

CANADA / JUDGMENT

Jevon v. Jevon

2007 BCSC 576

COURT

Supreme Court of British Columbia

DECIDED

27 April 2007

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2007 BCSC 576 Jevon v. Jevon IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Jevon v. Jevon, 2007 BCSC 576 Date: 20070427 Docket: E025502 Registry: New Westminster Between: Mandy-Lee Jevon Plaintiff And Gareth Peter Jevon Defendant Before: Master Caldwell Reasons for Judgment Counsel for Plaintiff: D. D. Hart Counsel for the Defendant: G. Lang Date and Place of Trial/Hearing: November 10, 2006 New Westminster, B.C.

- [1] This application involves a total of three Notices of Motion. The first, dated August 16, 2006, is a request by the plaintiff for sole custody and guardianship, along with a limitation on the removal of the two children of the marriage from British Columbia. The second dated October 11, 2006 is also filed by the plaintiff and seeks to have the defendant pay child support and maintenance for both children, including retroactive child support. The final Notice of Motion, dated October 31, 2006, is filed by the defendant and seeks a variety of relief related to access to the children outside of British Columbia, including holiday access scheduling and authorization for the children to be removed from British Columbia for access.
- [2] The parties married in April 1986, separated in November 1998, executed a separation agreement in December of 1998, and were divorced in February 2000 by way of a joint application desk order with no other relief.
- [3] There are two children of the marriage: Rhys Jevon, born September 28, 1993, currently 13 years old, and, Brent Jevon, born October 2, 1995, currently 11 years old.
- [4] The plaintiff works in a veterinarian laboratory and earns approximately \$57,000 from that employment. The defendant is a pediatric pathologist whose employment has, over the years, taken him outside of British Columbia, sometimes as far away as Australia. It is anticipated that the defendant may be working in Australia for at least a somewhat extended period, hence the application aimed at authorizing the children to travel to Australia for various access periods including Christmas, Spring Break, and school summer vacation.
Custody
- [5] The separation agreement provided that the parties share joint custody and guardianship. Both parties have been actively involved in the lives of their children.

- [6] The time that the defendant spends with the children has varied, based on the defendant's residential changes, but has always remained significant.
- [7] In his affidavit, the defendant outlines examples of his involvement with the boys including:
- attending school functions and parent teacher events and field trips;
 - attending to various health and medical appointments on occasion; and,
 - transporting, attending and/or coaching various extracurricular activities and sporting or hobby events.
- [8] Clearly the plaintiff has also been involved in similar or complimentary activities and attendances of the boys as their primary care parent.
- [9] Unfortunately, both parents have also had occasion to act rather unilaterally in spite of the joint parenting status. The defendant arranged for one of the boys to be baptized without consulting the plaintiff; his stated reason was that he knew she was opposed to such a ceremony. The plaintiff on the other hand moved the children from Vancouver to Langley and changed their school without consulting the defendant.
- [10] The plaintiff argues that as the defendant will now be living in Australia - literally the other side of the world - joint custody and guardianship cannot work. I disagree. Both parties have, for the most part, been involved in the major parenting decisions affecting the boys. Both have acted appropriately on most occasions and inappropriately on others. It would not be appropriate to upset the balance which has been achieved under the existing joint regime. Given the parties' resources, their ability to communicate and travel as may be required, the age of the children, and the nature of the relationships which the children enjoy with both parents, it is not in the children's best interest to change the parties custodial or guardianship status. The plaintiff's application for interim sole custody and guardianship is dismissed. Travel to Australia
- [11] Virtually all of the defendant's motion for what can be referred to as "access mobility" is granted as unopposed. In particular this relates to paragraphs 1, 2, 3, 5, and 6 of the motion as follows:
1. The Defendant shall be at liberty to remove the children of the marriage, namely, Rhys Jevon born September 28, 1993 ("Rhys") and Brent Jevon born October 2, 1995 ("Brent") (collectively the "Children") from the Province of British Columbia for access visits to Australia as follows:
 - (a) from December 13, 2006 to January 1, 2007.
 2. Further to paragraph 1 herein, the Defendant shall be at liberty to remove Rhys from the Province of British Columbia for access visits in Australia as follows:
 - (a) from March 15, 2007 to April 10, 2007.

3. The Plaintiff shall provide the Defendant with travel authorizations and passports for travel with the Children outside the Province of British Columbia as follows:
 - (a) for December 13, 2006 to January 1, 2007;
 - (b) for March 15, 2007 to April 10 2007 (Rhys only); and,
 - (c) for such additional access as the Court may order or the Plaintiff and Defendant may agree upon. and the Defendant shall cause the Children's passports to be returned to the Plaintiff upon the Children's return to the Province of British Columbia following their access visit with the Defendant.
 5. Further to paragraph 4 herein, the Defendant shall be at liberty to remove Rhys from the Province of British Columbia so long as the Defendant continues to reside outside the Province of British Columbia as follows:
 - (a) during Rhys' school spring break, subject to Rhys' availability given his school requirements and school events or activities, with the dates to be agreed upon by the Plaintiff and Defendant on or before January 15th of each year.
 6. During such times as the Defendant is residing outside of the Province of British Columbia, upon the Defendant's return to Vancouver, British Columbia on a temporary basis, the Plaintiff shall facilitate the Defendant's request for reasonable access to the Children insofar as the Plaintiff can accommodate the routine, schedule of activities and schooling requirements of the Children in any event, the Plaintiff shall not unreasonably withhold access to the Children.
- [12] Paragraph 4(b) is also granted, by consent, in the following terms:
- (i) that the children spend Christmas with the defendant in Australia in even numbered years, commencing with Christmas 2006; and, (ii) that the children spend Christmas with the plaintiff in British Columbia in odd numbered years commencing with Christmas 2007, provided, however, that if the defendant is in British Columbia for Christmas in odd numbered years, he shall have reasonable access time with the children during the Christmas school break, by prior agreement.
- [13] The only issue which remains active as between the parties is the defendant's request to have the children with him for access time in Australia for six consecutive weeks this summer. This request is supported by a single paragraph, number 29 contained in the defendant's affidavit number two, sworn October 27, 2006 which reads as follows: If I permanently relocate outside the province of British Columbia, I wish to increase my parenting time with Rhys and Brent to six consecutive weeks during the summer and further wish to have parenting time with Rhys during his school spring break, subject to his availability given school events or activities.

- [14] While the defendant may wish additional time with the children, he will have (or have had) the children for Christmas 2006 and Spring Break 2007 (as to at least Rhys). It is important that the plaintiff also enjoy significant, focussed "off" or fun time with the children. That is not accomplished by providing the defendant with 75% of the children's summer vacation time. The defendant will be entitled to have the children for four consecutive weeks of the children's summer school vacation period commencing in 2007. The precise dates are to be arranged by the parties by May 15th of this year and thereafter if this order continues. Child Support
- [15] When the separation agreement was signed in December 1998, the defendant disclosed income of \$152,000. Based upon that income he agreed to pay child support of \$1,717 per month. The defendant's income for the years following the separation agreement are agreed as being: 1999 - \$178,703 2000 - \$184,984 2001 - \$280,557 2002 - \$256,880 2003 - \$327,540 2004 - \$317,595 2005 - \$318,333 2006 - \$223,514
- [16] The defendant says at paragraph 17 of his affidavit number one: In response to paragraph 11 of the Plaintiff's Affidavit #1, I paid to the Plaintiff child support in the amount of \$1,717.00 per month from December 1998 through to February 2000 pursuant to our Separation Agreement. At the time that the Plaintiff and I finalized our joint divorce application in or about January 2000, my Guideline income had increased to \$180,000.00 and consequently, from in or about February 2000 to the present date, I have paid child support in the amount of \$2,000.00 per month in accordance with a Guideline income of \$180,000.00.
- [17] This is not disputed by the plaintiff in her material and in fact she essentially confirms the adjustment at paragraph 11 of her affidavit number one where she says: As well, since signing the Separation Agreement in December 1998 the Defendant has failed to provide updated employment information including income tax returns. The Defendant continues to pay the child support based on his salary in December 1998 of \$152,000 per annum pursuant to the then Child Support Guidelines in the amount of \$1,717 per month; which since the date of the Agreement, the Defendant has increased to \$2,000 per month; which he is currently paying, but I have had no information to justify this calculation.
- [18] Paragraph 7.2.2 of the separation agreement provided as follows: The spouses agree that child support paid pursuant to this agreement may be reviewed at the request of either party. The spouses also agree that in the event that Gareth's income increases, then child support shall similarly increase and Gareth agrees to advise Mandy of any salary increases which he receives. The increase shall be appropriate, having regard to the condition, needs, means, and other circumstances of the children and the financial ability of each spouse.
- [19] Counsel for the defendant submits that paragraph 7.2.2 is ambiguous in that it says two different things:
- (1) child support to be paid pursuant to the agreement, may be reviewed at the request of either party; and,

- (2) if the defendant's income goes up, support will increase and the defendant agrees to advise the plaintiff of any salary increases.
- [20] Counsel says that in the first instance, there is no review until the party specifically requests one; as no request was ever made the defendant was entitled to assume that the second "option" was never triggered and therefore it was reasonable for him to assume that no disclosure of increases was necessary.
- [21] In spite of his assertion through counsel that disclosure was not necessary, the defendant asserts at paragraph 20 of his affidavit number one: In response to paragraph 12 of the Plaintiff's Affidavit #1, in spring 2001, I met with the Plaintiff and offered her my 2000 T4 for her review. The Plaintiff, however, declined the opportunity to review it. At no time since December 1998 has the Plaintiff requested of me, either verbally or in writing, my updated employment and income information, nor have I received the same from her.
- [22] The plaintiff's response in paragraph 15 of her affidavit number two is as follows: In response to paragraph 20, I do not recall the Defendant offering his 2000 T4 for review, but do not think I would have declined the opportunity to review it. I have not asked for a review until now as the Defendant has told the children on many occasions that I am after his money and I experience extreme anxiety when faced with a dispute with the Defendant, so try not to "rock the boat", so I almost always agree with any of his requests regarding the children.
- [23] The reading of paragraph 7.2.2 as suggested by counsel for the defendant may well be too narrow. The defendant was the payor. There is no provision for special or extraordinary expenses and accordingly no need for proportionate sharing of such expenses. The plaintiff's income was, accordingly, irrelevant to a calculation of basic guideline income.
- [24] A proper interpretation of paragraph 7.2.2 may be that the defendant will keep the plaintiff advised of any and all salary increases and that once in receipt of the information the plaintiff will decide whether to ask for a review. Without the basic information as to the defendant's income, the decision as to whether to request a review would occur in an informational vacuum and without any context.
- [25] The defendant is an intelligent, well educated person. He was clearly aware of the Federal Child Support Guidelines at the time of the agreement. He voluntarily adjusted his child support payments in February 2000, recognizing a higher obligation based upon his then increased income.
- [26] The plaintiff seeks an order for child support and maintenance retroactive to, essentially, January 1999 and based upon the application of the Federal Child Support Guidelines to the defendant's actual income in each of those years. In general, those figures are: Year Income Child Support Paid (monthly) Guideline (amount monthly) Difference for the year 1999 \$178,703 \$1,717 \$2,001.16 \$3,409.92 2000 \$184,984 \$1,717 x1 \$2,000 x11 \$2,063.34 \$1,043.08 2001 \$280,557 \$2,000 \$3,009.51 \$12,114.12 2002 \$256,880 \$2,000 \$2,775.11 \$9,301.32 2003

\$327,540 \$2,000 \$3,474.65 \$17,695.80 2004 \$317,595 \$2,000 \$3,376.19 \$16,514.28 2005 \$318,333 \$2,000 \$3,383.50 \$16,602.00 2006 \$223,514 \$2,000 \$2,416.00 \$4,992.00 TOTAL \$81,672.52

- [27] In this summary I have not included figures for 1998 as the separation agreement was signed in December 1998.
- [28] Defendant's counsel submits that the issue of retroactive child support should not be dealt with in chambers, but rather should be reserved for trial. No authority for such proposition was cited. On the contrary, in the recent case of *D.B.S. v. S.R.G.*; *L.J.W. v. T.A.R.*; *Henry v. Henry*; *Hiemstra v. Hiemstra*, [2006] S.C.J. No. 37 (S.C.C.), three of the four files before the court involved decisions originally made by a chambers judge. In British Columbia masters routinely hear and decide matters of interim child support. No authority was cited which would indicate that the issue of retroactivity was, or is, beyond the jurisdiction of a master sitting in chambers. Accordingly, I am of the view that the matter may be dealt with as it has been presented in masters chambers, as an interim application.
- [29] Having determined that a master may hear matters regarding retroactive support, I also note the comments of Bastarache J. commented at paragraphs 94 to 97 of the *D.B.S.* (supra) decision: 94 The foregoing analysis only confirms that courts ordering child support will generally have the power to order it retroactively. But having determined that a court may order a retroactive child support award, it becomes necessary to discuss when it should exercise that discretion. 95 It will not always be appropriate for a retroactive award to be ordered. Retroactive awards will not always resonate with the purposes behind the child support regime; this will be so where the child would get no discernible benefit from the award. Retroactive awards may also cause hardship to a payor parent in ways that a prospective award would not. In short, while a free-standing obligation to support one's children must be recognized, it will not always be appropriate for a court to enforce this obligation once the relevant time period has passed. 96 Unlike prospective awards, retroactive awards can impair the delicate balance between certainty and flexibility in this area of the law. As situations evolve, fairness demands that obligations change to meet them. Yet, when obligations appear to be settled, fairness also demands that they not be gratuitously disrupted. Prospective and retroactive awards are thus very different in this regard. Prospective awards serve to define a new and predictable status quo; retroactive awards serve to supplant it. 97 Lest I be interpreted as discouraging retroactive awards, I also want to emphasize that they need not be seen as exceptional. It cannot only be exceptional that children are returned the support they were rightly due. Retroactive awards may result in unpredictability, but this unpredictability is often justified by the fact that the payor parent chose to bring that unpredictability upon him/herself. A retroactive award can always be avoided by appropriate action at the time the obligation to pay the increased amounts of support first arose.
- [30] I turn now to look at the various factors which should be considered in applications for retroactive child support.

- [31] The plaintiff indicates her delay in bringing forward his application was caused by her feeling intimidated by the defendant during their early, post separation agreement discussions. The plaintiff further indicates that she does not recall ever being offered any form of updated financial disclosure regarding the defendant's income. In her affidavit number one, at paragraph 12, the plaintiff clearly implies that she governed herself on the basis that the agreement of the parties was that the defendant would advise her of his salary increases. In this regard she says that there was no requirement that she request or demand financial disclosure annually or on some other time interval.
- [32] It is clearly arguable that the defendant was to advise the plaintiff of any increases. Excepting only the defendant's assertion that he made one oral offer of such information, there is no evidence before me to indicate that the defendant ever offered or provided disclosure of his income in spite of the fact that his income has nearly doubled (from that disclosure in December 1998) by 2001 and had more than doubled for the years 2003, 2004 and 2005. This, may on a balance amount to what Bastarache J. refers to as blameworthy conduct on the part of the payor, defendant.
- [33] At paragraphs 106 and 107 of D.B.S. (supra) is lordship says: 106 Courts should not hesitate to take into account a payor parent's blameworthy conduct in considering the propriety of a retroactive award. Further, I believe courts should take an expansive view of what constitutes blameworthy conduct in this context. I would characterize as blameworthy conduct anything that privileges the payor parent's own interests over his/her children's right to an appropriate amount of support. A similar approach was taken by the Ontario Court of Appeal in *Horner v. Horner* (2004), 72 O.R. (3d) 561, at para. 85, where children's broad "interests" -- rather than their "right to an appropriate amount of support" -- were said to require precedence; however, I have used the latter wording to keep the focus specifically on parents' support obligations. Thus, a payor parent cannot hide his/her income increases from the recipient parent in the hopes of avoiding larger child support payments: see *Hess v. Hess* (1994), 2 R.F.L. (4th) 22 (Ont. Ct. (Gen. Div.)); *Whitton v. Shippelt* (2001), 293 A.R. 317, 2001 ABCA 307; S. (L.). A payor parent cannot intimidate a recipient parent in order to dissuade him/her from bringing an application for child support: see *Dahl v. Dahl* (1995), 178 A.R. 119 (C.A.). And a payor parent cannot mislead a recipient parent into believing that his/her child support obligations are being met when (s)he knows that they are not. 107 No level of blameworthy behaviour by payor parents should be encouraged. Even where a payor parent does nothing active to avoid his/her obligations, (s)he might still be acting in a blameworthy manner if (s)he consciously chooses to ignore them. Put simply, a payor parent who knowingly avoids or diminishes his/her support obligation to his/her children should not be allowed to profit from such conduct: see *A. (J.) v. A. (P.)* (1997), 37 R.F.L. (4th) 197 (Ont. Ct. (Gen. Div.)), at pp. 208-9; *Chrintz*.
- [34] In the present case, it is hard to overcome the conclusion that the defendant well knew of his increased income, the related increased obligation for child support and consciously chose to ignore that increase obligation. Having said that, however, the subjective conduct

of the defendant is or may well also be relevant. At paragraph 109 of D.B.S. (supra), Bastarache J. says: Finally, I should also mention that the conduct of the payor parent could militate against a retroactive award. A court should thus consider whether conduct by the payor parent has had the effect of fulfilling his/her support obligation. For instance, a payor parent who contributes for expenses beyond his/her statutory obligations may have met his/her increased support obligation indirectly. I am not suggesting that the payor parent has the right to choose how the money that should be going to child support is to be spent; it is not for the payor parent to decide that his/her support obligation can be acquitted by buying his/her child a new bicycle: see *Haisman v. Haisman* (1994), 22 Alta. L.R. (3d) 56 (C.A.), at paras. 79-80. But having regard to all the circumstances, where it appears to a court that the payor parent has contributed to his/her child's support in a way that satisfied his/her obligation, no retroactive support award should be ordered.

- [35] The defendant in the present case has spent tens of thousands of dollars on various "extras" for the benefit of the children. Rhys, for example, is attending St. Michael's University School for this school year. The cost of that exceeds \$30,000. The defendant agrees that he has characterized such payments as a gift to Rhys. The plaintiff clearly has no ability to contribute even a proportionate share of that cost. The defendant has also funded exotic vacations, including to South Africa and Australia, sports camps and activities, tutoring, speech therapy, and the purchase of a one-fourth interest in a Whistler Condominium, all of which have served to benefit the children. Again, few of those benefits would have been available were the costs, or even a proportionate share of them, to be borne by the plaintiff. This would be the case even if the full amount of child support had been paid by the defendant over the various years.
- [36] Fortunately, as can be seen, the overall circumstances of these children have been and are quite favourable. They have enjoyed and continue to enjoy a lifestyle significantly beyond that of a large portion of the population.
- [37] Finally, I look at the issue of hardship. The defendant has a new family and related obligations. His financial statement shows income of approximately \$223,000 and expenses of \$272,000. He shows assets of approximately \$205,000 and debts of \$95,000. He also appears to show a further \$425,000 in cash from the sale of a former home in August 2006. While the defendant has significant cash holdings, I must remember that retroactive awards are disruptive in a way that perspective maintenance awards are not.
- [38] In all of the circumstances I am of the view that an interim retroactive support order is appropriate, however, I am also of the view that I should only exercise my jurisdiction and discretion to award retroactive child support commencing as of August 1, 2006.
- [39] The issue of retroactive obligations before August 1, 2006 should, in my view, remain to be determined by a judge at trial or summary trial. There are well founded arguments as to the appropriateness of retroactivity in this case; the ultimate date of retroactivity and what, if any, of the various additional payments made by the defendant should be accounted for as

credits against any retroactive reward. Full evidence should be presented on these issues by the parties as the resulting order will in fact be a final order. Accordingly, the defendant is ordered to pay basic child support on a guideline income of \$223,514 per year, namely \$2,416 per month, commencing August 1, 2006 and continuing until further order of the court or written agreement of the parties. The defendant will have credit for the payments made during that time, which I am told have been \$2,000 per month. The defendant will not have credit for any of the alleged "extra" payments which he may have made from August 2006 to today's date; that is an issue which can be dealt with by the judge who hears the trial or summary trial and appropriate adjustments may be made at that time if necessary.

[40] Success overall, considering all three applications has been divided and accordingly, costs will be in the cause. "Master I. Caldwell"

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