
CANADA / JUDGMENT

H.A.P. v. D.A.P.

2005 BCSC 595

COURT

Supreme Court of British Columbia

DECIDED

20 April 2005

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IN THE SUPREME COURT OF BRITISH COLUMBIA

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Citation:

H.A.P. v. D.A.P.,

2005 BCSC 595

Date: 20050420

Docket: E043233

Registry: Vancouver

Between:

H.A.P.

Plaintiff

And:

D.A.P.

Defendant

Before: The Honourable Mr. Justice Warren

Reasons for Judgment

Counsel for the plaintiff

S.G. Label

Counsel for the defendant

D.C. Halkett

Date and Place of Trial/Hearing:

March 23, 2005

Vancouver, B.C.

The Applications

- [1] The plaintiff applies for interim spousal support and interim child support for one child of the marriage, C.A.P., born [], 1986, retroactive to August 1, 2004. The defendant cross-applies for an order for interim child support for the child D.T.D.P., born [], 1988.
- [2] Originally, the plaintiff had applied only for interim spousal support, but by her amended notice of motion filed March 10, 2005, after the defendant had launched his application, she amended the notice of motion to include a request for retroactive child support for C.A.P.

Background and Submissions

- [3] The plaintiff submits that the parties were in a long-term marriage, during which she worked part-time for much of the marriage in addition to her role as the primary child care provider. In 2004, the plaintiff returned to work full-time as a clerk at a hospital. The parties separated in May 2004. The defendant has paid no support since the separation for either the plaintiff or the one child residing with her since the separation.
- [4] After the separation, the former matrimonial home was sold and each party received \$86,000. The plaintiff's evidence is that she has been obliged to dip into her capital, comprised of her portion of the proceeds of sale, in order to help support herself and the child residing with her, as well as to pay off some pre-existing debt and in the result, has slightly under \$20,000 remaining.
- [5] When the plaintiff returned to work full-time in 2004, she was earning \$18.58 per hour, but that was reduced due to cut-backs to \$17.83 per hour. Her employment income at the hospital in the year 2004 was approximately \$34,770. She was able to pick up some extra work at another hospital, but her evidence is that there are others that have seniority over her for this casual position and she does not anticipate being able to pick up extra shift work in the future at the other hospital. Nevertheless I am going to attribute to her an annual income of \$36,000.
- [6] The plaintiff's Form 89 financial statement, sworn February 17, 2005, shows monthly expenses of \$4,363.50. The largest single monthly expense was for the rent on the house she occupies with her son. There are other expenses, which in my view, are inappropriate for a consideration on an interim application, including a vacation allowance, savings by way of Canada Savings Bonds and gifts, to name but three examples. Her counsel concedes that approximately \$500 could accordingly be deducted from the monthly expenses, which would still leave expenses of approximately \$3,865. For reasons set out later in this decision, C.A.P. should be making some contribution to his "necessaries" such as room and board and, with

an annual income of roughly \$28,000; he could be paying a nominal \$350 per month to his mother. This either operates as an increase in the plaintiff's income or, for simplicity's sake, to reduce her expenses by \$350. I find, therefore, her reasonable expenses to be roughly \$3,500 per month.

- [7] The defendant has been employed for approximately 20 years with Honda Canada Inc. His affidavit material deposes to singular efforts to overcome what may have been his rather turbulent teenage years, and how, through perseverance, hard work and sacrifice, he eventually was able to increase his qualifications so that he became employed with Honda Canada Inc. in June 1981.
- [8] Mr. D.A.P. says he was more prudent with his share of the sale proceeds of the former matrimonial home and used some of the proceeds to acquire a new residence where he presently resides with the parties' son D.T.D.P., his girlfriend S.M. and her two sons, aged 15 and 17. The residence is large enough so that each of the three boys has his own bedroom.
- [9] Mr. D.A.P. initially deposed to a base employment salary of \$70,000, but he also receives performance bonuses from time to time and earns additional income working during his holidays. Mr. D.A.P. did not attach copies of his three most recent income tax returns, but I do have his 2004 T4 statement of remuneration paid by his employer, Honda Canada Inc., which shows total employment income of \$86,737.
- [10] Mr. D.A.P., in his list of expenses, shows total monthly expenses of \$6,531.39. While Ms. S.M. does not contribute directly to the housing costs of \$2,000 per month, she does pay \$40 per month for cable television and another \$40 per month for household supplies. Mr. D.A.P. pays only \$250 of the \$700 monthly food expenses leaving a balance of \$450 apparently being paid by Ms. S.M..
- [11] On my review of both the plaintiff's and defendant's financial statements, other than my earlier comments regarding the plaintiff's expenses, I do not see much that attracts particular attention. While some of the expenses claimed by the defendant on behalf of the child D.T.D.P. for gifts or entertainment may seem high, other expenses seem to be low or modest with the result any objectionable expenses are offset by the more modest ones.
- [12] One point raised by plaintiff's counsel warranting comment is that Ms. S.M. is not contributing directly to the cost of housing. I agree that some portion of the housing expenses of \$2,000 per month should be borne by Mr. D.A.P.'s girlfriend. Taking into account the fact that she and her two children reside there and that her income from employment and child support is considerably less than the income earned by Mr. D.A.P., I attribute 20% of the housing expenses to her as a fair apportionment. Accordingly, I would reduce Mr. D.A.P.'s expenses by \$400 which should be contributed by Ms. S.M., as well as a deduction of \$30 for furnishings and equipment, \$50 for personal expenses and a further \$50 for D.T.D.P.'s entertainment and recreation. Accordingly, the total to be deducted from Mr. D.A.P.'s claimed monthly expenses are \$530 resulting in monthly expenses of approximately \$6,000.

- [13] In determining Mr. D.A.P.'s income for both child support purposes and spousal support purposes, I am somewhat handicapped by his failure to provide his three most recent tax returns. Although he has apparently not prepared his 2004 income tax return, he could have and should have attached his tax returns for 2001, 2002 and 2003.
- [14] His 2004 income, he says, as indicated on his 2004 T4, was inflated by cashing out unused holiday time and one week of casual time. He is not sure whether he will be in a position to do the same in 2005. In his affidavit sworn March 2, 2005, Mr. D.A.P. deposed that he earned approximately \$75,000 to \$85,000 per annum.
- [15] Absent the tax returns or other documentary evidence as to his previous years' income, I conclude for interim support purposes only, that Mr. D.A.P.'s annual income is \$85,000. Contrary to what he deposes when he says, "my expenses basically equal my income", his income in fact exceeds his reasonable expenses by approximately \$13,000 a year.
- [16] In her submissions on behalf of the plaintiff, Ms. Label submits that the defendant should be paying \$375 per month to the plaintiff for the support of the child C.A.P.. This amount is the result of deducting the amount which the plaintiff should be paying under the Child Support Guidelines to the defendant for the support of D.T.D.P. (\$300) from the amount which the defendant should be paying to the plaintiff (\$675).
- [17] C.A.P. graduated from high school last June and has been employed since then, but the plaintiff deposes that he has plans to return to school and obtain his qualifications as a welder. To that end, he is saving his money to go to BCIT. Apparently, the course starts in August 2005. Although C.A.P. does not make any direct contribution for room and board, he does pay for his own entertainment, most of his clothes and most of his vehicle costs.
- [18] With reference to her claim for interim spousal support, the plaintiff's counsel submits that her monthly expenses of \$3,800 and monthly after tax income of \$1,940 leave her with a shortfall of \$1,860. In the event that child support is ordered in the amount of \$375, her monthly needs to cover the shortfall would be \$1,485, which, before tax, would require a spousal support payment of \$1,700 per month.
- [19] Her counsel submits that this was a long marriage and a strong prima facie case has been established for the payment of spousal support. This amount would result in an approximate equality of monthly disposable income between the two spouses: see *Ulrich v. Ulrich*, 2003 BCSC 192, [2003] B.C.J. No. 836, per Owen-Flood J.
- [20] In his reasons for judgment Owen-Flood J. wrote (at ¶ 15):

In my view, the significance of the presumptive claim to an equal standard of living on an application for interim spousal support is this: the court should consider the means of the applicant to include that which is required to maintain his or her pre-separation standard of living. In other words, an applicant's needs may be greater than the amount required merely to meet his or her bare expenses pending trial.

- [21] In support of her claim for interim child support for C.A.P., the plaintiff, relying on the decision of Quijano J. in *Manchur v. Manchur*, 2001 BCSC 1607, [2001] B.C.J. No. 2590, submits that C.A.P. remains a child of the marriage even though he is working pending his return to further education/training.
- [22] The defendant is opposed to paying interim spousal support on the grounds that the plaintiff earns sufficient income to be self-sufficient; she has spent approximately \$66,000 of her share of the sale proceeds of the matrimonial home; and he does not have sufficient means to pay spousal support. The defendant relies upon the decision in *Yemchuk v. Yemchuk*, 2004 BCSC 1407, where, after considering a number of decisions both pre-and-post *Moge v. Moge*, [1992] 3 S.C.R. 813, 43 R.F.L. (3d) 345, Cohen J. wrote (at ¶ 43):

As defence counsel correctly asserted, the plaintiff's application must be decided on an assessment of the plaintiff's needs. It is not to be decided as a case of compensatory maintenance where the applicant spouse has been out of the workforce in the traditional sense. In this case both parties worked throughout most or all of their lives and this is not an application by the plaintiff to compensate him for the loss of a capital asset.

Conclusion

- [23] In my view, the decision in *Yemchuk*, supra, is distinguished by a number of factors. The parties there were in their early 60s and the plaintiff/husband had elected to retire after a 32-year career as a chemical engineer. The defendant/wife was still working, although she was close to the end of her employment life. There had been a division of assets with the plaintiff/husband electing to take his share of the defendant/wife's pension as a lump sum payment of \$132,000, and he was living with his mother who was contributing to the living expenses. Further, it appears that a portion of the defendant's income was her share of the plaintiff's pension which she had received on the division of assets. Thus, the plaintiff/husband would be getting a portion of the already divided asset back if spousal support was awarded. In the case at bar, the only asset that has been divided is the proceeds of sale of the former matrimonial home.
- [24] This is an interim application, and in my view the words of L'Heureux-Dubé, J. in *Moge*, supra, quoted by Curtis J. in *Shirran v. Shirran* (1999), 46 R.F.L. (4th) 371, [1999] B.C.J. No. 1195 (S.C.), and in turn quoted by Cohen J. at ¶ 18 of *Yemchuck*, are most apt. L'Heureux-Dubé J. wrote in *Moge* (at 870):

Although the doctrine of spousal support which focuses on equitable sharing does not guarantee to either party the standard of living enjoyed during the marriage, this standard is far from irrelevant to support entitlement (see *Mullin v. Mullin* and *Linton v. Linton*. citations omitted). Furthermore, great disparities in the standard of living that would be experienced by spouses in the absence of support are often a revealing indication of the economic disadvantages inherent in the role assumed by one party. As marriage should be regarded as a joint endeavour, the longer the relationship endures, the closer the economic union, the greater will be the presumptive

claim to equal standards of living upon dissolution.

[my emphasis]

- [25] In my view, particularly on an application for interim support following a long marriage, where the full financial separation of the parties has yet to occur and the consequences of the marriage and its breakdown are yet to be determined, the presumptive claim to an equal standard of living is of greater importance. Here, there is a substantial difference in the incomes of the parties and a need on the part of the plaintiff.
- [26] As in so many cases, there is a shortage of income and a surplus of expenses, but I conclude the defendant has both the financial ability and the legal obligation to contribute to the support of the plaintiff. Before setting the amount of spousal support I turn to deal with the plaintiff's claim for child support for C.A.P..
- [27] A child of the marriage is defined by s. 2(1) of the Divorce Act, R.S.C. 1985, c. 3, as:
at the material time,
- (a) is under the age of majority and who has not withdrawn from their charge, or
 - (b) is the age of majority or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessities of life.
- [28] So long as C.A.P. is under the age of majority and continues to reside with a parent and has not withdrawn from his parent's charge, he remains a child of the marriage.
- [29] The principal issue before me is not whether C.A.P. remains a "child of the marriage" before he attains majority but whether, after he turns 19 on [], 2005, and not having continued immediately following graduation from high school into a course of education or technical training, he will remain a child of the marriage.
- [30] Some assistance in answering that question can be found in viewing it from the perspective of the parents still living together with the child at home. Undoubtedly, the parents would consider him to continue to be under their charge and not able to obtain the necessities of life, at least in part, if not in whole. Under those circumstances the parents would likely continue to contribute significantly to their child's upkeep, providing at least food and shelter and clothing. I do not think the situation is any different from when a child takes what is understood to be a temporary leave from continuing education and works trying to amass sufficient funds to pay, or help to pay the cost of further training or education.
- [31] Should the situation change because the parents are separated? I think not, but in any event there is authority for finding an adult child remains a child of the marriage notwithstanding graduation and part-time or full-time employment pending a return to education.
- [32] In *Harwood v. Harwood* (1999), 45 R.F.L. (4th) 357, [1999] B.C.J. No. 975 (S.C.), the child left school temporarily. During that time he worked full-time for eight months and traveled for three months but thereafter returned to school. According to the parties' separation

agreement, child support would cease upon the child turning 19 or becoming self-supporting. The father argued that the child had become self-supporting. Williamson J. found that he remained a child of the marriage during his hiatus from school, since he lived at home while he was working full-time and remained dependent on his mother. His absence from school was intended to be and was in fact only temporary. He did not become self-supporting during that time.

- [33] In reaching that decision, Williamson J. stated (at ¶ 22, 24 and 25):
- [22] I conclude that in circumstances where a child temporarily ceases to be a student, one must look at all of the factors to determine whether a responsibility for child maintenance ceases during that hiatus.
- [24] I am aware that there are circumstances when a child takes a substantial period out from school and earns income to support himself, that lead inexorably to the conclusion that he is no longer a child of the marriage. But I am also aware that many students travel and arguably a brief period of travel can be seen, in the large sense of the word, to be part of one's education.
- [25] I also note that this was understood to be a temporary absence, [and] the petitioner would still have certain costs involved in keeping [the child's] place of permanent residence, her home, available for her son.
- [34] In *Sherlock v. Sherlock* (1998), 36 R.F.L. (4th) 301, [1998] B.C.J. No. 116 (S.C.), the child took a six month break from attending university and worked part-time during that period, but remained living with her mother. The father argued that she ceased to be a child of the marriage during the time that she was not in school, although he acknowledged that she reverted to being a child of the marriage upon her return to university. In determining that the payor spouse was entitled to a reduction in his child support for the time that the child was out of university, I held that while attendance at an educational institution does not, of itself, mean that a child is a "child of the marriage" as defined by the Divorce Act, the obverse is equally true: non attendance at an educational institution may not end a parent's obligation to pay the child support. On the evidence before me in *Sherlock* it was clear that the child's earnings were insufficient to support herself entirely, but I held that given the fact that the child earned some income during her break from college, it was not unreasonable for her parents to have expected her to make some contribution to her personal expenses thereby, in part, encouraging her to return to college.
- [35] Accordingly, I hold that C.A.P. will remain a child of the marriage after he turns 19 provided he continues with his plans to enrol in the welding course in August 2005.
- [36] The issue of the Court's ability to make orders of child support retroactive to some date earlier than the date of the application for support was considered by the Court of Appeal in *L.S. v. E.P.* (1999), 50 R.F.L. (4th) 302, 1999 BCCA 393. At ¶ 40 the Court wrote:

The jurisprudence supports the view that there is jurisdiction under both the Divorce Act and the Family Relations Act to order an award of child support retroactively, that is, to cover a period predating the date of judgment: see *Allen (Guardian ad litem of) v. Allen* (1994), 9 R.F.L. (4th) 48 (B.C.S.C.); *Elliot v. Elliot* (1993), 15 O.R. (3d) 265 (C.A.); *Donald v. Donald* (1991), 33 R.F.L. (3d) 196 (N.S.C.A.); and *Dahl v. Dahl* (1995), R.F.L. (4th) 122 (Alta. C.A.). There is also jurisprudence to support the view that the court has jurisdiction to order, where appropriate, the payment of child maintenance for a period predating the commencement of the proceedings: see *Waterman v. Waterman* (1995), 16 R.F.L. (4th) 10 (Nfld. C.A.); *MacMinn v. MacMinn* (1995), 17 R.F.L. (4th) 88 (Alta. C.A.); *Chrintz v. Chrintz* (1998), 41 R.F.L. (4th) 219 (Ont. Gen. Div.), [1988] O.J. No 3289; and *Celi v. Eagle*, [1996] O.J. No. 4429 (Gen. Div.).

[37] While the Court of Appeal was dealing with an application to vary an existing order, and this portion of the judgment is obiter, in my view it is authority that permits a Court in appropriate circumstances to make an order under the Divorce Act retroactive to some date even prior to the commencement of the action.

[38] In the case at bar there are several reasons militating against the making of such an order. First, C.A.P. has been working since his graduation and his 2004 T4 slip showed an income of \$14,140 which, while below the poverty line, nevertheless is only for six months employment. If extended over a full year, his resulting income would be roughly \$28,000 which, as I have earlier stated, demonstrates some ability to contribute to his necessities of life. Second, the application by the plaintiff was only made in response to the defendant's application for child support, which indicates to me that the plaintiff herself felt C.A.P. was, at this point in time, able at least in part to provide some of his own necessities of life.

[39] Based upon the defendant's income of \$85,000 and the split custody of the children, I order the defendant to pay \$354 per month in child support for C.A.P. commencing on April 1, 2005 and continuing on the first of each month until further order of the Court.

[40] Having determined that the plaintiff's annual expenses, after making appropriate allowances, amount to roughly \$42,000, her income falls short of meeting her expenses by roughly \$6,000 or \$500 a month.

[41] According to the PriceWaterhouseCoopers 2003 Matrimonial Tax Tables in order for the plaintiff to receive that amount net after taxes the amount the defendant would need to pay would still be insufficient to approximate a roughly equal monthly disposable income as between the parties. Using Divorce Mate Calculator with the defendant paying \$354 per month in child support, in order to equalize their net disposable income at 50% the defendant would have to pay the plaintiff approximately \$1495 per month. These calculations are based the following facts:

- (1) Father with annual income of 85,000;
- (2) Mother with annual income of 36,000;

- (3) Each has custody of one child;
- (4) Father pays mother \$354 in a split custody situation; and
- (5) To share the family net disposable income of \$7615 equally the father would have to pay spousal support of approximately \$1495.

Defendant - monthly amounts

Amount

Gross Income

7083

Child Support (paid to plaintiff)

354

Spousal Support (paid to plaintiff)

1495

Income Tax

1257

Benefits

47

Net disposable income

3800 +/-

Plaintiff - monthly amounts

Amount

Gross Income

3000

Child Support (received from defendant)

354

Spousal Support (received from defendant)

1495

Income Tax

918

Benefits

69

Net disposable income

3800+/-

[42] Accordingly, I fix the amount of spousal support at \$1,495 retroactive to the 1st of November, 2004, the date when the plaintiff first filed her application.

[43] The plaintiff is entitled to her costs.

"T.P. Warren, J."

The Honourable Mr. Justice T.P. Warren

August 12, 2005 - Revised Judgment

On page 7, paragraph 22, last line on page, the cite should read:

"Yemchuk v. Yemchuk, 2004 BCSC 1407, where ."

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