] In reaching this conclusion, I have taken into account the absence of income information from Mr. Atkinson for 2007 and the short period of time that Jody stayed with him. For Jody, I would, absent any other considerations, fix his arrears at \$3,920.

Evidence relating to Jeremy

- [32] Justice Maddalena had the following information about Jeremy's residence from Mr. Atkinson:

- Jeremy lived with him from September to December 2008;
- Jeremy then lived in residence at UBC until April 2009;
- He then lived with his mother until August of that year.

- [33] Based on the evidence from Mr. Atkinson, Justice Maddalena was satisfied that Jeremy was able, through savings, summer work, student loans, and an allowance from Ms. Boonstra, to pay for his engineering studies for the 2009 school year. The same was found to be true for 2010, with the exception that Jeremy received income from a co-op placement.
- [34] Mr. Atkinson provided further material before Justice Maddalena suggesting that the same degree of self-sufficiency will be possible for 2012 and 2013, at which point I infer that Jeremy is expected to have completed his studies.
- [35] Ms. Boonstra's affidavit presents a very different, and I find a more complete, picture of Jeremy's situation. She deposed that Mr. Atkinson's description of Jeremy's living arrangements is generally correct, except that since September 2009, Jeremy has rented a room in a private house. Since September 2008, she has provided Jeremy with \$200.00 per month, which as of June of this year totalled just slightly in excess of \$10,000. She has also contributed to such required items as tuition and a computer, but since these would be in the nature of extraordinary expenses, for which there is no current claim by either party, I will put them aside for the moment.
- [36] Ms. Boonstra says that she contributed to:
- Jeremy's housing and food costs in student residence, in the amount of \$2,236.95;

- \$3,200 for unspecified purposes (which I infer were Jeremy's general needs), part of which came from the collapse of an RRSP;
 - cell phone costs of \$3,568.62; and
 - a vehicle for \$4,500.
- [37] The total of these additional amounts, leaving aside the tuition and computer, is \$13,505. She deposed that she expects Jeremy to remain dependent on her for support.
- [38] Applying the Farden factors once again, I am satisfied that Jeremy also remains a child of the marriage. It does not appear, based on the amounts that Ms. Boonstra has been required to contribute to his support, that the respondent's contention that Jeremy has been and will continue to be able to cover his own expenses entirely is realistic.
- [39] As in the case of Jody, I think that s. 3(2)(b) provides the appropriate basis for determining the amount of child support.
- [40] Applying the criteria in that subsection, I think that the monthly allowance, the residence costs and the vehicle are required child support expenses.
- [41] The absence of greater detail explaining the \$3,200 payment means that I do not feel comfortable taking that amount into account at this point. The cell phone bill also seems to be excessive, in light of what I would consider to be a sensible student budget, and I will not take it into account either.
- [42] I think a reasonable measure of appropriate child support costs here is Ms. Boonstra's actual contribution after those amounts are deducted, which is \$16,756. Again, based on respective incomes alone without the recent decline, Mr. Atkinson should be responsible for a 50 percent share and I would normally have fixed his arrears at \$8,378.

Mr. Atkinson's arrears

- [43] The total arrears without adjustment would be \$12,298, but it is clear on the material that Mr. Atkinson suffered a serious decline in income in 2009, a relatively early stage in the accumulation of these arrears, and that he expects that to continue. I think the balancing of factors under s. 3(2)(b) should reflect that decline, which has essentially resulted in a halving of his income.
- [44] Doing the best with the evidence before me, I fix his arrears at \$8,500, which are to be paid off at the rate of \$200.00 per month commencing September 21, 2011 and continuing on the 21st of each month afterwards until all of it is paid.
- [45] Similarly, my finding that Jeremy remains a child of the marriage means that his ongoing support requires some modification, in light of s. 3(2)(b), of what would otherwise be the Guidelines levels.

[46] If a child support application were being made today without a consideration of arrears, on Mr. Atkinson's current reported income the support payable for Jeremy would be \$160.00. I will modify that, but not by much, because Jeremy's ongoing needs remain significant. Therefore, I order that as long as Jeremy remains a child of the marriage the respondent will pay Mr. Atkinson \$150.00 per month towards his support, commencing on September 21st and continuing on the 21st of each month thereafter.

Conclusion

[47] To summarize my orders, pursuant to s. 19(7)(b) of the Divorce Act, I confirm the order of Justice Maddalena of the Ontario Superior Court dated March 25, 2011 with the following variations:

1. Jody Christina Atkinson, born March 28, 1986, ceased to be a child of the marriage on June 30th, 2009.
2. Jeremy Charles Harry Atkinson remains a child of the marriage.
3. Mr. Atkinson's arrears of child support are fixed at \$8,500 and are to be paid at the rate of \$200.00 per month commencing on September 21st, 2011.
4. Mr. Atkinson will pay child support in the amount of \$150.00 per month in respect of Jeremy to Ms. Boonstra commencing on September 21st, 2011.

[48] I think success here has been pretty well evenly divided. The order has not been confirmed, but the position of Ms. Boonstra that it should be rejected in its entirety and the status quo continue in terms of both arrears and child support for Jeremy has also not prevailed either. In those circumstances, I order that the parties each bear their own costs.

"Schultes J."

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Prepared on 25 October 2026 · Esheria