

CANADA / JUDGMENT

Espersen v. Espersen

2017 BCSC 1206

COURT

Supreme Court of British Columbia

DECIDED

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2017 BCSC 1206 *Espersen v. Espersen* IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: *Espersen v. Espersen*, 2017 BCSC 1206 Date: 20170714 Docket: E13554 Registry: Smithers Between: Charlene Lyn Espersen Claimant (Respondent) And Tommy Kaae Espersen Respondent (Applicant) Before: The Honourable Madam Justice Russell Reasons for Judgment Counsel for the Claimant: H. Crosby Counsel for the Respondent: E.L. Crocker Place and Date of Hearing: Smithers, B.C. April 24, 2017 Written Submissions of Respondent (Applicant) dated: May 31, 2017 Written Submissions of Claimant (Respondent) dated: June 20, 2017 Place and Date of Judgment: Smithers, B.C. July 14, 2017

Introduction

- [1] This is an application in a family law action concerning extraordinary expenses for the post-secondary educational costs of twin boys, Tanner Kaae Espersen and Bailey Larson Espersen. They are currently over 18 years of age. The respondent on this application is the claimant, Charlene Lyn Beaulieu, formerly Ms. Espersen, ("Ms. Beaulieu") who argues that beyond accommodating her sons in her home in Maple Ridge, if they were to attend a local university, she does not want to financially support their educational pursuits. The applicant respondent, Tommy Kaae Espersen, ("Mr. Espersen") the boys' father, submits that the claimant should be responsible for a proportionate share of the boys' educational costs.
- [2] For the reasons that follow, I find Ms. Beaulieu responsible for a proportionate share of those educational costs. However, given that Tanner has chosen to study outside Canada, I have used Bailey's Canadian educational costs as the benchmark to determine the proportionate share that Ms. Beaulieu is required to contribute.

Facts

- [3] Ms. Beaulieu and Mr. Espersen were married on August 17, 1996. Their sons were born on August 14, 1998. The parties entered a separation agreement on August 20, 2003 (the "Separation Agreement"). While they were together, the family lived in Smithers, British Columbia. However, after the couple's separation, Ms. Beaulieu moved to the Lower Mainland, while Mr. Espersen and the boys stayed in Smithers.

- [4] The Separation Agreement was silent as to child support. However, attached to that agreement was a letter to the CRA, signed by both parties, advising that neither parent was to pay support to the other. Instead, the letter stated that the parties had agreed to equally share the major expenses for the boys' education, sporting activities and daycare.
- [5] On March 10, 2005, by way of a consent order, Rogers J. granted a divorce order. In addition, the following conditions were ordered:
- a) The boys would live primarily with Mr. Espersen;
 - b) Ms. Beaulieu would be responsible for the boys' travel costs for access visits; and
 - c) Due to undue hardship, Ms. Beaulieu would pay no child maintenance to Mr. Espersen.
- [6] Since 2005, other than paying approximately \$1,500 per year for the boys' costs of travel to the Lower Mainland, Ms. Beaulieu has otherwise not paid any child support to Mr. Espersen.
- [7] The boys graduated from high school in June 2016 and are currently pursuing post-secondary studies.
- [8] Both boys participate in their university's varsity swim club. The boys have been involved in swimming since they were four years old, and are highly accomplished in this area. They are currently nationally ranked and, in their respective events, they are in the top 16 spots in British Columbia. Recently, Bailey came very close to qualifying for Olympic trials.
- [9] Last year, Tanner received \$22,000 USD in academic and swim scholarships to attend the nurse practitioner program at King's University in Bristol, Tennessee. However, that program was subsequently discontinued. Consequently, beginning in the 2017/2018 academic year, he will be attending the University of South Dakota, where such a program does exist. The costs associated with this latter program will be outlined later in these reasons.
- [10] For his part, Bailey received a \$3,250 bursary to attend the University of Victoria and participate in their varsity swim program. Ultimately, he plans on pursuing a master's degree in occupational therapy. However, given this is a graduate degree, he must first receive a bachelor's degree as a prerequisite. He has chosen to do a Bachelor of Science with a concentration in marine biology to fulfill this requirement.
- [11] Both boys secured summer employment following graduation from high school, and both are currently employed in summer jobs. Tanner is working in Houston, BC as a labourer for Canadian Forest Products making \$28.09 per hour. Bailey has secured employment with the Department of Fisheries and Oceans in Burns Lake, and is currently earning \$21.25 per hour. In addition, the boys recently received an inheritance of \$10,500 each.
- [12] Regarding Tanner's educational costs, Mr. Espersen provided the following calculation (in Canadian dollars) for the 2017/2018 academic year: Expenses Total for School Year (8 months) School and Expenses Tuition \$14,181 Fees \$1,777.85 Books \$300 Lodging Dorm

\$5,579.49 Meal Plan \$4,710.09 Transportation 2 roundtrips from South Dakota to Smithers \$3,000 Communication Cell Phone \$1,440 Incidentals \$1,000 Total cost: \$31,988.43 Amounts to be Subtracted from Total Cost Summer Income (estimated amount to be set aside for education costs from total) \$9,583.12 Half of Inheritance \$5,250 Total Cost Subtracted by Summer Income and Half of Inheritance Shortfall \$17,155.31

- [13] For Bailey, the calculation is as follows for the 2017/2018 academic year: Expenses Total for School Year (8 months) School and Expenses Tuition & Fees \$6,140 Books \$800 Lodging Rent \$4,200 Groceries \$3,200 Utilities \$400 Transportation Insurance \$1,360 Gas \$800 2 roundtrips from Victoria to Smithers \$1,300 Communication Cell Phone \$640 Incidentals \$800 Total cost: \$19,640 Amounts to be Subtracted from Total Cost Summer Income (estimated amount to be set aside for education costs from total) \$10,970.42 Half of Inheritance \$5,250 Total Cost Subtracted by Summer Income and Half of Inheritance Shortfall \$3,419.58
- [14] Neither Tanner nor Bailey is eligible for government student loans, bursaries or scholarships.

Analysis

(1) Statutory Provisions

- [15] Before undertaking an analysis of the case at bar, it is important to note that there are a number of statutory sections in the Federal Child Support Guidelines that are relevant in these circumstances. For ease of reference, I have outlined ss. 3(2), 7(1)(e) and 7(2) here: Child the age of majority or over 3(2) Unless otherwise provided under these Guidelines, where a child to whom a child support order relates is the age of majority or over, the amount of the child support order is o (a) the amount determined by applying these Guidelines as if the child were under the age of majority; or o (b) if the court considers that approach to be inappropriate, the amount that it considers appropriate, having regard to the condition, means, needs and other circumstances of the child and the financial ability of each spouse to contribute to the support of the child. Special or extraordinary expenses 7 (1) In a child support order the court may, on either spouse's request, provide for an amount to cover all or any portion of the following expenses, which expenses may be estimated, taking into account the necessity of the expense in relation to the child's best interests and the reasonableness of the expense in relation to the means of the spouses and those of the child and to the family's spending pattern prior to the separation:
- (e) expenses for post-secondary education . Sharing of expense 7(2) The guiding principle in determining the amount of an expense referred to in subsection (1) is that the expense is shared by the spouses in proportion to their respective incomes after deducting from the expense, the contribution, if any, from the child.

(2) Child of the Marriage

- [16] On the issue of a child over the age of majority qualifying as a 'child of the marriage', the Court in *W.P.N. v. B.J.N.*, 2005 BCCA 7 found the following at paras. 16-20:
- [16] Under s. 15.1(1) of the Divorce Act, a court may make an order "requiring a spouse to pay for the support of any or all children of the marriage". The definition of "child of the marriage", in s. 2(1) of the Act, includes a child who:
- (b) is the age of majority or over and under their [her parents] charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessities of life;
- [17] The parties' separation agreement similarly provides that child support will cease for a child who is not a "child of the marriage" within the meaning of the Divorce Act.
- [18] The pursuit of education necessary to equip a child with a career qualifies as "other cause" for continuing dependence of a child of or over the age of majority: *Martin v. Martin* (1988), 26 B.C.L.R. (2d) 390 at 393 (C.A.). In determining whether a child pursuing an education is unable to withdraw from her parents' charge or obtain the necessities of life a court must consider the surrounding circumstances; mere attendance at an educational institution is not sufficient: *Ciardullo v. Ciardullo* (1995), 15 R.F.L. (4th) 121 at para. 17 (B.C.S.C.).
- [19] A list of relevant circumstances was formulated by Master Joyce (as he then was) in *Farden v. Farden* (1993), 48 R.F.L. (3d) 60 at para. 15 (B.C.S.C.) and referred to by this Court in *Darlington v. Darlington* (1997), 32 R.F.L. (4th) 406 at para. 14 (B.C.C.A.). These factors were considered by the chambers judge, who noted that in *Darlington*, this Court made it clear that there does not have to be evidence on all of the factors in order to establish that a child is a "child of the marriage" because she is pursuing an education. Nor should this list be considered to be exhaustive of the relevant factors.
- [20] The factors outlined in *Farden* are:
- (1) whether the child is in fact enrolled in a course of studies and whether it is a full-time or part-time course of studies;
 - (2) whether or not the child has applied for or is eligible for student loans or other financial assistance;
 - (3) the career plans of the child, i.e. whether the child has some reasonable and appropriate plan or is simply going to college because there is nothing better to do;
 - (4) the ability of the child to contribute to his own support through part-time employment;
 - (5) the age of the child;
 - (6) the child's past academic performance, whether the child is demonstrating success in the chosen course of studies;

- (7) what plans the parents made for the education of their children, particularly where those plans were made during cohabitation;
- (8) at least in the case of a mature child who has reached the age of majority, whether or not the child has unilaterally terminated a relationship from the parent from whom support is sought. [Emphasis added]
- [17] On a weighing of these factors, it is clear that the boys are children of the marriage. Neither is eligible for student loans, their career plans are reasonable, and both are in good academic standing in their respective programs. While the boys are taking four courses per semester in order to pursue varsity swimming, courts have made it clear that this qualifies as "a reasonable course load": J.L.T. v. K.L.H., 2014 BCSC 220 at para. 54.
- [18] As a result, I conclude that the boys are children of the marriage.
- (3) Extraordinary Expenses
- [19] Given that the boys are children of the marriage, their educational costs qualify as an extraordinary expense under section 7 of the Guidelines. On this issue, a good summary of the relevant law was recently provided by this Court in L.A.F. v. C.P.M., 2015 BCSC 281 at paras. 52-56:
- [52] The guiding principle for awarding extraordinary expenses under s. 7 of the Guidelines is that each parent pays in proportion to their respective income. However, the Court retains discretion to award a different proportion based on the financial circumstances of the payor and payee.
- [53] As well, an award for an extraordinary expense can be denied or the proportion paid can be adjusted based on the means of the payor and payee: see Ebrahim v. Ebrahim (1997), 73 A.C.W.S. (3d) 812 at paras. 19-21 (B.C.S.C.). In Ebrahim, the husband's income was substantially less than his ex- wife's but the means of the husband were adjusted by the Court to factor in contributions he was receiving from his family. This approach is consistent with the British Columbia Court of Appeal decision, McLaughlin v. McLaughlin (1998), 167 D.L.R. (4th) 39 (B.C.C.A.), discussing the reasonableness of extraordinary expenses Justice Prowse, writing for the Court, held at para. 48:
- [48] The question of reasonableness involved examining the "means" of the parties, taking into account the reality of their separate status and such other factors as their capital, income distribution, debt load, third party resources which impact upon a parent's ability to pay, access costs, obligations to pay spousal or other child support orders, spousal support received and any other relevant factors
- [54] In Baum v. Baum, 2000 BCSC 1835, Justice Martinson expressed the notion that the means of the parties under s.7 of the Guidelines should be interpreted liberally:

- [9] Section 7(1) of the Guidelines does however give the court a discretion. It requires the court to consider the means of the parties, not just their income. The word "means" should be interpreted broadly to include not just the income of the spouse, but other sources of revenue available to that spouse. The court can look at the economic wellbeing of the spouses and this includes a consideration of family income.
- [10] Section 7(2) does say that a guiding principle is that the expense is shared by the spouses in proportion to their respective incomes after deducting from the expense, the contribution, if any, from the child. However, the mandatory provisions of s. 7(1) must prevail when there is a conflict.
- [55] Baum has often been cited by courts in this province when assessing the means of a party where they have remarried. In *Pearse v. Pearse*, 2010 BCSC 117, Justice Schultes, citing Baum, held that the wife's means were to be assessed based on income available to her through her new spouse. The Court held that the wife was to pay a greater share of certain educational expenses as "her overall means as part of her family unit are greater than the defendant's."
- [56] A similar conclusion was reached in *Marshall v. Marshall*, 4 R.F.L. (5th) 115 (B.C.S.C.) (Master). In that case the husband's income was higher than his ex-wife's (although he only made \$25,000 a year). However, the wife had recently begun cohabiting with a new spouse who earned \$54,000 a year. When considering who was to pay for daycare, which was deemed an extraordinary expense, Master Powers factored in the new spouse's contribution to the means of his new wife. At para. 17 of the judgment, Master Powers holds: 17 However, in considering the means of the spouses with regard to these extraordinary expenses one of the factors which will affect Ms. Marshall's means is the contribution made to her household by her new spouse. This is the case even though this new spouse may not be a parent with an obligation to contribute to the support of the child. The contribution does affect Ms. Marshall's means.
- [20] As a result, in Baum, the husband was ordered to pay only \$70 of the \$290 a month for the child's daycare.
- [21] As was made clear by the Court in *Z.D.D. v. R.C.G.*, 2004 BCSC 1239 at para. 22, these educational costs must be reasonable: Thus, there is an obligation on both parents to assist their children, to the extent that they are able, with their reasonable and necessary expenses relating to such education.
- [22] Subsequent to their divorce, both Mr. Espersen and Ms. Beaulieu remarried.
- [23] Mr. Espersen currently earns \$78,644.60 per year, while his new wife makes \$50,000 per year. Consequently, their household income is \$128,644.60.

- [24] Ms. Beaulieu, for her part, makes \$36,899 in employment income. In addition, she makes \$8,400 per year in rental income, and was provided a loan by her father, Wayne Larson, for a down payment on her house, and for a vehicle. Her new husband has an income of \$68,000, making Ms. Beaulieu's household income \$113,299.
- [25] As the statutory and case law cited above makes clear, generally, in cases where the parties have remarried, courts have permitted apportionment of extraordinary expenses based on the parties' household incomes.
- [26] In addition, there was an agreement made between the parties when they separated that stipulated that both educational and sports costs for the boys were to be shared equally. However, I have not taken this agreement into account, as it is quite dated, and I am not convinced that the educational and sports costs it envisioned were those associated with post-secondary studies.
- [27] As a result, I have decided that both parties are to pay their sons' reasonable educational costs at a share proportionate to their household incomes. In other words, Ms. Beaulieu is responsible for 47% of the boys' reasonable educational costs and Mr. Espersen is responsible for 53%.
- [28] What costs qualify as "reasonable" will be discussed below.
- (4) Educational Costs
- [29] Earlier in these reasons, I outlined the shortfall in costs for each of the boys according to the calculations provided by Mr. Espersen. Overall, I find that these calculations are fair and accurate. The accounting put forward by Mr. Espersen anticipates the boys putting their substantial inheritance wholly toward their educational costs, as well as a large portion of their lucrative summer employment earnings. Ms. Beaulieu complains that this accounting outlining the boys' contribution does not consider any tax refund to which they may be entitled. I have nothing more than her complaint on this point as she did not estimate the amounts to which they would have been entitled. Therefore, I will rely on Mr. Espersen's numbers.
- [30] However, one issue in the case at bar is that Tanner's educational costs are significantly higher than his brother's, as he is pursuing his post-secondary studies in the United States. In addition, there is some issue as to whether Ms. Beaulieu was consulted about Tanner's attendance at an American university over a Canadian one.
- [31] Courts have addressed the importance of both parents being consulted before a child takes on an especially expensive educational program. Regarding this issue, the Court said the following in *Pearse v. Pearse*, 2010 BCSC 117 at paras. 50-51:
- [50] There is also a question of the fairness of seeking to impose a share of this rather large educational expense on the defendant in the absence of any prior consultation with him about its reasonableness. I draw the analogy to situations in which one spouse commits to a

much more expensive post-secondary education program than might normally have been anticipated. In *Daicar-Gendron v. Gendron* (2004), 8 R.F.L. (6th) 23 (B.C.S.C.) Melnick J. made the following helpful observations at para. 27: When children embark on a program of education the cost of which is remarkably higher than that which would be the case in most other career paths at either university or college, there is a positive obligation on them (and on any custodial parent who seeks to recover a substantial portion of the cost of that education as an extraordinary expense) to enter into meaningful discussions with the parent who is expected to contribute. This, too, is based on the concept of utmost good faith. In the absence of doing so, that parent should not be expected simply to provide a blank cheque.

- [51] That reasoning is apt here. While the cost of this program is probably a reasonable one, having regard to the costs of post-secondary education in general, it would still be unexpectedly high from the defendant's perspective, especially since he was not previously aware of Christine's enrolment in the program, and his contribution should be moderated to reflect his exclusion from the decision to incur it.
- [32] In the case at bar, the parties engaged in protracted conversations via email regarding the costs of the boys' education. There is no email on record predating Tanner's enrollment at King's University which made it clear to Ms. Beaulieu that he had decided to attend university in the United States. In addition, throughout their email exchanges, Ms. Beaulieu made it clear that she was against Tanner going to an American university. Consequently, I accept the claimant's submission that she was not properly consulted.
- [33] As noted above, in terms of actual costs, there is a shortfall of \$17,155.31 for Tanner, and \$3,419.58 for Bailey. This is a significant disparity.
- [34] Given this, I believe that Bailey's educational costs should serve as a benchmark for what is reasonable in the circumstances. As such, for the next two years, I find the total reasonable costs for the boys' education is \$6,839.16 per year.
- [35] However, after the next two years, the boys will have exhausted their inheritance of \$10,500 on their educational costs. As a result, their annual educational costs will grow by \$5,250 each. Given their course load, they should both only have two years left on their degrees after that point. Thus, for those final two years, I find that the boys' total reasonable educational costs will be \$12,089.16 per year.
- [36] Therefore, Ms. Beaulieu will be responsible for 47% of \$6,839.16 for each of the next two years, and then 47% of \$12,089.16 for each of the two years after that. Overall, this amounts to a total contribution by Ms. Beaulieu of \$17,792.62 over the next four years.
- (5) Retroactivity
- [37] Mr. Espersen requested a retroactive order for the sharing of the boys' 2016/2017 university expenses. On this issue, I find my reasons in *P.V. v. D.B.*, 2007 BCSC 237 at paras. 139-142 apposite:

- [139] The question of when retroactive child support should be awarded was recently considered by the Supreme Court of Canada in *D.B.S., supra*. Bastarache J. did not distinguish in that decision between section 7 expenses and basic child support. The same principles were applied to the determination of whether retroactive child support should be awarded for section 7 expenses where no section 7 expenses had been awarded in an interim child support order in *Kim v. Kim*, 2006 BCSC 1330.
- [140] As explained by Bastarache J. in *D.B.S., supra*, at ¶ 95: It will not always be appropriate for a retroactive award to be ordered. Retroactive awards will not always resonate with the purposes behind the child support regime; this will be so where the child would get no discernible benefit from the award. Retroactive awards may also cause hardship to a payor parent in ways that a prospective award would not. In short, while a free-standing obligation to support one's children must be recognized, it will not always be appropriate for a court to enforce this obligation once the relevant time period has passed.
- [141] However, he also emphasized that retroactive child support awards would not be exceptional. The relevant principles set out by Bastarache J. in determining whether an award of retroactive child support should be made are as follows:
- (a) Whether there is a reasonable excuse for why support was not sought earlier. A recipient parent will generally lack a reasonable excuse where he or she knew higher child support payments were warranted, but decided arbitrarily not to apply. Also, where the delay is attributable to unreasonableness on the part of the recipient parent and not blameworthy conduct on the part of the payor parent, the payor parent's interest in certainty will be compelling. Absent a reasonable excuse, uncorrected deficiencies on the part of the payor parent that are known to the recipient parent represent the failure of both parents to fulfill their obligations to their children. See *D.B.S., supra*, at ¶ 100-104.
 - (b) Whether there has been blameworthy conduct on the part of the payor parent. Blameworthy conduct includes anything that privileges the payor parent's own interests over his/her children's right to an appropriate amount of support. A court should consider a previous court order or agreement that the payor parent was following. The previous order is presumed valid, and a payor parent should be presumed to be acting reasonably by conforming to the order. See *D.B.S., supra*, at ¶ 105-109.
 - (c) Whether the present circumstances of the child will be improved by a retroactive award. A child who enjoys a relatively high standard of living may benefit less from a retroactive award than a child who is in need. While child support is not calculated from a needs-based perspective under the Guidelines, need remains a relevant consideration where the court's discretion is being exercised, and remains a useful factor to consider with respect to retroactive awards. An argument for retroactive support will be less convincing where the child already enjoyed all the advantages she would have received had both parents been supporting her. See *D.B.S., supra*, at ¶ 110-113.

(d) Whether hardship would be occasioned by a retroactive award. Hardship considered in broad terms is a relevant consideration because the quantum of awards is usually based on past income, and payor parents may have new families and new family obligations. Retroactive awards should be crafted in a way that minimizes hardship. Hardship for the payor parent is less of a concern where it is the product of his or her own blameworthy conduct. See *D.B.S.*, supra, at ¶ 114-116.

[142] See also *Kim v. Kim*, supra, at ¶ 62; *M.H.G. v. D.J.G.*, 2007 BCSC 25 at ¶ 17; *G.R.C. v. L.M.E.C.*, 2006 BCSC 1479 at ¶ 29-35. As Bastarache J. made clear in *D.B.S.*, supra, at ¶ 105, the first two factors listed above "establish that each parent's behaviour should be considered in determining the appropriate balance between certainty and flexibility in a given case" [emphasis added]. Given his comments, and in the circumstances in this case, I would recast the first factor more broadly to encompass blameworthy conduct on the part of the recipient parent, since it is relevant in the case at bar.

[38] In the case at bar, Mr. Espersen did send a series of emails to Ms. Beaulieu asking for financial contributions to the boys' educational costs, with some of these predating their enrollment in post-secondary studies. However, as noted earlier in these reasons, she was not appropriately consulted regarding Tanner's decision to attend an American university. In addition, I believe that it would constitute undue hardship to impose retroactive child support on Ms. Beaulieu: the boys' 2016/2017 educational expenses totalled approximately \$53,000.

[39] Therefore, I will not make a retroactive award.

Conclusion

[40] Ms. Beaulieu is responsible for a proportionate share of her sons' reasonable prospective educational costs. Specifically, she must pay \$3,214.41 per year over the next two years, and then \$5,681.91 per year for the two years after that if her sons continue in their current educational programs.

[41] As success was split between the parties, each will bear their own costs. "Russell J."

The Honourable Madam Justice Russell

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