
CANADA / JUDGMENT

Poehlke v. Poehlke

2012 BCSC 1029

COURT

Supreme Court of British Columbia

DECIDED

12 July 2012

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2012 BCSC 1029 Poehlke v. Poehlke

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Poehlke v. Poehlke,

2012 BCSC 1029

Date: 20120712

Docket: E112083

Registry: Vancouver

Between:

Charlotte Wanda Poehlke

Claimant

And:

Richard Poehlke

Respondent

Before: The Honourable Mr. Justice Grauer

Corrected Judgment: The text of the judgment was corrected at paragraph 33 on July 20, 2012

Reasons for Judgment

Counsel for the Claimant:

Patricia A. Fleming

Counsel for the Respondent:

Marianne Walters

Place and Date of Trial:

Vancouver, B.C.

June 19-21, 2012

Place and Date of Judgment:

Vancouver, B.C.

July 12, 2012

INTRODUCTION

- [1] This case is about retroactive child support, but the circumstances are unusual.
- [2] The parties married on September 11, 1992. Mrs. Poehlke was two months pregnant at that time, and gave birth to their son, BP, on May 12, 1993. He was and remains severely disabled, and requires assistance in all aspects of daily living.
- [3] The parties separated at a date and under circumstances that are disputed, and entered into a separation agreement dated March 24, 1994. The agreement provided that Mrs. Poehlke was to have custody of BP, that Mr. Poehlke would have no access to the child, and that Mr. Poehlke would pay no child support. That agreement was prepared by legal counsel representing Mrs. Poehlke. Mr. Poehlke signed it without the benefit of legal advice.
- [4] In April of 1994, the parties made an attempt at reconciliation. Although very brief, it was long enough to result in the conception of their second son, EP, who was born on January 3, 1995. It was some time before Mr. Poehlke learned of EP's existence, and it was only recently that it was confirmed by DNA testing that he was EP's father.
- [5] An uncontested divorce was pronounced on January 13, 1997, on Mrs. Poehlke's petition. The order confirmed that Mrs. Poehlke had sole custody of the two children. The Child Support Fact Sheet indicated that no amount was proposed for the support of the children, and that Mrs. Poehlke's fiancé was contributing to their support and intended to adopt them after their marriage. Once again, Mrs. Poehlke had counsel, while Mr. Poehlke did not. Mr. Poehlke did not respond to the petition for divorce.
- [6] Mrs. Poehlke now seeks an order for retroactive and ongoing child support for both children going back beyond the period of three years before she gave formal notice to Mr. Poehlke of her intention to claim support, together with an order for future special expenses.
- [7] Mr. Poehlke, who has remarried, is currently paying child support of \$750 per month pursuant to a consent order made at a Judicial Case Conference. He maintains that that was a final order, and that ongoing support at that level is appropriate. He opposes any order for retroactive child support. He would like access, but has not applied for it.

DISCUSSION

1. The Applicable Law

- [8] The leading authority governing orders for retroactive child support is *S.(D.B.) v. G.(S.R.)*, 2006 SCC 37, [2006] 2 S.C.R. 231 ("DBS"). It obliges me to balance the interests of certainty and predictability with the need for fairness and flexibility. In doing so, I must consider all relevant circumstances, paying particular attention to four factors: the reason for the recipient parent's delay in seeking child support; the conduct of the payor parent; the past and present circumstances of the child(ren); and any hardship imposed by a retroactive award. None of these factors is decisive.
- [9] The Court in DBS made it clear that the date of retroactivity will almost always be the date of "effective notice" by the recipient parent that child support should be commenced, resumed or increased (paras. 118-124), up to three years before "formal notice" was given to the payor parent. All that is required for effective notice is that the topic be broached. Blameworthy conduct on behalf of the payor parent, however, can push the retroactive date of the award back further. The court summarized the proper approach, albeit in the context of a material change in circumstances, as follows:
- [125] The proper approach can therefore be summarized in the following way: payor parents will have their interest in certainty protected only up to the point when that interest becomes unreasonable. In the majority of circumstances, that interest will be reasonable up to the point when the recipient parent broaches the subject, up to three years in the past. However, in order to avoid having the presumptive date of retroactivity set prior to the date of effective notice, the payor parent must act responsibly: s(he) must disclose the material change in circumstances to the recipient parent. Where the payor parent does not do so, and thus engages in blameworthy behaviour, I see no reason to continue to protect his/her interest in certainty beyond the date when circumstances changed materially. A payor parent should not be permitted to profit from his/her wrongdoing.
- [10] Moreover, a retroactive award can be made even in the face of an existing agreement or court order. The majority nevertheless recognized that "agreements reached by the parents should be given considerable weight" (para. 78).

2. The Dates of Effective and Formal Notice

- [11] In this case I find the date of effective notice to be October 1, 2008. By that date, Mr. Poehlke would have received correspondence from Mrs. Poehlke's then solicitor, Bruce Livingstone, which I find clearly broached the topic.
- [12] The date of formal notice was July 8, 2011, when Mrs. Poehlke commenced this Family Claim.

3. The Reason for the Delay/Conduct of Mr. Poehlke

- [13] There were two periods of delay. The first was the 14½ year gap from the spring of 1994, when the parties separated and reached an understanding that Mr. Poehlke would have no access and pay no child support, to the date of effective notice in October of 2008. The second was the nearly three-year period from the date of effective notice to the date of formal notice.
- [14] On the evidence, I conclude that the second delay of nearly three years was not intentional on Mrs. Poehlke's part, but rather resulted from slow pursuit on the part of her then solicitor, who was in the process of retiring. It is not, in any event, significant as I see this case. I therefore turn to consider the initial delay of 14½ years.
- [15] Mrs. Poehlke attributed her delay to the fact that her relationship with Mr. Poehlke had been an extremely difficult one, and to the overwhelming burden of responsibility she had borne for nearly 15 years in caring for two children on her own: one of whom was severely disabled, while the other suffered from a learning disability.
- [16] Mrs. Poehlke sought to portray Mr. Poehlke as a physically abusive partner who was addicted to alcohol and drugs, and was an uncaring father. While I accept that their relationship was a difficult one, I am unable to accept this portrayal.
- [17] Mr. Poehlke readily conceded that he was a recovering alcoholic, but has not had a drink since well before the time in question. That appears to be in accord with independent evidence.
- [18] In the period during which their separation took place, BP was very ill and spent a considerable time at British Columbia's Children's Hospital. The extensive records from that time make it very clear that Mr. Poehlke was a devoted parent who took time off work in order to be able to stay at the hospital with his son. He was tireless in his support. Investigations by the hospital's psychiatric and social work services centered on Mrs. Poehlke's mental health issues, not any problems of his. There is no indication of any addiction problems in the extensive records over several months. There is, however, a reference to, among other things, Mrs. Poehlke's receipt of directions from the Archangel Michael to enter into a relationship with another man from her church congregation. Regardless of the truth of this assertion and what Mrs. Poehlke did in response (she was under a great deal of stress at the time), that the issue was raised and discussed goes some way to explaining Mr. Poehlke's subsequent doubt as to the paternity of EP.
- [19] With respect to the separation agreement, I find it significant that Mrs. Poehlke, who was advised by counsel, insisted on an arrangement that would give no access to Mr. Poehlke, in return for receiving no child support. It was she who had the upper hand. She had the benefit of legal advice. Mr. Poehlke did not. She remained fully employed. Mr. Poehlke was out of money and afraid of his wife's mental state in a very stressful time. There is no hint of any desire on the part of Mr. Poehlke to escape his responsibilities. He was giving up his own right of access.

- [20] Mrs. Poehlke testified that three or four days after EP was born, she telephoned to Mr. Poehlke's parents' house and spoke to his father, telling him about the birth. She said that Mr. Poehlke's father would not give her Mr. Poehlke's telephone number, and that she never heard anything from Mr. Poehlke in response to this information.
- [21] Mr. Poehlke denied ever learning about EP's birth at this time, and his mother testified that no such call had come into their house, or her husband would have discussed it with her. Mr. Poehlke conceded, however, that he had known his estranged wife was pregnant from conversations at the hospital, and although he said he did not think that the child could be his, he admitted only when pressed that they had a moment of intimacy during their attempted reconciliation which could have accounted for the pregnancy.
- [22] I conclude that Mrs. Poehlke did little or nothing to seek any support or involvement from Mr. Poehlke in relation to EP, and in fact preferred to avoid it. She testified that she did not want to seek child support from him for either child because he would want visitation rights, and she had to put the safety of her children first. I do not accept that explanation insofar as the children's safety is concerned. The evidence does not support the suggestion that the children would have been in danger, and indeed Mr. Poehlke's actions in devoting time and resources to the care of BP during BP's hospitalization suggest otherwise.
- [23] As far as Mr. Poehlke is concerned, I accept that he was unsure about the EP's paternity, and content to remain uninvolved. He showed no interest in pursuing the question, being evidently prepared to cede the role of father to another man.
- [24] Both parents, of course, have a responsibility to ensure that there is reasonable support in place for the child. Mrs. Poehlke obviously concluded that she could accomplish this on her own. I note in this regard that her income was not inconsiderable (she has been a full-time employee of Canada Safeway for 37 years), and she lived rent free in a house on acreage owned by her parents, who lived in a different residence on the same acreage. Between their assistance, her income and government assistance in relation to BP's disability, I find that she considered that there was sufficient support in place. What she wanted, and what she got, was to be completely free of any involvement or interference from Mr. Poehlke.
- [25] There is no doubt that Mrs. Poehlke carried a significant burden in caring for her two sons, due to the very serious disabilities that afflicted BP. She was a hard-working advocate on his behalf with respect to government services, but (significantly) not for any involvement or support from his father. I would not presume to criticize her in that regard, but I am unable to find either that this burden explains the delay, or that the delay can be attributed to any misconduct on Mr. Poehlke's part. He could, of course, have paid voluntarily, but Mrs. Poehlke had made it abundantly clear that she wanted nothing to do with him, even to the point of misinforming him at the time of their divorce concerning the support she stated was forthcoming from her then-fiancé.

- [26] Mrs. Poehlke submits that there was further misconduct on the part of Mr. Poehlke once she had given him effective notice that she was seeking child support, and that this ought to be taken into account. She described the misconduct as "obfuscation, misinformation and manipulation" of his financial information.
- [27] There are certainly deficiencies in Mr. Poehlke's disclosure in the period after October of 2008, but he did not fail to respond, and his deficiencies, given his lack of legal representation, were not of the sort that in my view can properly be described as misconduct. With one possible exception, which I will discuss in relation to the factor of hardship, this was not a case of someone trying to hide assets, a significant increase in income, or pre-tax corporate profits.
- [28] Otherwise, delay in Mr. Poehlke volunteering payments once he had effective notice was due principally to two areas of concern: to what extent the children had spent time in the care of the Ministry of Family and Child Development (none), and whether he was indeed the father of EP. The latter concern was not resolved until May of 2011 when genetic testing confirmed his paternity. Given their history, his concerns were not unreasonable, and given the time it took Mrs. Poehlke to pursue matters after the date of effective notice, neither was his delay.
- [29] Accordingly, with respect to the factors of reasons for the delay and misconduct of the payor, I conclude that the delay seeking child support was principally due to the fact that Mrs. Poehlke preferred it that way, and that Mr. Poehlke's conduct did not fall into the category that can properly be described as blameworthy. The fact remains that he did not meet his obligations.
4. The Past and Present Circumstances of the Children
- [30] Mrs. Poehlke has done an exceptional job of raising these two boys. The most difficult time was the first 2½ years of BP's life when he was frequently ill, and rarely slept through the night. Mrs. Poehlke has been assisted through much of the time by her daughter from a previous marriage, her parents, an accommodating employer, and government aid. For a number of years, she obtained \$211.12 for each child from BC Home Respite. She used the amount paid on EP's behalf to help fund tutoring which addressed his learning disability. She also received disability tax credits once she was aware of their availability, and government assistance with BP's care and expenses.
- [31] Since reaching the age of 19, BP is paid \$906 per month by the Ministry of Social Development.
- [32] Mrs. Poehlke hopes to retire from her employment with Canada Safeway in the near future in order to devote her time to looking after BP, who continues to require full-time supervision.

- [33] EP struggled in elementary school due to learning disabilities. Mrs. Poehlke had no funds for tutoring, and did not know how to turn the situation around. She applied, however, for the same respite payments as BP was receiving and these were granted. The resulting increase in her income allowed her to arrange for tutoring for EP three hours a week. This has allowed his confidence to grow, and he is doing much better in school. He will graduate from high school next year.
- [34] EP has his driver's licence, and takes himself to swimming lessons. He will soon be a fully-qualified lifeguard, and then intends to undertake training in scuba diving. He expects this to cost about \$17,500. He has never met his father.
- [35] Beginning in December 2010, Mr. Poehlke started paying child support for BP in the amount of \$654 per month. A consent order was pronounced at a Judicial Case Conference held before the Honourable Mr. Justice Abrioux on November 17, 2011, which provided for Mr. Poehlke to pay ongoing child support for both children in the amount of \$750 per month, "payable on the 1st day of May, 2011 and the 1st day of each and every month thereafter until further order of the court or agreement between the parties, BY CONSENT". The order further provided for the payment of arrears from May 1, 2011, to November 1, 2011, and then stated that, "The arrears owing from prior to May, 2011 remain to be determined, BY CONSENT". May 2011, was, of course, when EP's paternity was conclusively established.

5. Hardship From a Retroactive Award

- [36] Mr. Poehlke will shortly turn 54 and is employed as a safety coordinator by Clearview Grinding. Since 2000, his income rose steadily from about \$45,000 per year to an uncharacteristic high of \$98,000 in 2007. Since 2008, his income has remained in the range of \$68,000-\$72,000. His health has suffered due to environmental toxic exposure, but he remains able to work. He is concerned about how long that will remain the case. While I accept that he has had health problems, there was no evidence from which I can conclude that those problems are likely to interfere with his employment.
- [37] In 2005, Mr. Poehlke married again. His wife, Deborah Poehlke, owned her own house on Downes Road in Abbotsford, and Mr. Poehlke moved in with her. In 2006, Deborah Poehlke bought a vacation home in a development known as Lindell Lake in the Cultus Lake area. This required refinancing for the Downes Road property, and to facilitate this, Mr. Poehlke went on title as a tenant in common with an undivided 1% interest in both properties. Deborah Poehlke held the other undivided interests of 99%.
- [38] In 2010, the mortgage on Downes Road, which had been used in part to finance the purchase of the Lindell Lake property, had to be renewed. At that time, Mr. Poehlke's undivided 1% interest in both properties was transferred back to Deborah Poehlke. It is clear on the evidence that this was done to protect the properties from any exposure to a claim against Mr. Poehlke such as the one being advanced in this action. Counsel for Mrs. Poehlke made much of describing this transaction as a "fraudulent conveyance", noting that the equity in both properties would appear to be over \$600,000.

- [39] Deborah Poehlke has earned a good income through fostering four sibling children, and providing respite care for a fifth sibling. She looks upon them as being like her own children. That income is now considerably reduced as only one of them is still in her care and will remain so for only one more year. She is also providing respite for two other children.
- [40] The house on Downes Road was one Deborah Poehlke bought some time ago to provide sufficient room for her and the foster children. She had looked upon it as providing funding for her retirement when she no longer has an income, and could move into the Lindell Lake cottage. That cottage is now up for sale to help cover the child support Mr. Poehlke is paying, and his legal expenses.
- [41] It is important to remember that this case is not about a division of assets between Mr. Poehlke and Deborah Poehlke, nor is it about any obligation of Deborah Poehlke towards Mr. Poehlke's children. The so-called "fraudulent conveyance" is of no legal significance. It does not alter the overall financial situation in which Mr. Poehlke now finds himself, and to which I must have regard in terms of assessing what hardship might follow from imposing retroactive child support. What is clear is that Mr. Poehlke is not obliged to support Deborah Poehlke or her foster children.
- [42] I give little weight to Mr. Poehlke's health condition. The important fact is that he is capable of earning an annual income in the range of \$68,000 plus. Should his health deteriorate to a point where that is no longer possible, then that might well constitute a material change in circumstances that should be taken into account. For the present, I consider it to be a non-issue.
- [43] I conclude that an award of retroactive child support within the parameters set down by DBS would not constitute an unreasonable hardship to Mr. Poehlke. An award that extended well beyond those parameters might do so.

6. Appropriate Child Support

(a) The Order of November 17, 2011

- [44] Mr. Poehlke takes the position that the consent order of Abrioux J. pronounced November 17, 2011, has already dealt with the issue of ongoing support and is a final order in that respect. It provides for an ongoing obligation to pay \$750 per month for the maintenance of both children, "until further order of the court or agreement between the parties". A further order would be anticipated, for instance, when EP became an adult.
- [45] Mrs. Poehlke maintains that the order for ongoing support was intended only to be interim, pending the trial of the action when there would be a "further order of the court".
- [46] This is a regrettable state of affairs. Contrary to Mrs. Poehlke's position, however, the court file indicates quite clearly that the order for ongoing child support was a final order. That is what she is recorded as having consented to at the time. As there is no application before me

to vary that order due to a material change in circumstances, the parties remain bound by it. An order intended to have effect on only an interim basis should specify that, or should state, "until the trial of this action or further order of the court or agreement between the parties".

[47] The order is quite clear with respect to arrears. Any arrears owing from before May of 2011 remain to be determined.

(b) Ongoing Child Support

[48] Ongoing child support in the amount of \$750 per month for both children remains payable pursuant to the order of Abrioux J. pronounced November 17, 2011. For the assistance of the parties, I make the following observations.

[49] BP remains a dependent child. This was not seriously contested. He is thus a person who is unable, because of disability, to withdraw from the charge of his parents or to obtain the necessities of life, and each parent accordingly remains responsible for his reasonable and necessary support and maintenance: Family Relations Act, R.S.B.C. 1996, c. 128, sections 87 and 88; Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), sections 2(1) and 15.1.

[50] Under the current Federal Child Support Guidelines, the table amount for the support of two children payable by a person with an income at Mr. Poehlke's level would be approximately \$1,034 per month. Under section 3(2) of the Guidelines, however, where a child to whom a child support order relates is over the age of majority, as is BP, the court has the discretion to vary from the guidelines if it considers it appropriate to do so 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".

[51] Just as the court will take into account the income-earning ability of a child over the age of majority who, for instance, is attending university, so it is appropriate in the circumstances of this case to take into account the income earned by BP as an adult person with disabilities in the amount of \$906 per month, together with the expenses that are covered. With this in mind, I consider that a reduction from the Guideline amount to \$750 per month is not unreasonable. The parties and their counsel evidently agreed in November. It is most unfortunate that one should seek to renege from that agreement by mischaracterizing it.

(c) Retroactive Child Support

[52] Mr. Poehlke has paid no child support since separation, apart from some minor amounts of no significance. Notwithstanding the excellent care they have received, his children have suffered from having to do without his support, through no fault of their own. Taking into account all of the circumstances, including the factors discussed above, I conclude that this is an appropriate case to award child support retroactive to the date of effective notice, which, as it happens, is a little less than three years before the date of formal notice. The factors do not, in my view, take this case outside of the general rule laid down in DBS in that regard. Accordingly, Mrs. Poehlke is entitled to child support at the Guideline amount for

two children retroactive to October 1, 2008, through April 1, 2011, inclusive, in accordance with Mr. Poehlke's actual income for each year, less the amounts paid for the support of BP from December 2010, through April of 2011.

- [53] Mr. Poehlke's income for this purpose should be calculated without including rental income, or deducting rental expenses, relating to the cottage. I will leave it to counsel to calculate the precise retroactive amount that is payable. Mr. Poehlke may pay it, if he wishes, in equal installments over 24 months beginning September 1, 2012. Counsel are at liberty to apply if they cannot agree.

(d) Other Matters

- [54] Mrs. Poehlke seeks an order requiring Mr. Poehlke to take out life insurance in an amount sufficient to cover the retroactive support payable in accordance with this judgment. Given Mr. Poehlke's medical conditions, I do not consider it practicable to make such an order. I do, however, direct Mr. Poehlke to make his sons beneficiaries of any existing retirement savings plans, pension plans and life insurance policies, although the parties are at liberty to apply in relation to this provision, given that those plans were not in evidence.
- [55] Mr. Poehlke is responsible for sharing with Mrs. Poehlke the cost of EP's extraordinary expenses relating to his post secondary education, in proportion to their respective incomes.

SUMMARY

- [56] Mrs. Poehlke is entitled to ongoing child support in accordance with the terms of the order of Abrioux J. pronounced November 17, 2011. No new order is made in that regard. That order also provides for an ongoing obligation of financial disclosure.
- [57] Mr. Poehlke shall pay to Mrs. Poehlke his proportionate share of any future extraordinary expenses incurred with respect to EP's post secondary education.
- [58] Mr. Poehlke shall pay to Mrs. Poehlke retroactive Guideline child support for the two children for the period from October 1, 2008, through April 1, 2011, inclusive, to be calculated in accordance with his actual income over the years in question, such income to be calculated without regard to rental income or rental expenses relating to the Lindell Lake property. The amount thus owing shall be calculated by counsel with liberty to apply if they cannot agree. Mr. Poehlke may, if he chooses, pay the amount owed in equal installments over 24 months commencing September 1, 2012.
- [59] Mr. Poehlke shall take all steps necessary to make his sons the beneficiaries of any existing retirement savings plans, pension plans or life insurance policies, with liberty to apply.
- [60] Costs should follow the event. If the parties are unable to agree, or if there is relevant information of which I am unaware, they may apply.

"GRAUER, J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/SC/12/10/2012BCSC1029cor1.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/poehlke-v-poehlke-2012>

Prepared on 29 October 2026 · Esheria