
CANADA / JUDGMENT

Jensen v. Jensen

2019 BCCA 117

COURT

British Columbia Court of Appeal

DECIDED

28 March 2019

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2019 BCCA 117 Jensen v. Jensen

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Jensen v. Jensen,

2019 BCCA 117

Date: 20190328

Docket: CA45178

Between:

Kimberly Ann Jensen

Respondent

(Claimant)

And

Warren Edward Douglas Jensen

Appellant

(Respondent)

Before:

The Honourable Mr. Justice Frankel

The Honourable Mr. Justice Harris

The Honourable Madam Justice Fisher

On appeal from: Orders of the Supreme Court of British Columbia, dated

February 27 and July 17, 2018 (Jensen v. Jensen, 2018 BCSC 283 and 2018 BCSC 1177, Vancouver Docket E064431).

Oral Reasons for Judgment

Counsel for the Appellant:

D.H. Goodwin

Counsel for the Respondent:

D.R. Greig

Place and Date of Hearing:

Vancouver, British Columbia

March 27, 2019

Place and Date of Judgment:

Vancouver, British Columbia

March 28, 2019

Summary:

Appeal by a payor father on the issues of retroactive and ongoing child support and costs. The child is a disabled adult who resides full-time with the mother. Held: Appeal allowed to the limited extent of reducing the amount of the arrears. The trial judge did not err in imputing income to the father based on corporate pre-tax income available to him through his business. The father was not permitted to raise for the first time on appeal the issue of whether money from the child's Persons' with Disability benefit deposited into a Registered Disability Savings Plan should have been included in the child's monthly expenses, nor was he permitted to raise for the first time an issue with respect to the costs associated with a full-time live-in caregiver. An amount for additional child care required by reason of the mother's enrollment in a part-time university program was properly included in the expenses. However, the judge did err in calculating the arrears by failing to take a one-time provincial subsidy for child care into account and by a mathematical miscalculation. As a result, the arrears were reduced. The judge did not err in awarding the mother costs.

[1] FRANKEL J.A.: This appeal is about child support for a person with disabilities. The appellant, Warren Jensen, appeals from the order made by Justice MacNaughton of the Supreme Court of British Columbia, ordering him to pay on-going and retroactive child support to his former wife Kimberly Jensen (now Kimberly Tillyer) for their son Wyatt. Those orders were made following an eight-day trial: 2018 BCSC 283. The judge ordered costs in Ms. Tillyer's favour: 2018 BCSC 1177.

- [2] Wyatt, who was 22 years old at the time of trial, has a number of significant medical and cognitive challenges. He resides full-time with Ms. Tillyer, who is almost exclusively responsible for his care. Wyatt requires a high level of care and this will remain the case throughout his life. There is no dispute he remains a child of the marriage under s. 2(1) of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.).
- [3] A further matter not in dispute is that Mr. Jensen's child support obligations fall to be determined under s. 3(2)(b) of the Federal Child Support Guidelines which provide that support is to be determined on the basis of what is:

consider[ed] appropriate, having regard to the condition, means, needs and other circumstances of the child and the financial ability of each spouse to contribute to the support of the child.

- [4] The trial judge calculated Mr. Jensen's support obligations as follows. She first determined the total per month cost of the support Wyatt requires. To arrive at a net amount, the judge deducted assistance provided by government programs, i.e., the Persons' with Disability ("PWD") benefit Wyatt receives under the Employment and Assistance for Persons with Disabilities Act, S.B.C. 2002, c. 41, and the subsidy Ms. Tillyer receives from Community Living British Columbia ("CLBC") to pay for a full-time live-in caregiver. Next, the judge determined Mr. Jensen's and Ms. Tillyer's respective incomes in accordance with the Guidelines. She then apportioned the net amount pro rata, based on those incomes. As the judge found Mr. Jensen earns 82% of the total income available to the parties, she ordered him to pay 82% of Wyatt's net monthly support costs.

- [5] Mr. Jensen states his grounds of appeal as follows in his factum:

The trial judge erred in including the Registered Disability Savings Plan ("RDSP") contributions of \$125 per month and \$600 for care for Wyatt while Ms Tillyer attends University/Studying as expenses to which Mr. Jensen is obliged to pay his pro-rata share.

The trial judge erred in imputing Mr. Jensen's income at \$300,000 per annum for Guideline income purposes.

The trial judge erred in failing to consider that Ms Tillyer had received an additional \$3000 from CLBC for Wyatt's care from November 1, 2016 to March 31, 2017 in calculating the arrears of support payable to Ms Tillyer for Wyatt.

The trial judge erred in exercising her discretion to award costs to Ms Tillyer in circumstances where Ms Tillyer had repeatedly breached the consent order of Justice Ehrcke and the order of Mr. Justice Betton.

- [6] In considering these grounds it is important to keep in mind that an appeal is not a retrial and that deference must be given to an order dealing with child support. To succeed on an appeal, an appellant must show there was a material error, a serious misapprehension of the evidence, or an error in law. The palpable and overriding standard of review applies when findings of fact or findings of mixed fact and law are challenged: *Hickey v. Hickey*, [1999] 2

S.C.R. 518 at paras. 10–12; Ouellette v. Ouellette, 2012 BCCA 145 at paras. 19–20, 32 B.C.L.R. (5th) 67.

- [7] I will deal first with Mr. Jensen's income as it was the central issue at the trial. Mr. Jensen did not dispute income should be imputed to him. His position was the amount imputed should be \$120,000 per year. Based on that amount, he would be responsible for 64% of Wyatt's support.
- [8] Mr. Jensen's business affairs are conducted through a number of companies involved in the automobile body shop business. He holds the majority interest in some of those companies. Those interests are described in detail by the trial judge and need not be repeated here.
- [9] The issue for the trial judge was Mr. Jensen's earning capacity taking into account corporate pre-tax income available to him. Mr. Jensen's position at trial was that the companies needed to retain a considerable amount of their earnings as working capital and for future relocation.
- [10] Both Mr. Jensen and Ms. Tillyer called accountants to give evidence concerning Mr. Jensen's income earning capacity. Mr. Jensen's accountant was the accountant for the companies. Mr. Jensen also called his business partners. The financial documentation provided with respect to the companies was far from current or complete. There was late disclosure of financial information which resulted in revised opinions being filed during the trial. As a result, to paraphrase what the trial judge said in para. 95 of her main reasons, she was left to do the best she could from the evidence that was available.
- [11] The trial judge had considerable difficulty with the evidence of Mr. Jensen's accountant and, in the end, preferred the evidence of Ms. Tillyer's accountant. In particular, the judge considered Mr. Jensen's accountant to be an advocate for Mr. Jensen.
- [12] Following a detailed review of the evidence, the trial judge imputed Mr. Jensen's annual income at \$300,000. Mr. Jensen contends she erred in doing so. As at trial, he says the correct amount is \$120,000.
- [13] Mr. Jensen's argument that the corporate income available to him is substantially less than that found by the trial judge is no more than an attempt to retry that issue. In effect, he asks this Court to accept evidence the judge did not accept and to take a different view than she did with respect to the needs of the businesses to maintain cash reserves. I see no basis on which this Court should interfere. Accordingly, I would not accede to this ground of appeal.
- [14] The next issue concerns the money Ms. Tillyer deposits each month into Wyatt's Registered Disability Savings Plan ("RDSP") account; a federal government long-term saving program designed to help persons with disabilities and their families provide for the future.
- [15] Ms. Tillyer deposits \$125 per month from Wyatt's PWD benefit into his RDSP account, for a total of \$1,500 per year. The federal government contributes \$3,500 per year. At the time of trial there was approximately \$53,000 in the account.

- [16] Mr. Jensen submits the RDSP deposits should not have been treated as a Wyatt-related expense because they do not relate to Wyatt's current needs but, rather, are being used to create an asset for future use. Mr. Jensen relies on *C.L.C. v. B.T.C.*, 2012 BCSC 736 at para. 82, 22 R.F.L. (7th) 144, wherein deposits into an RDSP account were said to be irrelevant to the determination of child support under s. 3(2)(b) of the Guidelines because they are in the nature of savings and not an expense. That decision was followed in *Kollmuss v. Kollmuss*, 2015 BCSC 1101 at para. 51, 62 R.F.L. (7th) 42.
- [17] Mr. Jensen's objection to the \$125 deposits is being advanced as a legal issue for the first time on appeal. At trial he only mentioned it in passing in his costs submissions. Accordingly, he requires leave to raise it here. In discussing when it will be appropriate to grant leave, Justice Saunders said this in *Gorenshtein v. British Columbia (Employment Standards Tribunal)*, 2016 BCCA 457, 92 B.C.L.R. (5th) 343:
- [45] In [*Quan v. Cusson*, 2009 SCC 62] the court adopted the approach in *Wasauksing First Nation v. Wasausink Lands Inc.* (2004), 184 O.A.C. 84 and approached the issue by asking three questions in this sequence: first, is the issue truly "new"; second, is the evidentiary record sufficient; and third, being the question in which the issue of potential prejudice looms large, do the interests of justice support granting an exception to the general rule? This restrained approach is consistently applied in British Columbia, see for example, *Devine v. Devine*, 2012 BCCA 509; *Suen v. Suen*, 2013 BCCA 313.
- [46] The restrained approach to entertaining new issues engaging the evidentiary record also applies to legal questions that have not been the subject of a reasoned decision. For example, in *R. v. Trieu*, 2010 BCCA 540, this court referred with approval to the observation in *R. v. R. (R.)* (1994), 91 C.C.C. (3d) 193 (Ont. C.A.), that when a court of first instance does not have the opportunity to undertake an analysis, the appellate function is compromised. There is, however, room for the exceptional case where there is no prejudice to the other party: *Braber Equipment Ltd. v. Fraser Surrey Docks Ltd.*, 1999 BCCA 579.
- [Emphasis added.]
- [18] I would not permit Mr. Jensen to raise the RDSP issue. There is a dearth of information with respect to that account in the record. For example, we do not know when the account was opened, but from the balance at the time of trial it appears to have been in place for many years. Moreover, we do not know whether Mr. Jensen and Ms. Tillyer ever agreed some of Wyatt's PWD benefits should be set aside to provide for Wyatt's future needs. Further, the trial judge was not asked to consider whether setting aside funds in this way is appropriate in the context of s. 3(2)(b) of the Guidelines. I note that in *C.C.L. v. B.T.C.* an RDSP account had not been opened and that also appears to have been the situation in *Kollmuss v. Kollmuss*. In both those cases the combined income available for child support was less than what is available in the present case.

- [19] The next issue concerns the \$600 per month the trial judge allocated for additional caregiver assistance while Ms. Tillyer is attending university classes or studying at home. It is a condition of Ms. Tillyer's full-time employment that she complete a university program on a part-time basis within the next few years. She attends classes two evenings a week and during the day on Saturdays.
- [20] At trial, Mr. Jensen did not take issue with this specific aspect of Ms. Tillyer's claim for caregiver expenses. Rather, he took issue with the reasonableness of her claim for a full-time live-in caregiver. His position was that she personally benefits from having a nanny. However, the trial judge found a nanny was "essential to Ms. Tillyer being able to work full time, care for Wyatt without assistance from Mr. Jensen, and attend university." Mr. Jensen does not challenge that finding.
- [21] Mr. Jensen now says the \$600 per month expense item should be disallowed because there was minimal evidence to support it. In particular, he says Ms. Tillyer did not provide receipts. He also says that because the full-time caregiver is paid for at times during the day when Wyatt is away it would be reasonable for this person to work some extra hours in the evenings without pay.
- [22] This ground is somewhat incompatible with Mr. Jensen's ground relating to retroactive support. That ground alleges the trial judge, in calculating arrears, failed to take into account \$3,000 CLBC gave Ms. Tillyer to cover additional care costs relating to her attending university. On a one-time basis, CLBC provided \$600 per month for five months. Ms. Tillyer's evidence with respect to needing additional care for Wyatt to be able to complete her university studies and what she paid for that care was not challenged at trial. In light of that evidence and what CLBC paid for additional care, it was reasonable for the trial judge to allocate \$600 per month for that expense. Accordingly, I would not accede to this ground of appeal.
- [23] Mr. Jensen's next argument also relates to care costs. He says the caregiver expenses claimed by Ms. Tillyer should be reduced by \$325 per month, an amount he says the caregiver has to pay Ms. Tillyer for room and board. In support of this argument, Mr. Jensen points to a term in a contract Ms. Tillyer entered into in 2014 with a previous caregiver.
- [24] Not only was this issue not litigated at trial, it is not mentioned in Mr. Jensen's factum. I would not allow him to raise it now.
- [25] I turn now to the calculation of arrears for the period January 1, 2015 to March 1, 2018, a total of 38 months. The trial judge awarded \$8,785.
- [26] The parties agree the trial judge failed to take CLBC's \$3,000 payment into account in calculating arrears. As well, they agree there is a mathematical error in the calculation of the arrears the judge awarded because after determining the amount of Mr. Jensen's monthly underpayment, the judge multiplied that number by 35 instead of 38.

- [27] The trial judge determined Ms. Tillyer's net expenses relating to Wyatt to be \$2,417 per month. This includes \$600 required for additional child care. Mr. Jensen's 82% share of the net expenses is \$1,982. The judge then calculated the monthly arrears as being the difference between \$1,982 and the \$1,731 Mr. Jensen had paid. However, the judge overlooked the fact that, because of the additional \$600 provided by CLBC, for five months of the arrears period the net expenses for each of those months was only \$1,817.
- [28] When the \$3,000 is taken into account, Ms. Tillyer's net expenses during the arrears period are \$88,846. Mr. Jensen's share is \$72,854. As he paid \$65,778 during that period, his arrears are \$7,076, not the \$8,785 the trial judge awarded. As Mr. Jensen overpaid, the overpayment should be offset against future payments. I leave it to the parties to make arrangement in that regard.
- [29] The last ground challenges the trial judge's decision to award Ms. Tillyer costs. The judge did so because she was of the view Ms. Tillyer had been substantially successful and because Mr. Jensen's offer to settle was not one which ought reasonably to have been accepted.
- [30] Mr. Jensen submits the trial judge did not properly consider Ms. Tillyer's failure to keep him advised of Wyatt's PWD benefits and CLBC's caregiver subsidy as she was required to do by court orders. He says because of this, each party should have been ordered to bear their own costs.
- [31] Once again, the argument being advanced on appeal was not advanced at trial. At trial, Mr. Jensen's position was that he was entitled to costs on the basis he had been substantially successful. In addition, he sought double costs from the date he made a settlement offer Ms. Tillyer did not accept.
- [32] Putting to one side the issue of whether Mr. Jensen should be permitted to advance a new costs argument on appeal, his argument fails because it is clear the trial judge was of the view Ms. Tillyer's conduct did not warrant depriving her of costs. In her costs reasons, the judge said this:
- [25] Although I accept that Ms. Tillyer's failure to disclose the PWD benefits being received by Wyatt, or her receipt of CLBC funding, was the focus of cross-examination of Ms. Tillyer, she acknowledged during her evidence that she was not claiming nanny costs from Mr. Jensen.
- [26] Both parties' conduct in this litigation was not conducive to a resolution in advance of trial.
- [33] Also pertinent is the following from the judge's main reasons:
- [71] Ms. Tillyer did not disclose to Mr. Jensen that she was receiving CLBC funding. She was required to do so pursuant to the terms of the consent order.
- [72] Mr. Jensen submitted that her failure to do so was intentional and intended to deceive him into paying for special expenses which were funded by CLBC. Ms. Tillyer explained her understanding that the CLBC funding was not permanent, and not treated as taxable income in her hands. As a result, she testified that she was not required to report it on her financial

statements. She also testified that she only sought the CLBC funding because Mr. Jensen refused to contribute to the cost of a caregiver for Wyatt and that, so long as she received the CLBC funding, she was not seeking that Mr. Jensen share in the special expenses it covered. I accept her explanation.

- [34] An order for costs is discretionary and is entitled to a high degree of deference. As Justice Arbour stated in *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9 at para. 27, [2004] 1 S.C.R. 303 "[a] court should set aside a costs award on appeal only if the trial judge has made an error in principle or if the costs award is plainly wrong". See also: *Yung v. Jade Flower Investments Ltd.*, 2013 BCCA 170 at para. 17. I see nothing that would justify this Court interfering with the trial judge's order.
- [35] In the result, I would allow this appeal to the limited extent of varying para. 3 of the trial judge's formal order (entered April 25, 2018), by substituting \$7,076 for \$8,785.
- [36] Despite the reduction in arrears, Ms. Tillyer has been successful on this appeal and I would award her costs in this Court.
- [37] HARRIS J.A: I agree.
- [38] FISHER J.A.: I agree.
- [39] FRANKEL J.A: The appeal is allowed to the limited extent of reducing the arrears; costs in favour of Ms. Tillyer.

"The Honourable Mr. Justice Frankel"

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Prepared on 29 October 2026 · Esheria