

CANADA / JUDGMENT

H. v. H.

2003 BCSC 479

COURT

Supreme Court of British Columbia

DECIDED

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2003BCSC0479

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

H. v. H.

2003 BCSC 479

Date: 20030328

Docket: 05806

Registry: Prince George

Between:

E.C.H.

Plaintiff

And

W.E.H.

Defendant

Before: The Honourable Mr. Justice Meiklem

Reasons for Judgment

Counsel for the plaintiff:

J.Anderson

Counsel for the defendant:

J.H. Cluff

Date and Place of Trial:

October 7 - 11, 2002

Prince George, B.C.

INTRODUCTION

[1] The parties were married on April 15, 1995, having lived together since September 1991. They separated on October 9, 1998. Mr. H. was then 32 years old, Mrs. H. was 37 years old. They have two children: T., born [], 1993, and E., born [], 1996. A divorce order was pronounced on the last day of trial, and the entered order includes consensual orders on custody, guardianship and access to the children and on several property-related matters, including the dispositions of the former family residence and RRSPs. There are several specific property issues and an issue regarding quantum of child support remaining to be decided.

[2] Mrs. H. has reverted to the use of her maiden name and I will refer to her as Ms. E.

HISTORY OF INTERLOCUTORY ORDERS RELEVANT TO UNSOLVED ISSUES

[3] The court pronounced a s. 57 Family Relations Act declaration that the parties had no reasonable prospect of reconciliation on January 11, 1999, and on the same date ordered interim child support of \$1,049 per month based on Mr. H.'s Guideline income of \$82,300.

[4] On June 7, 1999, the court ordered that Mr. H. pay additionally one-half of daycare expenses, not to exceed \$15 per diem.

[5] On September 13, 1999, interim child support was reduced to \$816 per month pursuant to the Guidelines, based on a Guideline income of \$60,000.

[6] On October 21, 1999 a previous interim order of May 27, 1999 specifying access was varied. The new order specified that Mr. H. would have access as follows:

- a) 3:00 p.m. every second Friday to Tuesday morning return to school and daycare;
- b) every Wednesday at 3:00 p.m. to Thursday morning return to school and daycare; and
- c) an equal sharing of school vacations and statutory holidays, pursuant to a specified regimen.

[7] This access regime was not specifically varied by court order, other than by an April 2, 2002 Master's order that:

The plaintiff shall allow the defendant the first opportunity to provide alternate care for the Children, in the event that such is required, other than the Children's usual day care arrangement;

[8] The order agreed to at trial changes the Wednesday and Friday commencement time from 3:00 p.m. to 2:30 p.m.

THE CHILD SUPPORT ISSUE

- [9] Mr. H. argues that the existing access arrangement gives him rights of access and physical custody of the children not less than 40% of the time, which invokes s. 9 of the Federal Child Support Guidelines. He does not seek a drastic departure from the Guideline child support, but seeks a reduction of \$100 per month, taking into consideration increased access costs, his payment of hockey expenses without much contribution from Ms. E., and his ongoing monthly contributions to an educational savings fund for the children.
- [10] The first question to be answered is whether Mr. H.'s assertion that he has access to the children not less than 40% of the time throughout the year is correct. He placed into evidence three different compilations based on his daily records over the period from September 2001 to August 2002, each taking different approaches to time the children spent in school and daycare. One approach allocated school and daycare time to the parent that dropped the children off. Another excluded all school and daycare time from the calculation; the third attributed school and/or daycare time to a parent if the same parent dropped off and picked up the children but excluded school or daycare time not in that category. All of these approaches would support a finding that the children were in his custody or he had rights of access in the range of 45 - 46% of the time in the 12 month period from September 2001 to August 2002.
- [11] Strict adherence to the access ordered in October 1999 results, by my calculations, in Mr. H. having the children 43.44% of the time if the 5.75 hours per day of school and daycare on school days is excluded. If school and daycare time is not excluded from the calculations, and none of it is apportioned to Mr. H., on the theory that school time does not accrue to a non-custodial parent, (as was held in *Mador v. Kelly* 2000 BCSC 872, 7 R.F.L. (5th) 369 following *de Goede v. de Goede* (February 3, 1999), Doc. Courtney D4928 (Master Horn)), then Mr. H. falls short of the threshold with 36% on the existing arrangement.
- [12] I have reviewed *de Goede v. de Goede* and the several cases cited therein in support of the conclusion that the weight of authority favoured the conclusion that school time should not accrue to the benefit of the non-custodial parent. Several of the cited cases also rejected arguments from non-custodial parents to exclude school time from the calculations altogether. In one of the cases, *Crofton v. Sturko* (13 January 1998) Victoria Registry No. 5939/32257 (S.C.), Master Patterson expressed the rationale for not excluding school time as follows:

In calculating the percentage of time, it is in my view, appropriate that time spent by the children in school be included in the calculation as time with the parent having care and control. There are good practical reasons for this, including the fact that even although a child is at school, if he or she becomes ill, then the parent who is caring for the child must take some steps, to bring the child home, to see the family doctor, or to do whatever else is appropriate in the circumstances. In addition, school hours vary from time to time, there are field trips, sporting events, and discretionary days, all of which will require parental involvement.

- [13] Master Patterson's comments were endorsed in *Cross v. Cross* (unreported) June 30, 1998, New Westminster Registry, Docket No. D030328 (McKinnon, J.).
- [14] This analysis seems to presume the approach adopted in some cases that care and control resides solely with the "custodial" parent at all times except when the children are in the actual physical custody of the non-custodial parent. But the Guidelines also speak of "right of access to". Where the parent exercising access to children has joint custody and guardianship, as in this case, and the school attendance begins and ends wholly within the defined access period, I think that leads properly to the conclusion that that parent has a "right of access to, or has physical custody of" the children during that specific attendance at school. By that reasoning I would add alternating Monday school attendances to the computation of Mr. H.'s time for the purposes of s. 9 of the Guidelines. This would bring Mr. H.'s percentage of time exercising a right of access up to approximately 38% according to the defined access schedule.
- [15] While I think it is only logical to acknowledge that care and control lies with the parent having access for school or daycare hours falling wholly within a defined access period, at least in the case of joint custody and guardianship, I do not accept the argument that school or daycare hours should accrue to the parent who leaves the children at school or daycare at the end of a defined access period. If the defined access period ends at the time of the drop-off, then the care and control of the children passes to the other parent at that time. I think this is so even under the umbrella of a joint custody and guardianship order where there is a clear allocation of the time during which the children are in the care and control of each parent, as there is in this case.
- [16] Furthermore, there is little reason to prefer drop-off over pick-up as the determining factor in deciding who has care and control. It may be equally logical to presume care and control during school hours to the parent picking a child up from school to commence a defined access period, in that the typical difficulties arising during the school day that would involve a parent are equally likely to be a concern for the parent expecting to pick up the child.
- [17] If drop-off and pick-up are logically equally determinative of the care and control question, that would be a logical basis for removing certain school hours from the calculation of time where one parent drops or sends them off to school and the other picks up or receives the children after school. (These are the category that Mr. H. termed "neutral time".) But the approach of removing school hours from the calculations has generally been rejected by the courts, and I think properly so.
- [18] I do not adopt any of the calculations that exclude school or daycare hours but I do include in Mr. H.'s percentage the school and daycare hours on alternating Mondays that fall within the defined access periods.

- [19] Exhibit 17 includes Mr. H.'s record of the actual time he spent with the children over the year from September 1, 2001 to August 31, 2002. If 5.75 hours is added for each Monday school day that fell wholly within his access time, he would have met the threshold with 40.9% of the time throughout the year.
- [20] Other evidence confirms that Mr. H. spent more time with the children than he would have by strict adherence to the defined access schedule. In part this was a result of the order that he was the first alternate care giver and in part because sometimes Mrs. H. dropped the children off at his home early in the morning on many school days to accommodate her work schedule.
- [21] There is no reason to conclude that Mr. H. will spend any less time with the children than he did in the period from September 2001 to August 2002, so I find that he meets the 40% threshold set out in s. 9 of the Guidelines.
- [22] On a consideration of the factors listed in s. 9 of the Guidelines which come into play where the 40% threshold is met, I find that Mr. H.'s request that child support be set at \$100 below the Guideline amount is reasonable. The main shifting of costs due to increased access relates to food expenses for six days out of 14. The parties' incomes for Guideline purposes are \$60,000 for Mr. H. and \$45,000 for Mrs. H. The quantum of basic child support is therefore set at \$716 per month, commencing in April 2003. Counsel should be able to agree on the wording of an order to incorporate the sharing of extraordinary expenses. Mr. H. has agreed to pay the entirety of the children's hockey expenses and will be paying a proportionately higher portion of day care expenses, in proportion to the Guideline incomes of each of the parties.

THIRD PARTY CHILD CARE

- [23] Mr. H. seeks an order that his new spouse become the designated child care provider in the event that he is not available. He acknowledges that one of Ms. E.' concerns is that the presently established day care provider requires a guaranteed minimum of three days per week or she cannot remain available. He is prepared to have the court's order incorporate this proviso. He cites two reasons for his request: a saving of approximately \$40 per week, and his preference for care by his partner over day care.
- [24] One disadvantage of his proposal is that Mr. H.'s partner has a variable work schedule. Although she can predict it some time in advance and could provide notice, her work schedule is three days on - three days off, so she is available on different days each week, resulting in a rather irregular routine. Ms. E.' opposition to the proposal is still partly an emotional response, because Mr. H.'s partner is "the other woman" with whom he was unfaithful to Ms. E. within 18 months of their marriage. Her discomfort is diminishing over time I think, but from her perspective it is more significant than her share of \$40 per week savings.

- [25] I find in Ms. E.' favour on this issue. I think the children will be better off if their mother is not discomforted and the irregularity associated with third party daycare by Ms. D. might be marginally disruptive to the children's routine. This is the type of issue where the court should not override the legitimate emotions of the principal care giver for the sake of saving a relatively small sum of money.

VEHICLES AND SPECIFIC CHATTELS

- [26] Mr. H. claims that Ms. E. retains more than her fair one-half share of their household chattels and it is agreed that at the time of separation Ms. E. retained a van worth \$10,000 and Mr. H. retained a Saab car worth \$2,500. Ms. E. provided hearsay evidence that her van is now worth \$8,500. Mr. H. sold his car after separation for \$2,500, notwithstanding that he had spent \$4,800 repairing it shortly before separation for what might be called sentimental reasons.
- [27] Mr. H. argues that the evidence of the current value of the van is not satisfactory and the \$7,500 separation date difference in value between the vehicles should be the subject of a credit to him in the property division. Ms. E. argues that his sentimental expenditure of \$4,800 of family funds on repairs on the eve of separation should come back into the equation by re-apportioning the van entirely to her.
- [28] In my view the trial date values should be used. I accept that a trial date valuation of \$8,500 for the van is more than fair to Mr. H. in view of the reality of depreciation. I will use the value of \$2,500 for his vehicle. (Strictly speaking if the sale proceeds were traced they may have appreciated in value, but I will not pursue that inquiry.) On these valuations a compensation payment or credit to Mr. H. in the sum of \$3,000 would be necessary to equalize the division.
- [29] On the authority of *Newson v. Newson* (1986), 2 R.F.L. (3d) 137 (B.C.C.A.), *Fernandez v. Fernandez* (1996 Carswell BC 832) (Unreported) Doc: Vancouver D091690, and *Johnstone v. Johnstone* (1981), 26 R.F.L. (2d) 18, it is sometimes appropriate to take account of inappropriate unilateral dispositions of family money. I agree with Ms. E.' it would be unfair in these circumstances to compel Ms. E. to in effect pay one-half of the imprudent repair bill, but I will re-visit that matter when I deal with the issue of the shareholder's loan and Hessair Services Ltd.
- [30] The remaining chattels issues are minor. Mr. H. shall receive the items designated for him on Ms. E.' list in evidence, and he may retain the family asset portion of the entertainment center and bed he purchased for Ms. D. and himself.

MS. E.' EMPLOYMENT PENSION

- [31] The issue between the parties is simply whether Mr. H.'s interest should accrue from the beginning of their pre-marital common-law relationship in September 1991, or from the date of marriage in April 1995. In the absence of a re-apportionment under s. 65 of the Family Relations Act, Mr. H.'s entitlement under the regulations would commence with the date of marriage.
- [32] The triggering event in this case was the s. 57 Family Relations Act declaration pronounced January 11, 1999. Mr. Cluff is incorrect in saying that an equal division is the default position. A re-apportionment to entitle Mr. H. to a share of the pension before marriage can only be done on the basis of a finding of unfairness having regard to the Family Relations Act s. 65(1) factors. (See *Margetish v. Margetish* 2002 B.C.S.C. 1177) Mr. H.'s claim is a form of unfairness remedy specifically authorized by s. 65(3) of the Family Relations Act which provides as follows:

65 (3) If the division of a pension under Part 6

would be unfair having regard to the exclusion from division of the portion of a pension earned before the marriage and it is inconvenient to adjust the division by reappportioning entitlement to another asset, the Supreme Court, on application, may divide the excluded portion between the spouse and member into shares fixed by the court.

- [33] Counsel did not argue the potential issue as to whether s-s 65(3) should be interpreted without regard to the specific fairness factors listed in s-s 65(1). One might question why s-s 65(3) is necessary if this was not the case, but I will not pursue that inquiry further in the absence of developed argument. As the law now stands, the fairness inquiry is the usual one which considers the s. 65(1) factors.
- [34] Ms. E. started contributing to her employment pension in 1980. At the 1991 commencement and during the initial years of their co-habitation Ms. E.'s income exceeded Mr. H.'s. They lived in a condominium that she had purchased earlier for herself. She paid the strata corporation fees and they shared expenses for groceries, utilities, the mortgage and improvements. Their first child was born [], 1993. There was no evidence of when they started contemplating marriage. Mr. H. testified to the effect that their cost sharing system continued until they were married. Even when Ms. E. was on maternity leave for their first child she maintained her share of her mortgage payments.
- [35] I am unable to find that the pension division provided in the regulations is unfair on a consideration of the s. 65(1) factors. The division provided in the regulations is clearly not unfair to Mr. H. under factors in s. 65(1)(a) - (d). Factor 65(1)(e), the economic independence and self-sufficiency factor, may actually favour a re-apportionment in Ms. E.' favour, since she now has the lower income and is nearly five years older than Mr. H. Section 65(1)(f) is not of assistance to Mr. H. on account of any contribution to the acquisition, preservation or maintenance of the pension during their pre-marital cohabitation.

- [36] Mr. H. is entitled to a portion of the employment pension as provided by the Family Relations Act and regulations.

THE ISSUE OF REPAYMENT OF HOMEBUYERS' PLAN RRSP WITHDRAWAL

- [37] This issue arises out of rather unique circumstances. Acting on an idea communicated by a financial adviser at the time of the purchase of their home in 1998, the parties purchased an RRSP, then withdrew \$20,000 from the RRSP under a Statutory Homebuyers' Plan and used a large part of the proceeds to fund the purchase of the house. The withdrawn amount is repayable to the RRSP over 15 years at the rate of \$1,333 per year. If the annual payments are not made the amount of \$1,333 is deemed to come back into Mr. H.'s income each year and is taxable at his marginal tax rate. If the payments are made, he maintains the RRSP asset of \$20,000 which is registered in his name.
- [38] Mr. H. claims he cannot afford to contribute the \$1,333 per year and seeks a contribution from Ms. E. to share the tax cost of bringing \$1,333 per year back into his income. Mr. H. did not repay the annual instalment of \$1,333 in 1999 or 2000. This was clearly a voluntary choice on his part, since he chose to and was able to pay off a substantial shareholders' loan of over \$50,000 due to Hessair Services Ltd. to avoid it being set up as wages. He has also been regularly contributing \$150 per month to an educational fund for the children.
- [39] Ms. E. is prepared to pay \$10,000 into the RRSP if it could be rolled back to her as a RRSP in her name. If that can be accomplished with the agreement of Canada Customs and Revenue Agency, it would clearly be consistent with Mr. H.'s stated interests. If that cannot be done within the statutory scheme, perhaps a beneficial interest in the RRSP could be secured by Ms. E. by way of a trust agreement. Failing some resolution that allows Ms. E. to benefit from any contribution she makes, I do not find that Ms. E. should be obliged to contribute an avoidable income tax burden that Mr. H. has voluntarily chosen to bear.

HESSAIR SERVICES LTD.

- [40] This company was incorporated to receive Mr. H.'s income from pilot services provided under contract. It does not appear that Ms. E. ever has been a shareholder or director, but some wages were paid to her as a means of splitting income.
- [41] The evidence includes the financial statements for the fiscal years 1996 to 2000 inclusive. The financial statements for the year end at February 29th, 2000 do not include the usual notes, but it appears that the capital assets (book value shown as \$18,390) are the same assets that were described in the notes to the 1999 financial statements as primarily an automobile. There were no capital assets in 1998 and previous years, and prior to the 1999 fiscal year, the company appears to have simply been a vehicle for receiving Mr. H.'s contractual earnings and paying expenses and a management salary to him.

- [42] The corporate fiscal year ending February 28th, 1999 provided the basic ingredients for competing claims. As noted, the parties separated in October 1998. The corporate revenues for the fiscal year were significantly higher than previous years, at \$96,314. The original financial statements show salaries and benefits of \$37,310 and various other expenses, to a total of \$59,542 resulting in income from operations of \$36,772. After provision for corporate income taxes the net income was \$31,048. Set off against a deficit at the beginning of the year, the retained earnings were \$20,049. However, the balance sheet showed that an amount of \$41,412 was due from the shareholder, Mr. H.
- [43] An amended financial statement for February 1999 was approved by Mr. H. in February 2000, which reduced salaries and benefits to \$25,013 and increased the amount due from the shareholder to \$53,114. This had the effect of increasing the corporate income to \$40,635 and the retained earnings were thereby increased to \$29,688.
- [44] Pointing to the fact of the corporate retained earnings Ms. E. puts forward a claim quantified at \$16,050.82. This amount is computed as one-half of the net income for the year after provision for income taxes (\$40,635) pro-rated to the date of separation.
- [45] Mr. H. does not dispute that Hessair Services Ltd. is a family asset. There can be no dispute that although the retained earnings are contingent upon the loan from the shareholder being repaid, Mr. H. has elected to repay the shareholders' loan to the company rather than set up wages in the same amount.
- [46] Mr. Kalsbeek, CGA, testified that he could think of no reason other than a tax planning purpose for Mr. H. to pay off the \$53,114 shareholders' loan with tax-paid funds rather than incur the income tax on that amount at his marginal tax rate.
- [47] No evidence was tendered as to the valuation of the shares of Hessair Services Ltd.
- [48] Mr. H. claims that Ms. E. should be responsible for \$12,865.53 of the shareholders' loan. He arrived at this amount in consultation with his accountant, by an after-the-fact allocation of the amounts spent by the company which were set up on the books as loans to shareholder either at the time of the initial expenditure or by subsequent adjusting entries. The main ingredients of Mr. H.'s allocation were allocations to Ms. E. of 50% of the shareholders' account as it stood on the company's general ledger on October 9th, 1998, 50% of credit card payments allocated to shareholder at year end in February 1999 less personal charges after October 9th, 1998, and 50% of charges to shareholder for vehicle use until October 1998.
- [49] The approach of both parties ignores the fact that from a legal perspective the family asset is not the retained earnings or the shareholders' loan account, but rather the shares in Hessair Services Ltd. Having said that, however, where the primary asset of the company is the shareholders' indebtedness to the company it is clearly relevant to inquire into what portion of the amount due from shareholder should be characterized as a family debt. If the entirety of the amount due from shareholder was a family debt there would be clearly no net value in the shares of the company to the shareholder.

- [50] One difficulty with Ms. E.'s approach in specifically claiming a one-half share of the company's yearly profit pro-rated to the date of separation is that it treats corporate earnings as if they were personal earnings without taking into account personal income tax liability. It also ignores the pre-existing deficit in the company of \$10,998 and it ignores the potential finding that some of the profit had already been advanced to the shareholder for family use purposes.
- [51] Ms. E. takes particular issue with Mr. H.'s allocation of credit card payments to family purposes. Considerable trial time was consumed on the issue of whether many of the expenditures were for food and entertainment for Mr. H. and Ms. D. while travelling. Mr. H. insisted that although some individual charges fell into that category his allowances and reimbursements from his employer for expenses covered them.
- [52] The credit card allocation includes the approximate amount of \$4,800 spent on repairing Mr. H.'s Saab vehicle in September 1998. I have already stated that I agree that it is inappropriate and unfair to burden Ms. E. with one-half of that expenditure. I would, therefore, specifically adjust Mr. H.'s computations on Exhibit 11 by reducing the amounts allocated to family expenditures on credit cards by \$4,800.
- [53] It is impossible to perform a precise analysis from the documentary evidence as to the proper characterization of the uses made of company advances charged to Mr. H.'s shareholders' loan. Mr. H.'s computation, although done in conjunction with his C.G.A., is obviously subjective and disputed. I am satisfied, however, that approximately \$18,000 of the shareholders' loan from the company was probably legitimately allocatable to family purposes that it would be fair to notionally charge equally to Ms. E. and Mr. H. if there was to be a notional distribution of the retained earnings of the company. This would result in a distribution or credit to her of one-half of \$29,688, less \$9,000, that is, \$14,844 minus \$9,000 equals \$5,844.
- [54] As I have previously noted, however, the retained earnings are corporate, not personal. I presume that there would be some shrinkage due to personal income taxes even if they were distributed as dividends. There should also be a pro-ration of the retained earnings because the separation occurred part way through the fiscal year. The combination of these factors undoubtedly would reduce Ms. E.'s credit to the approximate value of the \$3,000 credit due to Mr. H. in respect of the vehicles. In my assessment, the credits offset each other and in the result there is no compensation due to either party.
- [55] Unless there are pertinent circumstances unknown to me, it would appear that success is divided and therefore the parties shall bear their own costs.

"I.C. Meiklem, J."

The Honourable Mr. Justice I.C. Meiklem

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