
CANADA / JUDGMENT

B.R.T. v. J.L.T.T.

2011 BCSC 250

COURT

Supreme Court of British Columbia

DECIDED

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2011 BCSC 250 B.R.T. v. J.L.T.T.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

B.R.T v. J.L.T.T.,

2011 BCSC 250

Date: 20110301

Docket: E100539

Registry: Vancouver

Between:

B.R.T

Claimant

And

J.L.T.T.

Respondent

Before: The Honourable Mr. Justice Goepel

Reasons for Judgment

Counsel for the Claimant:

K. Duhra

Counsel for the Respondent:

L.F. Olver

Place and Date of Trial:

Vancouver, B.C.

December 13-17, 2010

Place and Date of Judgment:

March 1, 2011

INTRODUCTION

[1] The issues in this family law case are shared parenting, child support, spousal support, determination of extraordinary expenses and division of family assets. At a judicial case conference on April 13, 2010, the parties consented to an order of joint custody and joint guardianship. On December 17, 2010, at the end of submissions, I ordered the parties divorced and also ordered that the matrimonial home be listed for sale. Although the parties are now divorced, for ease of reference I will refer to them as husband and wife in these reasons.

BACKGROUND

[2] The husband is 39 years old. He is employed as a security patroller for the Greater Vancouver Regional District. The wife is 43 years old. She owns and operates a talent agency which provides background actors for movie and television productions.

[3] The parties met in 1991 when the husband was employed by the wife's talent agency. The husband was then 20 years old and the wife 25. They married on November 28, 1992. Their son, S.T., was born on February 26, 2002. The parties separated on January 29, 2009.

[4] The wife commenced work as a talent agent when she was 19 years old. The wife testified that through the early 2000s she made up to \$60,000 a year operating her agency. In recent years, she has made considerably less. Since separation, she claims she has earned no income whatsoever.

[5] During the early years of the parties' relationship, the husband worked in security and as a bodyguard. He made considerably less than the wife. Since 2004, he has had a permanent position with the Greater Vancouver Regional District. He presently earns approximately \$63,000 a year.

[6] The parties both contributed to family expenses. They appear to have spent more than they earned and throughout their relationship they accumulated debt.

[7] The parties initially lived in rental premises. In November 2001, they purchased a condominium for \$229,000 on Barclay Street (the "Barclay Street Residence"). They paid \$30,000 down and financed the balance. They borrowed \$13,000 of the down payment from E. H., the wife's grandmother, while the balance came from the wife's RRSPs.

- [8] The Barclay Street Residence was initially registered in the wife's name alone. In 2004, the Barclay Street Residence was refinanced and the husband's name was added to title. A second refinancing took place in 2008. The two refinancings were necessary to pay down accumulated debts.
- [9] The Barclay Street Residence was recently appraised at \$476,000. There is approximately \$306,000 owing on the mortgage. Since the conclusion of the trial, the parties have entered into an agreement to sell the Barclay Street Residence for \$421,000. The sale is subject to the purchasers arranging financing.
- [10] The circumstances leading to the parties' separation on January 29, 2009 are a matter of some dispute. The wife called the police after she alleges that the husband threatened her. The police came to the Barclay Street Residence and suggested that the husband leave. While the husband denies making any threats, he does agree that he moved out of the premises at the suggestion of the police.
- [11] Following the incident of January 29, 2009, a criminal charge was brought against the husband. The charges were ultimately stayed.
- [12] Since separation, the wife has continued to reside in the Barclay Street Residence. She has paid the mortgage and strata fees. The husband presently lives in a one-bedroom basement suite.

DIVISION OF ASSETS

- [13] The parties' main asset is their interest in the Barclay Street Residence. Additional assets include the husband's pension (\$12,316.38), the wife's RRSPs (\$25,000), a 1999 Chevrolet truck which was purchased in 2003 for \$30,000 and a 1992 Fifth Wheel which was purchased in 2003 for approximately \$6,000. The truck is in the husband's possession and the Fifth Wheel is in the wife's possession. No evidence was led concerning the present value of the truck and the Fifth Wheel. While the truck has clearly depreciated in value, it undoubtedly remains somewhat more valuable than the Fifth Wheel.
- [14] During their marriage the parties accumulated considerable debt. The debts include a joint line of credit at the CIBC (\$6,500), the wife's outstanding income tax bill (\$10,000) and monies borrowed from E. H. for the down payment on the Barclay Street Residence and for use during a family vacation. The exact amounts owed to E. H. are in issue. It is common ground that she lent \$13,000 towards the down payment. The wife and E. H. both suggest she lent \$2,500 on two subsequent occasions to finance the parties' vacations at Cultus Lake. The husband says that they borrowed \$2,500 for Cultus Lake on only one occasion. The husband's evidence is corroborated by a letter written by the wife's then solicitor shortly after separation, which indicated that there was but one \$2,500 debt owed to E. H. In addition, the wife repaid some money to E.H. The wife was unable to provide any evidence as to the amounts repaid. E.H. testified she had been repaid somewhere between \$5,000 and \$8,000. Doing the best I can with this somewhat unsatisfactory evidence, I find the

indebtedness to E.H. to be \$10,000.

- [15] The wife says the assets should be reapportioned in her favour. She says the husband now has a steady job and a good pension, while she is without income. She notes that since separation she has paid all the mortgage payments and reduced the principal on the mortgage by approximately \$25,000.
- [16] The husband says the family assets and debts should be divided equally between the parties. He notes that the wife has had exclusive use of the residence since separation while he has had to find and pay for other accommodation. Although she has paid the mortgage payments and condo fees in relation to the Barclay Street Residence, she has paid nothing for use and occupation of the premises. In addition, the wife for the last several months has been renting a portion of the Barclay Street Residence and keeping the income generated from that rental.
- [17] Throughout the marriage, the parties shared the costs of expenses and upkeep of the Barclay Street Residence. Although the down payment came in part from the wife's RRSPs, those RRSPs were family assets earned while the parties were together. When the parties initially separated, they agreed that they would immediately sell and share equally the proceeds from the sale of the Barclay Street Residence. The wife subsequently changed her mind and chose instead to unilaterally renovate the Barclay Street Residence so it could accommodate a tenant.
- [18] I see no reason to depart from the parties' agreement to divide the proceeds equally. I direct that the net proceeds from the Barclay Street Residence sale be divided equally. Before the division takes place the family debts consisting of the CIBC line of credit, the \$10,000 owed to E.H., and the wife's outstanding taxes will be paid. Any existing arrears for child and spousal support will be paid from the husband's share of the proceeds. In regard to the remainder of the assets, I direct that each retain the assets now in their possession. While the wife's RRSPs are greater than the husband's pension, that is offset in that the truck in turn is more valuable than the Fifth Wheel.

CUSTODY/ACCESS

- [19] To their credit the parties were within days of their separation able to agree to joint custody and joint guardianship. They also agreed to an interim access schedule that was to remain in effect until the sale of the Barclay Street Residence. The access schedule reflected the husband's four days on and four days off work schedule. The husband has access to S.T. during his four days off work. When his off days are on school nights, S.T. returns to the wife's home to sleep. On non-school nights, S.T. stays overnight at the husband's residence.

- [20] The husband now wishes to amend the access schedule in order to create an equal parenting arrangement. The only change to the schedule would be that on school nights in which the husband has access, S.T. would sleep at the husband's residence and he would take S.T. to school in the mornings. The wife opposes any change in the access regime. The wife submits that S.T. is presently doing well and there is no need to change what is working.
- [21] S.T. is presently in Grade 3 in a Montessori School in downtown Vancouver. He appears to be doing well at school. He participates in karate and has been involved in soccer. He is by all indications thriving. He appears devoted to both his parents and both parents recognize that the other is important to S.T.
- [22] Dr. Krywaniuk prepared a View of the Child Report. He interviewed both parents and S.T. His impression was that S.T. got along well with both parents. He believed that S.T. would like to spend more time with his father than he is currently doing and that would include overnight visits on school nights.
- [23] S.T. reported to Dr. Krywaniuk that when he told his mother that he wanted to spend more time with his father, his mother told him there was nothing she could do about it and that his father did not have time to spend more time with him. This is patently false. The husband has sought an equal parenting schedule since shortly after separation. The wife has resisted such a schedule.
- [24] I see no reason why these parties should not move to a full shared parenting regime with S.T. spending four days with one parent and then four days with the other. Both parties' work schedules can accommodate such a regime. The only significant impact of this change is that S.T. would stay at his father's on school nights, have breakfast there, and then go to school. Such a regime is reasonable and in S.T.'s best interest. The parties' present access schedule will be amended immediately so that S.T. spends four days with one parent and then four days with the other.

CHILD SUPPORT

A. Judicial History

- [25] On April 22, 2009, following a family court conference in Provincial Court and by consent, the husband was ordered to pay child support of \$339.00 per month. The order specifically stated that it was without prejudice. After these proceedings were commenced, the wife filed an application seeking retroactive child support. The matter came before Mr. Justice Sewell on August 4, 2010. He found pursuant to the provisions of Federal Child Support Guidelines, S.O.R./97-175 (the "Guidelines") that the husband's Guideline income was \$60,000 and the wife's Guideline income was \$24,000. Based on those findings, he made an interim order of child support in the amount of \$561. He found arrears of child support for the period of February 1, 2009 to August 31, 2010 in the amount of \$4,991.

[26] Mr. Justice Sewell further ordered the husband pay 71% of extraordinary expenses and the wife 29%. He found those expenses totalled \$6,222 a year including Montessori school expense of \$2,400, Canadian scholarship fund of \$2,006, soccer expense of \$360, karate expenses of \$312, Beavers expense of \$430, swimming expense of \$169 and health-related expenses (orthotics) of \$545.

B. Wife's Guideline Income

[27] Before considering child support, it is first necessary to give consideration to the wife's income. As previously discussed, the wife has operated a talent agency for more than 25 years. While operating the agency, she has earned up to \$60,000 per year. In recent years, the agency has been less successful. She blames the decline in business on increased competition. She says that the film industry is historically cyclical and she is hopeful her business will pick up.

[28] Since separation, the wife has earned no money whatsoever from her talent agency. What little revenue has been generated has not met expenses. The complete failure of the wife to earn money as a talent agent cannot be explained by a downturn in film production. Evidence was called at trial to indicate that the film industry is presently as busy as it ever has been.

[29] The wife is clearly a bright, resourceful and talented woman. She has shown great skill in obtaining various benefits for her son. She spends a great deal of time volunteering at school and church activities. While she is to be commended for her volunteer efforts, those efforts do not excuse her failure to take any steps to use her many talents to support herself. Her financial statements indicate annual expenses of \$42,000. Taking into account her line of credit upon which approximately \$21,000 has been accumulated since separation, it is not clear how she is paying those expenses.

[30] Section 19(1) of the Guidelines allows a court to impute such income to a parent as it considers appropriate in the circumstances. Pursuant to Section 19(1)(a) of the Guidelines, before income can be imputed, the court may find that the person is intentionally underemployed or intentionally unemployed. A parent is intentionally unemployed if he or she chooses not to work when capable of earning an income. In *Hanson v. Hanson*, [1999] B.C.J. No. 2532 (S.C.), Martinson J. at para. 14 set out the principles that apply when determining capacity to earn an income:

The following principles apply when determining capacity to earn an income. (See Dr. Julien D. Payne, *Imputing Income*, "Determination of Income; Disclosure of Income", *Child Support in Canada*, Danrab Inc., August 3, 1999.)

1. There is a duty to seek employment in a case where a parent is healthy and there is no reason why the parent cannot work. It is "no answer for a person liable to support a child to say he is unemployed and does not intend to seek work or that his potential to earn income is an irrelevant factor." (Van Gool at para 30.)
 2. When imputing income on the basis of intentional under-employment, a court must consider what is reasonable under the circumstances. The age, education, experience, skills and health of the parent are factors to be considered in addition to such matters as availability of work, freedom to relocate and other obligations.
 3. A parent's limited work experience and job skills do not justify a failure to pursue employment that does not require significant skills, or employment in which the necessary skills can be learned on the job. While this may mean that job availability will be at the lower end of the wage scale, courts have never sanctioned the refusal of a parent to take reasonable steps to support his or her children simply because the parent cannot obtain interesting or highly paid employment.
 4. Persistence in unremunerative employment may entitle the court to impute income.
 5. A parent cannot be excused from his or her child support obligations in furtherance of unrealistic or unproductive career aspirations.
 6. As a general rule, a parent cannot avoid child support obligations by a self-induced reduction of income.
- [31] The wife is capable of earning an income. Since separation she has persisted in unremunerative employment. In these circumstances, the Court is entitled to impute income.
- [32] The husband submits that I should impute to the wife an income of \$60,000 per year based on the fact she has in the past shown she is capable of earning that amount. I do not think it would be appropriate to impute that amount at this time. That is the maximum that the wife has ever earned. It is necessary, however, to impute income to the wife because she is clearly able to work and has for her own reasons chosen not to. I impute an income to the wife of \$36,000 per year. I suspect that once the wife seriously attempts to earn an income that she may well in the future earn in excess of that amount.

C. Shared Custody

i. Overview

[33] Section 9 of the Guidelines governs in situations of shared custody. Section 9 states:

9. Where a spouse exercises a right of access to, or has physical custody of, a child for not less than 40 per cent of the time over the course of a year, the amount of the child support order must be determined by taking into account

- (a) the amounts set out in the applicable tables for each of the spouses;
 - (b) the increased costs of shared custody arrangements; and
 - (c) the conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought.
- [34] In *Contino v. Leonelli-Contino*, [2005] 3 S.C.R. 217, the Supreme Court of Canada provided guidance as to the process to be followed in calculating child support under s. 9. At para. 39 the Court noted that the discretion bestowed on courts to determine child support in shared custody arrangements calls for the acknowledgement of the overall situation of the parents and the needs of the children. The Court emphasized that there is neither a presumption in favour of awarding at least the Guidelines amount under s. 3, nor a presumption in favour of reducing the parent's support obligation downward from the Guidelines amount: *Contino* at para. 31.
- [35] In determining the appropriate level of support, the court must weigh each of the s. 9 factors and the weight of each factor will vary according to the particular facts of each case: *Contino* at para. 39. Under s. 9(a) the court must determine the amount set out in the applicable table for each of the spouses. It allows the court to focus on the fact that each parent has an obligation to contribute.
- [36] Under s. 9(b) the court must examine the increased costs of shared custody arrangements. Section 9(b) recognizes that the total costs of children in shared custody situations may be greater than in situations when there is sole custody: *Contino* at para. 52.
- [37] Under s. 9(c) the court must consider the conditions, means, needs and other circumstances. In assessing each parent's ability to bear the increased costs of shared custody, the court should look at the income levels of each parent, the disparity in incomes and the assets and liabilities of each. The child's standard of living in each household is also a matter to be considered. Children should not experience a significant variation in the standard of living as they move from one household to another. The broad discretion conferred by s. 9(c) also allows the court to consider claims for special or extraordinary expenses falling within s. 7 of the Guidelines: *Contino* at para. 71.

ii. Table Amounts

- [38] The husband's present income is \$63,500. His table amount is \$594. I have imputed income to the wife of \$36,000. Her table amount is \$334. The set-off amount is \$260 per month.

iii. The Increased Costs of Shared Custody Arrangements

- [39] There are clearly increased costs in this situation. Both parties require residences to accommodate their time with S.T. Both parties incur direct expenses during the time S.T. is in their care. Some costs are clearly duplicated.

iv. The Conditions, Means, Needs and Other Circumstances

- [40] The husband is marginally better able to provide for S.T. His earnings are steady and known and presently greater than the wife's. He is, however, far from wealthy. While the family assets and debts have been equally divided, both parties have accumulated significant non-family debt since separation. By the time they pay their outstanding bills, both parties net worth will be negligible. Both households suffer from financial pressures. S.T. does not suffer a significant variation in the standard of living between the two households.
- [41] When the matter came on before Justice Sewell in August 2010, based on the incomes he then found, the husband was ordered to pay 71% of extraordinary expenses, the wife 29%. He found the wife's Guideline income to be \$24,000. That conclusion was based upon incomplete evidence concerning the wife's earning history and potential. As set out herein, I have determined that an income of \$36,000 should be imputed to the wife. Based on their incomes as found in this proceeding, the husband should pay 64% of extraordinary expenses, the wife 36%.
- [42] As noted at para. 26, Mr. Justice Sewell determined that extraordinary expenses totalled \$6,222 a year and included Montessori school fees, payments to the Canadian scholarship fund, soccer, karate, Beavers, swimming, and certain health-related costs.
- [43] That finding was based on incomplete evidence concerning the financial situation of the parties. I find that the Montessori School is an extraordinary expense. Karate plays an important role in S.T.'s life and I find in the circumstances of this case that it is also an extraordinary expense. So are all health-related expenses. Soccer, Beavers and swimming, although important activities, are not extraordinary expenses and not subject to the cost sharing formula. Similarly, the Canadian Scholarship Fund is not an extraordinary expense. While saving for a child's future education is a noble goal, it is not a necessary one. This family simply does not have the financial wherewithal to be paying \$2,000 a year to such a plan.
- [44] In regard to the Montessori School, S.T. is presently on scholarship and the parties are paying but a fraction of the regular tuition fees. Given the family's financial resources, even that amount is a significant sum for this family. That said, I am satisfied that the Montessori School fees should be paid as an extraordinary expense as long as S.T. remains on scholarship. If the costs of the Montessori School increase significantly, the question as to whether or not the family can afford to have S.T. continue to attend will have to be revisited. I also note with regard to the health expenses that S.T. is covered under the husband's medical plan, and all medical expenses should be submitted to the husband so he can seek reimbursement from the plan. The parties will share on a 64-36% basis any necessary medical expenses not covered under the husband's plan and any additional extraordinary expenses that may be occurred in the future.

v. Discussion

- [45] The objective of s. 9 is to give a court the discretion necessary to adjust child support in situations of shared custody so that the children do not experience significant differences in the standards of living that each parent can offer in their homes. A court will depart from the set-off amount if it is inappropriate in light of the factors considered under ss. 9(b) and 9(c). On the facts of this case the factors set out in ss. 9(b) and 9(c) do not lead to the conclusion that the set-off amount is inappropriate. Commencing March 1, 2011, the husband will pay child support of \$260 per month.

SPOUSAL SUPPORT

- [46] At the hearing of August 4, 2010, Mr. Justice Sewell ordered the husband to pay interim spousal support of \$342 commencing February 1, 2009. He found arrears of spousal support through to August 31, 2010 in the amount of \$6,498. That finding was in part dependent on his finding that the wife's income was but \$24,000 a year. Material before the Court indicated that based on incomes of the husband and wife of \$63,093 and \$21,068 respectively, spousal support calculated pursuant to the Spousal Support Advisory Guidelines (the "SSAG") ranged between \$260 and \$730 per month.
- [47] Based on incomes of \$63,500 and \$36,000 respectively, the SSAG with child formula results in a range for spousal support of between zero and \$616 per month.
- [48] In the circumstances of this case, I am satisfied that some spousal support for a limited duration is necessary. Although the wife's failure to earn an appreciable income since separation cannot be laid at the foot of the husband, nor is it in any way related to the breakup of the marriage, the fact is that she has earned no income. As previously noted, the wife is fully capable of earning significant sums of money. I order that the husband pay spousal support for five years commencing February 1, 2009 in the amount of \$250 a month. It is my present understanding that no spousal support has been paid to date. Arrears from February 1, 2009 to March 1, 2011 total \$6,500. Those arrears are to be paid from the husband's share of the proceeds from the sale of the Barclay Street Residence.

ONGOING DISCLOSURE

- [49] As long as S.T. remains a child of the marriage, the parties shall disclose to each other their annual income tax returns by no later than June 30 of the following year.

COSTS

- [50] There has been mixed success in this trial. The husband has succeeded in shared parenting while the wife has obtained an order for ongoing spousal support. The husband obtained an order to have the Barclay Street Residence sold and the proceeds divided equally. Taking all matters into consideration, my view is that each party should pay their own costs save and except the parties will share equally the hearing fees and the costs of Dr. Krywaniuk's report. If either party seeks a different costs determination, they should file written

submissions within 21 days of release of these reasons. Any responsive submissions should be filed within 14 days thereafter.

"R.B.T. Goepel J."

The Honourable Mr. Justice Richard B.T. Goepel

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