

CANADA / JUDGMENT

James v. James

2022 BCSC 1402

COURT

Supreme Court of British Columbia

DECIDED

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2022 BCSC 1402 James v. James IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: James v. James, 2022 BCSC 1402 Date: 20220817 Docket: E071750 Registry: Vancouver Between: Heather James also know as Heather Eileen James Claimant And Byron Walter William James Respondent Before: The Honourable Madam Justice Burke Reasons for Judgment In Chambers Counsel for the Claimant: H. Vahidi Counsel for the Respondent: A. Kerslake Place and Dates of Hearing: Vancouver, B.C. July 6 and 8, 2022 Place and Date of Judgment: Vancouver, B.C. August 17, 2022 I. Introduction

- [13] The respondent, Byron James, seeks an order varying Justice Burnyeat's September 29, 2014 order such that his obligation to pay spousal support to the claimant, Heather James, is terminated as of January 1, 2022. In addition, he seeks an order that his obligation to pay child support to the claimant for their adult child, C.J., is also terminated or varied as of January 1, 2022.
- [14] The respondent concedes that C.J. remains a child of the marriage, as he is unable--by reason of illness, disability or other cause--to withdraw from his mother's charge or to obtain the necessities of life: Family Law Act, S.B.C. 2011, c. 25 [FLA], s. 146. However, the respondent submits the Court should nonetheless vary the child support payable to the claimant. Section 3(2)(b) of the Federal Child Support Guidelines, SOR/97-175 [Guidelines], provides that where a child is the age of majority, the court may vary the child support payable to an amount it deems appropriate, having regard to the condition, means, and other circumstances of the child, and the financial ability of each spouse to contribute to the support of the child.
- [15] In response, the claimant says C.J. remains dependent upon his parents and there is no reason that child support should cease or be varied. Likewise, the claimant maintains that spousal support should be payable by the respondent indefinitely. She says there is no material change in circumstances warranting termination of spousal support payable at this time. II. Background

- [16] The claimant and respondent are 62 and 63 years old, respectively. The parties commenced cohabitation on July 1, 1989, were married on July 25, 1992, and separated on November 27, 2006.
- [17] At separation, the respondent commenced cohabitation with Ramona Manzer, with whom he continues to reside in Surrey, BC.
- [18] The parties have two children. Their daughter, J.J., was born in 1994. The parties agree J.J. is no longer a child of the marriage. Their son, C.J., was born October 9, 1996. He continues to reside with the claimant in a co-op housing for low income earning families in Burnaby, BC.
- [19] On September 14, 2009, the parties executed a full and final settlement of all outstanding issues in their family proceeding. The settlement was incorporated into a final order dated February 16, 2010. That order attributed a Guidelines income to the respondent of \$82,000, and income of \$72,171.84 for the purposes of the Spousal Support Advisory Guidelines [SSAG]. The respondent was ordered to pay monthly child support for two children in the amount of \$1,212 and monthly spousal support of \$1,353 per month. The order was retroactive to October 1, 2009, and continued until November 1, 2011, when the claimant's entitlement to receive spousal support could be reviewed.
- [20] On January 25, 2012, Justice Davies varied this order, adjusting the respondent's Guideline income to \$70,000 and the claimant's to \$8,000. Child support was therefore payable by the respondent at \$1,062 per month and spousal support was varied to \$774 per month.
- [21] On September 29, 2014, Justice Burnyeat varied the order once again, such that the respondent's guideline income was deemed to be \$50,000 and the claimant's income was deemed to be \$19,000. The child support payable by the respondent was varied to \$458 per month and spousal support was varied to \$400 per month. III. Issues
- [22] There are three issues on this application:
- 1) Has there been a material change in circumstances, such that the Court may re-examine the child support order?
 - 2) If so, is the amount of child support presently payable inappropriate, and what is the appropriate amount?
 - 3) Should spousal support be terminated?
- 1) Has there been a material change in circumstances, such that the Court may re-examine the child support orders?
- [23] To vary an existing child support order based on the Guidelines table amount, there must be a material change in circumstances.
- [24] Section 14 of the Guidelines reads:

14. For the purposes of subsection 17(4) of the Act, any one of the following constitutes a change of circumstances that gives rise to the making of a variation order in respect of a child support order:
- (a) in the case where the amount of child support includes a determination made in accordance with the applicable table, any change in circumstances that would result in a different child support order or any provision thereof
- [25] Justice Burnyeat last varied the child and spousal support payable in September 2014. At the time, C.J. was a school-aged child. At present, C.J. works part-time at a wholesale grocery store and receives Persons with Disabilities ("PWD") benefits from the Province.
- [26] I accept that this constitutes a material change in circumstances, as was the case in *Martin v. Martin*, 2021 BCSC 2015 at para. 26, and *Neuman v. Neuman*, 2021 BCSC 873 at para. 66. As explained by Justice Kirchner in *Martin*, there is a consensus amongst British Columbia courts that a disabled adult child coming into receipt of PWD benefits constitutes a material change in circumstances: para. 26.
- [27] Accordingly, I will consider whether the present child support amounts are appropriate in the circumstances, per s. 3(2)(b) of the Guidelines.
- 2) Is the amount of child support presently payable inappropriate, and if so, what is the appropriate amount?
- [28] Section 146 of the FLA defines a child entitled to child support as including "a person who is 19 years of age or older and unable, because of illness, disability or another reason, to obtain the necessities of life or withdraw from the charge of his or her parents or guardians". Section 2 of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), defines a "child of the marriage" similarly to the FLA.
- [29] The respondent argues that while C.J. remains a child of the marriage, he is receiving the "necessaries of life" through his PWD benefits and employment income. In particular, the respondent says that C.J.'s combined income from employment and disability benefits comfortably cover the expenses listed in the budget presented by the claimant. On this basis, he says that child support no longer "appropriate" within the meaning of s. 3(2)(b) of the Guidelines, and should thus be terminated.
- [30] Where an adult child is not able to withdraw from the charge of their parents--such that they remain a child of the marriage--but are in receipt of government disability benefits, child support should be determined under s. 3(2)(b) of the Guidelines.
- [31] The leading authority on this issue is *Kollmuss v. Kollmuss*, 2015 BCSC 1101, where Justice Voith (then of this court) said:
- [40] In considering an appropriate amount or level of support, the court engages in the usual condition, means, needs and other circumstances analysis; however, in these cases, the reasonable ability of the child to contribute to those needs is also incorporated, or factored,

into the analysis. Ultimately, a court will calculate a child's reasonable costs and deduct the amount of the disability benefit in order to quantify the relevant shortfall. The court will then consider the parents' incomes and the usual table amount. The child's shortfall is then often divided in proportion to the parents' respective incomes.

- [32] In circumstances such as the present case, courts have assessed the child's reasonable living costs (typically from a budget provided by the child's primary caregiver) and where there is a shortfall in coverage for those expenses after the PWD benefits are applied, ordered that the gap be filled by the parents in proportion to their respective incomes.
- [33] However, in circumstances where a parent provides "extraordinary care" to their adult child (i.e., tantamount to the level provide to a child), the court may properly account for this added value: Martin at para. 53. This accounting may necessary to ensure justice is done between parties and to account for the unique circumstances of the child of the marriage: Martin at para. 53.
- [34] Consistent with the case law, I will therefore approach this analysis on the basis of s. 3(2)(b) of the Guidelines, but I do so considering the factors set out in s. 3(2)(b) that focus not only on C.J.'s means and needs, but also on his condition and other circumstances.
- [35] As recognized in Kollmuss at para. 41, in assessing the needs of an adult disabled child, "courts have generally been prepared to work with rough budget amounts, or budgets lacking significant detail, so long as they were able to determine the reasonable costs of the child."
- [36] The claimant has provided the following budget in respect of C.J.'s expenses: Item
Frequency Price C.J.'s Share C.J.'s Annual Share Rent 12 \$1,246 \$623 \$7,476 B.C. Hydro 12 \$75 \$37.50 \$450 Telus Mobility 12 \$111 \$55.50 \$666 Telus Home 12 \$260 \$130 \$1,560 Auto Insurance 1 \$1,420 \$710 \$710 Auto Lease 12 \$313 \$156 \$1,872 Auto Maintenance 1 \$1,500 \$750 \$750 Food 12 \$550 \$550 \$6,600 Clothing 12 \$100 \$100 \$1,200 Toiletries 12 \$50 \$50 \$600 Entertainment 12 \$50 \$50 \$600 Snowboarding 1 \$250 \$250 \$250 Haircuts 4 \$35 \$35 \$140 Model hobby 12 \$100 \$100 \$1,200 Miscellaneous 12 \$50 \$50 \$600 Dental 1 \$970.79 \$970.79 \$970.79
Total: \$25,644.79
- [37] C.J.'s annual approximate annual expenses of \$25,644.79 equate to a monthly cost of living of \$2,137.06. The claimant says C.J. receives \$1,183 per month in disability benefits. The claimant also says C.J. works approximately 20 hours per week. The evidence is that C.J. earns \$18 per hour--yielding earnings at approximately \$1,440 per month (i.e., 20 hours per week x \$18 x four weeks). Accordingly, C.J. has an approximate total monthly income of \$2,623--more than enough to cover his budgeted expenses.
- [38] Based on the budget provided by the claimant, it appears prima facie that C.J. is able to support himself financially through his employment and PWD benefits. However, as Justice Kirchner explained in Martin, orders under s. 3(2) of the Guidelines may account for the extraordinary burden undertaken by one parent in the care of an adult disabled child where

it is necessary to do justice between the parties: paras. 51-54. While the respondent argues that C. J. is much more independent than his mother portrays him, I find that the evidence supports the claimant's characterization of C.J.'s condition and needs.

- [39] In a letter dated March 17, 2022, Dr. Bernhard Klein, C.J.'s family physician, stated as follows: [C.J.] lives on the autism spectrum. He is in constant need of supervision for time management, concentration issue and staying on tasks. He is unable to live independently were he to work full time because of the challenges he faces daily. He has below average social skills and below normal reading/writing skills. His mother is his constant support, allowing him to work part-time and traverse daily life. He also relies on the support of his sisters and coworkers to allow him to live life on the autism spectrum.
- [40] Dr. Klein's description of C.J. and his condition is consistent with the claimant's affidavit evidence. The claimant attests that C.J. is unable to perform basic tasks, such as shopping for basic necessities, preparing his own meals, managing his time with respect to commitments (e.g., work schedules; appointments). Indeed, the claimant's does all his shopping and books all his medical and dental appointments. She provides most of his transportation and cooks all his meals. She ensures he is reminded of tasks by setting daily alarms and reminder calls throughout each day to ensure he has made it to and from work and has eaten enough. Moreover, the claimant has made significant efforts to ensure her son is able to collect the disability benefits by filling out all the necessary forms. These efforts cannot be ignored when considering this issue. Indeed, the evidence indicates the claimant spends much of her time outside work devoted to caring for C.J and helping him with the tasks of daily life
- [41] As is evident, the respondent underestimates the daily burden the claimant undertakes to support their son. Furthermore, the reality is that C.J. continues to be the responsibility of both parents. As noted in *Jensen v. Jensen*, 2018 BCSC 283 at para 50: "the receipt of state-funded benefits evidences that financial responsibility for disabled adults is being shared by the adult's parents and the state." In this situation, the respondent must continue to bear his share of that responsibility.
- [42] In recognition of the extraordinary levels of care the claimant provides to C.J. on a daily basis--and to account for the respondent's responsibility to contribute to that care--I conclude that an additional \$500 per month should be added to C.J.'s budget. This same approach was taken in *Martin*, where Justice Kirchner attributed an additional \$408 per month to account for the mother's caregiver functions for the parties' child: paras. 78-79. Despite C.J.'s ability to contribute to his expenses through his PWD benefits and part-time work, I find that this additional amount is necessary to account for the disproportionate role the claimant takes in caring for all facets of his daily life.

- [43] I conclude the amount of \$500.00 is reasonable to account for the claimant's supervisory/caregiving, considering the minimum wage is over \$15.00/hr and the fact that C.J. is able to work outside the house on a part-time basis. This amount is an estimate and no doubt disproportionate to the amount of time and effort the claimant actually expends on C.J.'s care. This amount would therefore be over and above the present budget and income set out above.
- [44] There is also evidence, however, that C.J. requires constant supervision at work, can get exhausted, and may not be able to consistently and continuously undertake this work schedule of 20 hours per week x 4 weeks. There is therefore some doubt as to the continuity of this arrangement.
- [45] While C.J. has been able to work part-time, this has not always been a successful endeavour. As a result, in my view his working income must be discounted to reflect that uncertainty. A reasonable conclusion is that C. J. could consistently work 15 hours a week which discounts his income to \$1080 monthly, thereby leaving the shortfall of approximately \$500.00.
- [46] While it could be argued that the shortfall is closer to \$400.00, I conclude \$500.00 is the better estimate, as it reflects the care-giving responsibilities, which amount as noted earlier, undervalues the claimant's efforts. I reiterate as noted in Kollmus that the courts have generally been prepared to work with rough budget amounts which I have done in this matter. Furthermore, as in Martin, this accounting is necessary to ensure justice is done between the parties.
- [47] As will be evident in my analysis, below the parties are now making similar incomes. As set out in Kollmus, where there is a shortfall in an adult disabled child's budgeted expenses, the amount should be divided between the parents, proportionate to their respective incomes: para. 40. Accordingly, I conclude the parties should cover the \$500 shortfall equally and the respondent must pay \$250 in child support.
- [48] I therefore reduce, with some reluctance, the child support payable by the respondent's to \$250 per month, commencing January 1, 2022.
- 3) Should spousal support be terminated?
- [49] Pursuant to s. 17(4.1) of the Divorce Act, before a court makes a variation order, it must be satisfied that a change in the "condition, means, needs or other circumstances" of either spouse has occurred since the making of the last order. As stated in L.M.P. v. L.S., 2011 SCC 6:
- 1) the change of circumstances must be material, meaning if known at the time, would like have resulted in different terms: para. 32;
 - 2) the focus is on the prior order and the circumstances in which it was made: para. 33. What amounts to a material change will depend on the actual circumstances at the time of the last order: para. 34; and

- 3) in general, the material change must not be temporary: para. 35.
- [50] The respondent submits that his income has taken a significant downturn since the Justice Burnyeat's order. He says that his financial situation arises to the level of a material change in circumstances, such that Justice Burnyeat's order should be varied.
- [51] The claimant says that the respondent's alleged decrease in business income does not constitute a material change in circumstances. She submits that the respondent has continuously represented to the courts that his business has been in decline, and thus it cannot be said that his current financial situation constitutes a material change not known at the time of Justice Burnyeat's order. Moreover, she says that the respondent has received a sizeable inheritance from his mother and lives an upscale lifestyle, such that the Court should impute an income of \$100,000 to him.
- [52] With respect to the imputation of income, I find that there is insufficient evidence to warrant such a finding, and I thus decline to do so. With respect to the respondent's lifestyle, the claimant relies on his social media postings showing frequent travels and holidays. There is also some evidence of the respondent giving an engagement ring to Ms. Manzer. However, he says that the ring was modestly priced and paid for by Ms. Manzer. I am unable to draw the necessary inferences from such evidence.
- [53] Likewise, while the respondent did receive a sizeable inheritance following his mother's death in May 2020, he deposes that he gave the entire amount to his partner, Ms. Manzer. In his June 24, 2022 affidavit, the respondent stated as follows: I did receive the sum of \$222,033.75 in April 2021. As the sole beneficiary of my mother's estate after payment of the estate expenses, I did receive the net sum of \$216, 975.68 as an inheritance from my mother. I provided the entirety of those monies to Ramona Manzer, my partner of 16 years given that she had provided me with financial assistance throughout, due to my declining income over the years.
- [54] While this certainly calls the respondent's financial choices into question, the evidence is insufficient to impute an income of \$100,000 at this point.
- [55] In order to establish a material change in circumstances, the applicant must demonstrate that their situation has materially evolved in a way that, if known at the time of the previous order, would have likely resulted in different terms. This is not the case here. A review of the affidavit material attached to the various applications over the years indicates virtually identical claims--the respondent has represented that his business and income have been in dire straits since before Justice Burnyeat's order. The respondent continues to make the same argument and one must ask why he has not sought another avenue of earning income.
- [56] Having declined to impute a higher income to the respondent, the question remains as to whether the respondent has shown a material change in circumstances warranting a variation of his spousal support obligations to the claimant. In my view, he has not. In this case, the respondent, argues the claimant now has a significantly higher income, and points

to her recent income earnings. While changes in the parties' respective incomes may constitute a material change in circumstance in some instances, I am not satisfied that is the case here: see e.g., *Clarke v. Clarke*, 2014 BCSC 824 at para. 32. A change in income alone is not necessarily sufficient to show material change in circumstances.

- [57] Accordingly, given a material change in circumstances has not been demonstrated, I see no reason to depart from the order of Justice Burnyeat with respect to spousal support at this time. IV. Conclusion
- [58] Commencing January 1, 2022, the respondent's child support obligation to the claimant is varied to \$250 per month.
- [59] I decline to vary the respondent's spousal support obligation to the claimant.
- [60] In closing, I thank both counsel for their thoughtful and very courteous presentations in this matter.
- [61] If the parties are unable to agree on costs, they are at liberty to apply to have that matter determined, if such an application is brought within the 45 days of this judgment. "Burke J."

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