

CANADA / JUDGMENT

C.D.H. v. J.E.H.

2005 BCSC 558

COURT

Supreme Court of British Columbia

DECIDED

14 April 2005

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IN THE SUPREME COURT OF BRITISH COLUMBIA

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Citation:

C.D.H. v. J.E.H.,

2005 BCSC 558

Date: 20050414

Docket: 5939/24911

Registry: Victoria

Between:

C.D.H.

Petitioner (Plaintiff)

And:

J.E.H. (now R.)

Respondent (Defendant)

Before: The Honourable Mr. Justice R. D. Wilson

Reasons for Judgment

Counsel for the Petitioner (Plaintiff):

D. F. Tracy

The Respondent (Defendant) Appearing in Person:

J.E.R.

Counsel for the Director of Maintenance Enforcement:

A. P. Leslie

Date and Place of Trial/Hearing:

March 31, 2005

Victoria, B.C.

I.

- [1] There are competing applications in this enduring, acrimonious, divorce and family law proceeding.
- [2] The plaintiff's application was the first in time. Among other orders, the plaintiff seeks an order declaring that the named recipients in a child support order, made 14 May 1997, "are no longer children of the marriage". He also seeks an order terminating his duty to pay child support, effective 1 January 2005.
- [3] The plaintiff's application was precipitated by the termination of his employment with Lucent Technologies Inc. in September 2004.
- [4] There is common ground between the parties on most of the factors conventionally taken into consideration in the determination of the issue of when a person, of the age of majority, remains a child of the marriage.
- [5] The recipients' dates of birth were [] 1983 and [] 1985, respectively. They are relatively recent arrivals at the age of majority.
- [6] Both are enrolled as full-time students, pursuing career goals in medicine and business. The career plans of both are reasonable and appropriate. Both are excellent students.
- [7] Both are employed in part-time work. They have not applied for student loans, because they are in a category of applicant required to disclose the financial circumstances of their parent or step-parent. They assume they will not qualify for publicly funded loans by reason of the financial circumstances of their parents and step-parent.
- [8] Registered educational plans were established for both recipients early in their lives, to ensure funding for post-secondary education.
- [9] The question of whether the recipients have unilaterally terminated the parent/child relationship with the plaintiff is controversial.
- [10] In her submissions, the defendant concedes that there is an estrangement between her sons and the plaintiff. She has read the affidavit of her sons, so that concession is prudent. She also said in her submissions that she hoped there would be an eventual reconciliation. I do not believe her.

- [11] These parties appeared before this court on 10 July 1997 on an application by the plaintiff for an access order.
- [12] In the course of that appearance, Fraser J. made the following comments:
- [3] The evidence before me today, and not seriously in dispute, is that the relationship between Mr. C.D.H., the petitioner, and his sons has been steadily deteriorating since Mr. C.D.H. moved from Vancouver Island to Langley, B.C. Mr. Tracy, counsel for Mr. C.D.H. , was restrained in his analysis of this fact, but I think it is to be implied from his submissions that it was unacceptable to Ms. J.E.R. that Mr. C.D.H. move, and that has had a very significant impact on Ms. J.E.R. 's feelings towards Mr. C.D.H..
- [4] This is, in my view, virtually a crisis in the lives of the two boys. One does not have to be a psychiatrist or a psychologist, it seems to me, to understand that losing a parent is an emotionally traumatic event for a child, no matter what the reason. We know, for example, from situations in which children have been apprehended from abusive parents, that sometimes the apprehension causes more damage than the abuse ever did.
- [5] I see here two boys who have been far too deeply engaged in assessing the behaviour of their father. Of course, parents should listen to their children, and it may be that from time to time Mr. C.D.H. has not been sufficiently sensitive to the feelings of the boys. But my sense of this situation is that both boys are now in such a volatile frame of mind or emotional state that the slightest and most trivial act on the part of Mr. C.D.H. will send them into a state of near hysteria. When the mere fact of him showing up at a baseball game drives one son to tears and leads the other son to run away, we know that there are serious problems.
- [6] The boys have been intensely assessed since the separation of their parents. They have been the clients of two child psychologists. They have been encouraged to, in the words of Ms. J.E.R., "vent their feelings" about their father. The only product of this process seems to be an escalation of the problems, rather than an amelioration of them, although I note that there were some temporarily optimistic assessments in the letter of Mr. Guest, the psychologist, written in October, 1995.
- [7] It seems to me reasonable to speculate that the boys see it as necessary in retaining the approval of their mother that they find fault with their father. This is a very different thing from saying that Ms. J.E.R. has consciously and actively encouraged their hostility. It is just that I see the possibility of a cause and effect relationship here. I can see nothing in this history which would provide any rational basis in the mind of a child, any understandable basis in the mind of a child, for the feelings they express toward their father.
- [8] So the struggles of Ms. J.E.R. have not helped, the attempts of Mr. C.D.H. have been counterproductive and the work of the involved professionals has produced no positive result. It is my sense of this situation that these boys are on the brink of disaster in terms of their relationship with their father, and that an opportunity for him to see the boys may virtually be his last chance. It may already be too late.

- [13] His Lordship's comments are as relevant to this matter in April of 2005 as they were in July of 1997. Little has changed. However, the relationship between the plaintiff and his sons has indeed continued to deteriorate, to the point of total estrangement.
- [14] The defendant has filed affidavits of herself and her sons in these applications. It is apparent from the content of those affidavits that the defendant is using this court as a forum to encourage her sons to continue to "vent their feelings" about the plaintiff.
- [15] The affidavits filed by the defendant do not comply with R. 51(10) of the Rules of Court. Furthermore, they offend several rules of evidence. They are replete with opinion and legal argument. Ironically, however, in their non-compliance, those affidavits provide compelling, probative evidence of a unilateral termination of the parent/child relationship between the plaintiff and his sons.
- [16] The H.' marriage was dissolved by order of this court made 29 July 1992. The defendant married her present husband, Mr. R., in December 1992. Shortly after that marriage, her sons assumed the surname "R." and thereafter were known by that surname instead of their birth surname "H.". At the time, they were approximately 9 years and 7 years of age respectively. Upon attaining their majority, both sons formally changed their surnames from H. to R., pursuant to the Name Act, 1996 R.S.B.C., c. 328.
- [17] In many paragraphs of the sons' affidavits, the wording is precisely the same. For example, both sons swore to this bit of information:

On this note, both my brother and I realize that we have acted inappropriately by sending our father sarcastic messages about our relationship with him. For example, our father has irritated us to the point of frustration with his constant telephone calls, guilt trips and demands for correspondence from us. Connecting with him has not been natural for a long time and we avoid speaking with him. We did reach the stage of sending greeting cards that lacked sincerity, although our father may have considered our sarcastic messages to be sincere.

- [18] In her submissions, the defendant said that her sons "adore" their step-father; they hold him in high esteem and with great respect. This is not so for the plaintiff. Him, they hold in contempt. He is an annoyance; simply a source of revenue for their mother.
- [19] It is clear that the defendant's sons are not, and do not want to be, children of the H.' marriage. It is equally clear that they are, as they want to be, children of the R. marriage. From their perspective, there has been a virtual adoption. That is the reality. The plaintiff's loss of his job provides an opportunity to bring the orders of this court into conformity with that reality.
- [20] Therefore, on the plaintiff's application, the following orders will follow:
1. There will be declaration that C.A.R., born [], 1983 and K.A.R., born [], 1985 are not children of the marriage which is the subject of this proceeding;

2. The order of this court of 15 May 1997 is varied by terminating the plaintiff's duty to pay support to the defendant, for the maintenance and support of the aforementioned persons, effective 31 December 2004;
3. The order of this court made 14 August 1997 in this proceeding, requiring the plaintiff to post security is rescinded. And the plaintiff's RRSP account with Vantage Securities Inc., No. [] is released from security;
4. The Director of Family Maintenance Enforcement shall, as soon as practicable after the 32nd day following the filing date of these reasons for judgment, pay out to the plaintiff, or to his order, the money held by the Director, in trust, to the credit of this proceeding;
5. The defendant's application is dismissed; and
6. Costs follow the event.

II.

- [21] If I am wrong in making those orders, then I record my findings on the defendant's application for the reviewing court.
- [22] The defendant's first claim for relief is a declaration that the persons named in the order of 14 May 1997 are children of the marriage. This claim is superfluous. If the plaintiff's application is dismissed, then the order of 14 May 1997 remains in force.
- [23] The defendant's second claim for relief is for an order that the order of 14 August 1997 (requiring security), not be rescinded. This, too, is superfluous. If the plaintiff's application is dismissed, then the order of 14 August 1997 remains in force.
- [24] The defendant's third claim for relief is for a variation of the order of 14 May 1997, to substitute a lump sum award, in the place and stead of the periodic award. The lump sum sought is \$20,055. That sum is calculated on a formula which contemplates the continuation of periodic support, at the current rate, for the elder son (\$477.50 per month), through September 2005 (when he will be eligible for an independent student loan for graduate study). The sum of the projection is \$4,297.50. And, for the younger son, support at the current rate, through September 2007, when he will be eligible for an independent student loan for graduate study. This sum is \$15,757.50.
- [25] I find merit in the defendant's claim for a lump sum award. The plaintiff does not have current employment income. He says that his prospects for future employment, certainly at his current vocation, are not optimistic. He may require retraining. He does, however, have capital, including a recently received inheritance of \$153,000. Accordingly, he does have the means to pay lump sum support. The animosity which permeates these proceedings is a further justification for a lump sum award. See the helpful review of authorities on the issue in *Myatt v. Myatt* (1993), 45 R.F.L. (3d) 45 (B.C.S.C.).

- [26] I am not persuaded that the current rate of support is the appropriate multiplier. The defendant's sons are contributing to their own maintenance and support through part-time work; and they are in receipt of the educational funds benefits.
- [27] The defendant's current husband, Mr. R., stands in the place of a parent to the defendant's sons. There is no evidence on the record of Mr. R.'s needs, means and circumstances. It is said, however, that he is a colleague of the defendant. Presumably, his gross annual income from employment is equivalent to that of the defendant.
- [28] In all of the circumstances, an appropriate periodic award against the plaintiff would be at the rate of \$125 per month per recipient. Accordingly, on the defendant's formula, but with a \$125 per month modifier, the lump sum awards are \$1,125 for the elder son, \$4,125 for the younger son, for a total lump sum award, in lieu of the periodic award, of \$5,250, and the order would be varied accordingly.
- [29] Fourth, the defendant seeks a review of the plaintiff's annual earnings, from 1998 through 2004; and fifth, a retrospective variation of the order of 14 May 1997, to reflect increased child support, pursuant to the Guidelines, consistent with the plaintiff's increased annual income from year to year.
- [30] I am not persuaded that this is an appropriate case for a retroactive order. There is no evidence that the defendant incurred any debt or drew down capital as a result of the plaintiff's underpayment. There is no evidence that the defendant had a need for a lump sum at the present time. There is no evidence that the defendant's sons did without, or that the defendant or Mr. R. suffered any economic hardship as a result of the underpayment.
- [31] Since there would be divided success on the defendant's application, there would be no order for costs.

III.

- [32] The order will go as particularized in paragraph 20 of these reasons.

"R.D. Wilson, J."

The Honourable Mr. Justice R.D. Wilson

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Prepared on 27 October 2026 · Esheria