
CANADA / JUDGMENT

J.A.E. v. J.M.E.

2007 BCSC 167

COURT

Supreme Court of British Columbia

DECIDED

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2007 BCSC 167 J.A.E. v. J.M.E.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

J.A.E. v. J.M.E.,

2007 BCSC 167

Date: 20070418

Docket: 49985

Registry: Kelowna

Between:

J.A.E.

Plaintiff

And

J.M.E.

Defendant

Before: The Honourable Mr. Justice Rogers

Reasons for Judgment

Appearing on His Own Behalf:

J.A.E.

Appearing on Her Own Behalf:

J.M.E.

Date and Place of Hearing:

January 29, 2007

Kelowna, B.C.

Introduction

- [1] In this application Mr. E seeks an order relieving him of child support and requiring Mrs. E to pay support to him based on an imputed income, all based on his assertion that the two children of the marriage have lived with him full time since late April 2006. Mr. E also seeks an order that would take his interest expense into account when setting his own income for the purpose of the Federal Child Support Guidelines. Finally, Mr. E seeks an order varying an earlier order of this court so as to require Mrs. E to contribute to those special and extraordinary expenses.
- [2] For her part, Mrs. E seeks orders imputing income to Mr. E and requiring that he pay child support to her for the children, that Mr. E pay the children's extraordinary expenses, and that Mr. E register the children's Registered Education Savings Plan jointly in her and Mr. E's names.
- [3] At the root of these cross applications is a lengthy history of post-separation acrimony between the parties, and the decision the parties' two teenaged children made in April 2006 to no longer live exclusively with their mother.

The Facts

- [4] The parties were married in August 1985. They have two children: M1 born March 25, 1988, now 18 years old; and M2 born October 31, 1991, now 15 years old. Mr. and Mrs. E separated in the summer of 2000. They were divorced in May 2002. The children lived primarily with Mrs. E after the separation.
- [5] Mr. E is a realtor. Mrs. E is now employed at a rest home and Interior Health.
- [6] On April 25, 2003 Metzger J. imputed an annual income of \$65,000 to Mr. E and ordered that he pay Mrs. E monthly child support of \$867.
- [7] In late April 2006 both M1 and M2 decided to no longer live primarily with their mother. They moved in with their father. The parties have not been able to agree with whom the children have primarily resided since April 2006. It follows that they have not been able to agree who should pay child support or in what amount that support should be paid.

Children's Residence

- [8] The parties give conflicting evidence with respect to the children's residence since April 2006. Mr. E maintains that M1 lived with him through until the beginning of September. Mr. E says that from September to the present M1 has spent equal time in each household.

[9] Mr. E says that M2 lived primarily with him until the beginning of December 2006 when she, too, began spending equal time in each household. He says that the children continue to move equally between the two homes and that he expects this to continue for the foreseeable future.

[10] Mrs. E denies that M2 lived primarily with Mr. E after April 2006. She does, however, acknowledge that before and after April 2006 she and M2 have had serious differences of opinion about things, sometimes leading to arguments. Mrs. E also acknowledges that in late April 2006 M2 went to Mr. E's house and took with her all of her clothing and personal belongings, including the family dog. In her affidavit #5, Mrs. E deposed that:

8. On September 27, 2006, [M2] did attend counselling with me through the Interlock Program provided by my employer, Interior Health. [M2] had asked me at the beginning of September if she could come back to my house. I told her that I would love for her to come back here as soon as she receives some counselling around what happened to her this summer to ensure that she does not try to re-align once again with her father and undermine my authority.

[M2] has agreed to see a psychologist once a week with me so that we can work on the primary issues that have kept her from living here....

(emphasis added)

[11] In a somewhat contrary vein, Mrs. E later says that M2 came to live with her full time in late November 2006, and has lived full time with her since then.

[12] As for M1, Mrs. E says that during the summer of 2006 he spent about 15 nights at her place, and so he cannot be said to have lived primarily with Mr. E during that time. She does not seriously contest the proposition that M1 has been spending approximately equal time in each household since September 2006. In fact, in her affidavit #5 Mrs. E deposed that:

7. On September 1, 2006 [M1] returned to my house, requesting to be able to live half time, being one week at my house and one week at the Plaintiff's house. I am in agreement with that for [M1].

...

[13] Notwithstanding her assertion that the two children were living her with during the summer of 2006, Mrs. E acknowledged that shortly after M2 moved to her father's house Mrs. E had all the locks on her house changed. She did this in order to prevent M2 from having access to her house.

[14] In the course of her submissions Mrs. E advised the court that she has reluctantly agreed to a shared custody arrangement for the children.

- [15] Each party submitted extensive affidavit evidence to support their respective views of the situation. In those affidavits each party ascribes to M1's and M2's thoughts, feelings and intentions which tend to support his or her position and undermines the other's position. Other than a very brief and frankly unhelpful affidavit from M2, the court did not have the benefit of an unbiased account of what these two children wish for their own futures. Such an account could have been available, of course, had the parties employed the Kelowna "Views of the Child" Pilot Project. Mr. E's affidavits repeatedly advocate a views of the child interview; Mrs. E's affidavits are silent on the point.
- [16] I find that the submissions Mrs. E made in the course of her argument are inconsistent with her affidavit evidence. During submissions she maintained, for example, that M2 did not live primarily with Mr. E after April 2006. However, her affidavit evidence indicates that M2 took her personal possessions out of the house, that Mrs. E changed the locks on her house, that in September 2006 M2 was, in fact, living away from Mrs. E's home and that Mrs. E would not allow her back until M2 undertook a course of counselling. Given the disconnect between Mrs. E's oral submissions and the facts to which she had earlier attested, I find that I can give little weight to Mrs. E's assertions about where the children were primarily spending their time during the period between April 2006 and the present.
- [17] There was no similar disconnect in between Mr. E's evidence and submissions. Mr. E's affidavit evidence was, in my view, generally consistent. For example, in his affidavit #6, Mr. E deposed:
13. All I want is what is best for the kids. [M2] has told me that in no way will she ever want to live full time with her mother again. [M1] and [M2] both want to live with each of us half time, which I am in full agreement of....
- [18] Mr. E went on to depose that at the beginning of September M1 began spending equal time in the two households. Mr. E has been consistent in his submission that from that point forward the parties have had shared custody of M1.
- [19] In the same vein, Mr. E's evidence that it was not until the beginning of December 2006 that M2 began to spend equal time in each household is consistent with Mrs. E's own evidence that she was not prepared to have M2 back in her house until M2 underwent counselling, and that that counselling did not start until late September.
- [20] On the whole, I find that Mr. E's version of events, and in particular where the children spent their time from late April 2006 to the present, is more reliable than Mrs. E's version. Where Mrs. E's evidence contradicts Mr. E's evidence concerning the children's residence during that period, I prefer the latter.

[21] Accordingly, I find that from at least May 1, 2006 to September 2006 M2 and M1 were primarily resident in Mr. E's household, and that M2 continued to be primarily resident there until December 1, 2006. From September 1, 2006 to the present M1 has been spending approximately equal time in each household. From December 1, 2006 to the present, M2 has been spending approximately equal time in each household. That pattern of residence will continue for the foreseeable future.

Plaintiff's Income

[22] Mr. E reported \$52,533 as his total income on Line 150 of his 2005 tax return. The figures that produced that number were:

Gross Income

\$67,925

Interest Income

2,005

Plus 1/2 Taxable Capital Gains

11,567

Less Business Expenses

<28,965>

Total Income

\$52,532

(the rounding error is mine)

[23] Mr. E deposes that he had to borrow money to buy the investments which produced his capital gain income. His interest expense for that borrowing was \$10,591. Mr. E's original 2005 return did not claim the full amount of that interest, and that portion of it that was claimed appeared on Line 221 of his return. Since that entry comes after Line 150 on his return, his total income was not reduced by the interest expense.

[24] Recently Mr. E has pointed out to the Canada Revenue Agency that he had inadvertently claimed only half of his 2005 interest expense. The Agency has reassessed his return, and on reassessment it has allowed him to deduct the full interest expense.

[25] Mr. E argues that his interest expense should also be allowed as a deduction from his Guideline income. Mr. E says that his income for the purpose of the Guidelines should, therefore, be \$41,564.

[26] The Federal Child Support Guidelines provide the principles for determining a parent's income. The starting point is s. 16:

16. Subject to sections 17 to 20, a spouse's annual income is determined using the sources of income set out under the heading "Total income" in the T1 General form issued by the Canada Customs and Revenue Agency and is adjusted in accordance with Schedule III.

The portion of Schedule III relevant to this matter is:

8. Deduct the spouse's carrying charges and interest expenses that are paid by the spouse and that would be deductible under the Income Tax Act.

[27] The Canada Revenue Agency reassessment allowed Mr. E to deduct his 2005 interest expense. It follows that s. 8 of Schedule III dictates that this same interest expense must be deducted from Mr. E's 2005 Guideline income as well.

[28] Mrs. E took the position during the hearing that Mr. E's 2005 income should be imputed to be approximately \$90,000. Her theory was that Mr. E's gross business income was \$67,900 and his capital gains were \$23,135, making a total of \$91,000. For reasons Mrs. E could not articulate, she asserted that Mr. E's business expenses should not be deducted from his income to determine his Guideline income. I disagree. I have examined the business expenses Mr. E claimed on his tax return. They appear to be in line with the expenses that a realtor would likely incur in the course of a year. They are, in my view, properly deductible.

[29] As for including the full amount of Mr. E's capital gains in his Guideline income, Mrs. E did not cite, as she might have, the relevant portion of s. 19 of the Guidelines:

19. (1) The court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following:

...

- (h) the spouse derives a significant portion of income from dividends, capital gains or other sources that are taxed at a lower rate than employment or business income or that are exempt from tax...

[30] The following data derives from the tax returns that Mr. E has entered into evidence in this proceeding: in 2000 Mr. E claimed a capital loss of \$19,084; in 2001 he claimed no capital gains or losses; in 2002 his capital losses were \$9,042; I do not appear to have a copy of his 2003 tax return; in 2004 his total capital gains were \$35,565; and in 2005 his capital gains were \$23,135. It is apparent that Mr. E regularly realizes either capital gains or losses. These are not insubstantial sums. In 2004 total capital gains comprised 41 percent of Mr. E's combined net business and capital gains income. In 2005 that share was 34 percent.

[31] It is apparent that Mr. E relies upon capital gains for a significant portion of his income. It is equally apparent that capital gains are taxed at a lower rate than Mr. E's business income. Under these circumstances it is appropriate to apply s. 19(1)(h) of the Guidelines to impute income to Mr. E. The amount imputed will be the whole amount of his capital gains.

[32] In the result, Mr. E's 2005 Guideline income was \$53,509, calculated as follows:

Gross Income

\$67,925

Interest Income

2,005

Plus All Taxable Capital Gains

23,135

Less Business Expenses

<28,965>

Less Interest

<10,591>

Total Guideline Income

\$53,509

[33] Mr. E reports his annual expenses at approximately \$94,000. This includes annual mortgage payments of \$22,800, property taxes of \$12,000, and child support payments of \$12,500. The only expense item that appears to be out of the ordinary on his Financial Statement is the nearly \$6,000 per year that he gives to charity. Mr. E's household relies on his income alone. He does not share his expenses with others.

Defendant's Income and Expenses

[34] Mrs. E's employment income is \$46,000 per year. She lives with her fiancé Mr. H. His income was not revealed to the court. Mrs. E and Mr. H take in foreign students as boarders. According to exhibit B to Mrs. E's affidavit #8, her portion of the boarder's income was \$3,900 in 2005 and \$4,225 in 2006. As of September 2006 they took in two boarders instead of only one, and her share of the income from those two boarders is \$650 per month.

[35] Mrs. E says that Mr. H receives one-half of the boarding income, and uses it to pay his own child support obligation. Mrs. E says that she does not report income from the boarders because after paying expenses, she realizes little or no profit from it. From this I conclude that Mrs. E uses her share of the boarder's income to pay all the expenses relating to them. I conclude that the portion of the boarder's income that Mr. H takes is, in essence, profit, and that Mrs. E has chosen to allocate all of that profit to Mr. H's account, thereby foregoing a share to which she might have a claim. If Mr. H's share represents profit, and his share in 2006 was \$4,225, then it follows that if he and Mrs. E were to equally share the income and expenses relating to the boarders, Mrs. E would have realized a profit of at least \$2,112 for the year. It also follows that Mrs. E's profit from the two full-term students should be one-half of \$650 per month for ten months, or \$3,900 per year.

- [36] Mrs. E's income for the purpose of child support is, therefore, her employment income of \$46,000 plus \$3,900 from the student boarders, for a total of \$49,900.
- [37] Mrs. E's financial statement puts her annual household expenses at \$75,559. According to her, she shares those expenses equally with Mr. H. Her portion of the household expenses is, therefore, approximately \$37,700. Given that Mr. H does not prorate the household expenses, but rather shares them equally with Mrs. E, I infer that Mr. H's income is approximately equal to Mrs. E's, or about \$50,000 per year. The total household income for Mrs. E's family unit is approximately \$100,000. That figure will be of use later when assessing which household has a higher standard of living.

RESP

- [38] One element of Mrs. E's notice of motion sought production of information concerning the RESP the parties created for the children. Beames J. heard that part of the motion in October 2006. Beames J. ordered that Mr. E provide details of the RESP to Mrs. E. Mr. E has complied with that order.
- [39] Beames J. postponed ruling on one particular aspect of Mrs. E's motion relating to the RESP. That had to do with Mrs. E's request that Mr. E take steps to register the RESP in the parties' names jointly - as opposed to in Mr. E's name alone. There was scant evidence in the affidavit material before me on this point. The parties contented themselves with making submissions on the issue. Mrs. E candidly admitted that she did not understand the RESP program, and knows very little about its formalities and requirements. Mr. E submitted that to the best of his knowledge the only way to transfer the RESP into joint names of parties who are not spouses (and these parties are not spouses - their marriage having been dissolved in 2002) was to collapse the plan and initiate a brand new plan under joint ownership.
- [40] Mrs. E also requested an order that Mr. E make the minimum annual RESP contributions so as to qualify for the available annual federal government grant of \$400. Mrs. E made that request in her chambers outline, which was filed approximately two weeks before this matter was heard, but approximately seven months after she filed her notice of motion. That request was not set out in that notice of motion.

Discussion

Child Support

- [41] I am satisfied that commencing April 1, 2006 the two children of the marriage moved their primary residence from Mrs. E's house to Mr. E's house. They lived there for a total of five months. While a short-term change of a child's residence, or a visit during summer vacation, will not generally trigger a change in the child support regime, I consider a change of residence for five months a not insignificant period of time. It is sufficient to constitute a change in circumstances such that the child support regime should be adjusted.
- [42] Accordingly, Mr. E should be relieved of the burden of paying child support for those five months, and Metzger J.'s order from 2003 should be varied accordingly. Further, Mrs. E ought to have paid support to Mr. E during that time. Given her income of \$49,900, she ought to have made monthly payments of \$757 for those five months. There will, therefore, be an order that Mrs. E pay \$757 per month for the period April 1, 2006 to August 31, 2006.
- [43] From September to the end of November 2006, M2 continued to live with Mr. E. Mrs. E ought to have paid support to Mr. E in the amount of \$464 per month for the period September 1, 2006 to November 31, 2006. There will be an order that Mrs. E pay \$464 per month to Mr. E for M2's support for the period September 1, 2006 to November 31, 2006.
- [44] During that same time M1 spent equal time in each household. Given that Mrs. E's obligation to transfer funds to Mr. E for M2's support between September and end of November, I consider it unnecessary to make an additional order with respect to M1 for that period.
- [45] The situation changed in December 2006, and it continues to be different from the fall of 2006. The change was that in December 2006 both children began to spend approximately equal time in each parent's household. It then became a true shared custody arrangement. The principles to apply in assessing child support in a shared custody situation were described by the Supreme Court of Canada in *Contino v. Leonelli-Contino*, 2005 SCC 63. Professor Rollie Thompson has provided this useful and accurate synopsis of the approach prescribed by Bastarache J. in that case:

(1) Determine the Simple Set-Off Amount

The starting point under s. 9(a) is the simple or straight set-off of each parent's Table amount for the number of children involved in the shared custody arrangement. No pro-rating, no multiplier (paras. 40-51).

(2) Review the Child Expense Budgets

A court must look at the parents' actual spending patterns, based upon child expense budgets, and not just make assumptions about spending. Further, a court should look at all the expenses of both parents under s. 9(b); not just the additional expenses resulting from an increase in access, not just the variable or fixed expenses, not just the expenses of the recipient parent. Under s. 9(b), a court has two concerns: (i) the overall increased total costs of child-rearing for both parents, especially duplicated costs; and (ii) any disproportionate assumption of spending

by one parent or the other (paras. 52-53).

These expenses should be "apportioned between the parents in accordance with their respective incomes" (para. 53), to "verify" the set-off (para. 77) and to determine "the need for significant adjustments to the set-off amounts" (para. 78).

(3) Consider the Ability of Each Parent to Bear the Increased Costs of Shared Custody and the Standard of Living for the Children in Each Household

The consideration of these two factors lies at the heart of the s. 9(c) analysis, set out at paras. 54-72, especially paras. 69-70. In assessing each parent's ability to bear the increased costs of shared custody, a court should look at the income levels of each parent, the disparity in incomes, and the assets and liabilities of each.

The child's standard of living in each household is "particularly useful for the exercise of discretion in a predictable manner" (para. 70). The children should not experience "a significant variation in the standard of living ... as they move from one household to another" (para. 51). As the term "household" is used, the incomes and resources of new partners in each household would presumably be relevant.

(4) Distinguish Between Initial Orders or Agreements and Variations

"An application that represents a variation of a prior support arrangement will usually raise different considerations from a s. 9 application where no prior order or agreement exists" (para. 55) A recipient parent "may have validly incurred expenses based on legitimate expectations about how much child support would be provided", especially for fixed costs (para. 55).

[46] In the present case, given the parties' Guideline incomes, a simple set off Table amounts produces a net payment of \$54 from Mr. E to Mrs. E.

[47] The second stage of the Contino analysis requires the court to assess the parties' child expense budgets. These parties were self represented, and it is fair to say that neither parent was aware of the need to prepare and produce such detailed budgets for this hearing. I do have the option of adjourning the hearing so that those budgets may be prepared, but given that Mr. E's original motion was filed more than seven months ago, and that it took more than half a year for this issue to finally come on for hearing, I think that delaying this matter further would not be in the children's best interests. The parties deserve certainty on this issue, and the court must do the best that it can with the data at hand. Even though it requires a degree of assumption making, this particular case requires that the court proceed with expediency.

[48] Mr. and Mrs. E described M1 and M2 as relatively normal teenagers. They do not appear to have unusual or particularly expensive habits, pastimes, or hobbies. Neither has a medical problem or a learning disability. M2 has, apparently, benefited from counselling, and those sessions were funded by Mrs. E's extended health package. M1 had some tutoring in his last year of high school. Mrs. E put her monthly child expenses at \$340. Mr. E did not supply a

breakdown of his child-related expense, but in fairness he prepared his financial statement only two months after the children came to live with him. In any event, Mr. E did not contest the accuracy of Mrs. E's estimate of her child care costs, and from that I infer that his experience has been roughly similar to hers.

- [49] As for apportioning costs between the two parents in accordance with their respective incomes, it is manifestly clear that Mrs. E's two-income household has a greater capacity to bear child expenses than does Mr. E's single-income household. That capacity at least balances out the minor payment that Mr. E would make to Mrs. E if child support was determined by a simple set off of Table amounts. The fact that Mrs. E's household has two incomes and those incomes exceed the household expenses makes it unnecessary to make an adjustment to the set-off amount.
- [50] The third stage of the Contini analysis requires the court to consider the ability of each parent to bear the increased costs associated with shared custody along with the standard of living the children experience in each household. Again, Mrs. E's two-income household and the fact that expenses in her household do not outstrip the combined income suggest that she has a greater capacity to bear the cost of shared custody. But in any event, the evidence does not suggest that the shared custody arrangement has visited a significant impact on either parent's expenses. So Mrs. E's higher capacity to absorb changes is not particularly relevant here.
- [51] As for living standards, according to the evidence Mr. E lives in a waterfront home. In the central Okanagan that is like having a ski-in condo at Whistler, or a place fronting Stanley Park's seawall. I have no doubt that from an aesthetic perspective, Mr. E's household offers M2 and M1 a higher standard of living than does Mrs. E's house. But on other fronts, such as the quality of their food, furnishings, clothing, recreation, travel, or education, there appears to be no significant difference in the standard of living the children experience in either household.
- [52] The final stage of the Contini process is to give appropriate weight to plans and commitments the parties have made based upon a legitimate expectation that previously ordered child support would continue unabated. The only evidence I have on that point is Mr. E's double hearsay assertion in paragraph 5 of his affidavit #5 that the children have told him that Mrs. E has told them that she needs the child support money to keep her house. I do not consider this to be particularly reliable evidence. And in any event, if it were true, Mrs. E would surely have made it clear in her own evidence that she relies on child support in order to meet her expenses. Mrs. E did not adduce evidence to that effect. Indeed, her evidence was to the contrary - even without child support, her income combined with what I assume to be Mr. H's income is ample to cover the operating cost of her household.
- [53] Accordingly, there is no convincing evidence before the court to establish that if Mrs. E did not get child support her financial stability would be significantly jeopardized.

- [54] On the whole, I find that in these circumstances, particularly the parties' nearly equivalent incomes, that neither need make child support payments to the other.
- [55] Because their circumstances may vary at some point in the future, the parties shall exchange copies of their completed income tax returns no later than May 15, 2007, and on May 15 of every year thereafter.
- [56] Beames J. ordered that Mr. E pay his proportionate share of the children's special and extraordinary expenses to Mrs. E. That order must have been predicated upon the assumption that Mrs. E will incur most of those expenses. In my view, given the shared custody regime that now pertains, Beames J.'s order should be varied to provide that the parties shall pay to the other their proportionate share of the children's special and extraordinary expenses incurred by the other. Given the similarity of their incomes, they shall share those expenses equally. So that the parties do not continually bombard one another with demands for payment of minor sums, the parties shall tabulate, exchange, and set off their respective special and extraordinary expenses on a quarterly basis, commencing April 1, 2007 and on the first of every third month thereafter.

RESP

- [57] I am prepared to take judicial notice that collapsing an RESP may have serious negative tax consequences which may significantly erode the overall value of the plan. There is no evidence that Mr. E has managed the RESP badly or that there is a significant risk that he will raid the fund if it is left in his name alone. Collapsing the plan at this point would expose the children to an unnecessary risk of loss, would avoid no perceptible risk of malfeasance by Mr. E, and would not overall be in the best interests of the children. Mrs. E's notice of motion relating to transfer of the RESP is, therefore, dismissed.
- [58] I would dismiss that request in any event on the ground that she did not put it forward in a properly filed and served notice of motion. Although I am aware that parties ought not be held strictly to the Rules of Court, and that in the case of self-represented litigants the Rules ought not be interpreted against them so as to deny them an opportunity to be heard, nevertheless, Mrs. E is no stranger to the court system - the court file in this matter is at least 30 cm thick, and the quality of the chambers brief she prepared stand testimony to that proposition. Furthermore, the thing she seeks here, an order that Mr. E pay a significant sum into the RESP, is substantial and substantive. It would, in my opinion, be manifestly unfair to make an order granting relief against Mr. E when he has had very little effective notice of it.

Costs

- [59] Mr. E has achieved substantial success in these competing applications. He is entitled to his costs on Scale B.

"P.J. Rogers, J."

The Honourable Mr. Justice P.J. Rogers

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