
CANADA / JUDGMENT

L.C.E. v. E.S.B.

2012 BCSC 232

COURT

Supreme Court of British Columbia

DECIDED

17 February 2012

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2012 BCSC 232 L.C.E. v. E.S.B.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

L.C.E. v. E.S.B.,

2012 BCSC 232

Date: 20120217

Docket: E92390

Registry: Vancouver

Between:

L.C.E.

Claimant

And

E.S.B.

Respondent

Before: The Honourable Madam Justice Hyslop

Reasons for Judgment

The Claimant appeared on her own behalf:

The Respondent appeared on his own behalf:

Place and Date of Hearing:

Vancouver, B.C.

February 3, 2012

Place and Date of Judgment:

Vancouver, B.C.

February 17, 2012

[1] This application has been brought by the respondent, E.S.B., who seeks the following:

1. The Respondent, E.S.B. shall pay child support pursuant to his Federal Child Support guideline income for the year 2010 and ongoing, including any retroactive reductions in child support.
2. The Respondent, E.S.B. shall pay spousal support to the Claimant taking into consideration her income and benefits for the year 2010 and ongoing, including any retroactive reduction in spousal support.

...

4. Costs.

[2] E.S.B. sought the resolution of a third matter; however, E.S.B. stated this income tax matter is resolved.

[3] L.C.E. opposes this application.

[4] After a trial and on September 21, 2010, I ordered that E.S.B. pay L.C.E. child support of \$1,638.00 per month for the support of their two daughters, and \$1,800.00 per month spousal support. E.S.B. has made all his payments pursuant to this order. I note there is a dispute as to the amount of spousal support paid in 2011; however, that is not before me.

Child Support

[5] On September 21, 2010, I ordered (the "Order"), as it relates to child support, the following:

10. The Respondent's Guideline income for spousal and child support purposes shall be imputed at \$115,000 per year.

...

14. The Respondent shall pay to the Claimant \$1636.00 on the first of each month for child support for the two children of the marriage ... commencing September 1, 2010.

...

19. For as long as either party is obligated by law to pay child or spousal support to the other, by July 1 of each year the parties will exchange the following documents beginning in 2011:

- a. Income tax returns;
- b. Notices of assessment or re-assessment;

20. In addition to the items set out in paragraph 19, the Respondent must also disclose the following to the Claimant:
- c. B. Co.'s financial statement for the year ending March 31, commencing in 2011; and
 - d. B. Co.'s corporate tax return.
- [6] As it relates to child support, it is helpful to reproduce portions of my reasons for judgment cited at 2010 BCSC 1336:

The Defendant's Income

- [103] The defendant's income for 2009 was \$123,927.00. Of that amount, approximately \$100,000.00 was T4 income and the balance dividend income. Part of the dividend money was used to pay money due on one of the rental properties that the parties owned. I impute income to E.S.B. at \$115,000.00 per year, in accordance with the Federal Child Support Guidelines (the "Guidelines").

Child Support

- [104] Based on an income of \$115,000.00, the defendant will pay the plaintiff the sum of \$1,636.00 per month for the children's support, payable on the 1st day of each and every month, commencing September 1, 2010, pursuant to the Divorce Act, [1985, c. 3 (2nd Supp.)] or otherwise at law.

...

- [116] The plaintiff and defendant, so long as either one of them is obliged by law to pay or receive spousal or child support, shall each exchange their income tax returns, all assessment or re-assessment notices issued by CRA, by July 1st of each and every year, commencing 2011. The defendant will give to the plaintiff copies of B. Co.'s financial statement for the year ending March 31st of each year, commencing 2011, together with all corporate tax returns. As a result of the exchange of these financial records, any change of child support payment shall commence July 1, 2011. If the parties cannot agree as to what that amount shall be, an application can be brought before the court by either party.
- [7] Pursuant to the Order, L.C.E. and E.S.B. are to exchange their income tax returns and other documents each year and to adjust child support without the necessity of a court hearing.
- [8] For purposes of child support, E.S.B.'s income was determined on his 2009 income for purposes of the Federal Child Support Guidelines (the "Guidelines") which is set out above. E.S.B. derives his income from a limited company, B. Co., which operates a restaurant and catering business of which E.S.B. is the sole shareholder. E.S.B. determines his T4 income and any dividends that he receives from B. Co. L.C.E. argues that E.S.B.'s Line 150 is \$149,255.00 for the taxation year 2010. The calculation of child support for the period from July 1, 2011 to and including June 1, 2012 should be in accordance with the Guidelines which is \$2,052.00 per month.

- [9] When considering the adjustment of child support, I ordered E.S.B. and L.C.E. to exchange all documents relating to their income as set out above. At the time L.C.E. swore her affidavit of January 13, 2012, E.S.B. had not provided his documents. However, he did produce some of the documents that he was required to produce at this hearing.
- [10] There are documents missing and a number of flaws in the documents that E.S.B. has placed before the court to support his application. Financial statements of the company appear to have information missing. Not produced as an example are the usual accountant's notes to the financial statements. In the financial statement there is no statement as to what money is owed to the shareholder - E.S.B. - or the amounts paid to him from that which is owed. Further, there is no information in the financial statements as to what expense includes E.S.B.'s income. As an example, is it the item direct labour, or is it due from a related party - \$146,633.00? E.S.B. has gone to the trouble of having his chartered accountant prepare a letter which E.S.B. exhibits. That letter advises E.S.B. of methods of reducing B. Co.'s expenses and increasing B. Co.'s income. That letter could have provided an explanation to the financial statements and could have explained the dividend paid to E.S.B., and how the T4 income of \$133,047.62 was determined.
- [11] Ms. Andreassen, B. Co.'s bookkeeper, stated the following in a memorandum addressed to E.S.B. and dated May 11, 2011:

In the meantime please note that the \$133,047.62 noted on your T4 includes the \$37,000 that was noted in your divorce decree. This amount was to be paid to you as per the judge with regard to the GST owed to CRA. This was a direct result of the valuation of the company in which Mr. Mynett advised this should have been paid by the company and claimed by you as income. This is not money you earned or took from the company in a shareholder loan for the year 2010. This was from 2009 and prior and was part of your divorce settlement. Also in this regard there is a \$15,000 dividend that had to be claimed as in 2009 you borrowed money from the company to put the down payment on the Pender Street apartment. This also is subject to tax. The tax you had to pay on these amounts should have been included in the disbursement of your assets in the divorce. I am not sure that this is the case. You may want to review this with your lawyer.

- [12] Part of this memorandum from Ms. Andreassen contains inaccurate information. If the GST owed by the company and paid personally by E.S.B. in the amount of \$37,455.00 is included in his T4 income, it should not have been.
- [13] As it relates to the payment of \$37,455.00 paid personally by E.S.B., it is acknowledged in my reasons as follows:
- [15] The plaintiff and defendant have used their bank accounts for their own purposes. The defendant has used his bank accounts and investments in order to pay the GST owing by B. Co. and some of his CRA income tax debt. It is for these reasons that the bank accounts should be divided using the balances at the end of July of 2009. After the separation, the plaintiff removed from the parties' line of credit, \$8,000.00, which the plaintiff agreed at the outset to pay \$4,000.00 to the defendant. Neither the plaintiff nor the defendant conducted

an accounting of their bank accounts during this trial.

...

- [46] The defendant shall pay to the plaintiff, being her share of the CIBC investment account and the RBC account, the sum of \$29,164.27 ($\$62,903.46 + \$32,880.45 = \$95,783.91 - \$37,455.30$ (GST) = $\$58,328.61 / 2 = \$29,164.31$).

...

- [85] The assessment for the GST is directed to B. Co. This is a debt owed by B. Co. to the defendant and is an additional asset of the defendant. This is referred to by Mr. Mynett in his report. The defendant personally paid the GST in the amount of \$37,455.30.
- [86] Mr. Mynett stated that this will appear on B. Co.'s financial statements as a debt due to the defendant. The company is able to pay this amount as one of B. Co.'s assets is a cash investment. The defendant stated that this money was earmarked to purchase B. Co.'s own building.
- [87] The defendant claimed that he was told to pay the GST personally. He brought no evidence before the court that he was in fact personally liable for the GST.
- [14] The amount of \$37,455.00 is an asset of E.S.B., was awarded to him and should not have been part of his 2010 income. If it was, then E.S.B. should re-file his tax return and have his income re-stated; presumably at \$112,800.00. If that is so, then child support should be \$1,608.00 per month commencing July 1, 2011, and payable at that amount until and including June 1, 2012, or when the new amount is determined in 2013. However, before I make an order adjusting the child support, I must have a sworn affidavit from E.S.B.'s chartered accountant stating whether the \$37,455.00 appears on B. Co.'s financial statement as a debt due by B. Co. to E.S.B., or whether this amount was included in E.S.B.'s income for the year 2010.
- [15] Ms. Andreassen's memorandum raises the matter of a dividend of \$15,000.00 claimed in E.S.B.'s 2009 tax return. E.S.B. claims that in 2009 and 2010 a dividend of \$15,000.00 for each year was declared by B. Co., which relates to the purchase of the Pender Street apartment.
- [16] The Pender Street apartment, owned by the parties, was sold before trial. It was not an issue before the court. Ms. Andreassen's memorandum dated May 11, 2011 makes reference to the dividend for the year 2009 as it relates to the Pender Street apartment. She makes no reference to the dividend of 2010 as having any relationship to the Pender Street apartment. In determining child support, I took this 2009 dividend into consideration and adjusted child support accordingly. The payment of the 2010 dividend to E.S.B. by B. Co. was not raised at the trial.

[17] E.S.B. produced his T4 from B. Co. for 2011. It states that E.S.B.'s T4 income is \$80,000.00. It is premature to consider this amount until E.S.B. files his 2011 tax return and produces all his documents required under the Order for purposes of re-adjusting child support.

[18] Until I have received further information as stated in these reasons, I cannot adjust child support.

Spousal Support

[19] Pursuant to the Order, I ordered E.S.B. to pay L.C.E. spousal support in the amount of \$1,800.00 per month. I ordered the following:

17. At any time after December 1, 2011, spousal support shall be reviewed on the application of either party. At the review, the following information will be considered by the court:

- a. The Claimant's efforts to obtain employment;
- b. Whether the Claimant has obtained part or full time employment; and
- c. Childcare expenses in the event the Claimant is employed.

[20] At the time of the Order, L.C.E.'s only source of income was from the two suites in the family home and spousal support. In my reasons, I found the following:

[109] The plaintiff's income is spousal support and the income which she derives from the family home, the latter of which is approximately \$1,850.00 per month. The plaintiff is not looking for employment at this time as C. is just entering kindergarten.

[110] The plaintiff acknowledged that she is capable of working, but her responsibilities for the children at this time make her available only for part-time employment of less than five hours per day.

[111] The children do not walk to school on their own as school is half an hour away and five minutes by car. If the plaintiff becomes fully employed, she estimates her childcare costs would be something between \$800.00 to \$1,000.00 per month, increasing during the summer months and holidays.

[112] For purposes of determining the Spousal Support Advisory Guidelines [SSAG], I have concluded that the plaintiff has no earnings other than the revenue income from the family home, and I have also assumed that the expenses exceed or are equal to the revenue.

[21] For reasons that have not been explained, the Order stated:

11. The Claimant's guideline income for spousal support purposes shall be set at \$22,200.00 per year.

[22] So that the parties understand this, the rental income is \$22,200.00; that is before expenses. The rental income should be stated as gross income, less expenses which is the income that L.C.E. derives from the rental suites. To illustrate my point, this would be similar to E.S.B.'s

child support being fixed at the gross sales of B. Co. Before me is a review of spousal support and it is limited to L.C.E.'s efforts to obtain employment, whether she has obtained employment, either part-time or full-time, and as a result of any employment, does she have childcare expenses?

- [23] Since the Order, one of the suites is no longer rented. It is illegal and has been, in the words of L.C.E. "decommissioned" by the City of Port Moody. At the time of trial it was known that it was illegal. L.C.E. last received rent from the suite in November of 2010, thus reducing her gross income. In 2010, L.C.E.'s sole source of income as disclosed in her 2010 tax return was spousal support of \$17,200.00, \$3,321.38 of rental income and capital gains of a little under \$500.00. However, I noticed that L.C.E. declared only half of the rental income, declaring the other half as received by the co-owner; that co-owner is E.S.B. E.S.B. did not receive half of the net income from the suites. In my order of November 12, 2009, I ordered that L.C.E. would pay all expenses of the family home and would receive "all rents" from the family home.
- [24] L.C.E., in her 2010 tax return, declared as an expense "telephone" of \$1,532.94. Without some explanation, it is hard to imagine that this "telephone" expense would be incurred as it relates to the suites. The Court is entitled to assess the reasonableness of an expense when assessing income, and it is not solely governed by the Income Tax Act when considering spousal support. As a result, L.C.E.'s net income in 2010 from the rents of the suites in the family home is \$8,175.71. E.S.B. is alive to this issue as, on July 15, 2011, he wrote to the Canada Revenue Agency complaining of these matters. E.S.B. also raised the matter of spousal support he paid versus that declared by L.C.E. in her tax return. As I have already stated, this application is limited to what is declared in L.C.E.'s tax return for 2010.
- [25] L.C.E. has not provided information as to the attempts she made to obtain employment. It may be that she has not done so because she did obtain part-time employment with her former employer. M. Co., starting in February of 2011. The position that she holds with M. Co. is not the same position she had when she terminated her employment with M. Co.
- [26] L.C.E.'s employment with M. Co. is described as "Administrative Assistant, Part Time". It is a shared job with another employee. L.C.E. is paid \$32.50 per hour for 30 hours per week. On an annual basis this is \$50,700.00. I have no evidence before me as to whether this position provides any benefits. L.C.E.'s evidence is that her job ends at the end of March of 2012. The letter from her employer states that "L. is currently on working notice until [the] end [of] March [2012]". This is confusing. It suggests that L.C.E. may have further work. She is still obliged to show what efforts she has made to obtain employment. This includes any efforts with M. Co. In the Order, I anticipated that if L.C.E. obtained employment before December of 2011, she could apply for an order that E.S.B. pay something towards her childcare expenses. L.C.E. has incurred childcare expenses. However, she produced only her childcare expenses for half of 2011. She is entitled to receive from E.S.B. a proportionate share of the childcare expenses, less any tax deduction or credit to which she would be entitled pursuant to s. 7(1)(a) and (3) of the Guidelines.

[27] My order is as follows:

- 1) E.S.B. must present evidence from his chartered accountant under oath as to whether his income for the year 2010 (\$149,255.00) includes the GST owed to him by B. Co. by March 30, 2012;
- 2) E.S.B. will provide to L.C.E. and the Court B. Co.'s complete financial statements and corporate tax returns by March 30, 2012;
- 3) L.C.E. will provide under oath evidence of all her efforts to obtain employment, including copies of all written applications for employment prior to and after being employed by M. Co., and the responses, whether written or verbal, to those applications This will include any written applications made to M. Co.;
- 4) E.S.B. will not contact, directly or indirectly, without the Court's consent, any employers or potential employers disclosed by L.C.E.;
- 5) L.C.E. will provide evidence under oath stating whether she has any other adults residing in her home. She does not have to disclose any adults who visit with her from time to time;
- 6) E.S.B. will continue to pay child and spousal support as ordered in the order of September 21, 2010 until further order of the court.

[28] E.S.B.'s application is adjourned until after July 1, 2012 to a date fixed by the Supreme Court Scheduler.

[29] If child support scheduled to be adjusted by July 1, 2012 is not resolved, that matter will also form part of this application. The documents that are required to be disclosed for this adjustment will be provided to the Court by June 1, 2012.

"H.C. Hyslop J."

HYSLOP J.

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Prepared on 29 October 2026 · Esheria