
CANADA / JUDGMENT

Doyle v. Doyle

2006 BCCA 128

COURT

British Columbia Court of Appeal

DECIDED

7 March 2006

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2006 BCCA 128 Doyle v.Doyle

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Doyle v. Doyle,

2006 BCCA 128

Date: 20060307

Docket: CA033471

Between:

Tracy Ann Doyle

Respondent

(Plaintiff)

And

Andrew Joseph Doyle also known as Drew Joseph Doyle

Appellant

(Defendant)

Before:

The Honourable Madam Justice Huddart

The Honourable Mr. Justice Thackray

The Honourable Mr. Justice Lowry

Oral Reasons for Judgment

P.A. Dyck

Counsel for the Appellant

Respondent appeared In Person

Place and Date:

Kamloops, British Columbia

7 March 2006

- [1] HUDDART, J.A: This appeal is about the application of the Child Support Guidelines to the support of two teen-age girls who are in the joint guardianship and custody of their parents. In consent orders ancillary to the divorce order made 18 July 2002, Stephanie, then 13, and Jordyn, then 10, were to spend equal time with each parent, Mr. Doyle was to pay spousal support of \$954 and child support of \$846 monthly to Ms. Doyle, based on his annual income determined to be \$64,000 for the purposes of the Guidelines. Additionally, Ms. Doyle received the Child Tax Credit. Mr. Doyle worked for a company in which he had a 25% interest. Ms. Doyle was studying for a degree in social work. It follows Ms. Doyle was to pay the bulk of the children's ordinary expenses.
- [2] By 1 July 2003, Ms. Doyle had obtained a Bachelor's degree in social work, and found employment as a social worker, first in Penticton, and later in Kelowna. In anticipation of her employment, Mr. Doyle obtained an order on 23 June 2003 suspending payment of spousal support as of 2 July 2003 and terminating it as of 1 July 2004.
- [3] After he learned Ms. Doyle had accepted full-time employment as a youth care worker with the Interior Health Authority to begin on a three-month probationary basis on 17 October 2005, Mr. Doyle applied to vary the child support. By then, by her own choice, Stephanie was living primarily with her father, while Jordyn continued to share her time more or less equally between her parents. Mr. Doyle asked the court to find these two changes of circumstance material to the child support order justifying a variation order under the Divorce Act and Guidelines.
- [4] On 11 October 2005, Brooke J. found Stephanie had moved into the day-to-day care of her father on 1 July 2005. He found that to be a material change of circumstance. He was not convinced Ms. Doyle's potential employment was a material change, given its probationary nature and her employment history. He then terminated Mr. Doyle's obligation to pay support for Stephanie, found Mr. Doyle's current annual income under the Guidelines to be \$64,342 and Ms. Doyle's current annual income to be \$26,299. Consequently, he ordered Mr. Doyle to pay the table amount (\$530) for Jordyn's support. In his view, Jordyn was still subject to the co-parenting arrangement the parents had put in place when they divorced.
- [5] In making that order, the chambers judge rejected Mr. Doyle's submission that the Guidelines required that his obligation to support Jordyn be reduced in consideration of his co-parenting responsibility and that Ms. Doyle contribute to Stephanie's support. He also

rejected Mr. Doyle's submission that Ms. Doyle's current annual income for Guidelines purposes should be established at \$47,000, finding Ms. Doyle's income would exceed \$40,000 annually if her employment was made permanent. He also rejected Ms. Doyle's submission that he should find hardship on her part under s. 10(1) of the Guidelines.

- [6] Mr. Doyle alleges the chambers judge erred in fixing the date Stephanie had begun to live primarily with him, in determining Ms. Doyle's current annual income, and in the application of the Guidelines.
- [7] Ms. Doyle responds that the difference in the parents' incomes will give Stephanie a higher standard of living than that of her sister, Jordyn, under the variation order of Brooke J. If the amount of the order is reduced under the split custody provision (s. 8) of the Guidelines, and further under the shared custody provision (s.9), that difference will be worsened. She sees the Guidelines as designed to provide children whose custody is shared with the same standard of living in both homes.
- [8] Before I embark on the difficult question of how to apply the Guidelines in a situation where one child lives primarily with one parent and the other child spends roughly equal time with both parents, I will consider the first two grounds of appeal.
- [9] I would not interfere with the finding of fact as to the date of Stephanie's voluntary move. The best evidence as to when she could be considered to have made a firm choice to live primarily with her father is Mr. Doyle's request made on 25 July 2005 to renegotiate child support. The finding of the chambers judge is consistent with Stephanie's letter appended to Mr. Doyle's affidavit that she had been "residing at my dad's for the past few months."
- [10] Nor would I interfere with the finding as to Ms. Doyle's income for purposes of the Guidelines. Each suggested the other's income would or should increase. Given Ms. Doyle's employment history and the nature of her proposed employment, the chambers judge cannot be said to have erred when he looked to her 2004 income tax return as the most current information available for determining her annual income under the Guidelines, as he did to determine Mr. Doyle's income. With no history of permanent employment, Ms. Doyle was not yet settled into a new career after her years of home-making. He acknowledged the potential for future change in child support consequential on increased incomes when he directed both parties to exchange their "T-4 tax returns" no later than 31 May in 2006 and subsequent years.
- [11] More problematic is the chambers judge's approach to the application to vary child support consequential on Stephanie's choice to change her primary residence under the parents' co-parenting arrangements. The trial judge's finding that choice was a change in circumstances under s. 17(4) of the Divorce Act permitted, but did not require him to vary the child support being paid under the consent order. However, once a court decides to vary an order for child support, the variation order must comply with the Guidelines, subject to the exception in s. 17(6.2): Divorce Act, s. 17(6.1), *Montalbetti v. Montalbetti*, 2000 BCCA 504 at ¶21 and *Wang v. Wang* (1998), 58 B.C.L.R. (3d) 159 (C.A.). at ¶35.

- [12] The chambers judge did not find s. 17(6.2) applies. Ms. Doyle does not suggest it should. He did, however, explain why he did not require any payment for Stephanie by Ms. Doyle, at ¶41 of his reasons for judgment:

I relied principally in my decision with respect to the child support obligation having regard to the income and growing income of the plaintiff on the consent order in which the parties agreed that while they would share the care and custody of the children equally the father would pay child support for the two children, and the fact that Stephanie has left that arrangement by her own wishes, with the concurrence of her parents, and now principally resides with her father is sufficient in my opinion to displace the obligation to contribute towards her support; but the fact that she now resides with her father of itself is not sufficient to trigger a reciprocal obligation, in my view, at this time

- [13] With respect, that comment reveals legal error. It reflects an understanding of the child support regime that preceded the enactment of s. 17 (6.1) of the Divorce Act. Then, a court might vary a child support order taking into account only or primarily the material change of circumstance. Now, "a court making a variation order in respect of a child support order shall do so in accordance with the applicable guidelines."
- [14] It may be the chambers judge, was attempting to preserve the agreed support for Jordyn while varying Stephanie's support, in a good faith exercise of his discretion to acknowledge the struggle of Ms. Doyle to obtain professional qualifications and start a new career to establish her independence, while co-parenting with a father well-established and secure in his career at their separation. I am not, however, persuaded the statutory regime permits that result. The Guidelines do not lend themselves to an easy analysis where one child's care is shared and the other is primarily dependent on one parent.
- [15] Under s. 3 of the Guidelines, the presumptive rule is that "the amount of a child support order for children under the age of majority is (a) the amount set out in the applicable table, according to the number of children under the age of majority to whom the order relates and the income of the spouse against whom the order is sought; and (b) the amount, if any, determined under s. 7. Neither parent in this case claimed any amount under section 7 for special or extra-ordinary expenses. If both daughters were living primarily (more than 40% of their time) with their mother, Mr. Doyle would be obliged to pay \$846 for their support. If both were living primarily with their father, Ms. Doyle would be obliged to pay \$393 for their support.
- [16] Section 8 of the Guidelines provides for a split custody arrangement where "each spouse has custody of one or more children." Then, "the amount of a child support order is the difference between the amount that each spouse would otherwise pay if a child support order were sought against each of the spouses." If Mr. Doyle has custody of Stephanie and Ms. Doyle has custody of Jordyn, Mr. Doyle's obligation for Jordyn would be \$530 and Ms. Doyle's obligation for Stephanie would be \$233. The child support order would require Mr. Doyle to pay Ms. Doyle \$297 monthly.

- [17] Section 9 of the Guidelines provides for a shared custody arrangement "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." Then the amount of the child support order is 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.
- [18] These three factors are to structure the court's exercise of discretion: *Contino v. Contino-Leonelli*, 2005 SCC 63 at ¶27. On the evidence before the chambers judge only the first can be determined. The applicable Table amounts are \$846 for Mr. Doyle and \$393 for Ms. Doyle. If they shared physical custody of both children equally, as they had under the consent order, the simple set-off payment would be \$453 by Mr. Doyle to Ms. Doyle. That would be the starting-point of the s. 9 analysis: *Contino* at ¶49. The Table amounts reflect "the average expenditure of parents with the referable income": *Contino* at ¶47. But the simple set-off amount is not presumed to be appropriate support in the absence of evidence about the other two factors.
- [19] The mathematical precision with which child support is determined under ss. 3 and 8 is not applicable to shared custody. By s. 9, Parliament and the Legislature have left a structured discretion to trial courts to determine appropriate child support in the particular circumstances of each family. As Bastarache, J. stated in *Contino* at ¶41:
- A court will depart from the set-off amount or make adjustments to it if it is inappropriate in light of the factors considered under s.s. 9(b) and 9(c). The set-off amount must therefore be followed by an examination of the continuing ability of the recipient parent to meet the needs of the child, especially in light of the fact many costs are fixed.
- [20] It is not clear, however, that s. 9 applies in this case. Stephanie does not reside with her mother more than 40% of the time.
- [21] In these circumstances, Mr. Doyle's first position is that s. 8 should set the upper limit to his support obligation. Alternatively, he submits his obligation should be fixed under s. 9, or possibly, by a combination of the two sections, because Stephanie's physical custody is with him, while Jordyn's physical custody is shared.
- [22] Although the parents share legal custody of both children, I agree with counsel for Mr. Doyle that split custody is the Guidelines concept that best describes the current situation on the available evidence. This concept acknowledges that Stephanie now lives primarily with her father and he is paying the bulk of her expenses, and Ms. Doyle's submission that she is, as she has been historically, primarily responsible for Jordyn's ordinary expenses, although Jordyn spends about half her time at her father's home. It also acknowledges that under the

co-parenting arrangement in place, each parent is providing a home available to both children as they have since the consent order. In such an arrangement, either daughter's primary residence may be ephemeral.

- [23] In an alternate submission, Mr. Doyle suggests child support might be determined under s. 9 because the parties share legal custody, but Stephanie is with him full-time and Jordyn about half time. It may be that additional evidence will persuade a court that s. 9 is the more appropriate provision under which to determine the payor and the amount of the award. The discretion permitted by s. 9 would permit the court to tailor an award to the particular circumstances of this family. Section 9 permits a court to modify the set-off amount in a shared custody situation where, as Bastarache J. stated at ¶51 in *Contino*,

considering the financial realities of the parents, it would lead to a significant variation in the standard of living experienced by the children as they move from household to another, something which Parliament did not intend. As I said in *Francis v. Baker*, one of the overall objectives of the Guidelines is, to the extent possible, to avoid great disparities between households. It is also necessary to compare the situation of the parents while living under one roof with the situation that avails for each of them when the order pursuant to s. 9 is sought. As far as possible, the child should not suffer a noticeable decline in his or her standard of living.

- [24] However, when the Supreme Court considered s. 9 in *Contino*, it emphasized the need for evidence to permit consideration of ss. 9(b) and 9(c), as had this Court in *Green v. Green*, 2000 BCCA 310. Both courts were clear that there is no governing or default presumption to be applied. The discretion is to be exercised in each case considering and weighing each of the three listed factors so that the economic reality and particular circumstances of each family are properly accounted for. The evidence in this case does not permit a satisfactory exercise of that discretion, even if the facts permit a finding of shared custody of Stephanie.
- [25] It was open to the chambers judge to adjourn the hearing to require further evidence. This is a costly exercise for parents and one to be avoided if possible. However, Ms. Doyle advised the court that she wants the opportunity to prove Mr. Doyle's financial situation is not as he portrayed it at the hearing. Whatever order this Court might make on the record, it is likely Mr. Doyle will apply to vary the child support further if and when Ms. Doyle's new job is made permanent. That may happen in the next few weeks. On any new application, both parents would have the opportunity to provide the court with all the evidence necessary to permit a court to make a proper determination whether their arrangements for the care of Stephanie and Jordyn come within s. 8 or s. 9, or some combination thereof, and, if within s. 9, to consider and weigh all the listed factors. On such an application, or to help them in avoiding further litigation, they would have the guidance found in the reasons in *Contino*, released after the order under appeal.
- [26] In these circumstances I would set aside the order of Brooke J. and remit the application for a further hearing, new evidence can be provided and the Guidelines can be considered and applied.

[27] There will be no order as to costs.

[28] THACKRAY, J.A.: I agree.

[29] LOWRY, J.A.: I agree.

"The Honourable Madam Justice Huddart"

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