

CANADA / JUDGMENT

Evans v. Evans

2023 BCSC 2171

COURT

Supreme Court of British Columbia

DECIDED

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2023 BCSC 2171 Evans v. Evans IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Evans v. Evans, 2023 BCSC 2171 Date: 20231208 Docket: E47208 Registry: New Westminster Between: Jennifer Juliet Webster Evans also known as Jennifer Juliet Webster Claimant And Darryl Sheldon Evans Respondent Before: The Honourable Justice Branch Reasons for Judgment Counsel for the Claimant: B. Kibur Counsel for the Respondent: K.A. Quong Place and Date of Hearing: New Westminster, B.C. October 6, 2023 Written Submissions Received: October 20, 2023 and November 3, 2023 Place and Date of Judgment: New Westminster, B.C. December 8, 2023 Table of Contents I. INTRODUCTION. 3 II. BACKGROUND. 3 III. ANALYSIS. 10 A. Standing. 10 B. Adjusting Support to Reflect the Respondent's Actual Income. 10 C. Child of the Marriage. 12 IV. CONCLUSION. 13 I. INTRODUCTION

- [1] The respondent seeks to reassess his support obligations based on a dip in his financial fortunes going forward and in relation to his arrears. II. BACKGROUND
- [2] This family law proceeding reached trial in 2018. Justice Baker issued reasons on January 21, 2019, reported at Evans v. Evans, 2019 BCSC 62 (the "Baker Reasons"). I rely on the background facts set out therein, but review and supplement them as necessary to determine the present application.
- [3] The parties began living together in a marriage-like relationship in January 1998 and married in April 1999. The parties' first child, J, was born on November 28, 1999. Their second child, C, was born on February 25, 2005.
- [4] During the marriage, Mr. Evans worked at BCTel/Telus and then at Bell. Ms. Evans worked as a stay-at-home mother until 2010 when she also found part-time work in the entertainment industry.
- [5] The respondent says that he was diagnosed with a weakened heart in 2009 and sleep apnea in 2017. The respondent also suffers from depression, which leads to a lack of energy. The respondent asserts that his depression worsened after the parties separated in December 2013.

- [6] At the time of trial, the respondent had been employed full-time with Sysco Canada Inc. ("Sysco") since April 2018.
- [7] In her reasons, Justice Baker analyzed the parties' employment situation as follows:
- [114] Ms. Evans' work success is still developing. Mr. Evans' 2018 income was based on a year where he changed jobs and had no work for a short period. I expect his income will increase in the years to come. In addition, [J] may cease being a child of the marriage in several years as he finishes school and this may have an impact on quantum payable. For these reasons, I find that it is appropriate to require a review of spousal support. The spousal support order I have made will be reviewed not earlier than September 2021 to assess Ms. Evans' earnings and efforts to attain self-sufficiency, Mr. Evans' income, and any changes to [J's] entitlement to support as a child of the marriage. The parties may, by agreement, waive or postpone this requirement to review spousal support.
- [8] The respondent was ordered to pay \$1,314 monthly in child support and \$789 in spousal support. These figures were based on the respondent's salary of \$85,000 and claimant's income of \$23,000.
- [9] After the trial, on February 26, 2019, the respondent's employment with Sysco was terminated without cause. The respondent obtained a new position on April 15, 2019, but was terminated again on June 4, 2019. The respondent could not secure new employment (aside for a brief stint from July-September 2020) until July 2022. He attributes the latter part of this employment gap to his health problems, in part. That said, despite his health challenges, he made continual efforts to find work over this period. He provided detailed information regarding his job search efforts, including some opportunities where he had up to six interviews or contacts before being rejected.
- [10] In January 2019, the respondent's family doctor, Dr. Gordon Spooner, expressed concerns about the respondent's stress level and the impact on his heart. Dr. Spooner recommended that the respondent "step away" from his attempts to find work. In March 2019, the respondent had a follow-up appointment with Dr. Spooner, who again stressed that the respondent should step away from work and apply for disability benefits. The respondent's cardiologist, Dr. Winston Tsui, also recommended that the respondent apply for disability benefits. On May 7, 2019, Dr. Spooner went so far as to recommend that the respondent be added to a list for a heart transplant. The respondent declined to do so because of concerns about the associated risks.
- [11] From April to June 2019, the respondent withdrew the funds from his locked-in RRSPs held with TD Bank. TD Bank held back a portion of the funds for income tax. These funds received by the respondent were largely transferred to the respondent's friend, Christine Alexandre, on or about June 6, 2019. The respondent says that this transfer satisfied a debt owed to Ms. Alexandre, a debt noted on his Financial Statement dated May 14, 2018. Ms. Alexandre purchased a home in or about February 2020, where the respondent lived for a period. The respondent was not particularly forthcoming about this series of transactions in

his affidavit material. For example, his 26th affidavit made on August 4, 2021, does not disclose the payment to Ms. Alexandre in his review of the history of his RRSP funds.

- [12] In August 2019, the claimant submitted an application to adjust his support obligations. On August 9, 2019, Justice Baker ordered that the respondent's income be imputed at \$100,000 for the purposes of calculating child support, resulting in an adjustment of his child support payments to \$1,522 per month, effective July 1, 2019. However, the Court paused this obligation for September and October 2019, given that the respondent was still unemployed at the time of the application. Justice Baker also ordered that the respondent transfer certain amounts in the respondent's RRSP accounts. However, given the respondent's withdrawal mentioned above, the respondent could not in fact transfer these amounts to the claimant.
- [13] The respondent applied for Canada Pension Plan Disability Benefits in September 2019. In November 2019, the respondent's application was approved. However, for reasons unclear to the respondent, he never received any CPP disability payments.
- [14] On January 7, 2020, the claimant filed a Notice of Application to enforce the division of the RRSPs/pensions. The respondent indicated in his Application Response that he also wished to adjust the child and spousal support given his problematic employment status. On January 17, 2020, the respondent's purported application was dismissed, but with liberty to reapply. Justice Baker also declared that the respondent was in contempt of the property transfer orders, but she provided the respondent with an opportunity to purge his contempt. The respondent received some limited relief in relation to the arrears outstanding up to August 2019, but the court concluded that there was insufficient evidence of a material change in circumstances to justify further adjustment.
- [15] On January 29, 2020, the respondent filed a proper Notice of Application to reduce his support obligation with additional evidence. The claimant brought a cross-application on that same date, seeking a finding that the respondent was in contempt of the earlier order, given the ongoing failure to transfer all the required financial assets. At the conclusion of these two applications, Justice Saunders ordered that:
- a. The respondent was in contempt of the order made on January 17, 2020 (pertaining to the parties' RRSPs/pensions);
 - b. That the penalty for contempt would be imposed on March 6, 2020; and
 - c. The respondent's Notice of Application was adjourned until such time as the contempt issue was dealt with or until further order of the court. (the "Saunders Order")
- [16] On March 11, 2020, the parties appeared in chambers to address the respondent's contempt. At the conclusion of the hearing, Justice Winteringham ordered that the respondent sign an authorization in favour of the claimant to obtain financial disclosure from TD Canada Trust. Further, the respondent was not to bring any application until he had complied with the August 9, 2019, and January 17, 2020 orders relating to the property transfer issue. The parties were to reappear before Justice Winteringham again on March 30, 2020. The parties

did not proceed on March 30, 2020, due to interruptions arising from the COVID-19 pandemic.

- [17] The respondent obtained a position with the Four Rivers Cooperative in Vanderhoof, BC, in July 2020. The respondent was terminated from this position at the end of his probationary period in September 2020.
- [18] On February 26, 2021, the respondent filed a bankruptcy petition. He did not disclose the existence of his responsibility to divide his RRSP in his disclosure, nor did he serve the claimant with the materials.
- [19] On March 17, 2021, the claimant filed a Notice of Application, which was heard on August 10, 2021. Justice Verhoeven made the following orders: The child support arrears of the Respondent be fixed at the amount of \$35,830.61 as of the month of March 2021 is adjourned. The order of Madam Justice W.A. Baker made on August 9, 2019 be varied to award the Claimant 37.5% of the funds held in the Respondent's RRSP Account #8127211 and 45.5% of the funds held in the Respondent's RRSP Account #807164, as of June 1, 2019 is ordered. The pension division amount owing to Claimant from the Respondent be fixed at the amount of \$73,253.48 is ordered by consent. The Respondent pay to the solicitor for the Claimant \$108,083.81 within 14-days of being served this order, is dismissed. The Respondent be imprisoned for 14-days for the contempt if payment is not made is adjourned. The Canada Revenue Agency shall produce, directly to lawyer for the Claimant, Laughlin & Company, 2300 - 2850 Shaughnessy Street, Port Coquitlam, BC, V3C 6K5, a complete and unedited copy of all tax records in the name of the Respondent from the period of January 1, 2018 to Present, within (30) days of this order by consent. Special costs against the Respondent.
- [20] On December 2, 2021, the respondent was discharged from bankruptcy.
- [21] In June 2022, the respondent secured employment with Quadro Communications Co-Operative Inc. ("Quadro"). He receives a \$90,000 salary, as well as a signing bonus of \$25,000 that has to be returned in whole or in part if he leaves the post within the next three years.
- [22] The respondent provided the following summary of his employment and earnings over the past three years: Year Employer 2019 May 2018 - February 2019 Sysco Canada \$43,672.07 April - June Misty Mountain Industries \$42,660.63 Employment insurance \$16,166.00 Lump sum payment from Sun Life Assurance and non-eligible retiring allowance \$13,433.01 2020 July - September Four-Rivers Cooperative \$50,337.38 Employment insurance \$3,591 Lump sum payment from the Co-operative Superannuation Society Pension Plan, CERB and the Canada Recovery Benefit \$13,528.56 2021 Unemployed Canada Recovery Benefit \$21,200 2022 July - present Quadro Communications Co-Operative Inc. \$90,000 annual salary and a \$25,000 signing bonus
- [23] On this application, the respondent seeks:

1. An order varying the child support payments set out in the order of the Honourable Madam Justice Baker made August 9, 2019, and varying the spousal support payments set out in the order of the Honourable Madam Justice Baker made on January 21, 2019, pursuant to s. 17 of the Divorce Act (Canada) based on a material change of circumstances.
 2. A review and subsequent termination of the spousal support payable by the Respondent pursuant to paragraph 12 of the order of the Honourable Madam Justice Baker made on January 21, 2019.
 3. An order cancelling arrears of child and spousal support, interest owing on such arrears and all default fees sought by the Family Maintenance Enforcement Program.
- [24] As part of his application to adjust child support, the respondent also seeks a declaration that J ceased to be a child of the marriage in April 2019. J began attending Kwantlen Polytechnic University ("KPU") in the fall of 2017. He was initially registered for a full course complement but moved down to a half-course load in the summer of 2019. In Fall 2019, J had a problematic term, dropping two courses and failing his others. He decided to stop attending KPU at the end of 2019. In June 2020, J moved out of the claimant's residence and into the apartment where the respondent was residing. J later moved out to live on his own.
- [25] The respondent initially sought to bring this application before me on January 27, 2023. I declined to hear the application at that time, as the respondent was not in compliance with the orders requiring him to transfer his RRSP/pension before advancing any further applications. As discussed below, the respondent now says that his discharge from bankruptcy has effectively disposed of that obligation.
- [26] The enforcement of the support payable is now in the hands of the Family Maintenance and Enforcement Program ("FMEP"). Their latest report indicates that the respondent had arrears and fees of \$66,943.79 as of August 25, 2023.
- [27] At the latest hearing before me, the parties agreed on terms providing for further disclosure of income information from the claimant, the production of which would allow the parties to be properly informed before considering any issues regarding the termination or adjustment of spousal support. As such, it is not necessary for me to address spousal support further in these reasons III. ANALYSIS A. Standing
- [28] The claimant initially took issue with the respondent's standing to bring on the application because he had not yet made the payment required by Justice Verhoeven's August 10, 2021 order, and hence advancing the application was in breach of Justice Winteringham's March 11, 2020 order. However, on a closer review of s. 178 of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, the claimant accepted that the bankruptcy discharge effectively released the respondent from the obligation to transfer the assets. B. Adjusting Support to Reflect the Respondent's Actual Income

- [29] The respondent seeks a recalculation of child support to that payable based on the actual Line 150 income he has received since 2020. At the hearing, he abandoned his claim for any adjustment for the 2019 calendar year, which would have been relatively insignificant in any event.
- [30] Section 17 of the Divorce Act provides that a court "may make an order varying, rescinding or suspending, retroactively or prospectively, a support order or any provision of one." In *Colucci v. Colucci*, 2021 SCC 24, the Supreme Court of Canada clarified the proper approach to retroactively reducing child support orders and rescinding arrears. At para. 29, Justice Martin stated that s. 17 confers "wide discretion on the judge, who 'may' -- but is not required to -- vary, rescind, or suspend an order into the future, the past, or both."
- [31] The first issue is the appropriateness of making any retroactive adjustment. I find that the respondent is entitled to pursue a retroactive adjustment back to January 2020. He gave notice of his intention to seek readjustment through his Notice of Application dated January 29, 2020, and has been continuously pressing the issue forward since. The pandemic caused some of the delays since 2020. Although aspects of the delay were also the fault of the respondent (including the delays arising from the initial failure to respect the trial order in relation to the transfer of the RRSP funds and the associated contempt proceedings), I find that the respondent's conduct is an insufficient basis on which to refuse to make the requested retroactive adjustment given the clear notice provided to the claimant from January 2020, and the employment struggles the respondent was facing over this period.
- [32] Regarding the appropriate income level for the respondent, his actual income should be applied. This is the default approach under the Federal Child Support Guidelines, SOR/97-175.
- [33] The respondent has provided sufficient evidence regarding his health problems to avoid intentional underemployment arguments. This evidence includes direct evidence from the party and the medical information from two physicians, most notably, the medical support they provided for his approved CPP disability claim: *Castedo v. Haldorsen*, 2016 ONSC 3870 at paras. 116-118; *L.C. v. Y.S.*, 2023 BCSC 422 at para.212.
- [34] The claimant relies on the fact that the respondent continued to apply for jobs over this period as a basis to find that he was not actually restricted from working. However, I find that a court could as reasonably infer that the respondent is the type of individual who is prepared to "power through" his pain, particularly when faced with dire financial circumstances if he did not find work. Furthermore, the efforts to find work in and of themselves help to rebut any interference that the respondent was intentionally unemployed.
- [35] The claimant suggests that the respondent could have been carefully calibrating his job search efforts to get just enough traction to show effort, but not so much effort that he would actually succeed in obtaining a position. This theory implies tremendous cunning and an illogical willingness to harm his financial situation to hurt the claimant. Such a theory is not

otherwise suggested by the respondent's conduct. I conclude that the facts more likely suggest a decent effort to find work notwithstanding his health challenges, but poor luck in achieving his objective.

- [36] Regarding the RRSP withdrawal, I find that these amounts should be included in the respondent's income in the usual way. The claimant's various machinations regarding this amount do not support a more forgiving approach in his favour.
- [37] Regarding the treatment of his signing bonus, the respondent suggested that it be removed from his income and then added back in as he survives each potential reimbursement date. This is looking at the issue from the wrong end of the telescope. The entire income should be included in the year received. If his income is reduced in subsequent years due to the need to reimburse part of the signing bonus, then the respondent should be in an excellent position to receive an adjustment reflecting that reimbursement.
- [38] The respondent suggested that any readjustment should be applied in the same year as the redetermined income. The better approach is to match the current approach: i.e., the revised 2020 income should be used to determine support payable in 2021, and so on. C. Child of the Marriage
- [39] The respondent seeks a declaration that J ceased to be a child of the marriage in April 2019. The claimant accepts that such a declaration should be effective at the end of 2019 but not earlier.
- [40] I find that J continued to be a child of the marriage through to the end of 2019, given his college registration status and efforts until that date: *Farden v. Farden*, 1993 BCSC 2570. The mere fact that J had a problematic last term is not a proper basis for declaring that J was not a student for that term and therefore not a child of the marriage. There is no evidence that J was intentionally underperforming. J only decided not to return to school at the end of 2019. A student is only generally going to appreciate that they have hit an academic wall once they have actually hit that wall. IV. CONCLUSION
- [41] The parties and FMEP should recalculate the support payable from January 1, 2020 forward based on the findings in these reasons. I note that the respondent did not seek a return of any surplus payments. If there is any dispute about the recalculation, this should be referred to the Registrar for final determination. "The Honourable Mr. Justice Branch"

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