
CANADA / JUDGMENT

Deuling v. Ketchum

2016 BCSC 824

COURT

Supreme Court of British Columbia

DECIDED

10 May 2016

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2016 BCSC 824 Deuling v. Ketchum

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Deuling v. Ketchum,

2016 BCSC 824

Date: 20160510

Docket: E046371

Registry: New Westminster

Between:

Kim Stephanie Deuling

Claimant

And

Curtis Clark Ketchum

Respondent

Before: The Honourable Mr. Justice G. C. Weatherill

Reasons for Judgment

Counsel for the Claimant:

L.K. Hawes

Counsel for the Respondent:

J.E. Kovacs

Place and Date of Hearing:

New Westminster, B.C.

April 26, 2016

Place and Date of Judgment:

New Westminster, B.C.

May 10, 2016

Introduction

- [1] Each of the parties in this matrimonial dispute claims various forms of relief from the other in respect of support and other expenses relating to their Children.

Background

- [2] The parties were married in 1987 and have two children, Creston now 27 and Kyle now 21 (the "Children").
- [3] The parties separated in August 2006 and were divorced on March 15, 2010. They executed a separation agreement on March 23, 2007 ("Separation Agreement"). It was filed in the registry of the Supreme Court of British Columbia on April 30, 2014, thereby becoming effective as an order of the court.
- [4] The Separation Agreement provides in salient part as follows:
6. (a) the Husband and the Wife have agreed that the Husband shall pay to the Wife as support for the Children the sum of \$2,000.00 monthly, being \$1,000 per child, commencing on the 1st day of the first month following completion of sale of the family home, and continuing on that basis until each child ceases to be a "child of the marriage" as defined by the Divorce Act, 1985 or further Agreement between the Parties or Court Order. If/when Creston commences post secondary education and resides in residence (for which costs the Husband shall be solely responsible for) the Husband shall continue to pay the sum of \$1500 per month for Kyle until he ceases to be a "child of the marriage" or he too pursues post secondary education and resides in residence.
 - (c) the Husband shall pay the private school fees for Creston and Kyle and any post secondary education costs for either Creston or Kyle, and shall be at liberty to pay the fees together with post secondary education costs for either child through the vehicle of the Family Trust.
 - (d) the Husband shall create two TD Canada Trust GIC (or similar vehicle) accounts and deposit \$50,000 into each which shall be deemed "security" for the Husband's obligations to cover private school and post secondary education costs for the Children (the "Security funds"). The said accounts and the said deposits shall be created no later than 14 days following the sale of the said family home

- (g) the Husband and the Wife shall discuss and agree on any Section 7 Extraordinary Expenses for the children in advance of such expenses being incurred and shall discuss and agree on a proposal for sharing the cost of any such expenses.
7. Either party shall be at liberty to apply to a Court of competent jurisdiction to vary the maintenance payable herein upon a material change in circumstances.
8. (a) The Husband and the Wife agree that until the children are no longer dependents, they will each maintain the children on any employment medical, dental and extended health plans available to them.
- (b) the Husband shall continue to provide coverage and pay the monthly premiums to cover both children on the BC Medical Services Plan.
- [5] The sale of the family home completed on June 29, 2007.
- [6] The respondent paid child support in accordance with the terms of the Separation Agreement until March 2012. Since then, he has not paid any child support.
- [7] The respondent has paid some, but not all, of the Children's private school and post-secondary education costs, which are contemplated by paragraph 6(c) of the Separation Agreement.
- [8] The respondent did not create either of the trust accounts contemplated by s. 6(d) of the Separation Agreement. He has provided no explanation for his failure to do so.
- [9] The respondent has not paid his agreed share of the s. 7 Extraordinary Expenses.
- [10] The respondent has not fulfilled his obligations under paragraph 8 of the Separation Agreement to maintain medical benefits. The claimant takes the position that the respondent was required to pay medical benefits for her and for the Children.
- [11] The claimant seeks orders to enforce the respondent's obligations under the Separation Agreement.
- [12] The respondent seeks orders retroactively varying the terms of the Separation Agreement to either reduce or cancel his payment obligations.
- [13] The parties now consent to an order that, effective October 2009, Creston was no longer a child of the marriage. That order will go.
- [14] They also consent to an order that the Order of Mr. Justice Ball dated November 20, 2014 be rescinded. I am making that order.

Issues

- [15] The issues left for determination are:

- a) should the Separation Agreement be varied retroactively or otherwise? and if so, to what extent?
- b) was it an implied term of the Separation Agreement that the respondent would pay the Medical Services Plan ("MSP") premiums for the claimant in addition to those of the Children?
- c) is the respondent liable to pay child support for Kyle? and if so, how much?
- d) is the respondent liable to pay Kyle's private school expenses? and if so, to what extent?
- e) is the respondent liable to pay Kyle's post-secondary education expenses? and if so, to what extent?
- f) is the respondent liable to pay s. 7 Extraordinary Expenses in respect of Kyle? and if so, in what amount?

Variation of the Separation Agreement

- [16] The Separation Agreement was intended by the parties to be a comprehensive settlement of their matrimonial claims and obligations against each other and in respect of the Children. Each party received independent legal advice before signing it.
- [17] The law is clear that, although agreements reached by parents should be given considerable weight, where circumstances have changed, courts may order a retroactive award so long as the applicable statutory regime permits it: *Hiemstra v. Hiemstra*, 2006 SCC 37 at para. 78.

Prospective Variation

- [18] The respondent submits that the Separation Agreement should be varied going forward pursuant to the provisions of s. 148(3) of the Family Law Act, S.B.C. 2011, c. 25 [FLA] on the basis that there has been a material change of circumstances in respect of the respondent's income since the Separation Agreement was signed.
- [19] Section 148(3) of the FLA provides as follows:
- (3) On application by a party, the court may set aside or replace with an order made under this Division all or part of an agreement respecting child support if the court would make a different order on consideration of the matters set out in section 150.
- [20] Section 150 of the FLA provides as follows:

Determining child support

150 (1) If a court makes an order respecting child support, the amount of child support must be determined in accordance with the child support guidelines.

- (2) Despite subsection (1), a court may order child support in an amount different from that required by the child support guidelines if
- (a) the parties consent under section 219 [persons may consent to order being made] or have an agreement respecting child support, and
 - (b) the court is satisfied that reasonable arrangements have been made for the support of the child.
- (3) The court must consider the child support guidelines for the purposes of subsection (2), but must not consider arrangements made for the support of the child to be unreasonable only because the amount required under the child support guidelines differs from those arrangements.
- (4) Despite subsection (1), a court may order child support in an amount different from that required by the child support guidelines if satisfied that
- (a) an agreement or order respecting the financial duties of the parents or guardians or the division or transfer of property, other than an agreement respecting child support, benefits the child directly or indirectly, or that special provisions have otherwise been made for the benefit of the child, and
 - (b) applying the child support guidelines would be inequitable on consideration of the agreement, order or special provisions.
- (5) If a court makes an order respecting child support in an amount different from that required under the child support guidelines, it must give reasons for doing so.
- [21] The respondent also relies on his right pursuant to paragraph 7 of the Settlement Agreement to apply to vary his maintenance obligations upon a "material change in circumstances." In my view, because the parties expressly contemplated a variation of the respondent's maintenance obligations, there is no need to consider the application otherwise than under that contractual provision.
- [22] The respondent's child support obligations under the Settlement Agreement were based upon his 2006 income, when he earned approximately \$95,000 annually as a consultant. The evidence that, since then, his income has dropped dramatically has not been contradicted:

Year

Line 150 Income

2007

\$38,674

2008

\$52,734

2009

\$35,882

2010

\$81,856

2011

\$42,077

2012

\$2,333

2013

\$27,300

2014

20,000

2015

Not Available

[23] The claimant submits that higher income should be imputed to the respondent on the basis that he is not working to his full capacity and potential.

[24] The test for imputing income for intentional under-employment or unemployment is one of reasonableness, having regard to the parties' capacity to earn income in light of their age, education, health, work history and work availability, and it will include a party's ability to work or be trained to work: *Marquez v. Zapiola*, 2013 BCCA 433 at para. 37; *P.K.C. v. J.R.R.*, 2014 BCSC 932 at paras. 99 - 101.

[25] The burden of proof is on the party seeking to impute income to the other party to demonstrate intentional underemployment or unemployment on the basis of evidence, not mere speculation: *Nahu v. Chertkow*, 2003 BCSC 1285 at para. 30. However, where the party to whom income is sought to be imputed is a self-employed professional who has unique knowledge of the facts, that party has the burden of demonstrating, at least to some degree, the reasonableness of his/her actions in attempting to find employment. An adverse inference may be drawn from the failure to produce relevant documents or answer relevant questions on discovery: *Nahu*, at paras. 31 - 32.

[26] Here, the respondent has provided full and complete evidence of his work history. He has no formal education or vocational training. He began work in 1976 as a mail boy at Canadian Pacific Airlines and worked his way through the ranks to become Director of Worldwide Cargo Marketing in 1988. He lost that employment when his employer was taken over by

Pacific Western Airlines. He started his own consulting company which was sold in 2000 for \$1.1 million. Thereafter, he has offered his services as a consultant in airport planning and technology, among other areas. He has continued to seek employment in that and many other fields both in Canada and overseas, sometimes successfully, but more often than not unsuccessfully. He has not restricted himself to a specific area of work. The evidence is overwhelming that the respondent has made reasonable efforts to generate income over the years.

- [27] The respondent is now 57 years of age. He has kept the claimant fully apprised of his efforts to find employment as well as of his ongoing financial circumstances. There is no evidence that the respondent has been living beyond his means. Indeed, the claimant has regularly offered to allow him to reduce his support obligations to her.
- [28] It is clear that the respondent has not been intentionally under-employed or unemployed and there is no evidentiary basis for a finding that income should be imputed to him.
- [29] Presently, the claimant's financial circumstances are substantially better than those of the respondent. She is employed full time as an Air Canada flight attendant. She has a substantial Air Canada pension and RRSPs and virtually no debt. She has not satisfied me that she is suffering undue hardship. In contrast, the respondent is unemployed, has no savings or RRSPs or other assets of any significant value. He is living off his wife's income as a school teacher.
- [30] In my view, there has been a material and long lasting change in circumstances regarding the respondent's ability to pay child support under the terms of the Separate Agreement, including Kyle's post-secondary education expense.
- [31] The evidence demonstrates that, since he began attending the University of Calgary in September 2013, Kyle has proceeded with his courses at leisurely to modest pace, taking five courses during his first term, four during his second term and three during his third term and thereafter. He is attending classes under his current schedule for 13 hours per week. Throughout, Kyle has worked during the summers and part time during the school year. He has student loans totalling approximately \$32,640. He is living in rented accommodation shared with others, and seems to have decided to make Calgary his home.
- [32] Despite having sworn two affidavits in this proceeding, Kyle has not provided any meaningful breakdown of his university or monthly living expenses. There is no basis upon which the court is able to assess the reasonableness of his expenses.
- [33] Paragraph 6(c) of the Separation Agreement provides that the respondent will pay "any post secondary education costs for Kyle ". It defies common sense that, at the time the Separation Agreement was entered into, the parties intended that the respondent would pay all of Kyle's post-secondary education costs regardless of Kyle's own ability and/or willingness to pay them. It would be reasonable to infer the parties intended that, to the extent Kyle required financial assistance from his parents, it was the respondent, rather than the claimant who

would provide it.

- [34] A term may be implied into an agreement on the basis of the presumed intentions of the parties where such a term meets the "officious bystander" test, namely, a term which the parties would have said, if questioned at the time, they had obviously assumed: *Joffres v. Joffres*, 2014 BCSC 1778 at paras. 87.
- [35] In my view, it was implied by paragraph 6(c) of the Separation Agreement that the respondent's obligation to pay Kyle's post-secondary education costs would be limited to the reasonable financial need beyond Kyle's own financial resources, including student loans, bursaries and scholarships. After having considered all of the foregoing, I am ordering that the Separation Agreement be varied accordingly.
- [36] Moreover, I am ordering that paragraph 6(c) of the Separation Agreement is varied to provide that, henceforth, Kyle's reasonable post-secondary education costs beyond his own financial resources will be shared by the claimant and the respondent in amounts proportionate to their respective Line 150 incomes.

Reduction/Cancellation of Arrears

- [37] The respondent submits that the arrears owing under the Separation Agreement should be reduced or cancelled pursuant to s. 174 of the FLA, on the basis that, given his significantly reduced income since the Separation Agreement was entered into, it would be grossly unfair not to do so.
- [38] Section 174 of the FLA provides as follows:

Reducing or cancelling arrears

174 (1) On application, a court may reduce or cancel arrears owing under an agreement or order respecting child support or spousal support if satisfied that it would be grossly unfair not to reduce or cancel the arrears.

- (2) For the purposes of this section, the court may consider
- (a) the efforts of the person responsible for paying support to comply with the agreement or order respecting support,
 - (b) the reasons why the person responsible for paying support cannot pay the arrears owing, and
 - (c) any circumstances that the court considers relevant.
- (3) If a court reduces arrears under this section, the court may order that interest does not accrue on the reduced arrears if satisfied that it would be grossly unfair not to make such an order.

- [4] If a court cancels arrears under this section, the court may cancel interest that has accrued, under section 11.1 of the Family Maintenance Enforcement Act, on the cancelled arrears if satisfied that it would be grossly unfair not to cancel the accrued interest.
- [39] There is a heavy duty on the party asking for a reduction or cancellation of arrears to show that there has been a significant and long lasting change in circumstances. Arrears will not be reduced unless it is grossly unfair not to do so. If arrears are not reduced or cancelled, the court can order a payment plan over time if it is convinced that the arrears cannot be paid right away: *Earle v. Earle*, 1999 BCSC 283 at para. 46.
- [40] I am satisfied that the respondent, who has made detailed and full financial disclosure, has demonstrated a significant and long lasting change in his income.
- [41] However, I am not satisfied that it would be grossly unfair not to reduce or cancel the arrears.
- [42] In my view, when a spouse agrees to the terms of a Separation Agreement in the context of a matrimonial breakdown, particularly where, as here, the terms were comprehensive and the result of negotiations between the parties with legal advice, it is incumbent upon that spouse to do what he or she agreed to do, unless there are compelling reasons why performance should be excused.
- [43] The respondent received over \$300,000 from the net proceeds of sale of the matrimonial home in June 2007. He has provided no explanation, compelling or otherwise, for his failure to establish the \$50,000 trust fund for Kyle's education that he was required to establish under the terms of the Settlement Agreement he executed a mere three months earlier. Had he honoured his commitment to do so, there would have been no arrears because the trust fund would have been available to pay them.
- [44] The respondent's application for an order cancelling or reducing the support arrears owing under Settlement Agreement is dismissed.

MSP Premiums

- [45] The claimant submits that the parties' conduct after the Separation Agreement was entered into, as evidenced by a series of emails between them, demonstrates that they understood the respondent would pay the claimant's MSP premiums. She submits that a term to that effect should be implied into the Separation Agreement.
- [46] The emails upon which the claimant relies are, at best, equivocal. The first is an email dated May 20, 2012 from the respondent to the claimant in which he indicates that he will follow up with MSP as to why she was removed from the medical plan. The second is an email dated June 19, 2014 from the respondent to the claimant responding to an enquiry from her as to whether he had been making MSP payments for Kyle.

- [47] The evidence falls far short of meeting the "officious bystander" test. The Separation Agreement is a comprehensive document that was the culmination of negotiations between the parties and their respective counsel. If there was an understanding that the claimant's ongoing MSP premiums would be paid by the respondent, the agreement would have said so. I find that there was no implied term in the Separation Agreement that the respondent would pay the claimant's ongoing MSP premiums.
- [48] That aspect of the claimant's claim is dismissed.
- [49] However, it is clear that the respondent did agree to pay the MSP premiums in respect of the Children. The amount of that obligation cannot be determined from the evidence presented. I will leave it to the parties to make that determination. If they are unable to agree, there will be a reference to the Registrar.

Child Support for Kyle

- [50] During argument, counsel for the claimant accepted that, if the court declines to reduce or cancel the arrears owing under the Separation Agreement, the claimant is only entitled to the payment of child support for Kyle in the amount of \$1,500 per month for the months of April to August 2012, inclusive.
- [51] There will be an order that the claimant is entitled to the payment of child support in the amount of \$7,500 (\$1,500 per month x five months).

Kyle's Private School Expenses

- [52] Counsel for the respondent conceded during argument that the respondent is liable to pay the sum of \$375 in respect of Kyle's private school fees. These fees were paid by the claimant in December 2011.
- [53] There will be an order that the claimant is entitled to judgment against the respondent in the amount of \$375 together with Court Ordered Interest from January 1, 2012 to the date of this judgment.

Kyle's Post-Secondary Education Expenses

- [54] The evidence before me is that Kyle's post-secondary education expenses paid by the claimant to date are as follows:

a) **Living Expenses**

\$20,600.20

- [55] In addition, Kyle has paid tuition and other expenses totalling \$15,803.22. He has obtained student loans totaling \$32,640.00.

- [56] Despite his agreement to do so as set out in paragraph 6(c) of the Separation Agreement, the respondent has not contributed any monies towards Kyle's post-secondary education expenses.
- [57] As between the claimant and the respondent, it was the respondent who agreed to pay those expenses. As indicated above, I am not persuaded that his obligation in that regard should be retroactively varied.
- [58] In my view, it is appropriate to order that the respondent reimburse the claimant for that portion of the \$20,600.20 paid by the claimant that can be directly traced as a contribution towards his post-secondary education expenses, including university or college tuition and fees, books and residence costs. Expenses such as Kyle's day-to-day living expenses and off-campus rent do not qualify for reimbursement.

S. 7 Extraordinary Expenses

- [59] The parties agreed in the Separation Agreement that they would discuss and agree on any s. 7 Extraordinary Expenses in advance of such expenses being incurred, and would further agree on how those expenses would be shared between them.
- [60] The claimant says that she and the respondent agreed that they would equally split s. 7 Extraordinary Expenses totalling \$1,280.37. The respondent says that he only agreed to equally split a portion of that amount, namely \$826, and that the balance was never discussed with him prior to the expenses being incurred.
- [61] The meager documentary evidence that has been presented supports the respondent's position. The claimant has failed to satisfy me that the respondent agreed to make any further payments.
- [62] There will be an order that the respondent pay to the claimant the sum of \$413, representing his agreed 50% share of s. 7 Extraordinary Expenses.

Ann Ketchum's Tax Returns

- [63] The claimant's pleading include a claim for disclosure of the income tax returns of the respondent's new wife, Ann Ketchum. That claim was not pursued during that application and is dismissed.

Conclusion

- [64] I am making the following orders:
- i) as of October 2009, Creston ceased to be a "child of the marriage";
 - ii) the November 20, 2014 order of Mr. Justice Ball is set aside;

iii) paragraph 6(c) of the Separation Agreement is varied to reflect that the respondent is responsible to pay Kyle's post-secondary education costs limited to reasonable financial need beyond Kyle's own financial resources, including student loans, bursaries and scholarships, and is henceforth varied such that paragraph 6(c) of the Separation Agreement will now provide that Kyle's reasonable post-secondary education costs beyond his own reasonable financial resources will be shared by the claimant and the respondent in proportion to their respective Line 150 incomes;

iv) the respondent's application for an order cancelling or reducing the support appears owing under the Separation Agreement is dismissed;

v) the claimant's claim that there is an implied term in the Separation Agreement that the respondent would pay the claimant's ongoing MSP premiums is dismissed;

vi) the respondent agreed to pay the MSP premiums in respect of the Children under the Separation Agreement, as such the parties are to determine the amounts owing, and if they cannot agree, there will be a reference to the Registrar;

vii) the respondent will pay to the claimant \$7,500 in respect of child support owing for Kyle;

viii) the respondent will pay to the claimant \$375 plus Court Ordered Interest from January 1, 2012 until the date of this judgment, in respect of Kyle's private school expenses;

ix) the respondent is to reimburse the claimant for the portion of \$20,600.20 that can be traced to contributions toward Kyle's post-secondary education expenses; this includes tuition and fees, books, and residence costs, but does not include day-to-day living expenses and off-campus rent; and

x) the respondent will pay to the claimant \$413 in respect of his agreed upon 50% share of s.7 Extraordinary Expenses.

[65] As there has been divided success, there will be no order as to costs.

"G.C. Weatherill J."

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