

CANADA / JUDGMENT

Jensen v. Jensen

2013 BCSC 1373

COURT

Supreme Court of British Columbia

DECIDED

31 July 2013

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2013 BCSC 1373 Jensen v. Jensen IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Jensen v. Jensen, 2013 BCSC 1373 Date: 20130731 Docket: 35167 Registry: Kelowna Between: Ruth Elizabeth Jensen Claimant And Wayne Edward Jensen Respondent Corrected Judgment: The text of the judgment was corrected at paragraph 37 on January 17, 2014 Before: Master Young Reasons for Judgment Appearing on her own behalf: R.E. Jensen Counsel for the Respondent: C.E. Hansen Place and Date of Trial/Hearing: Kelowna, B.C. July 3, 2013 Place and Date of Judgment: Kelowna, B.C. July 31, 2013

- [1] This is an application by the respondent, Wayne Jensen, to extinguish arrears of child support pursuant to an order of Master Bishop dated March 24, 1997, or alternatively to reduce the arrears under that order.
- [2] The order was made in the respondent's absence, although he was duly served with the application and swore an affidavit and financial statement in response to the application.
- [3] Master Bishop ordered that the claimant was to have interim custody of the three children and that the respondent was to pay to the petitioner \$425 per month per child for the three children commencing April 1, 1997, and continuing on the first day of each and every month thereafter. The claimant's application for spousal support was adjourned. The respondent was also ordered to pay \$500 of costs to the claimant. I am unsure whether these costs have been paid.
- [4] At the hearing before me on July 3, 2013, the claimant produced the sworn financial statement of the respondent that was referred to by Master Bishop in 1997 prior to making his March 24, 1997 order. She also produced the affidavit he swore in response to the application. It was filed in court on March 24, 1997, and referred to the learned master.
- [5] In his financial statement, the respondent swore that his income was \$2,700 per month, which is \$32,400 per year. His 1997 tax assessment confirms this. He was reassessed at \$33,085. In his affidavit, he offered to make payments of \$1,000 per month in support.

- [6] The court order was made before the change in the Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.), disallowing the deduction of child support from income for tax purposes and prior to the proclamation of the Federal Child Support Guidelines ("FCSG"). The amount is higher than what the Guideline table amount would have been had the application been brought in May 1997, but I surmise that might have been because of the income tax treatment.
- [7] The respondent now says that, at the time, his income was in serious decline because he was a flooring installer and the housing market was collapsing.
- [8] The respondent has provided income tax summaries for the years 1997 to 2003, and he has provided calculations of what the FCSG table amount would have been each year based on his line 150 income.
- [9] The respondent was self-employed throughout this time. These summaries are of little help because I cannot assess whether his claimed business expenses were reasonable or not. He has also provided no support for his claim that his income dropped because of a decline in the market. I would have expected more evidence of his efforts to find employment.
- [10] The claimant says in her affidavit that the respondent was one of the best flooring installers in Kelowna with many connections and that he would always find work. She speculated that the respondent chose not to work or that he was taking on cash jobs. This is not evidence that I can rely on, but one would expect the respondent to deny this allegation. He does not. All he says in his second affidavit is that he was working for West Kootenay Carpets, and the Family Maintenance Enforcement Program ("FMEP") was enforcing the order against him and was garnishing his wages. He swears that he was not earning very much, and after the garnishment, he was not earning enough to provide for his own expenses so he moved to Vancouver for "better employment options".
- [11] One wonders if he moved to avoid collection proceedings. He goes on to say that he did not have a good enough credit rating to continue leasing a vehicle or to establish accounts with suppliers, so he could not continue to run his own business. He worked for subcontractors and was paid less.
- [12] He declared bankruptcy in 1999, and although he reported income of \$6,836 to the Canada Revenue Agency for the year, he told his bankruptcy trustee that his net income was about \$1,800 per month. Interestingly, he told the trustee that he could only pay \$150 per month into the bankruptcy because of his child support obligations when he had not paid a child support payment in two years. He did not pay the \$150 per month into the bankruptcy either.
- [13] After having his tools stolen twice, the respondent says that he moved to Vancouver Island. He worked for minimum wage in the fishing industry.
- [14] He started working again as a flooring installer in June 2004. Without providing proof, he says that his income between 2004 and 2011 was between \$50,000 and \$56,000 per year.

- [15] In the first six months of 2013, he says without supporting documentation that he has already earned \$31,000.
- [16] The following is a summary of his income disclosure for 1997 to 2003: Year Gross Business Income Net Business Income Assessed Income 1997 \$32,181 \$17,057 \$33,085 (includes other income of \$16,028) 1998 \$27,807 \$16,526 \$17,873 (includes other income of \$1,347) 1999 (Aug. 5/1999 - one child remaining) \$7,036 \$6,836 \$6,836* (Trustee says that his net monthly income was \$1,853) 2000 \$16,183 \$2,127 \$3,327 (includes other income of \$1,200) 2001 \$20,019 \$5,298 \$5,298 2002 \$17,898 \$11,130 \$11,130 2003 \$35,983 \$6,256 \$6,256
- [17] Only four child support payments were made by the respondent in 1997. It appears that the first three were voluntary and the fourth payment was garnished. No payments were made between October 1997 and 2008. FMEP withdrew attachments because they could not locate the claimant. When they re-registered her order in 2008, there were arrears of \$54,475 owing.
- [18] Interest was being charged on that amount, but no new support was payable because all three children had reached the age of majority by December 2003.
- [19] In 2008, the respondent's share of his mother's estate was seized by FMEP in the amount of \$23,337.29 and \$4,281.59 was paid to the claimant.
- [20] The respondent says that the reason he did nothing to vary this order for 16 years was that he could not afford a lawyer, and legal aid would not provide him with representation. He says that the plaintiff moved away and he has had no contact with the children.
- [21] The claimant and one of the children tell a different story. They say that the respondent left. They stayed in the same house for two years and he made no effort to contact them. When they moved, he came to the house to pick up some personal property. The claimant remained close to the respondent's parents, who always had their contact information.
- [22] The respondent took the youngest child on a cross-Canada road trip and picked her up at the old house and dropped her off at the new address, so clearly he knew where they resided.
- [23] The respondent failed to acknowledge the children's birthdays or Christmas. According to the letter prepared by the parties' son, CJ, and attached to the claimant's affidavit, CJ felt abandoned by the respondent.
- [24] In order to survive, the claimant worked two minimum wage jobs and has struggled financially.
- [25] The claimant said in her affidavit that the respondent never once contacted her and tried to negotiate a reduction in the support. Had he done so, she likely would have agreed in order to receive some support. Instead, she received nothing until his mother died.

- [26] No voluntary payments have been received by FMEP or the claimant since 1997. The respondent has been earning between \$50,000 and \$56,000 per year since 2004, and he has not made a single payment other than that which was seized from his inheritance.
- [27] The statutory authority for reducing or cancellation of arrears is contained in s. 174 of the Family Law Act, S.B.C. 2011, c. 25, which says: Reducing or cancelling arrears 174 (1) On application, a court may reduce or cancel arrears owing under an agreement or order respecting child support or spousal support if satisfied that it would be grossly unfair not to reduce or cancel the arrears.
- (2) For the purposes of this section, the court may consider
- (a) the efforts of the person responsible for paying support to comply with the agreement or order respecting support,
- (b) the reasons why the person responsible for paying support cannot pay the arrears owing, and
- (c) any circumstances that the court considers relevant.
- (3) If a court reduces arrears under this section, the court may order that interest does not accrue on the reduced arrears if satisfied that it would be grossly unfair not to make such an order.
- (4) If a court cancels arrears under this section, the court may cancel interest that has accrued, under section 11.1 of the Family Maintenance Enforcement Act, on the cancelled arrears if satisfied that it would be grossly unfair not to cancel the accrued interest.
- [28] This section is virtually the same as the former s. 96(2) of the Family Relations Act.
- [29] Would it be grossly unfair to leave the arrears in place?
- [30] The claimant worked two jobs to provide for the children after the respondent abandoned them. He has not provided adequate disclosure to establish his Guideline income for each year, and he has made no effort whatsoever to pay the support or to vary the order until now. He has the ability to pay the arrears but chooses not to do so.
- [31] The children are over the age of majority, but the claimant has saved no money for them or for herself because all of her resources went to supporting the children.
- [32] I find that it would be grossly unfair to cancel these arrears. The respondent has not made any effort to support his children. I have ample grounds to dismiss this application.
- [33] I do believe that there was some decline in the respondent's income after the order was made. People do not assign themselves into bankruptcy when they are doing well. I am not certain that the respondent was making his best efforts to find work or that he was declaring all of his income. I do not know what he was deducting from income.

- [34] Since I cannot rely on his financial disclosure, I impute what I believe a reasonable income is for the respondent. It is more than minimum wage income because he is skilled, but it recognizes that he might not have found full-time work during this time period.
- [35] I have already indicated the conflicting evidence between the Canada Revenue Agency and the trustee in bankruptcy. If he was making a net income of \$1,853 per month, then it is reasonable to assume that he was making at least \$25,000 per year gross income. I impute a notional income of \$25,000 per year to him for the years 1998 to 2003 when the last child reached the age of majority.
- [36] I find that the respondent is still obliged to pay \$1,275 per month for 1997 because that amount was ordered based on his accurate estimate of what his income was and based on his offer to pay \$1,000 per month.
- [37] Based on these findings, his child support obligations for the three children of the marriage, namely: DJ, born on August 5, 1980; CJ, born on August 5, 1980; and AJ, born on December 10, 1984, are as follows: Year Income Number of Children Child Support Annual Amount Owed Amount Paid 1997 \$33,000 3 \$1,275 \$15,300 \$5,100 1997 500 (costs) 0 1998 25,000 3 496/m 5,952 0 1999 25,000 3 until August then 1 496/m x 7 221/m x 5 4,577 0 2000 25,000 1 221 2,652 0 2001 25,000 1 221 2,652 0 2002 25,000 1 221 2,652 0 2003 25,000 1 221 2,652 0 Totals \$36,937 \$5,100
- [38] Although the Family Law Act gives me jurisdiction to reduce or cancel interest on the arrears, I decline to do so. The claimant has waited for years for this money and the respondent has made no effort to pay, so he should pay her interest on every outstanding monthly payment.
- [39] Under the Family Maintenance Enforcement Act Regulation, interest is dealt with at ss. 6.1 and 6.2: Interest on arrears 6.1 (1) The rate of interest payable under section 11.1 (2) of the Act is an annual rate equal to the prime rate of the principal banker to the Government.
- (2) During the first 6 months of a year, interest shall be calculated at the rate under subsection (1) as at January 1 and during the last 6 months interest shall be calculated at the rate under subsection (1) as at July 1.
- (3) Subject to subsection (4), interest accrues on maintenance payments in arrears from the date the arrears become payable.
- (4) Maintenance payments in arrears on the date section 11.1 of the Act comes into force begin to accrue interest from that date.
- (5) For the purposes of subsection (3) and (6), maintenance becomes payable
- (a) on the payment date specified in the maintenance order, or
- (b) on the last day of the month in which the maintenance became payable, if no date is specified in the maintenance order.

- (6) Despite subsection (3), if maintenance is paid within 15 days after it becomes payable, no interest is payable on the amount paid. Calculation of Interest 6.2 (1) Interest must be calculated daily as simple interest and accrued each calendar month.
- (2) If a calendar month for which a calculation is being made under subsection (1) has not ended, the accrual referred to in subsection (1) respecting the calendar month shall be for the portion of the month that has passed at the time of the calculation.
- [40] The Supreme Court website provides a table with interest rates: DATES BANKERS' PRIME RATE FROM TO Jan 1, 2007 June 30, 2007 6.00 July 1, 2007 Dec 31, 2007 6.00 Jan 1, 2008 June 30, 2008 6.00 July 1, 2008 Dec 31, 2008 4.75 Jan 1, 2009 June 30, 2009 3.50 July 1, 2009 Dec 31, 2009 2.25 Jan 1, 2010 June 30, 2010 2.25 July 1, 2010 Dec 31, 2010 2.50 Jan 1, 2011 June 30, 2011 3.00 July 1, 2011 Dec 31, 2011 3.00 Jan 1, 2012 June 30, 2012 3.00 July 1, 2012 Dec 31, 2012 3.00 Jan 1, 2013 June 30, 2013 3.00 July 1, 2013 Dec 31, 2013 3.00
- [41] I am not going to produce the interest calculation. I order that the respondent pay simple interest on the outstanding child support at the Bankers Prime rate, which varies from time to time as set out above.
- [42] The claimant is awarded a further \$500 in costs of this application to cover her expenses for preparing her reply affidavit and attending court. I find that the respondent has conducted himself in a highly irresponsible manner, and although I am reducing the arrears in child support, I decline to award any costs to him. "B.M. Young" Master Barbara M. Young

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