
CANADA / JUDGMENT

C.A.E. v. S.W.C.

2017 BCSC 534

COURT

Supreme Court of British Columbia

DECIDED

31 March 2017

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2017 BCSC 534 C.A.E. v. S.W.C.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

C.A.E. v. S.W.C.,

2017 BCSC 534

Date: 20170331

Docket: E109223

Registry: Kelowna

Between:

C.A.E.

Claimant

And

S.W.C.

Respondent

Before: The Honourable Mr. Justice A. Saunders

Reasons for Judgment

Counsel for the Claimant:

C. Wendell

Counsel for the Respondent:

C. McGuire

C. Wariach, Articled Student

Place and Date of Hearing:

Kelowna, B.C.

August 25, 2016

Further Written Submissions of the Claimant Received:

October 25 and

December 12, 2016

Further Written Submissions of the Respondent Received:

October 24 and

December 12, 2016

Place and Date of Judgment:

Kelowna, B.C.

March 31, 2017

- [1] These parties separated in April 2011. There are three children of the marriage. For the sake of the children's privacy I have initialized the names of the parents, and I simply refer to the children by initials, "A", "Q", and "P". Parenting has been largely shared since separation. Interim parenting arrangements were initially addressed in Interim Minutes of Settlement dated June 29, 2012. Those arrangements were later supplanted by the terms of a Separation Agreement dated December 20, 2013. At that time the parties were both living in Victoria, B.C., and Mr. C. was paying monthly expenses, as specified in the Interim Minutes.
- [2] However, the Separation Agreement contemplated the claimant, Ms. E., moving with the children to Kelowna in or about August 2014; I have inferred that it was for this reason that the Separation Agreement provided that as of the earlier of August 1, 2014, or the date of sale of the family residence, Mr. C.'s liability for the monthly expenses would cease, and he would begin paying child support at the table amounts specified by the Federal Child Support Guidelines, SOR/97-175 [Guidelines].
- [3] The Separation Agreement also made the following provisions:
- a) For the purpose of determining table support, Mr. C.'s annual income was \$95,000;
 - b) Table child support would first be reviewable as of June 30, 2015, and would then be revised annually to accord with the Guidelines, with the provision that if the parties did not review child support and vary it in writing, both parties would be deemed to consider that Mr. C.'s child support payments continued to satisfy the requirements of the Guidelines;

- c) For the purpose of determining each party's contribution to special or extraordinary expenses, Mr. C.'s annual income was \$95,000 and Ms. E.'s annual income was imputed at \$50,000;
 - d) Commencing August 1, 2014, the parties would each pay 50% of certain specifically designated special expenses, including psychological assessment expenses and private school fees for their daughter A; and
 - e) The proportions in which special or extraordinary expenses were to be shared would be reviewed as of January 1, 2015, and would be determined according to their incomes for 2014; however, the parties agreed that for a period of five years from the date of the Separation Agreement, regardless of the actual incomes of the parties, the special and extraordinary expenses would be determined on the basis of Mr. C. earning not less than \$95,000 and Ms. E. not less than \$40,000.
- [4] The Separation Agreement did contemplate the possibility of Ms. E. (and the children) moving back to Victoria at some future point in time, and/or the possibility of shared parenting being resumed if the parties, in the future, lived in the same city. However, the Separation Agreement was silent as to what the child support arrangements would be if the parties resumed shared parenting.
- [5] The parties were divorced by way of an order pronounced May 15, 2014.
- [6] Ms. E. moved to Kelowna in April 2014, after the sale of the family home on March 31. However, she arranged to rent a basement suite from the neighbours, and commuted for a few months, spending alternating weeks working for her new partner's company in Kelowna, and caring for the children in Victoria. She moved the children to Kelowna in June 2014. Per the terms of the Separation Agreement, Mr. C. had care of the children through the month of July. As of August 1, 2014 Mr. C. moved to Kelowna as well, and shared parenting resumed. However, Mr. C. continued to pay Ms. E. the child support payments called for under the Separation Agreement.
- [7] Following her move to Kelowna, Ms. E. continued working for her partner's company, but left its employ in mid-November 2014. She then underwent a period of retraining. Her line 150 income on her 2014 tax return totalled \$15,531.65. She obtained full-time employment as an insurance broker in April 2015. Her February 2016 financial statement discloses an annual income of \$45,000, with, her counsel submits, there being the potential for a further \$2,000 annually in commissions.
- [8] Mr. C. has brought the present application, seeking to have Ms. E. pay child support to him retroactive to August 1, 2014, on an imputed annual income of \$50,000.
- [9] Counsel appeared before me in Kelowna on August 25, 2016 to argue the motion. Time limitations only permitted me to make rulings on a number of discrete issues arising out of Mr. C.'s application, summarized as follows:

- a) Contrary to the submission made on behalf of Ms. E., the Separation Agreement did not reflect an intention that Mr. C. would continue paying child support as a sole payor if shared parenting was resumed. As of August 2014, Mr. C. had a notional right to look to Ms. E. for child support;
 - b) Having regard to the factors outlined in *D.B.S. v. S.R.G.*, 2006 SCC 37, Ms. E. is liable to pay child support retroactive to August 1, 2014; and
 - c) Notwithstanding Ms. E. having agreed, in a negotiated settlement, to have an annual income of \$50,000 imputed to her for the purpose of determining her share of special and extraordinary expenses, that income is not to be imputed to Ms. E. for the purpose of determining her liability for table support. For the time period from August 1, 2014 to November 30, 2014, Ms. E.'s liability for table child support, subject to an analysis under s. 9 of the Guidelines arising from the parties' resumption of shared parenting, will be based on the annualized value to mid-November of her 2014 line 150 income. For the time period December 1, 2014 to March 31, 2015, her income is set at zero. As of April 1, 2015 her support obligation is to be based on her employment income of \$47,000.
- [10] That left to be determined the ultimate issue of the parties' respective child support liabilities under s. 9 of the Guidelines, as interpreted in the seminal decision of the Supreme Court of Canada in *Contino v. Leonelli-Contino*, 2005 SCC 63 [Contino]. Counsel submitted written arguments, and judgment has been reserved to date.
- [11] Counsel for Ms. E. then attempted to introduce new evidence and new arguments on the basis of there having been a material change in the circumstances of the parties since the August 25 hearing. Counsel were advised by way of a memorandum from the court dated October 14, 2016 that this decision would be based on the evidence before the court on the hearing date; that the reasons would be confined to the parties' circumstances as of that date; and that if there had been a material change in circumstances since August 25 necessitating variation of whatever order I eventually make, that will be the appropriate subject of a variation application, to be heard by any judge of this court at a later date.
- [12] Section 9 of the Guidelines provides as follows:
- 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.

- [13] The respondent Mr. C.'s position on this application, simply stated, is that the factors in ss. 9(b) and (c) are neutral, and the Guidelines table amounts of support ought to apply. Mr. C. agrees with his child support payment being revised to the amount of \$2,001 per month, based on his 2015 employment income.
- [14] Ms. E.'s position is that while the respondent's costs, by his own admission, have not increased as a result of the renewed shared parenting arrangement, hers have; further, she points to a disparity in the children's standard of living at the parties' respective residences, as a result of their differing financial circumstances as well as the burden she bears in paying 50% of the children's private school tuition.
- [15] The Contino framework for a s. 9 determination was summarized by D. Smith J.A. in *C.L.B. v. A.H.B.*, 2013 BCCA 472:
- [4] the Court in *Contino v. Leonelli-Contino*, 2005 SCC 63, [2005] 3 S.C.R. 217, stated that the simple set-off serves as only a starting point for the inquiry into the appropriate amount of child support in a shared custody arrangement, observing at para. 49:
- [49] Hence, the simple set-off [of the parties' child support obligations under s. 8 of the Guidelines] serves as the starting point, but it cannot be the end of the inquiry. It has no presumptive value. Its true value is in bringing the court to focus first on the fact that both parents must make a contribution and that fixed and variable costs of each of them have to be measured before making adjustments to take into account increased costs attributable to joint custody and further adjustments needed to ensure that the final outcome is fair in light of the conditions, means, needs and other circumstances of each spouse and child for whom support is sought. Full consideration must be given to these last two factors (see [Julien D. Payne and Marilyn A. Payne, *Child Support Guidelines in Canada 2004* (Toronto: Irwin Law, 2004).] at p. 263). The cliff effect [a drastic change in support resulting from a rigid application of the set-off that may not be warranted considering the parents' financial situations and the standard of living in each household] is only resolved if the court covers and regards the other criteria set out in paras. (b) and (c) as equally important elements to determine the child support. [Emphasis in original.]
- [5] The Court in *Contino* went on to address ss. 9(b) and (c). In regard to s. 9(b) - the increased costs of shared custody arrangements - the Court underscored the need for evidence of the actual spending patterns of the parents and the need by the payor parent to demonstrate that his or her increase in the actual time spent with the child directly results in additional costs for him or her (para. 53). The Court stated:
- [52] What should the courts examine under this heading? Section 9(b) does not refer merely to the expenses assumed by the payor parent as a result of the increase in access time from less than 40 percent to more than 40 percent. Consequently, all of the payor parent's costs should be considered under s. 9(b). This does not mean that the payor parent is in effect spending more money on the child than he or she was before shared custody was accomplished. It means that the court will generally be called upon to examine the budgets

and actual expenditures of both parents in addressing the needs of the children and to determine whether shared custody has in effect resulted in increased costs globally. Increased costs would normally result from duplication resulting from the fact that the child is effectively being given two homes. [Emphasis in original.]

- [6] In regard to s. 9(c) - the conditions, means, needs and other circumstances - the Court underscored the need for evidence from the parties on these factors (stating that "courts should demand information from the parties when it is deficient" [para. 57]) and not make assumptions about increased costs (para. 56). It stated:
- [68] Section 9(c) vests the court a broad discretion for conducting an analysis of the resources and needs of both the parents and the children. As mentioned earlier, this suggests that the Table amounts used in the simple set-off are not presumptively applicable and that the assumptions they hold must be verified against the facts, since all three factors must be applied. Here again, it will be important to keep in mind the objectives of the Guidelines mentioned earlier, requiring a fair standard of support for the child and fair contributions from both parents. The court will be especially concerned here with the standard of living of the child in each household and the ability of each parent to [absorb] the costs required to maintain the appropriate standard of living in the circumstances.
- [71] Moreover, given the broad discretion of the court conferred by s. 9(c), a claim by a parent for special or extraordinary expenses falling within s. 7 of the Guidelines (see Appendix) can be examined directly in s. 9 with consideration of all the other factors (see *Slade v. Slade*, [(2001), 195 D.L.R. (4th) 108, 2001 NFCA 2] at paras. 26-30). Section 9(c) is conspicuously broader than s. 7.
- [16] With respect to s. 9(a) of the Guidelines, counsel for Ms. E. submits in his written argument that I should take into account Mr. C.'s reported taxable income for the years 2014 and 2015 (\$102,025 and \$104,730 respectively). The Separation Agreement, however, clearly provided that his income would be deemed to be \$95,000 subject to a review by the parties. Absent evidence of steps taken by the parties as of June 2015 to review their incomes, and absent an application by Ms. E. to determine Mr. C.'s income for table support purposes, I see no basis for deviating from the terms of the parties' agreement prior to June 1, 2016. Mr. C., as noted, agrees with his child support obligation being set at \$2,001 per month as of July 1, 2016, based on his reported 2015 employment income.
- [17] As to the s. 9(b) factor, increased costs of shared custody arrangements, there is scant evidence before the court on this application. Ms. E. asserts that despite the shared parenting arrangements she has been primarily responsible for the children's clothing, and day-to-day incidental costs including food and birthday parties, even during the times they reside with their father. This is denied by Mr. C.; he says that he has always seen to the children's day-to-day expenses during his parenting time, including clothing, school needs, and extra-curricular activity fees. He provided evidence of a text message exchange with Ms. E. from November 2015 in which he offered to pay for a school lunch she had ordered for the

children during his parenting week, and in which he asked her not to place any further orders during his week.

- [18] The significant increased cost item claimed by Ms. E. is for testing fees, tutoring, and private school tuition submitted to be necessitated by the children's learning disabilities. As noted above, A's private school fees, and potential future psychological assessment costs, were addressed in the Separation Agreement, and Mr. C.'s liability in respect of same was limited to a 50% share. Ms. E. swears in her sixth affidavit, sworn August 16, 2016, to the following:
- a) both A and Q have had psychoeducational assessments by a registered psychologist;
 - b) they both require ongoing specialized individualized educational plans;
 - c) A had been in a public school but the parties had her removed because "she was not thriving";
 - d) the girls now attend a private art-based learning school with smaller class sizes and increased individual attention;
 - e) the longer school day at the private school reduces the expense of the girls' before- and after-school care; and
 - f) the Arts curriculum reduces extracurricular costs that would otherwise be spent on art-related activities.
- [19] In written submissions, Ms. E.'s counsel now states that all three children have learning disabilities "that affect them on a daily basis"; that the assessments of A and Q revealed them to be operating "at grade levels significantly below the grade that they are currently enrolled in"; and that "they" - it is unclear if counsel is referring to all three children or only A and Q - require further assessments, tutoring, and classroom support to help them.
- [20] It is therefore submitted on behalf of Ms. E. that the court should give weight to her disproportionate share of these s. 7 expenses when examining her costs under s. 9(b). Alternatively, counsel repeats this argument in relation to s. 9(c), suggesting that Ms. E.'s burden of paying these expenses is a "circumstance" or "need" that should be accounted for.
- [21] Mr. C. disagrees with the need for private schooling. In his fifth affidavit, sworn June 22, 2016, he stated:
16. The Children attend private school at the Claimant's insistence. [A] struggles academically. Public school can also accommodate all our children and any special needs. My agreement with the Claimant at paragraph 5.6 of the Separation Agreement was to pay 50% of [A's] tuition. I subsequently agreed to pay 50% for all children at private school and 50% of soccer fees, but I do not consent to paying any more expenses .
- [22] The tuition and related academic fees currently being paid have never been agreed or determined to be claimable as extraordinary expenses under s. 7 of the Guidelines. There is no evidence before the court on the present application as to what specific disabilities have

been diagnosed, why those disabilities cannot be adequately addressed through an individual education plan administered through the public school system, or how the disabilities are addressed in the children's current private school. Section 7 requires an assessment of the necessity of the expense in relation to the children's best interests, and the reasonableness of the expense in relation to the parties' means.

- [23] As noted above, Contino specifically contemplates the court examining s. 7 expenses in the context of a s. 9(c) analysis. But there must be evidence that the expenses qualify under s. 7. Whether s. 9(b) or (c) is potentially engaged, the evidence tendered on this application is insufficient to support an order for the apportionment or re-apportionment of those expenses, either directly or indirectly, through the mechanism of s. 9.
- [24] As to s. 9(c), it is further submitted that there is a significant disparity in the parties' means, with the result that Ms. E. has had to continually rely on personal savings and the assets she received upon separation in order to keep the children at a standard of living similar to that which Mr. C. is able to provide through his significantly higher income. I am not persuaded this is the case. Virtually every point of evidence raised by Ms. E. in support of this contention is met by Mr. C. in his affidavits. Ms. E. makes assertions as to Mr. C.'s income or income-earning potential that I find are not borne out on a close scrutiny of his employment history.
- [25] The combined family income of Ms. E. and her spouse is on the order of \$95,000, while that of Mr. C. and his partner is over \$200,000. However, this simple comparison is inappropriate, in light of two factors. First, I agree with the submission of Mr. C. that the budgets and disclosed assets of the claimant and her spouse are inconsistent with this rather moderate combined personal income. It seems clear that in the case of Ms. E.'s household, there is a greater-than-expected standard of living due to the intermingling of expenses, with the spouses using a single credit card for both personal and corporate expenses, and with significant family expenses being run through the claimant's spouse's corporation. I find Mr. C. makes a compelling case that Ms. E. and her current spouse may in fact be seen as enjoying a higher standard of living, relative to that of he and his current partner, given this factor.
- [26] Second, Mr. C. and his new partner maintain separate finances. While the court has an overall discretion to consider a parent's new partner's income in the overall assessment of the parties' circumstances under s. 9(c), the partner's income is generally only relevant to the extent that it contributes to a material disparity in the standards of living between the households: see *B.P.E. v. A.E.*, 2016 BCCA 335 [B.P.E.] at paras. 52-66. Adopting the language used in two decisions cited in *B.P.E.*, I approach the present case looking for evidence of whether the financial situation or living standards are "considerably better" in one household than the other (*Corsie v. Taylor*, 2006 BCSC 528), or whether there is a "divergence [that] is significant and growing" (*L.A.B. v. M.L.B.*, 2012 BCSC 1066).

- [27] Ms. E. and her new partner live in Kelowna, where they share a single-family home that is leveraged by debt, but which had an assessed value of \$810,000 prior to the two of them undertaking a \$100,000 renovation. They share part ownership of a vacation home in Penticton with her spouse's business partner, where they also have a boat. Mr. C. and his partner have a rural lifestyle: they live in a double-wide trailer on a 10-acre property with an assessed value of \$512,000. The property has a riding area and a barn. They have a number of animals including a pony which the parties' children enjoy and help care for.
- [28] There are clearly differences in the parties' lifestyles. However, I cannot conclude that one is superior to the other, or that the differences are capable of being quantified and equalized through reapportionment of child support under s. 9.
- [29] Finally, Ms. E. argues that a circumstance that ought to be accounted for under s. 9(c) is her having waived a strong claim to spousal support, with the understanding that she would continue to receive full table child support on the basis of Mr. C. being a sole payor, as reflected in the Separation Agreement, regardless of any change in the children's living arrangements. I do not accept this contention. The Separation Agreement was drafted with considerable care and attention. If that had been the premise upon which spousal support was waived, I would expect there to have been an explicit statement to that effect in the document's recitals.
- [30] The parties made submissions with respect to some additional matters, including Ms. E.'s receipt of child tax benefits in 2014 and 2015 and Mr. C.'s beneficial interest in a family trust (of which he is also the trustee), his apparent pension benefits, and certain of his corporate shareholdings. However, based on the evidentiary record and submissions before the court on this application, I am unable to discern any impact of these affairs on the standard of living in either household or on either party's ability to absorb the costs required to maintain the appropriate standard of living in the circumstances. To the extent that these concerns may affect the parties' support obligations, that may properly be the subject of a future variation application or a review of the parties' incomes pursuant to their Separation Agreement.
- [31] For these reasons, I find no basis under s. 9(b) or (c) of the Guidelines to vary support other than in accordance with the table amounts, given the determinations of income I have made. Mr. C.'s application is allowed to the extent addressed in these reasons and in the course of the hearing of August 25.

"A. Saunders J."

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