
CANADA / JUDGMENT

J.R.B. v. P.J.B.

2012 BCSC 1644

COURT

Supreme Court of British Columbia

DECIDED

5 November 2012

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2012 BCSC 1644 J.R.B. v. P.J.B.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

J.R.B. v. P.J.B.,

2012 BCSC 1644

Date: 20121105

Docket: 46148

Registry: Vernon

Between:

J.R.B.

Claimant

And

P.J.B.

Respondent

Before: Master R.W. McDiarmid

Reasons for Judgment

Counsel for the Claimant:

P.A. Dyck

Counsel for the Respondent:

M.J. Keim

Place and Date of Hearing:

Vernon, B.C.

September 20, 2012

Place and Date of Judgment:

Vernon, B.C.

November 5, 2012

- [1] This is an application brought by the respondent for orders that the claimant pay child support to the respondent for the two children: L., born April 26, 1999, and K., born November 25, 2002; for an order that s. 7 expenses be shared proportionately; for an order that child support be ordered retroactively to July 1, 2010; for such further and other relief this court may deem just; and for costs.
- [2] In her application in response filed September 12, 2012, the claimant opposes the orders sought in paragraphs 1, 2 and 3 by addressing the issue in the context of shared custody and referring to a separation agreement dated March 5, 2008 and an addendum to that agreement dated April 19, 2009. The separation agreement specifies at clause 15(1) that neither party shall pay child support to the other in a shared custody arrangement. The addendum provides that the children's agreed upon s. 7 expenses be shared equally.
- [3] The parties were married on July 8, 1989 and separated on November 2, 2007.
- [4] Since April 2009, the children have been residing on an equal basis with the two parties.
- [5] On March 5, 2008, the parties entered into a separation agreement. It confirms the date of marriage, names and ages of the children, and the fact that the parties have been living separate and apart since November 2, 2007, and intend to continue to do so. The agreement sets out that the parties intend the agreement to finally settle property issues and to be a full release of each claim that one party may have upon the property of the other. With respect to the children, it reads as follows:

D. The Husband and Wife separately intend this Agreement to be:

...

- c. an interim settlement with respect to guardianship, custody, access and maintenance of the Children.

[6] Some of the other relevant provisions in the agreement are as follows:

E (2) The Parties wish to make it clear that it is their intention that:

- a. each of them rely upon this Agreement to be enforced according to the terms; and

- b. neither of them would have entered into the Agreement if he or she believed that the other would apply at any time to vary it.

F. The Parties acknowledge that each of them is prepared to abide by the terms of this Agreement because each recognizes that:

- a. the importance to each of them of being able to rely on it far outweighs the risk that it may operate unfairly at some future date; and
- b. the impossibility of returning the Parties to the position they occupied before they entered into this Agreement would make any variation, however fair solely viewed on the changed circumstances, unfair on the whole because all dealings with their respective property following the entering into of this Agreement will have been based on the binding nature of this Agreement.

G. The parties have each retained legal counsel or have been advised to retain legal counsel to advise them as to their respective rights and obligations and as to the execution of this Agreement.

H. The Husband is employed as a teacher and earns approximately \$74,858.00 per year.

I. The Wife is self employed and earns approximately \$116,945.00 per year.

...

GENERAL PROVISIONS

...

- 8. Subject to this Agreement, the Supreme Court of British Columbia shall have exclusive jurisdiction over this Agreement.
- 9. Any provision of this Agreement that is void, voidable, or unenforceable is severable and the remainder shall continue in effect.

...

12.d. A psychologist has been retained by both Parties for the purposes of meeting with the Parties and the Children to satisfy the Wife that there are no risks associated with the Husband's parenting of the Children. It is anticipated that the psychologist will be involved on an ongoing basis with respect to the Parties and the Children, and further, that the psychologist shall have access to both the Husband and Wife's counsellors to either obtain production of records in relation to the counselling, or to speak with the counsellors directly. The Husband and Wife shall be equally responsible for all costs with respect to the psychologist service and counselling for the Parties and the Children; and ...

CHILD MAINTENANCE

15. (1) The Husband shall not be obliged to pay the Wife child maintenance for the maintenance of the Children up until February 29, 2008. In the event that a co-parenting plan is negotiated, neither Party shall pay child support to the other, but the costs associated with the Parties' nanny shall be divided and apportioned between the Parties in accordance with their respective Guideline income as determined by the Federal Child Support Guidelines.

...

- (3) In the event that parties have not reached an agreement with respect to co-parenting the children, the husband shall pay to the Wife the sum of \$1,500.00 per month interim child support for the Children commencing March 1, 2008 and continuing on the first day of each and every month thereafter until further written agreement or Court Order. The amount agreed upon, being \$1,500.00, is based upon the Husband and Wife's respective incomes, special [and] extraordinary expenses and a set off of interim spousal maintenance of approximately \$500.00 (tax adjusted to \$300.00 non-taxable).

...

SPOUSAL MAINTENANCE

17. (1) Neither party shall claim interim or permanent maintenance from the other.
- (2) Each party forever discharges and releases the other from all such claims.

RELEASES AND FURTHER ASSURANCES

29 (1) This Agreement is a full and final settlement of all issues between the Parties, save and except custody and access of the Children, and all rights and obligations arising out of their marital relationship.

- (2) Each party hereby forever discharges and releases the other from all claims at law, in equity, or by statute, including, without restricting the generality of the foregoing, the Family Relations Act, the Wills Variation Act, the Estate Administration Act, the Divorce Act, and amending Acts thereto with respect to:
- a. spousal maintenance;
 - b. property;
 - c. succession rights; and
 - d. any other matter arising from their marriage.
31. The Husband and Wife separately acknowledge that:
- a. his or her present and future needs have been adequately provided for by this Agreement;

- b. all matters in dispute between them, including those pertaining to family assets and to real and personal property interests, have been settled to his or her satisfaction;
 - c. he or she has received independent legal advice;
 - d. he or she has been advised as to his or her rights against and obligations to the other;
 - e. he or she has made full disclosure to the other, in the recitals to this Agreement, of his or her financial position, including assets, liabilities, income, expenses, and prospects, and is fully aware of the effect, purpose, and intent of this Agreement;
 - f. if either Party makes or pursues a claim against the other, this Agreement shall form the basis of a consent order in those proceedings, so as to maintain the full force and effect of this Agreement; and
 - g. he or she has read the entire Agreement carefully, knows and understands its contents, and has executed it voluntarily, without any undue influence or coercion by the other.
- [7] The agreement contains the recital that the parties reached the agreement with the assistance of a mediator. Solicitors' certificates of independent legal advice are attached. They confirm that each party retained a lawyer, that the lawyer fully read over and explained to the party the agreement, and informed the party of the contents of the agreement and advised the party of the nature and effect of the agreement and the liabilities and obligations agreed to, both as to current and future status. The certification sets out that each party expressed understanding and appeared to fully understand the agreement, and entered into the agreement willingly and not under any duress or stress by the other party without any pressure, undue influence or deception on the part of the other party. The certification also confirms each party was fully advised and informed with respect to all foregoing matters and may fairly have been said to have acted independently thereto.
- [8] On April 14, 2009, the parties entered into what the respondent states is a variation of the separation agreement. He refers to the document as the "amendment we did in April 2009." The claimant, in paragraph 4 of her first affidavit, states:
- ... the Children were initially in my care after separation until about June 2009, at which time the Respondent and I commenced sharing the care of the Children pursuant to a Separation Agreement entered into between the two of us dated for reference March 5, 2008, and an Addendum to the Separation Agreement dated April 19, 2009.
- [9] The addendum contains the following provisions which are of relevance to the application before me:
- 4. The Husband and Wife shall each be obligated to retain and pay for the services of alternative caregivers while the Children are in their respective care.

...

6. The parties shall share equally all special and extraordinary expenses that are agreed to.
7. In the event that the parties cannot agree upon a special or extraordinary expense, then either may enroll the Children in an activity provided that they pay for all the cost of the activity and that the activity not conflict with any other previously scheduled activity. If the Husband or Wife enrolls the Children in an activity, it is the intention of the parties that the activity shall take place during the enrolling parent's time with the Children.
- ...
9. The parties agree that the Children shall continue to receive counselling as recommended by the Children's counsellor from time to time which counselling shall be paid for by the Wife. In the event that the Children's counsellor recommends that the parties attend for a joint parenting meeting the parties shall attend and shall share the cost of the meeting.
- ...
12. In the event that any disagreement arises between the parties in relation to this agreement the parties shall first attend mediation before any Court action is taken by either party.
- ...
14. The remaining clauses of the Separation Agreement shall remain in full force and effect except as modified herein.
- [10] This two-page document is signed by the parties. Each party's signature is witnessed by a lawyer.
- [11] The parties filed affidavits. The applicant filed an affidavit setting out some background to his application. He also filed a second affidavit which was a Form F8 made July 5, 2012, providing updated financial information. The claimant filed an affidavit setting out the facts from her perspective. She also filed a sworn financial statement made August 12, 2012 and filed September 12, 2012. The respondent then filed a six-page affidavit responding to the materials filed by the claimant.
- [12] The respondent is employed as a school teacher with School District No. 83. His second affidavit deposes that he earns \$84,194.55 paid annually from which he deposes to having union and professional dues of \$1,866.59 deducted. He also deposes to a loss of \$2,380.67 in 2011 on rental income he receives.
- [13] The evidence is that the home in which he resides consists of two storeys. The lower storey is rented out. In 2011, the respondent declared gross rental income of \$10,200.00. He set out rental expenses, generally allocating 50 percent of certain specified household expenses (insurance, interest, maintenance and repairs, property taxes, and utilities) resulting in a taxable loss of \$2,380.67 related to the lower storey rental.

- [14] The respondent deposes that his Federal Child Support Guidelines (the "Guidelines") income for basic child support for the calendar year 2011 ought to be set by the court or is \$79,947.29. He attaches some recent pay stubs for the pay periods ending March 31, April 30 and May 31, 2012. These show a regular salary of \$8,148.90 per month, something called an SIP allowance, which to May 31, 2012 totalled \$784.00, some deductions for job action and leave without pay, and deductions for summer pay in the amount of \$800.00 per month.
- [15] I conclude that the respondent is paid for ten months of the year. In order to determine his anticipated income for 2012, I double his regular salary and his SIP allowance for the year-to-date at May 31, 2012, and obtain a gross figure for his income from employment. His regular salary in 2012 will be \$81,489.00 and his SIP allowance will be \$1,568.58. Those total \$83,057.58. It is appropriate that I deduct the job action amount of \$1,222.34 and union and professional dues. I am unable to determine from the three tax stubs what the total union and professional dues would be for 2012, so I will use the amount he was allowed to deduct in his 2011 tax return of \$1,866.59. I find that his income from employment net of union and professional dues for 2012 will be \$79,968.65.
- [16] The claimant's initial position is that I should enforce the agreement, and in particular enforce the provision of the agreement that neither party will claim child support from the other. Recognizing the obvious; namely, that the parties cannot contract out of child support obligations, the claimant's counsel submitted that I should impute income to the respondent for the months that he is not working.
- [17] In support of this argument, the claimant deposes that during the course of their marriage, until the last summer before she and the respondent separated, the respondent worked in the summer months and was able to earn approximately \$4,000.00 to \$6,000.00 per year. She sets out in paragraph 8 of her first affidavit some of the summer jobs the respondent had.
- [18] The Guidelines permit the imputation of income under s. 23 when there has been a failure to comply with obligations set out in s. 21. Imputation of income is specifically addressed in s. 19 of the Guidelines. With respect to the submission that I should impute income to the respondent for failing to work in summer jobs, s. 19(1)(a) (intentional unemployment) is the key circumstance I should look at.
- [19] I could consider imputation of income as I consider appropriate in the circumstances. None of the specified circumstances in s. 19(1) are applicable to the failure of the respondent to work in the summer. As is well known, teachers work from the commencement of school following Labour Day until the conclusion of school just prior to Canada Day, and generally get the summers off as well as some additional holidays throughout the year. That is not intentional under-employment.
- [20] I do not impute any income to the respondent for his failure to work in the summer months despite the fact that he did so prior to the parties separating.

- [21] The claimant also submits that I should impute income to the respondent as a consequence of the respondent renting out the lower floor of his house.
- [22] As noted in the taxation year of 2011, he claimed rental income of \$10,200.00 and total expenses against that rental income of \$25,101.34, half of which he claimed was a personal portion. The effect of this was a \$2,380.67 loss which apparently has been accepted by Canada Revenue Agency ("CRA"). I say "apparently," because although the 2009 tax notice of reassessment was attached to the Form F8 financial statement sworn by the applicant, no notice of assessment or re-assessment for the taxation years 2010 or 2011 was attached.
- [23] The fact that CRA may have accepted a loss for tax purposes does not provide a full answer to the claimant's submission that I should impute some rental income to the respondent. As set out in the Family Law Sourcebook for British Columbia, 2011 update, p. 3-40:

The reasonableness of an expense deduction is not solely governed by whether the deduction is permitted under the Income Tax Act ... Even if the Canada Revenue Agency accepts expenses as business expenses, it is an error to assume that the expenses should not be included in the determination of income.

- [24] Section 19(1)(g) of the Guidelines permits the court to add income if a parent unreasonably deducts expenses from income.
- [25] The respondent deposes in his response affidavit at paragraph 4(b) as follows:
- My rental income for 2012 will be reduced. I did not have a tenant for 3 months and my current tenant pays \$750 a month, not the \$850 a month I was receiving in the past. My home has the exact same square footage on both floors - the tenant has the full use of the lower floor and the children and I have use of the upper floor. My insurer is well aware of my tenant and all expenses are claimed in keeping with Revenue Canada guidelines.
- [26] It is apparent that there is a financial benefit to the respondent in renting out the lower half of his house, and despite the deductibility of 50 percent of the expenses for tax reasons, it seems unreasonable to me that there would not be some net monthly economic advantage to this rental arrangement.
- [27] Doing the best I can, and looking at the expenses without having the benefit of cross-examination of the respondent (this being an interim application), I attribute \$200.00 per month, or \$2,400.00 annually to the respondent.
- [28] In the circumstances, I determine his annual income to be \$82,368.65.
- [29] The claimant is a medical doctor. Her income tax documentation shows that her gross income in 2011 was \$222,282.33 and her net income was \$137,419.39. She deposes in paragraph 12 of her affidavit as follows:

... My income was decreased as a result of a change in my practice. I no longer practice in obstetrics and my gross income was reduced accordingly. Due to my child care responsibilities I was unable to continue practicing obstetrics as I could not be available for work at all hours. ...

[30] The respondent submits that I should impute additional income to the claimant. The claimant deducted from her 2011 income \$903.87 from home expenses used for business. She deducted a total of \$80,373.97 in total business expenses, which amount includes approximately \$5,800.00 in motor vehicle expenses and capital cost allowance.

[31] The respondent, in paragraph 6 of his second affidavit, deposes:

In response to paragraph 10 [which deals with the claimant's gross and net income for taxation year 2010], the Claimant averages 3 - 4 days a week at work. She is fortunate to have wealthy parents who are able to gift her monies to support her lifestyle (for instance, they recently gave her \$18,000 to put a deck on her house).

[32] In paragraph 8, the respondent deposes:

In response to paragraph 12, it is the Claimant's choice to no longer perform obstetric work. My child care expenses are set out in the tax returns attached to my filed Form 89.

[33] I have carefully examined the financial information deposed to by the claimant. I have also considered the Guidelines which permit me to impute income to the claimant, and have considered the exhaustive list of circumstances set out in s. 19(1) of the Guidelines.

[34] From the material before me, the claimant is not intentionally under-employing herself. She has not unreasonably deducted expenses from her income. She deposes in paragraph 21 of her affidavit as follows:

I anticipate significant changes in my 2012 income. As a requirement of the BC government, I have to purchase electronic hardware to computerize my medical records. The cost for a portion of the shared system will be approximately \$50,000.00. I will be eligible for a 70% BC government reimbursement toward it, making my total out-of-pocket expenses \$15,000.00. The system will go live September 17, 2012. There will also be costs associated with work slowing down in order to implement the data for the first several months, which will decrease my earnings particularly for the first month of implementation. There is little or [no] anticipated increase in efficiency which would reflect an improved income as a result of [an] electronic system and there is no resale value for this item.

[35] In his response affidavit, the respondent does not make any response to that paragraph.

[36] I conclude that for the purposes of this application, the income of the claimant is as set out in her financial statement, namely, her line 150 income for 2011 which is the sum of \$137,419.39.

- [37] Both the respondent and the claimant set out certain expenses they have paid on behalf of their children. The respondent's counsel submits for 2010 and 2011 (which neglects money spent on the children for the first eight months approximately of 2012), that the claimant expended \$20,573.59 and the respondent expended \$623.00. Both of these figures can be supported by reference to the affidavits, when one analyzes the expenditures and deducts certain expenditures that the parties have made, but which are not properly considered to be, in my opinion, monies spent "on the children."
- [38] The respondent goes on to submit that had the parties been paying support based on an off-set and using the income figures set out in the submissions would result in the respondent being out approximately \$12,600.00 in arrears.
- [39] The claimant, utilizing somewhat different figures and taking the numbers through to the first nine months of 2012, submits that she would be owed approximately \$7,700.00.
- [40] The claimant submits that the law with respect to determination of child support in a situation where there is shared custody must be determined in accordance with the law set out by our Supreme Court in *Contino v. Leonelli-Contino*, [2005] 3 S.C.R. 217.
- [41] Respondent's counsel agrees that *Contino* does set out the law which binds me. Respondent's counsel submits that I have discretion around setting of income, around back-dating, and around expenses, but encourages me to take a broad stroke approach.
- [42] I am, of course, bound by the entirety of the directions and analysis set out by Bastarache J. in *Contino*. Some of the provisions I consider particularly applicable to this case are as follows:
- a) the three factors set out in s. 9 of the Guidelines are conjunctive; none of them should prevail. I must give consideration to the overall situation of shared custody and the cost related to the arrangement while paying attention to the needs, resources, and situation of parents and any child to allow sufficient flexibility to ensure that the economic reality and particular circumstances of each family are properly accounted for to ensure a fair level of child support [see para. 27];
 - b) a simple set-off is to serve as a starting point, cannot be the end of the inquiry, has no presumptive value, and has as its true value bringing the court to focus first on the fact that both parents must make a contribution; fixed and variable costs of each of them have to be measured before making adjustments to take account increased costs attributable to joint parenting [see para. 49];
 - c) further adjustments are needed to ensure the final outcome is fair in light of the conditions, means, needs, and other circumstances of each spouse and the children, giving full consideration to the factors in s. 9(b) and (c) [para. 49];

- d) I am to look at the actual effect of contributions made by each parent [para. 50]. I need to keep in mind that parliament did not intend that there would be a significant variation in the standard of living experienced by the children as they move from one household to another; in particular, the children should not suffer a noticeable decline in their standard of living [para. 51];
 - e) the Supreme Court has phrased this differently, but what I am really faced with here is the opposite of the "two can live as cheaply as one" adage; some expenses will be duplicated by both parents in parenting their children [para. 52];
 - f) I need to look at evidence, and am not to make assumptions about increased costs [para. 56]. I have a broad discretion for conducting an analysis of the resources and needs of both the parents and the children, keeping in mind the objectives of the Guidelines which require a fair standard of support for the children and fair contributions from both parents [para. 68];
 - g) I need to consider the impact of any new support order on the standard of living of the children, keeping in mind that this is a variation order and not a first time order [para. 80].
- [43] I have reviewed the facts before me and have analyzed the situation as required by the Supreme Court of Canada and by s. 9 of the Guidelines.
- [44] Both parents reside in what I consider to be decent, but not overly luxurious homes. The claimant values her home at \$528,000.00. The respondent values his residence at \$367,000.00. While the evidence before me indicates that the children, when they are residing with the respondent, reside in the top half of that home alone, it does not seem to me that the discrepancy in the values of the residence is particularly significant as it relates to the standard of living to be enjoyed by the children as they go from one parent to the other.
- [45] I note that the respondent, possibly because of his holiday schedule, and in part because of the assistance from his family, has been able to enjoy significant travel with the children. The uncontradicted evidence is that in 2011 they travelled with the respondent to Australia, and in 2012 they travelled with the respondent to France and Italy.
- [46] The claimant appears to regularly take the children to a summer camp that has costs associated with it. She took the children to Australia in 2012.
- [47] I have reviewed the expenses each party incurs on behalf of their children. Their children are financially well looked after. It is true that the claimant spends more on the children than does the respondent, but there is no evidence that that difference results in the children having different standards of living depending on which parent they are residing with.
- [48] I have not commented on all of the factors here, but I have reviewed the evidence and considered those factors.

[49] The respondent seeks support retroactively. He deposes that in June of 2010, he personally made an application in the Vernon Provincial Court and sent it to the claimant. Shortly thereafter, he deposes to being served with the claimant's writ of summons in this action which was filed on April 6, 2010.

[50] Section 15.1 of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp) gives the court discretion to award retroactive child support.

[51] It is important to keep in mind that there are certain core principles that underlie child support obligations, including the following:

- 1) child support is the right of the child;
- 2) the right to support survives the breakdown of a child's parents' marriage;
- 3) child support should as much as possible provide children with the same standard of living they enjoyed when their parents were together; and
- 4) the specific amounts of child support owed will vary based on the income of the payor parent.

[52] I am entitled to consider whether there has been an agreement between the parties as set out in the Family Law Sourcebook for British Columbia, p. 3-83:

In the case of a previous agreement on child support between the parties, the agreement will be given considerable weight. However, if circumstances have changed and the actual support obligations of the payor parent have not been met, the court may order a retroactive award ...

[53] In this case, there was an agreement which was that neither party would pay child support to the other. That agreement is an interim agreement and is not binding on the children.

[54] The children have not been financially deprived. A retroactive award may well be a hardship on the claimant, who to date has been generous in her support of the children. Provision 9 of the April 14, 2009 document contemplates that she will pay for counselling which benefits the children. The respondent sent the claimant a Provincial Court application in June 2010, seeking maintenance. The claimant continued her financial support of the children in a manner which seemed to me to be unchanged.

[55] The claimant has met her support obligations. She has paid a significant amount for extraordinary expenses. I conclude from the material before me that she has ensured that the children have not suffered financially as a consequence of the breakdown in the marriage. There is no blameworthy conduct here on the part of the claimant.

[56] The respondent's application for retroactive support is dismissed.

- [57] Using the straight set-off amount would require the claimant to pay to the respondent the amount of \$708.07 monthly. Analyzing all of the relevant factors, I conclude that fairness is met here with an order that the claimant pay the respondent the sum of \$500.00 per month commencing September 1, 2012.
- [58] From September 1, 2012 onward, s. 7 expenses should be shared proportionately, with the claimant paying 62 percent and the respondent paying 38 percent.
- [59] The claimant has been partially successful here. The claim for retroactive support has been dismissed. There is an order made for child support as sought by the respondent. There is no evidence that the respondent utilized the provisions of paragraph 12 of the addendum which requires mediation prior to court action. On the other hand, the respondent has been successful in obtaining an order for child support and for a sharing of s. 7 expenses. The claimant, in her response, states that the parties should each bear their own costs of this proceeding.
- [60] In the circumstances, each party will bear its own costs of this proceeding.

MASTER McDIARMID

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