
CANADA / JUDGMENT

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

2012 BCSC 1430

COURT

Supreme Court of British Columbia

DECIDED

27 September 2012

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2012 BCSC 1430 L.C.E. v. E.S.B.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

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

2012 BCSC 1430

Date: 20120927

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.

September 14, 2012

Place and Date of Judgment:

Vancouver, B.C.

September 27, 2012

- [1] This application brought by the respondent, E.S.B., seeks to vary child and spousal support retroactively and prospectively.
- [2] I heard the trial of this matter which dealt with all issues between L.C.E. and E.S.B. The first part of the trial dealt with matters relating to mobility of the children. Those reasons can be found at 2009 BCSC 1543. The second part of the trial dealt with the division of property, and child and spousal support. These reasons can be found at 2010 BCSC 1336.
- [3] On February 17, 2012, this application was before me. I adjourned the application so that further evidence could be provided to the court. My reasons can be found at 2012 BCSC 232.
- [4] In my order of September 21, 2010, I found E.S.B.'s income for the purposes of the Federal Child Support Guidelines (the "Guidelines") to be \$115,000.00, and based on his 2009 income required E.S.B. to pay \$1,636.00 per month for the support of his two children. I ordered that E.S.B. pay spousal maintenance to L.C.E. in the amount of \$1,800.00 per month.
- [5] In my reasons I stated:
 - [108] The defendant has not disputed the plaintiff's entitlement to spousal support.
 - [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.

[113] Based on the plaintiff's income of \$115,000.00, the lower range under the SSAG is \$1,581.00, the middle range is \$1,845.00 and the upper range is \$2,108.00 for a duration of 5.5 to 11 years. After considering the SSAG, I order that the defendant pay the plaintiff \$1,800.00 per month as spousal support, payable on the 1st day of each and every month, commencing September 1, 2010, pursuant to the Divorce Act or otherwise at law.

...

[115] At any time after December 1, 2011, there is to be a review of the spousal support that the defendant pays the plaintiff. That review is to consider the efforts that the plaintiff has made for obtaining employment, whether she has obtained employment, be it part-time or full-time employment, and also to consider childcare expenses in the event the plaintiff is employed. If the plaintiff is employed before December 1, 2011, this does not foreclose her from bringing on an application for childcare expenses as a result of her employment.

[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.

[6] The review of spousal support is only as to its amount.

[7] Even though the parties exchanged their respective income tax returns for the years 2011 and 2012, they could not agree as to the amount of child support that E.S.B. should pay to L.C.E.

[8] In addition, E.S.B. is seeking a variation of spousal support.

[9] E.S.B., in arguing this case, has confused legal principles relating to child support and spousal support.

[10] In *Kerr v. Baranow*, 2011 SCC 10, Mr. Justice Cromwell stated:

[208] Spousal support has a different legal foundation than child support. A parent-child relationship is a fiduciary relationship of presumed dependency and the obligation of both parents to support the child arises at birth. In that sense, the entitlement to child support is "automatic" and both parents must put their child's interests ahead of their own in negotiating and litigating child support. Child support is the right of the child, not of the parent seeking support on the child's behalf, and the basic amount of child support under the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), (as well as many provincial child support statutes) now depends on the income of the payor and not on a highly discretionary balancing of means and needs. These aspects of child support reduce somewhat the

strength of concerns about lack of notice and lack of diligence in seeking child support. With respect to notice, the payor parent is or should be aware of the obligation to provide support commensurate with his or her income. As for delay, the right to support is the child's and therefore it is the child's, not the other parent's position that is prejudiced by lack of diligence on the part of the parent seeking child support: see D.B.S., at paras. 36-39, 47-48, 59, 80 and 100-104. In contrast, there is no presumptive entitlement to spousal support and, unlike child support, the spouse is in general not under any legal obligation to look out for the separated spouse's legal interests. Thus, concerns about notice, delay and misconduct generally carry more weight in relation to claims for spousal support: see, e.g., M. L. Gordon, "Blame Over: Retroactive Child and Spousal Support in the Post-Guideline Era" [page362] (2004-2005), 23 C.F.L.Q. 243, at pp. 281 and 291-92.

E.S.B.'s Income

[11] The child support amount was based on E.S.B.'s 2009 income which I found at \$115,000.00. In my decision 2010 BCSC 1336, I determined E.S.B.'s income as follows:

[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").

[12] E.S.B.'s Line 150 income in 2010 was \$149,257.00 calculated as follows:

Employment income:

\$133,048.00

Taxable Dividend:

\$15,250.00

Interest:

\$248.00

Less Rental:

<\$299.00>

Other:

\$1,010.00

Total:

\$149,257.00

- [13] The explanation for his employment income by the accountant, B. & Co., for E.S.B.'s T4 income of \$133,047.62 is as follows:

Employment Income

E. was issued a T4 from the Company for \$133,047.62 which constituted his Employment Income for 2010. A portion of this income was normal recurring compensation and remainder related to an ill-advised payment. It is my understanding that E. had used the cash of the Company to pay various expenses from April 2003 - September 2009. These cash sales had however not been reported as income nor the GST paid. E. later reported that income and related expenses and was deemed to have received the GST amount personally (Appendix B). When E. later paid the GST debt (which would have cleared his debt to the Company), confusion arose and the courts ordered that he be repaid for having paid the GST. This left E. owing the Company money again. To solve this problem the balance was reported as income. This amount is however not a normal component of his compensation package and is not recurring in nature.

- [14] What was not drawn to the accountant's attention was that the amount of \$37,455.37 paid personally by E.S.B., came from a family asset to which L.C.E. was entitled to receive one-half. In the property division between L.C.E. and E.S.B., E.S.B. received it as an asset (the \$37,455.37) as he had paid B. Co.'s GST personally, and thus it would be owed to E.S.B. personally by B. Co. This adjustment between L.C.E. and E.S.B. in dividing their bank accounts can be seen at para. 46 of my reasons cited at 2010 BCSC 1336.
- [15] The accountant is not aware that in L.C.E. v. E.S.B., 2010 BCSC 1336, I rejected and I did not believe that E.S.B. paid from the unreported cash sales "related expenses". My findings can be found at L.C.E. v. E.S.B., 2010 BCSC 1336, paras. 61-67 and 72-74.
- [16] It would appear that the GST amount was treated differently when the Canada Revenue Agency accepted the unreported expenses. Either way, I treated it as an asset and not income, and I will not use that amount when considering E.S.B.'s income for 2010. The other amount, \$15,250.00, I accept was a dividend which was taken from B. Co. by E.S.B. and it related to the purchase of the Pender Street apartment. I note there was another dividend also in 2009, and whether it was the same apartment or not is unknown to me. However, the only real property left at the time of my decision in 2010 was the Hamilton, Ontario condominium and the family home. I will not take into consideration the dividend when determining E.S.B.'s income for the purposes of the Guidelines.
- [17] As a result, I find E.S.B.'s income to be \$101,000.00 a year for 2010, and I adjust the child support payments to reflect that income. Commencing July 1, 2011, E.S.B. shall pay to L.C.E. the sum of \$1,457.00 per month, payable on the 1st day of each and every month up to and including December 1, 2011. As the Guideline table amounts have been revised, commencing January 1, 2012, E.S.B. shall pay to L.C.E. child support in the amount of \$1,491.00 per month, and payable on the 1st day of each and every month thereafter until further order of the court.

- [18] This means that E.S.B. has a credit of \$895.00 for the months of August, September, October, November and December of 2011 ($5 \times \$179.00 = \$895.00$). Commencing January 1, 2012, E.S.B. has a credit of \$145.00 per month for the months of January, February, March, April, May and June ($6 \times \$145.00 = \$870.00$). E.S.B. has made all of his child support payments so he has a credit of \$1,765.00 up to and including June of 2012.
- [19] In 2012, E.S.B. and L.C.E. exchanged their respective income tax information. They were unable to make adjustments to determine E.S.B.'s income and the amount of child support.
- [20] E.S.B.'s Line 150 income was \$89,552.20, which consists of taxable dividends of \$273.45, interest income of \$1,136.92, a loss in rental income of \$578.59, RRSP income of \$214.00, and other income of \$76.42.
- [21] E.S.B.'s T4 income from B. Co. is \$88,400.00. B. Co. has suffered losses in the year ending March 31, 2011. B Co. lost \$67,257.00, and in March 31, 2012 \$30,369.00. Although I do not have the documents before me, L.C.E. commented that the gross sales were down considerably from over \$1 million in sales. The evidence before me when I heard the matter relating to mobility matters cited at 2009 BCSC 1543, the sales were down about 40%. E.S.B. attributes some of this loss to the considerable decrease in the catering part of B. Co.'s business.
- [22] One change was made in B. Co. B. Co. had an investment of approximately \$160,000.00. E.S.B. had ear-marked this money for the purchase of a building from which B. Co. could operate. E.S.B. incorporated a company called 0900805 B.C. Ltd. (the "numbered company").
- [23] E.S.B. is the sole shareholder of the numbered company. With this money B. Co. purchased a residential rental property for the sum of \$750,000.00. The purchase price was paid with the \$110,000.00 deposit from the original B. Co. investment, a loan from a friend in the amount of \$40,000.00, and the balance of the purchase price was borrowed from the bank and secured by a mortgage.
- [24] In the notes attached to the financial statement for the year ending March 31, 2011 is the following:

3. DUE FROM RELATED

During the period, the company transferred monetary assets to a commonly controlled enterprise under Section 85 of the Canadian ITA. As at period end \$145,115 was due to the company from the company [B. Co.] to 0900805 B.C. Ltd.

- [25] The numbered company's rental residence consists of three units, one of which E.S.B. resides. It is a one-bedroom unit for which he pays the numbered company the sum of \$1,000.00 per month.
- [26] The numbered company's financial statement dated December 31, 2011 shows assets of \$1,755.00 in cash and an investment of \$147,129.00. Its revenue consists of interest income of \$272.00 and dividend income of \$2,631.00. Its expenses consist of interest expenses of

\$407.00 and professional fees of \$6,989.00. On the disposal of its investment, a little over \$8,000.00 was realized as capital gain and the net income of the numbered company after payment of taxes was \$3,121.00. It is obvious that the numbered company's statement was prepared prior to the real estate investment made by it.

- [27] B. Co. records over \$13,000.00 in car expenses in its 2011 and 2012 financial statements. B. Co. owns a van and E.S.B. owns a motor vehicle. These amounts seem excessive given the decrease in business. E.S.B. also benefits from B. Co. in food expenses. As a result, I will impute to E.S.B. approximately \$5,000.00 for these benefits. I find that E.S.B.'s income for the purposes of the Guidelines for the taxation year 2011 is \$95,800.00. I have not taken into consideration in calculating E.S.B.'s income his rental loss nor RRSP income. This requires a payment under the table amount of the Guidelines of \$1,422.00 per month, commencing July 1, 2012 and payable on the 1st day of each and every month thereafter until further order of the court pursuant to the Divorce Act, R.S.C., 1985, c. 3 (2nd Supp.).
- [28] E.S.B. has paid his child support for the months of July, August and September of 2012, giving him a credit of \$642.00. Given the credit for the years 2011 and 2012, E.S.B.'s total credit is \$2,407.00.

L.C.E.'s Income

- [29] At the time when this application was first heard on February 17, 2012, L.C.E. had been working at a part-time job (30 hours per week) since February of 2011. At that time, L.C.E.'s part-time position was to end in March of 2012.
- [30] In 2011, L.C.E.'s employment income was \$45,435.60 a year. In addition, she had income of \$169.92 from dividends and \$108.16 in interest income, spousal support, and a loss for her rental income. She claims a loss on her rental income of \$3,819.27, which in my opinion for purposes of the Guidelines can be reduced by her telephone expenses of \$1,122.54.
- [31] The only sworn evidence from L.C.E. is as follows:
1. I am Claimant/Respondent in the proceeding herein and as such have personal knowledge of the facts and matters hereinafter deposed to save and except where the same are stated to be based upon information or belief and where so stated I verily believe the same to be true.
 2. This affidavit is made further to the order of [H.C.] Hyslop.
 3. I am employed by [name of company omitted] as an administrative assistant on a full-time regular basis. I had advised the court previously that my part-time temporary assignment had been eliminated and that I was on working notice. I was selected for another role prior to my part-time, temporary employment ending. I have not made any written employment application in the past three years and as such there are no written or verbal responses.
 4. No adults reside with me.

- [32] In that affidavit, L.C.E. did not state that she is now employed and the amount of her salary. She did acknowledge that she was now working full-time and earning about \$67,000.00 per year as an administrative assistant, plus benefits such as MSP, dental, extended medical, life insurance, and short and long-term disability. She pays towards some of those benefits. She is entitled to exercise option to purchase shares in the company for whom she works.
- [33] I would have expected L.C.E. to provide documents showing her annual income. The review that I had ordered, which was not to take place before December of 2011, was to determine what efforts L.C.E. had taken for purposes of obtaining employment. L.C.E. obtained employment before the review and as a result a review is not necessary.
- [34] L.C.E.'s employer is M. Co. L.C.E. had previously been employed by M. Co. before L.C.E. and E.S.B. separated. I make reference to that employment in my reasons cited at L.C.E. v. E.S.B., 2009 BCSC 1543:
- [15] ... She had temporary jobs; one such job was with M. Co., in late 1998. This eventually led to a permanent job with M.Co. as coordinator in their human resources department with a salary of \$48,000.00 per year. She then became the executive assistant to the senior vice president of human resources. As each year passed she received generous salary increases from M. Co.
- [16] The plaintiff took a year of maternity leave when C. was born, returning to work after one year. In November 2005, she took a year of maternity leave when S. was born. In November of 2006, she quit her job with M. Co. so that she could stay at home with the children. At the time she left her employment she was earning \$66,000.00 per year. The decision to quit her employment was a mutual decision made by the plaintiff and defendant.
- [17] Before leaving her employment, the plaintiff had been selected to be the assistant to the president and CEO of M. Co.; a position she never fulfilled. She recommended a colleague, L.C. for the position. L.C. was given the job. L.C. still works in that position and earns an employment package of approximately \$93,000.00 per year.
- [35] The next consideration is whether my order for spousal support ought to be varied as a result of L.C.E.'s employment, both part-time and full-time. I am not prepared to vary L.C.E.'s spousal support for the year 2011, as in that period and part of 2012, L.C.E. was only working part-time and only temporarily. Further, the order for spousal support that I granted to L.C.E. not only addressed her needs, but also compensatory support.
- [36] The fact that L.C.E. gained a degree of self-sufficiency with her temporary, part-time employment and then full-time employment does not compensate her for the period of time she was out of the work force. Further, at the time she ceased working for M. Co., she had an opportunity of promotion and increased salary which she gave up.

- [37] In order to vary spousal support, E.S.B. must prove there has been a material change of circumstances since the original order was made. A material change of circumstances is that the change, if known at the time of the original order, would have likely resulted in different terms.
- [38] I find there has a material change in the circumstances in that L.C.E. has obtained a full-time, permanent position, and the amount of spousal support E.S.B. pays to L.C.E. should be varied.
- [39] Judges are cautioned in applying the Spousal Support Advisory Guidelines ("SSAG") when dealing with variation applications. In this case, they ought to be as they were used in determining spousal maintenance initially. There are no events that have occurred since the initial order that would cause me concern in applying the SSAG. Based on the incomes I have determined for L.C.E. and E.S.B. and the child support, the SSAG calculated \$0 in the low and mid range and \$119.00 in the high range. The original spousal support order was based on the mid range. As a result, E.S.B. will no longer be required to pay spousal support in the amount of \$1,800.00 per month as of October 1, 2012. Given the compensatory matters to which I have referred, I am not prepared to back date the spousal support as sought by E.S.B. I order that E.S.B. pay L.C.E. the sum of \$1.00 per year until further order of the court pursuant to the Divorce Act.
- [40] I find for purposes of special and extraordinary expenses under the Guidelines and in particular child care expenses, that L.C.E.'s income is \$67,000.00 per year.

Child Care Expenses

- [41] L.C.E. has provided receipts and her income tax return for 2011, which confirm that she incurred child care expenses in the year 2011 in the amount of \$3,461.75. She is seeking contribution for those expenses from E.S.B. who is required at law to contribute to that expense. L.C.E. is required to provide child care for the children while she is employed. This was an expense that I contemplated when I ordered the review.
- [42] The basis for awarding child care expenses is set out in the Guidelines in s. 7(3):
- (3) Subject to subsection (4), in determining the amount of an expense referred to in subsection (1), the court must take into account any subsidies, benefits or income tax deductions or credits relating to the expense, and any eligibility to claim a subsidy, benefit or income tax deduction or credit relating to the expense.
- [43] There is no evidence before me relating to child care expenses for the year 2012. I understand that L.C.E. will incur child care expenses in the amount of \$690.00 per month commencing October 1, 2012. L.C.E. has not provided the amount of income tax rebate that she has received or will receive as a result of child care expenses. As a result, I have done some very rough calculations and I order that, commencing October 1, 2012, and on the 1st day of each and every month thereafter E.S.B. shall pay to L.C.E. the sum of \$275.00 a month

for child care expenses.

- [44] On a quarterly basis, commencing December 31, 2012 and each quarter thereafter, L.C.E. shall provide E.S.B. with her receipts for child care for so long as the children are in child care.
- [45] The amount owing to E.S.B. by L.C.E. for child support is set-off against any money owing by E.S.B. to L.C.E. for child care for the years 2011 and 2012, up to October 1, 2012.

COSTS

- [46] There has been mixed success. As a result, each party shall bear their own costs.

IN SUMMARY

- 1) When L.C.E. and E.S.B. exchange documents for the adjusting of child support pursuant to the Guidelines, E.S.B. shall include the numbered company's financial statement and tax returns;
- 2) E.S.B. shall pay to L.C.E. \$1.00 per year as spousal support;
- 3) Commencing July 1, 2012, E.S.B. shall pay L.C.E. the sum of \$1,422.00 for child support on the 1st day of each and every month commencing July 1, 2012 until further order of the court and pursuant to the Divorce Act;
- 4) E.S.B. shall pay to L.C.E. as his contribution towards the children's day care expenses the sum of \$275.00 per month on the 1st day of each and every month commencing October 1, 2012, so long as the children are in day care;
- 5) L.C.E. shall provide to E.S.B. copies of all receipts for day care expenses on a quarterly basis commencing December 31, 2012;
- 6) E.S.B., when exchanging financial documents annually shall provide to L.C.E. the financial statements and tax returns for the numbered company; and
- 7) All retroactive child support owed by L.C.E. to E.S.B. is off-set against the child care expenses owed by E.S.B. to L.C.E. up to October 1, 2012.

"H.C. Hyslop J."

HYSLOP J.

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