
CANADA / JUDGMENT

P.D.E. v. A.J.E.

2004 BCSC 658

COURT

Supreme Court of British Columbia

DECIDED

14 May 2004

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IN THE SUPREME COURT OF BRITISH COLUMBIA

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Citation:

P.D.E. v. A.J.E.,

2004 BCSC 658

Date: 20040514

Docket: E032402

Registry: Vancouver

Between:

P.D.E.

Plaintiff

And

A.J.E.

Defendant

Before: The Honourable Mr. Justice Scarth

Supplementary Reasons for Judgment

Counsel for the Plaintiff:

George Gordon

The Defendant:

Appearing in person

Dates and Place of Trial:

March 1--5, 8--12, 2004

Vancouver, B.C.

Reasons for Judgment filed:**Supplementary Submissions:**

April 13, 2004

April 30, 2004

- [1] The trial of this family law proceeding was heard during the weeks of March 1 and March 8, 2004. Reasons for judgment were filed on April 13, 2004. Therein the Court granted the parties a divorce and awarded them joint custody and joint guardianship of the three children of the marriage with the children's primary residence to be with Mr. P.D.E.. Mrs. A.J.E. was granted access each Monday and Wednesday from 2:30 p.m. to 5:30 p.m. and each Tuesday and Thursday from 2:30 p.m. to 7:00 p.m. as well as each alternating weekend from 2:30 p.m. on Friday to 8:00 p.m. on Sunday or 8:00 p.m. on Monday if her access weekend fell on a long weekend. The parties are to share the summer long vacation, spring break and Christmas vacation. Mr. P.D.E. is to have the children at all other times. The orders regarding primary residence and access are to take effect when Mr. P.D.E. moves into accommodation on the North Shore.
- [2] Apart from orders respecting the guardianship of the children, sale of the family home and the distribution of the proceeds of sale, division of Mr. P.D.E.' British Columbia Teachers Federation pension and division of the remaining family assets, the Court made orders regarding child support and spousal support, namely, that Mr. P.D.E. pay Mrs. A.J.E. \$505 per month by way of child support commencing on the first day of the month in which the orders relating to the children's primary residence and access take effect plus 80 percent of the cost of the children's orthodontist expenses after deduction of the payments made through his dental plan and, by way of spousal support, the sum of \$700 per month commencing May 1, 2004.
- [3] The parties were given leave to speak to the question of costs.
- [4] By notice of motion dated April 23, 2004, Mr. P.D.E. seeks the following orders:
1. That he be granted his costs of this proceeding on Scale 3;
 2. That the order directing him to pay monthly child support to Mrs. A.J.E. in the amount of \$505 be vacated;
 3. That the date for commencement of the payment of spousal support be fixed as being the first day of the month following the completion of the sale of the family home;

4. That from the sale proceeds of the family home Mr. P.D.E. be paid one-half of the monthly mortgage payments of \$2,175 between April 1, 2004 and the date of completion of the sale, and that such one-half reimbursement be paid from the proceeds of sale to him.
- [5] The formal order of the Court has not been entered.
- [6] The basis of Mr. P.D.E.' application that the order directing him to pay monthly child support to Mrs. A.J.E. in the amount of \$505 be vacated is that the Court lacked jurisdiction to make that order.
- [7] Prior to entry of the judgment the trial judge has a discretion to set aside or vary his order. Such discretion must be exercised judicially. As Mr. Justice Taggart wrote per curiam for the British Columbia Court of Appeal in *Federal Business Development Bank v. Mission Creek Farm Inc.* (1988), 25 B.C.L.R. (2d) 188, at pp. 198-199:
- My opinion is that the Clayton [*Clayton v. Br. Amer. Securities Ltd.* (1934), 49 B.C.R. 28 (C.A.)] decision stands for the proposition that a judge enjoys a discretion to set aside or vary an unentered order. There may be cases where his discretion may be exercised only where special circumstances are shown, as, for example, when a limitation period has intervened and it would be unjust to set aside the earlier order. The discretion to set aside or vary the order must, of course, be exercised judicially.
- [8] In essence it is argued by Mr. Gordon on behalf of Mr. P.D.E. that the 40 percent threshold required by s. 9 of the Federal Child Support Guidelines has not been met by Mrs. A.J.E. and therefore the Court has no jurisdiction to do what it has purported to do, namely, determine the Guideline amount payable by each party to the other and then direct Mr. P.D.E. to pay the difference between the two figures to Mrs. A.J.E..
- [9] In making a child support order the court is required to do so in accordance with the applicable guidelines: *Divorce Act*, s. 15.1(3).
- [10] Sections 8, 9 and 10 of the Guidelines provide as follows:

Split custody

8. Where each spouse has custody of one or more children, the amount of a child support order is the difference between the amount that each spouse would otherwise pay if a child support order were sought against each of the spouses.

Shared Custody

9. Where a spouse exercises a right of access to, or has physical custody of, a child for not less than 40 per cent of the time over the course of a year, the amount of the child support order must be determined by taking into account
- (a) the amounts set out in the applicable tables for each of the spouses;

- (b) the increased costs of shared custody arrangements; and
- (c) the conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought.

Undue Hardship

10.(1) On either spouse's application, a court may award an amount of child support that is different from the amount determined under any of sections 3 to 5, 8 or 9 if the court finds that the spouse making the request, or a child in respect of whom the request is made, would otherwise suffer undue hardship.

Circumstances that may cause undue hardship

- (2) Circumstances that may cause a spouse or child to suffer undue hardship include the following:
 - (a) the spouse has responsibility for an unusually high level of debts reasonably incurred to support the spouses and their children prior to the separation or to earn a living;
 - (b) the spouse has unusually high expenses in relation to exercising access to a child;
 - (c) the spouse has a legal duty under a judgment, order or written separation agreement to support any person;
 - (d) the spouse has a legal duty to support a child, other than a child of the marriage, who is
 - (i) under the age of majority, or
 - (ii) the age of majority or over but is unable, by reason of illness, disability or other cause, to obtain the necessities of life; and
 - (e) the spouse has a legal duty to support any person who is unable to obtain the necessities of life due to an illness or disability.

Standards of living must be considered

- (3) Despite a determination of undue hardship under subsection (1), an application under that subsection must be denied by the court if it is of the opinion that the household of the spouse who claims undue hardship would, after determining the amount of child support under any of sections 3 to 5, 8 or 9, have a higher standard of living than the household of the other spouse.

Standards of living test

- (4) In comparing standards of living for the purpose of subsection (3), the court may use the comparison of household standards of living test set out in Schedule II.

Reasonable time

- (5) Where the court awards a different amount of child support under subsection (1), it may specify, in the child support order, a reasonable time for the satisfaction of any obligation arising from circumstances that cause undue hardship and the amount payable at the end of that time.

Reasons

- (6) Where the court makes a child support order in a different amount under this section, it must record its reasons for doing so.
- [11] Plainly s. 9 of the Guidelines is the applicable provision here. This is not a "split custody" situation under s. 8, and I do not have before me an "undue hardship" application under s. 10. Nor, in any event, is there evidence before the Court to support a finding of "undue hardship".
- [12] The issue is whether Mrs. A.J.E. "exercises a right of access to, or has physical custody of," the children "for not less than 40 percent of the time over the course of a year".
- [13] As Master Joyce observed in *Hall v. Hall* (1997), 35 B.C.L.R. (3d) 311, at ¶ 11, quoted with approval by Madam Justice Prowse, writing for the Court of Appeal in *Green v. Green* (2000), 75 B.C.L.R. (3d) 306 at ¶ 22:

The figure of 40% seems quite arbitrary. Up to that magic number the court has no ability to recognize access costs, which might be quite significant, unless the matter can be brought within the "hardship" section of the Guidelines (s. 10). Once the magic number is reached the court is given a wide discretion to apportion the costs associated with the care of the children in accordance with all relevant financial circumstances of the parties.

- [14] The intent of the judgment in this proceeding was to ensure that the parties' young children spend as much time as practicable with both parents (¶ 117 of the reasons refers to a shared parenting arrangement), bearing in mind the need of the children to have a primary residence and avoid disruption in their lives by being shunted back and forth between two homes. Thus the judgment provided amongst other things for joint custody and guardianship and provision each week for the children to be with each parent, but with their sleeping hours generally, except on alternating weekends, to be with Mr. P.D.E..
- [15] Time spent sleeping or in school should be included in determining the amount of time a child is in each parent's care: *Evans v. Gravely* (2000), 14 R.F.L. (5th) 74 (Ont. S.C.J.), at p. 78. The children's sleeping and school hours should be included in the calculation of total hours to determine if the threshold of 40 percent is met: *Cross v. Cross* (1998), 40 R.F.L. (4th) 242 (B.C.S.C.), at p. 245. As Benotto J. wrote in *Evans v. Gravely* at p. 78:

There are different methods of calculating whether a person reaches the 40% threshold. I prefer not to exclude the time spent sleeping, in daycare or school. During those hours, one of the parents has primary responsibility and related expense for the child. The Court should start with the presumption that the primary residential parent has the child for 100% of the time. In this case, that is clearly the mother. Then, the parent asserting the 40% rule (in this case, the father) must demonstrate that he has physical custody for 40% of the total custodial time. Using these criteria, the father has the child for 28% of the time.

- [16] Mr. Gordon has fairly calculated the non-school time the children are with each parent during a two-week period under the terms of the judgment and has demonstrated that the children will be with Mrs. A.J.E. 31.7 percent of the time and with Mr. P.D.E. 68.3 percent of the time.
- [17] Quite rightly Mrs. A.J.E. submits that vacation and holiday time must be considered as required by s. 9. I do not find that assists, however. Of the 8,760 hours in a year, the children will be with Mrs. A.J.E. approximately 2,500 hours, bearing in mind the need to avoid double counting during the summer month Mrs. A.J.E. has the children. This results in the children being with her roughly 28 percent of the time, a long way from the "magic" 40 percent number.
- [18] I conclude that the child support order in question here was made without jurisdiction and must be vacated.
- [19] Mr. P.D.E. is entitled to payment by Mrs. A.J.E. of child support. Based on her Guideline income of \$17,560 the amount of child support payable by her monthly is \$351 for the three children.
- [20] This situation threatens to place in jeopardy the underlying thesis of the judgment -- that the children in their best interests be with each parent as much as possible.
- [21] It would not be appropriate, in my opinion, to vary the judgment by increasing the number of hours the children are with Mrs. A.J.E. in order to bring her within the 40 percent rule. The present allocation of time to be spent with each parent has been made on the basis it will serve the children's best interests rather than the parent's economic interests.
- [22] It cannot be gainsaid, however, that when the children are with her Mrs. A.J.E. must be able to provide suitable accommodation and meals for the children. This is particularly so on the alternating weekends and long summer vacation and other holiday periods when the children will be with her.

- [23] One difficulty facing the Court is that there is no evidence before it of the cost of such accommodation. The Court has ordered the sale of the family home in which Mrs. A.J.E. presently resides with the children so that two more modest dwellings can be acquired by the parties in relatively the same area on the north shore. Moreover, until the home is sold, the amount Mrs. A.J.E. will actually realize as her share of the equity cannot be determined bearing in mind the deductions from the proceeds of sale as specified in the judgment.
- [24] During his submissions on April 30, Mr. Gordon suggested that the Court could enhance the amount of spousal support and provide that it be of limited duration and open to review.
- [25] Mrs. A.J.E. again proposed that the whole of the net proceeds of sale of the family home be given to her by way of lump sum spousal support.
- [26] I decline Mrs. A.J.E.' claim for the whole of the proceeds of sale on the basis the criteria in s. 65 of the Family Relations Act for an unequal division of this asset are not met, and both parents require a fund with which to provide housing for the children.
- [27] On the other hand, Mr. Gordon's suggestion provides a means to ameliorate the difficult situation faced by Mrs. A.J.E. in having to pay child support.
- [28] I will vary the judgment by directing Mr. P.D.E. to pay \$1,200 per month by way of spousal support, rather than \$700 per month. In doing so I take into consideration the factors set out in s. 15.2(4) and s. 15.2(6) of the Divorce Act, including the facts that Mr. P.D.E. earns nearly five times the annual income earned by Mrs. A.J.E., and that she has been a "stay at home mom" whilst he has been able to enhance his career. Mr. P.D.E., however, now has the primary responsibility for providing for the children's needs. Bearing in mind that the living expenses and, in particular, the cost of accommodation, as well as the amount each of the parties will realize from the sale of the house, cannot yet be determined, I think it appropriate to provide for a review of the quantum of child support once these matters are determined. Either party may seek a review before me by applying to the registry.
- [29] Mr. P.D.E.' point with respect to the commencement date for the payment of spousal support is well taken. The payments will commence on the first day of the month following the completion of the sale of the family home.
- [30] I would however decline his application that he be paid one half of the monthly mortgage payments of \$2,175 between April 1, 2004 and the date of completion of the sale. Mrs. A.J.E. lives in the home with the children and receives no support apart from the benefit of having her equity in the property increased by each payment.

[31] With respect to the question of costs I find that success at trial was essentially in Mr. P.D.E.' favour notwithstanding the Court awarded the parties joint custody and guardianship which was Mr. P.D.E.' alternative position and Mrs. A.J.E.' only position. Apart from the issue of spousal support, Mr. P.D.E. was substantially successful on the issues relating to the children's primary residence, his role as joint guardian and the sale and division of the family home.

[32] In *Gold v. Gold* (1993) 49 R.F.L. (3d) 56 (B.C.C.A.) the Court of Appeal stated that costs in matrimonial proceedings should follow the event unless the Court otherwise directs for compelling reasons. In *Gold*, Chief Justice McEachern wrote for a five judge division of the Court at ¶ 20:

20 The question, then, is: when should the Court order otherwise? With respect, when the court should order otherwise is a matter of discretion, to be exercised judicially by the trial judge, as directed by the Rules of Court. To lay down any strict guidelines or even to attempt to give exhaustive examples is not, I think, helpful because the facts and issues in each family law case vary so greatly. Factors such as hardship, earning capacity, the purpose of the particular award, the conduct of the parties in the litigation, and the importance of not upsetting the balance achieved by the award itself are all matters which a trial judge, quite properly, may be asked to take into account. Assessing the importance of such factors within the context of a particular case, however, is a matter best left for determination by the trial judge.

[33] Mrs. A.J.E. tells me that the prolongation of the trial was the result of Mr. P.D.E.' intransigence in not being forthcoming with a settlement of the proceeding. There is not an evidentiary basis upon which I can properly make this determination. But I am able to take into consideration the considerable disparity in the parties' earning capacities and the importance of not upsetting the balance achieved by the award itself given the need to protect the best interests of the children.

[34] Mrs. A.J.E. will be responsible for 75 percent of Mr. P.D.E.' party/party costs on Scale 3, payable after taxation and from the proceeds of sale of the family home.

[35] The order regarding the cost of Dr. Elterman's report remains.

"W.B. Scarth, J."

The Honourable Mr. Justice W.B. Scarth

June 4, 2004 - Revised Judgment

[1] Supplementary reasons for judgment were filed in this proceeding on May 14, 2004. Paragraph 28 of those reasons reads as follows:

[28] I will vary the judgment by directing Mr. P.D.E. to pay \$1,200 per month by way of spousal support, rather than \$700 per month. In doing so I take into consideration the factors set out in s. 15.2(4) and s. 15.2(6) of the Divorce Act, including the facts that Mr. P.D.E. earns nearly five times the annual income earned by Mrs. A.J.E., and that she has been a "stay at home

mom" whilst he has been able to enhance his career. Mr. P.D.E., however, now has the primary responsibility for providing for the children's needs. Bearing in mind that the living expenses and, in particular, the cost of accommodation, as well as the amount each of the parties will realize from the sale of the house, cannot yet be determined, I think it appropriate to provide for a review of the quantum of child support once these matters are determined. Either party may seek a review before me by applying to the registry.

- [2] In his letter to the Court Registry (Trial Scheduling) dated 2 June 2004 counsel for the plaintiff Mr. P.D.E., Mr. Gordon, correctly points out that it is the quantum of spousal support, and not child support, that is to be reviewed once the parties' respective financial situations are determined following the completion of the sale of the former family home. Thus, the penultimate sentence of ¶ 28 should read:

Bearing in mind that the living expenses and, in particular, the cost of accommodation, as well as the amount each of the parties will realize from the sale of the house, cannot yet be determined, I think it appropriate to provide for a review of the quantum of spousal support once these matters are determined.

- [3] In his letter Mr. Gordon also refers to ¶ 24 of the supplementary reasons which reads as follows:
- [24] During his submissions on April 30, Mr. Gordon suggested that the Court could enhance the amount of spousal support and provide that it be of limited duration and open to review.
- [4] In his letter Mr. Gordon states in effect that the Court in its supplementary reasons apparently adopted Mr. P.D.E.' position at the hearing on April 30, 2004 that:

the amount of spousal support should be of limited duration

- [5] With respect, I did not in those reasons adopt Mr. P.D.E.' position in that regard, nor resile from what I wrote in ¶ 125 of the reasons for judgment filed on 13 April 2004 which states:
- [125] Whilst Mrs. A.J.E. must recognize that she is obliged to achieve economic self-sufficiency within a reasonable period of time, it is not appropriate to anticipate a change of circumstances and make an order for time-limited spousal support. If a change of circumstances occurs an appropriate application may be made.
- [6] Finally, the supplementary reasons do not make clear the commencement date for the payment of child support. Those payments will commence on the first day of the month following the completion of the sale of the family home or, in other words, at the same time as the payment of spousal support commences.

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