
CANADA / JUDGMENT

Lerner v. Lerner

2013 BCSC 239

COURT

Supreme Court of British Columbia

DECIDED

18 February 2013

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2013 BCSC 239 Lerner v. Lerner

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Lerner v. Lerner,

2013 BCSC 239

Date: 20130218

Docket: D108277

Registry: Vancouver

Between:

Edward Charles Lerner

Claimant

And

Karen Anne Lerner

Respondent

Before: The Honourable Mr. Justice Goepel

Reasons for Judgment

Counsel for Claimant:

S.S. Silber

Counsel for Respondent:

T.A. Macdonald

Place and Date of Hearing:

Vancouver, B.C.

December 12, 2012

Place and Date of Judgment:

Vancouver, B.C.

February 18, 2013

INTRODUCTION

- [1] The claimant, Edward Charles Lerner, applies to vary orders made in 2000 and 2004 for the payment of child support and s. 7 expenses for the two children of the parties' marriage. The children are now 23 and 21 years old. The main issues for determination are whether the children remain "children of the marriage" and if so the amount of child support that should be paid pursuant to the Federal Child Support Guidelines, S.O.R./97-175 (the "Guidelines").

BACKGROUND

- [1] The parties were married in 1988. They have two children: Joel, born November 18, 1989, and Jordan, born April 25, 1991. The parties separated in 1997 and were divorced on September 26, 2000. At the time of the divorce, the boys were 10 and 9 respectively.
- [2] On September 26, 2000, Mr. Justice Williamson ordered the claimant to pay child support to the respondent in the sum of \$1,470 per month until each child was no longer a child of the marriage. The order was based on the claimant's Guideline income of \$125,000. That order remains in force and until January 2012 the claimant made the payments required by the order.
- [3] Mr. Justice Williamson also ordered the claimant to pay to the respondent spousal support of \$3,000 per month. On January 9, 2004, Madam Justice Allen, by consent, varied the spousal support order and ordered that the claimant would pay spousal support to the respondent in a declining amount, with the final payment due on September 1, 2006, after which time the claimant's obligation to pay spousal support would terminate.
- [4] Madam Justice Allen's order, again by consent, set out that the parties would share certain delineated s. 7 expenses on a 75/25 basis. While a specific list of agreed s. 7 expenses did not include post-secondary education costs of the children, the claimant has contributed 75% to the children's post-secondary costs and, until recently, the respondent has contributed her share of 25%.

- [5] The claimant is now 59 years old; the respondent is 49 years old. Financial statements filed with respect to this application indicate that the claimant's present income for Guidelines purposes is \$150,000 per year. The respondent has fallen on hard times in recent years. She is presently unemployed. Since September 2012, she has been receiving income assistance in the sum of \$610 per month.
- [6] For many years, the claimant's child support has been paid through the Family Maintenance Enforcement Program ("FMEP"). In April 2010, the claimant was informed by FMEP that he was more than \$13,000 in arrears of child support. After several months of correspondence between claimant's counsel and FMEP, FMEP acknowledged on December 7, 2010, that the claimant was not in arrears, but rather had a credit on file of \$11,056.80.
- [7] In order to recover his overpayment, the claimant reduced his support payments from the court ordered amount of \$1,470 per month to \$730 per month. The claimant's credit was exhausted as of January 2012. At that time, FMEP notified the claimant that ongoing child support payments of \$1,470 a month were due.
- [8] In January 2012, the claimant notified FMEP that because Joel was presently taking only six units at Langara College, he did not meet the requirements of attending school fulltime and was no longer a child of the marriage eligible for child support. FMEP responded that it was not their role to make decisions as to whether a child is eligible for child support and that if the claimant wished to stop paying child support, he should apply to the court. This application followed.
- [9] Since January 2012, the claimant has paid no money by way of child support for Joel. He has, however, made payments in regard to Jordan. In that regard, he has paid directly to Jordan \$750 per month which represents 75% of his room and board. He has also paid 75% of Jordan's university tuition.
- [10] When the parties separated, the respondent purchased the claimant's interest in the family home. She remained in the family home until sometime in 2010. She received about \$70,000 from the sale of the home.
- [11] After the sale of the home, she rented premises until December 2011. She says the claimant's decision to unilaterally reduce support payments from \$1,470 a month to \$730 a month significantly affected her ability to support her children.
- [12] From January to August 2012, she and Joel lived with her sister and her family. It is a large home and she utilized three bedrooms. She agreed to pay her sister rent of \$1,000 a month but did not actually do so because of lack of funds.
- [13] Since leaving her sister's home on August 26, 2012, the respondent has lived at her mother's home. She hopes that this arrangement is temporary but currently cannot afford to live elsewhere.

- [14] The claimant now seeks to vary the orders of Mr. Justice Williamson and Madam Justice Allen. He seeks a declaration that Joel, effective January 1, 2012, is no longer a child of the marriage and an order terminating his obligation to pay child support for Joel and Jordan. He seeks an order that his obligation to Jordan is limited to paying 75% of his post-secondary living expenses and tuition with the respondent being responsible to pay the remaining 25% of those expenses.

PRESENT SITUATION

A. Joel

- [15] Joel is now 23 years old. He graduated from high school in June 2008 at age 18. He turned 19 that November. In the ensuing year, Joel attended a co-op course through the Boys & Girls Club for a total of 12 weeks, for which he was paid. Apart from that 12-week period, he has not worked. He did not go to school from June 2008 through September 2009. During that time the claimant continued to pay child support.
- [16] In May 2009, the claimant informed the respondent he was going to stop paying child support for Joel since Joel had turned 19 months earlier and was not in school. Following that notice, Joel enrolled in Langara College commencing September 2009. The claimant continued to pay child support.
- [17] Joel enrolled in the diploma program in computer studies at Langara which, if attending fulltime, would typically take two years to complete. Since enrolling at Langara, Joel has taken a part time course load of three and sometimes two courses per term. This amounts to approximately 12 to 16 hours per week. At the time of the hearing, Joel was taking the final course that he required to complete the diploma program in computer studies. That course was scheduled to complete in December 2012. Joel will be entitled to his diploma in computer science when the course completes.
- [18] Subsequent to the commencement of this application, Joel advised that he now was intending to pursue an associate degree in computer science, instead of a diploma. This would require him taking 10 additional courses at Langara College following which he would transfer to SFU, UBC or BCIT for an unspecified duration.
- [19] Joel has certain learning disabilities. He is entitled to and has received certain accommodations to assist him with his studies. His learning disabilities explain in part why he has taken so long to complete his diploma program.
- [20] Joel has not worked since high school. The one job he did take as a dishwasher at a restaurant lasted three days. While he took two classes in the summer of 2012, in the summers of 2010 and 2011 he was not at school. He did apply for and obtain a \$1,200 grant in May 2012, which money was applied towards his tuition fees.

- [21] Joel has not confided in the claimant concerning his education plans. The claimant has asked to attend a meeting with Joel and his counsellor at Langara, but Joel has refused. To date, the claimant has paid 75% of all of Joel's post-secondary costs.
- [22] Joel lived with his mother until they moved from her sister's house at the end of August 2012. Since that time he has been staying with friends. He hopes to again live with his mother when she finds her own place to live.

B. Jordan

- [23] Jordan is 21 years old and is currently in his fourth year of an engineering degree at the University of Victoria. He is currently registered for four courses for September to December 2012 and January to April 2013. As of April 2013, he will need 11 more classes to graduate, one more co-op to get work experience and three more co-ops to get a co-op degree. He indicates that as of September 2012 he has six semesters of school remaining. He has been obtaining A's and B's in his course work.
- [24] Jordan lived in residence in his first year at the University of Victoria. Starting in September 2010, he has been living in a rental home in Victoria with other students. Although he has on occasion visited, he has not lived with his mother for at least a year.
- [25] In the spring of 2012, Jordan applied for a student loan. He received only \$1,000 which he used to pay off accumulated credit card debt that he had to use to live on until he received his first cheque from his summer job in Ontario.
- [26] Jordan started to apply for a further student loan in the fall of 2012 but learned he would not qualify because of the income he had earned from his co-op program.
- [27] Since Jordan has been living off campus, the claimant has been providing Jordan with the sum of \$750 per month. This represents 75% of Jordan's room and board. He also has paid 75% of Jordan's tuition. Until this last year, the respondent had been paying the other 25% of the tuition. She did not pay her share for 2011-2012. In June 2012, the claimant paid the sum of \$1,706.83 to the University of Victoria, being the respondent's portion of Jordan's tuition.

POSITION OF THE PARTIES

- [28] The claimant seeks an order that Joel, effective January 1, 2012, is no longer a child of the marriage and that the claimant has no responsibility to pay child support of any kind with regard to Joel. In regard to Jordan, the claimant acknowledges he remains a child of the marriage but submits that his obligation should be limited to paying directly to Jordan \$750 per month, representing 75% of his living expenses, and 75% of his tuition expenses, up to and including April 2013. The claimant seeks an order that the respondent pay the sum of \$250 a month directly to Jordan towards his room and board and 25% of his tuition expenses.

[29] The respondent submits that both Joel and Jordan are still children of the marriage. She submits the claimant should pay child support in the sum of \$2,104 being the Guidelines amount for two children. In addition, she submits that she is no longer able to pay any portion of the tuition costs and given the parties' respective incomes, the claimant should pay 100% of those costs.

LEGAL TEST

[30] In *Darlington v. Darlington* (1997), 32 R.F.L. (4th) 406 at para. 14, 99 B.C.A.C. 134, the Court of Appeal adopted the factors set out in *Farden v. Farden* (1993), 48 R.F.L. (3d) 60 at 64-65 by Master Joyce (as he then was) for determining whether a person over the age of 18 is a "child of the marriage". The Court of Appeal held that a parent seeking support for a child over the age of majority does not have to present evidence in regard to all of the factors mentioned in *Farden*, and further that in each case different factors may be given more or less weight depending on the circumstances.

[31] The factors described in *Farden* at p. 64-65 are as follows:

- (1) whether the child is in fact enrolled in a course of studies on a full time or part time basis;
- (2) whether the child has applied for, or is eligible for, student loans or other types of financial assistance;
- (3) whether the child has a plan of pursuing educational goals that is related to a career or other reasonable objectives;
- (4) whether the child can contribute to his own support through part time work;
- (5) the age of the child;
- (6) the child's past and current success in the education program;
- (7) the parents' plans for the children's education, particularly if the plans were made during the marriage; and
- (8) whether the child has unilaterally terminated his or her relationship with the parent from whom support is sought.

[32] Once a child reaches the age of majority, the onus of proving that such a child remains a child of the marriage lies with the party so asserting: *Classen v. Anima*, 2011 BCSC 868.

DISCUSSION

A. Joel

- [33] Joel graduated from high school almost five years ago. Since 2009, he has been attending Langara College. His course load amounts to no more than 12 to 16 hours per week. In spite of his limited course work, Joel has made almost no attempt to earn money to support himself by working part time. There is no evidence that Joel is not capable of finding employment or supporting himself.
- [34] When this application was filed, Joel was enrolled in a diploma program in computer studies. That degree in the normal course takes two years to complete. He now suggests that he intends to pursue an associate degree in computer science instead of the diploma.
- [35] The evidence is silent as to the distinctions between the diploma program and the associate degree and to the extent that either educational objective would relate to a potential career. There is no evidence concerning Joel's ultimate goal or how the associate degree he says he is now pursuing will assist in that goal. There is nothing in his affidavit with regard to when he expects to complete his education program.
- [36] The evidence is also silent as to the level of achievement that Joel must meet in order to be accepted into the degree program. While he has passed the courses that he is taking, his grade point average is 2.58 out of 4. There is no evidence concerning his job prospects in computer studies or to the extent those job prospects might be enhanced if he had a degree as opposed to a diploma.
- [37] Given the length of time that Joel has been pursuing post-secondary education, it is incumbent upon the respondent, as the party bearing the onus, to provide evidence of a well-defined educational career plan to justify a claim for continued child support: *McAuley v. McAuley*, 2006 BCSC 1643 at para. 42. Such evidence has not been forthcoming on this application. The evidence does not disclose that Joel has a plan in pursuing educational goals that is related to a career or other reasonable objectives.
- [38] The claimant did not suggest prior to January 2012 that Joel was not a child of the marriage. The claimant was apparently content to continue to pay child support until Joel completed the diploma program. The evidence indicates that program was to be completed in December 2012. In the circumstances of this case, I find that as of December 31, 2012, Joel is no longer a child of the marriage.

B. Jordan

- [39] Jordan is enrolled in the fourth year of an engineering degree at the University of Victoria. As of September 2012, he has six semesters of school remaining. He has been obtaining good grades in his course work. I find that Jordan is and remains a child of the marriage and will do so at least until he finishes his present program of studies including his co-op degree.

C. Amount of Child Support

[40] Section 3(2) of the Guidelines concerns the payment of child support when the child is over the age of majority. This section provides:

(2) Unless otherwise provided under these Guidelines, where a child to whom a child support order relates is the age of majority or over, the amount of the child support order is

o (a) the amount determined by applying these Guidelines as if the child were under the age of majority; or

o (b) if the court considers that approach to be inappropriate, the amount that it considers 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.

[41] In *Neufeld v. Neufeld*, 2005 BCCA 7, the Court considered the interaction between Section 3(2) and Section 7 of the Guidelines. Section 7 provides that an order for child support may include a provision for special and extraordinary expenses including expenses for post-secondary education.

[42] In *Neufeld*, the Court held at para. 42 that support for an adult child who is entitled to child support because of his or her attendance at a post-secondary education generally should be determined under Section 3(2)(b). While that is the general rule it does not apply in every case.

[43] In this case, because the claimant, without complaint, paid child support for his over age children under s. 3(2)(a) until he stopped making payments in January 2012, I find that it is appropriate that the claimant continue to pay support pursuant to s. 3(2)(a).

[44] The claimant's Guidelines income is \$150,000. Pursuant to the Guidelines, his child support obligation is \$2,104 for two children and \$1,323 for one child.

[45] The respondent paid child support for the month of January 2012. For the period February 1, 2012 through to December 2012, I find that the claimant must pay child support in the sum of \$2,104 a month. That sum should be divided equally between Joel and Jordan. The amount payable on behalf of Joel is \$1,052 a month. That sum should be paid to the respondent. The amount owing for the 11-month period is \$11,572.

[46] In regard to Jordan, the claimant should pay \$1,052 a month through to December 31, 2012. The claimant paid Jordan \$750 a month leaving a balance owing of \$3,322 (11 x \$302). Against that sum, the claimant is entitled to a credit for his June 2012 payment of \$1,706.83 which amount was the respondent's portion of Jordan's tuition. This leaves a balance owing to Jordan for 2012 of \$1,615.17.

[47] Going forward, the claimant, effective January 2013 will pay child support to Jordan of \$1,323 per month as long as he remains a child of the marriage. As Jordan is living on his own, that sum should be paid to Jordan directly.

[48] In regard to s. 7 expenses, I find that the claimant should continue to pay 75% of Jordan's on-going tuition costs. Given her present financial circumstances, it is unlikely the respondent is in a position to contribute anything towards Jordan's living expenses or education costs. Jordan, however, has been earning income and he will be responsible for paying the remaining 25% of his tuition.

COSTS

[49] There has been mixed success on this application. While I have found that Joel is no longer a child of the marriage, I have further held that the claimant must pay child support in regard to Joel until December 31, 2012. My tentative conclusion is that each side should bear their own costs. If either side seeks a different costs determination, they should make submissions in writing within 21 days of the date of these reasons. Any responsive submissions should be filed within 15 days thereafter.

"R.B.T. Goepel J."

The Honourable Mr. Justice Richard B.T. Goepel

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