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Berns v. Berns

2019 BCSC 25

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Supreme Court of British Columbia

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2019 BCSC 25 Berns v. Berns

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Berns v. Berns,

2019 BCSC 25

Date: 20190111

Docket: E76082

Registry: Nanaimo

Between:

Deborah Louise Berns

Claimant

And

Patrick Dominic Theodorus Berns

Respondent

Before: The Honourable Madam Justice Iyer

Reasons for Judgment

Counsel for the Claimant:

G. White

Counsel for the Respondent:

T. Luchies

Place and Date of Hearing:

Nanaimo, B.C.

October 25, 2018

Place and Date of Judgment:

Vancouver, B.C.

January 11, 2019

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I. INTRODUCTION

[1] Mr. and Ms. Berns commenced a spousal relationship in 1992, married in 1994, separated in 2007, and divorced in 2013. They have one child, Jocelyn Berns[1], born in July 1995. She is now 23 years old, and is working towards completion of her first degree at Vancouver Island University.

[2] The parties made a comprehensive separation agreement on December 20, 2012 ("Agreement"). Among other things, it required Mr. Berns to pay child support for Jocelyn until she completed high school and then to contribute to her education-related expenses. The Agreement also required Mr. Berns to pay spousal support to Ms. Berns until December 1, 2020, with the quantum from September 15, 2014 forwards to be fixed based on an annual review of the parties' incomes. In 2014, the parties agreed to modify the spousal support provision and fix the amount payable by Mr. Berns at \$3,000 per month. In 2015, Ms. Berns commenced legal proceedings to vary the terms of the Agreement.

II. ISSUES IN THIS APPLICATION

- [3] In her notice of application, Ms. Berns sought orders for retroactive and ongoing spousal support based on the original Agreement (effectively asking the court to set aside the 2014 modification of spousal support) and declaring that Jocelyn is a "child of the marriage" for child support purposes. At the hearing, Ms. Berns acknowledged that those issues are not suitable for determination by summary trial and confined her application to enforcement of the Agreement.
- [4] Whether or not those issues could be decided by a process short of a full trial, the evidence before me is insufficient to do so. I adjourn those aspects of Ms. Berns' application.
- [5] At the hearing, Mr. Berns agreed that he would pay Ms. Berns \$315 representing his share of Jocelyn's annual uninsured prescription medication costs for 2018, 2019 and 2020.
- [6] Accordingly, the only issues before me are interpretation and application of the Agreement's provisions for Jocelyn's education-related expenses, for spousal support, and for designation of Ms. Berns as a beneficiary on Mr. Berns' life insurance policy.

III. APPLICABLE LEGAL PRINCIPLES

- [7] The principles governing the interpretation of separation agreements are the same as those governing the interpretation of contracts in general. The court must interpret the words of the contract in light of the intentions of the parties. As the Supreme Court of Canada has held, in this inquiry the court may consider the circumstances or factual matrix surrounding contract formation:
- [57] While the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement (Hayes Forest Services, at para. 14; and Hall, at p. 30). The goal of examining such evidence is to deepen a decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract. The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract (Hall, at pp. 15 and 30-32). While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement (Glaswegian Enterprises Inc. v. B.C. Tel Mobility Cellular Inc. (1997), 101 B.C.A.C. 62).

Sattva Capital Corp. v. Creston Moly Corp., 2014 SCC 53 at para. 57.

- [8] However, the court cannot look to the parties' subsequent conduct to interpret their contract unless it has first found that the contract is ambiguous: Wade Estate v. Duck, 2018 BCCA 176 at para. 28:

[28] In contrast, evidence of subsequent conduct should only be admitted if the contract is found to be ambiguous after one has considered its text and the factual matrix surrounding the creation of the contract: *Re Canadian National Railways and Canadian Pacific Ltd.* (1978), 95 D.L.R. (3d) 242, aff'd [1979] 2 S.C.R. 668 [Canadian National Railways]. In that case, Mr. Justice Lambert, writing for the majority of this Court, explained the circumstances permitting the use of subsequent conduct (at 262):

In Canada the rule with respect to subsequent conduct is that if, after considering the agreement itself, including the particular words used in their immediate context and in the context of the agreement as a whole, there remain two reasonable alternative interpretations, then certain additional evidence may be both admitted and taken to have legal relevance if that additional evidence will help to determine which of the two reasonable alternative interpretations is the correct one. It certainly makes no difference to the law in this respect if the continuing existence of two reasonable alternative interpretations after an examination of the agreement as a whole is described as doubt or as ambiguity or as uncertainty or as difficulty of construction.

IV. JOCELYN'S EDUCATION-RELATED EXPENSES

1. Interpretation of the Agreement

[9] Under the heading "Child Maintenance", paras. 4.1 and 4.2 of the Agreement provide:

4.1 The Husband will, commencing December 15, 2011 pay to the Wife as child support the amount of \$633.00 in semi monthly installments continuing thereafter on the 1st day and 15th day;

4.2 Commencing September 1, 2013 child support shall no longer be payable and the parties shall share the cost of the child's education, books, residence and such other costs incidental to her attending University of [sic] College with the husband to pay 70% of these cost [sic] and the wife 30% until the completion of a 1st degree or certificate.

[10] The parties agree that the payments will continue to August 2019.[2] They disagree about what expenses are included. Ms. Berns says all of Jocelyn's reasonable living expenses while she is attending post-secondary education are included. Mr. Berns says that only tuition, books and costs directly related to Jocelyn's educational program are included, and that general living expenses are not included unless Jocelyn is living in a university or college "residence".

[11] The first question I must answer is, what is the meaning of "residence" in the context of the Agreement? Does it refer exclusively to a university or college dormitory or does it refer to whatever kind of housing Jocelyn occupies while attending college or university? Alternatively, is the meaning of the term ambiguous?

- [12] Considering only the text of the Agreement and the factual matrix surrounding its creation, I conclude that "residence" is not ambiguous: it refers to the housing Jocelyn occupies while she is attending post-secondary education. The intention to be inferred from the text is that Mr. Berns' obligation to pay for Jocelyn's "residence" is contingent on her attending post-secondary schooling, not on the type of accommodation she lives in while she is in such a program.
- [13] The phrase "and such other costs incidental to her attending" post-secondary school supports this interpretation. In my view, it demonstrates the parties' mutual intention that Jocelyn receive financial support from her parents through to completion of a first degree or certificate. "Residence" as used in para. 4.2 of the Agreement is one example of costs incidental to post-secondary education.
- [14] Further, it is common knowledge that students attending post-secondary school do not necessarily live in a dormitory: some post-secondary schools do not provide such housing; many others only provide it for the first couple of years. Students often choose to find other accommodation. There is no evidence that, at the time the Agreement was made, the parties knew what post-secondary institution Jocelyn would attend and whether it had student residences. For these reasons, I find that "residence" refers to Jocelyn's housing costs while attending a post-secondary program.
- [15] If I am wrong in my conclusion, I would find that the term "residence" is ambiguous and, following Wade, I may consider the parties' subsequent conduct. Jocelyn lived in a University of Victoria dormitory in her first year and rented an apartment in her second year. Her parents paid her education-related costs, including housing costs, for both years out of an account that had been opened in Jocelyn's name, which Mr. Berns described as an education account ("Education Account").
- [16] While there is a dispute over whether the money in the Education Account belongs only to Mr. Berns (as he argues) or belongs to both Mr. and Ms. Berns (as she argues), there is no question that the parties treated Jocelyn's housing costs in her second year as an education-related expense. Therefore, consideration of the parties' subsequent conduct would also support interpreting "residence" as I have construed it.
- [17] Mr. Berns also argues that, if "residence" extends to rental accommodation, it includes only rent, and not the other items on Jocelyn's annual budgets. In addition to uncontroversial school expenses, such as tuition, books and school supplies, Jocelyn's annual budgets list the following items:

Transportation (bus pass)

Rent

Internet

Hydro

Food

Cell phone

Hair/clothing

Spending money

Travel money

- [18] I consider that the first five items are "costs incidental" to Jocelyn attending post-secondary school because they are equivalent to what would be included in the costs of a university dormitory.
- [19] The evidence establishes Jocelyn has contributed to costs associated with her education through scholarship, bursary, and employment income. Based on the pleadings, the parties appear to agree that they are only responsible for the amount remaining after Jocelyn's contribution to her living expenses, with Mr. Berns paying 70% and Ms. Berns paying 30% of those costs. Accordingly, Jocelyn's income through employment and other sources must be applied first to cover those of her expenses not covered by her parents' contractual obligations (that is, cell phone, hair/clothing, spending money, travel money) and then to the costs I have identified as incidental to her education. Pursuant to the Agreement, Mr. Berns must pay 70% and Ms. Berns must pay 30% of any shortfall.

2. Calculation of Amount owed by Mr. Berns

- [20] Jocelyn completed her first two years of post-secondary education in a science program at the University of Victoria. She attended that university again full-time in 2015-2016, but struggled with health issues and completed only one course that year. Neither of her parents knew what had occurred until the end of the year. Jocelyn remained in Victoria but transferred to a distance education bachelor business administration program at BCIT, attending full-time through December 2017. She decided that she did not want to move to Burnaby in order to complete the in-person part of the program. Accordingly, she transferred to Vancouver Island University and moved to Nanaimo in January 2018 to complete her program there, expecting to receive a bachelor's degree in business administration by August 2019.
- [21] Ms. Berns seeks an order requiring Mr. Berns to pay 70% of the cost of Jocelyn's education-related expenses from September 1, 2016, through August 2019. In addition to disputing the amounts, Mr. Berns argues that he overpaid Jocelyn's education expenses for the years 2013-2014, 2014-2015 and 2015-2016 because her education expenses in those years were paid out of the Education Account, which he says contained only his money.
- [22] Mr. Berns deposes that, after the Agreement was signed, his taxes for the two previous years were adjusted to reflect the spousal support he had been paying and he received a refund of approximately \$28,000, of which he deposited \$25,000 into the Education Account.

- [23] According to Mr. Berns, Ms. Berns did not pay any of her 30% share of Jocelyn's education-related costs for the first two years because the money came from the Education Account. Mr. Berns says Ms. Berns paid less than her 30% share in 2015-2016 because \$5,000 came from the Education Account, although he acknowledges that Ms. Berns paid \$3,126 towards Jocelyn's expenses that school year.
- [24] Mr. Berns paid Jocelyn approximately \$3,000 in March 2017 towards her 2016-2017 education costs.
- [25] Ms. Berns agrees that the money in the Education Account came from a tax refund on spousal support payments but that she says that Mr. Berns only received the refund because they agreed to structure the terms of the Agreement in order to obtain this tax advantage. She says that they agreed that most of the refund would be used for Jocelyn's education expenses and that their intention was that that money was from both of them, not only from Mr. Berns.
- [26] An email exchange between Mr. and Ms. Berns at the time of separation confirms the mutual intention that the tax refund money be used for Jocelyn's education expenses. There is no evidence that Mr. Berns asserted in 2013-2014, 2014-2015 or 2015-2016 that Ms. Berns' 30% share of Jocelyn's education expenses ought to come from a source other than the Education Account. I find that that the money in the Education Account represented a parental contribution, not a contribution by Mr. Berns alone.
- [27] Finally, Mr. Berns submits that Jocelyn should have moved in with her mother when she relocated to Nanaimo in January 2018, instead of rental accommodation. Ms. Berns deposes that her home is too small to accommodate her daughter, and Mr. Berns did not take issue with that. The Agreement does not speak to it. Accordingly, I find that the cost of Jocelyn's rental accommodation in Nanaimo is a cost relating to her education.
- [28] Mr. Berns attached evidence of e-transfers he made to Jocelyn's account from time to time, which he characterizes as "for education and living expenses." All but one pre-date September 1, 2016, and Ms. Berns is only seeking an order from that date forward. I accept that Mr. Berns payment of \$500 to Jocelyn in January 2018 was a contribution to her education expenses.
- [29] In conclusion, Mr. Berns must pay Ms. Berns 70% of Jocelyn's education-related expenses, as I have defined them (tuition, texts, school supplies, and other direct education costs, plus transportation (bus pass), rent, internet, hydro, and food), for the period from September 1, 2016 through August 31, 2019, less the \$3,000 he paid to Jocelyn in March 2017 and the \$500 he paid her in January 2018.

V. SPOUSAL SUPPORT

- [30] Paragraph 12 of the Agreement is headed "Spousal Support". The relevant portions of this article are set out below: (the last sub-paragraph below is numbered incorrectly.)

12.5 In addition to the payments in paragraph 12.1, the husband shall pay to the wife the sum of \$3,300.00 per month payable in installments of \$1,650.00 on the 1st and 15th days of each month commencing December 15, 2012 and continuing thereafter until June 15, 2014.

12.6 The husband and wife are to provide to each other their Canada Revenue Agency Assessment Notice (and any subsequent assessment notice) by May 30 of each year commencing May 30, 2014. The parties shall review the quantum of spousal support to be paid commencing September 15, 2014 based upon the husband's gross annual income and the greater of the wife's gross annual income or \$30,000.00 as imputed annual income to the wife, at the mid-point range of the Spousal Support Guidelines. The adjusted amount payable shall be payable commencing September 15, 2014 and be adjusted September 15 of each year thereafter based upon the husband's gross annual income and the greater of the wife's gross annual income or the amount of \$30,000.00 as imputed annual income to the wife, at the mid point range of the Spousal Support guidelines.

12.4 The spousal support payable to the wife shall in any event terminate regardless of any change in circumstances of the parties on December 1, 2020.

[31] Much argument and evidence was directed at the annual review provision in para. 12.6. However, the evidence is incontrovertible that the parties modified this term of the Agreement in 2014 and fixed the amount of spousal support at \$3,000 per month. Ms. Berns agreed at the hearing that the issue of whether the 2014 modification of the Agreement should be set aside is not before me. That means Mr. Berns' spousal support obligation under the Agreement starting on September 15, 2014, is \$3,000 per month, payable in installments on the 1st and 15th days of each month and terminating on December 1, 2020.

[32] Mr. Berns paid spousal support pursuant to the Agreement (and its 2014 modification) in bi-monthly installments through to the December 1, 2015 payment. On December 15, 2015, Mr. Berns reduced his payments to \$656 per month, which he paid in bi-monthly installments of \$328 through March 1, 2016. Since March 15, 2016, he has paid \$1,275 per month in bi-monthly installments of \$637.50 up to and including the payment on October 15, 2018. Mr. Berns does not dispute these amounts. The evidence does not establish whether or not Mr. Berns has continued to pay \$1,275 per month since October 15, 2018.

[33] Based on his contractual obligation to pay \$3,000 per month in spousal support, Mr. Berns owes Ms. Berns \$61,369.50 in retroactive spousal support through October 31, 2018. He owes an additional \$6,000 in retroactive spousal support for November and December 2018, less any amount he has paid. As of January 1, 2019, his ongoing spousal support obligation under the Agreement is \$3,000 per month continuing until December 1, 2020.

VI. LIFE INSURANCE

[34] Paragraph 13.3 of the Agreement provides the following with respect to life insurance:

13.3 The husband will maintain any life insurance he may have available to him through his employment and designate the wife as the irrevocable beneficiary of the lesser of the face value of the policy or the aggregate amount required to make all further child or spousal support payments the husband was making at the time of his death to the wife until the child or spousal support terminates hereunder.

[35] Mr. Berns deposes that Ms. Berns is listed as first beneficiary at 50% of his life insurance policy. He does not say what the value of his policy is. Ms. Berns is entitled to be the beneficiary in the amount provided in para. 13.3 of the Agreement.

VII. CONCLUSION

[36] In conclusion, I make the following orders:

- a) Upon the claimant presenting proof of payment, the respondent shall pay the claimant 70% of Jocelyn's education-related expenses, which includes tuition, texts, school supplies, and other direct education costs, plus transportation (bus pass), rent, internet, hydro, and food, for the period from September 1, 2016 through December 31, 2018, less the sum of \$3,500.
- b) Upon the claimant presenting proof of payment, the respondent shall pay the claimant 70% of Jocelyn's education-related expenses, which includes tuition, texts, school supplies, and other direct education costs, plus transportation (bus pass), rent, internet, hydro, and food, for the period from January 1, 2019 to August 31, 2019.
- c) The respondent shall pay the claimant \$61,369.50 in retroactive spousal support, plus \$6,000 less any amount the respondent has paid in spousal support for November and December 2018.
- d) The respondent shall pay the claimant \$3,000 per month in spousal support until December 1, 2020.
- e) The respondent shall name the claimant as beneficiary on his life insurance policy the irrevocable beneficiary of the lesser of the face value of the policy or the aggregate amount required to make all further spousal support payments the respondent was making at the time of his death to the claimant until spousal support terminates.
- f) As agreed, the respondent shall pay the claimant \$315 representing his share of Jocelyn's annual uninsured prescription medication costs for 2018, 2019 and 2020 on January 1 of the year following the year in which those costs were incurred.
- g) The remainder of the relief sought by the claimant is adjourned.

[37] As success was divided, each party shall bear its own costs.

"TYER J."

[1] For clarity, I will refer to her as Jocelyn, not Ms. Berns.

- [2] At the hearing, the claimant submitted that, due to the unavailability of some courses, Jocelyn might not complete her program until April 2020. However, as the respondent pointed out, the notice of application only seeks an order to August 2019 and counsel for Ms. Berns did not dispute that.
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