
CANADA / JUDGMENT

Publicover v. Publicover

2013 BCSC 1179

COURT

Supreme Court of British Columbia

DECIDED

2 July 2013

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2013 BCSC 1179 Publicover v. Publicover

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Publicover v. Publicover,

2013 BCSC 1179

Date: 20130702

Docket: 15385

Registry: Prince George

Between:

Angela Publicover also known as Angela Isabel Publicover

Claimant

And

Richard Darrel Publicover

Respondent

Before: The Honourable Mr. Justice Parrett

Reasons for Judgment

In Chambers

Counsel for the claimant:

D. W. Lindsay

Counsel for the respondent:

D. M. Smith

Place and Date of Hearing:

Prince George, B.C.

February 25, 2013

Place and Date of Judgment:

Prince George, B.C.

July 2, 2013

INTRODUCTION

[1] In the present application the claimant, Angela Publicover, seeks a series of orders related to the child Terri Elizabeth Publicover, born November 5, 1993. She is presently 19 years of age.

[2] The orders sought as set out in the amended Notice of Application include the following:

1. A Declaration that the child, Terri Elizabeth Publicover, born November 5, 1993, is a "child of the marriage" as defined by the Divorce Act (Canada).
2. An Order that the Respondent, Richard Darrel Publicover, pay to the Claimant, Angela Publicover, also known as Angela Isabel Publicover, child maintenance in accordance with the Federal Child Support Guidelines for the child Terri Elizabeth Publicover, born November 5, 1993, for the months of May through August each year, for so long as she remains a "Child of the Marriage" as defined by the Divorce Act (Canada).

2A. An Order that the Respondent, Richard Darrel Publicover, pay to the Claimant, Angela Publicover, also known as Angela Isabel Publicover, retroactive child maintenance in accordance with the Federal Child Support Guidelines for the Child, Terri Elizabeth Publicover, born November 5, 1993, from January, 2012.

3. An Order that the Respondent, Richard Darrel Publicover, pay his proportionate share of the post-secondary education of the child, Terri Elizabeth Publicover, born November 5, 1993 to specifically include costs for tuition, books/supplies, residency, food/spending and travel home, net of any grants, scholarships, bursaries and earnings of the child. The Respondent to pay his proportionate share of the tuition and residency payments directly to the post secondary institution, when due, with the balance of the Respondent's proportionate share to be paid to the claimant on a monthly basis.

3A. An Order that the Respondent, Richard Darrel Publicover, pay his proportionate share of the post-secondary education of the child, Terri Elizabeth Publicover, born November 5, 1993 to specifically include costs for tuition, books/supplies, residency, food/spending and travel home, net of any grants, scholarships, bursaries and earnings of the child retroactive to January, 2012, such retroactive proportionate share be paid directly to the Claimant.

4. An Order that the Respondent, Richard Darrel Publicover, enroll the child, Terri Elizabeth Publicover, born November 5, 1993, on the medical, dental and extended health benefits available to him through his employment and that the Respondent, Richard Darrel Publicover, maintain the medical, dental and extended health benefits for the child, Terri Elizabeth Publicover, born November 5, 1993, for so long as she is an eligible dependent.
5. An order for costs.
- [3] The respondent at this hearing took the position that the claimant, the child and he should all split the costs equally.
- [4] In terms of retroactivity, the respondent says that effective notice was in March of 2012 and that he quit paying child support because he thought that was the law.

BACKGROUND

- [5] The claimant is 57 years of age and the respondent is 58. The parties began cohabitation in the fall of 1992 and were married on July 2, 1993. Their marriage ended in divorce by an order pronounced on March 17, 2003.
- [6] During the relationship the claimant gave birth to Terri Elizabeth Publicover on November 5, 1993. The respondent is the natural father of this child.
- [7] By the order of March 17, 2003, Chamberlist J. awarded the claimant sole permanent custody and joint guardianship. The order also contained the following provisions:
 6. The Defendant shall pay to the Plaintiff permanent child support or maintenance for the Children of the Marriage, in the base amount of \$1,210.00 per month commencing on the 1st day of April, 2003 and continuing on the first day of each and every month thereafter for so long as they are "Children of the Marriage" as defined by the Divorce Act.
 7. In addition to the base amount, the Defendant shall pay to the Plaintiff the amount of \$125.00 per month for the Special and Extraordinary Expenses for the Children of the Marriage commencing on the 1st day of April, 2003 and continuing on the first day of each and every month thereafter until further Order.
 8. The Defendant shall pay to the Plaintiff spousal support or maintenance in the amount of \$2,000.00 per month, commencing on the 1st day of April, 2003 and continuing until September 1, 2005, at which time all spousal support or maintenance obligations shall cease forever.
 9. The Defendant shall be at liberty to pay his monthly support or maintenance payments in two equal installments on the 15th and last days of each month.
 10. The Defendant shall maintain the Children of the Marriage and the Plaintiff on his medical, dental and extended health care plans provided by his employer for so long as the plans allow. Coverage for the Plaintiff may be terminated by the Defendant on September 1, 2005.

11. The Defendant shall provide 30 days notice to the Plaintiff of termination of the Plaintiff's coverage.
- [8] The term "Children of the Marriage" was found to include both Terri Elizabeth Publicover and her step-brother Raymond Daniel Sabo, who was born March 2, 1988.
- [9] Terri Publicover graduated from high school in June 2011 and enrolled in Yukon College where she completed an English upgrading course and a math University transfer course. Despite her attendance at Yukon College from September to December 2011 the respondent discontinued all child support for Terri at the end of November 2011. Terri turned 18 years of age on November 5, 2011.
- [10] Terri was accepted into the Bachelor of Science program at Thompson Rivers University and commenced full time attendance in that program in September 2012, and intends to begin a full time nursing program at that institution in 2013-2014.
- [11] The claimant paid Terri's first term of tuition of \$1,708.00 by means of a Yukon Grant that Terri received. The second term tuition for the term commencing January 2013 was \$1,504.00.
- [12] The estimated cost of her books and supplies for this academic year is \$1,000.00.
- [13] Terri lives in student residence. The costs for the first term were \$3,679.00, which was paid by the claimant. The cost for the second term was \$2,979.00 and the claimant and respondent have each paid one-half of that amount.
- [14] The respondent paid, to the claimant, \$667.50 in September and October of 2012. In addition, on October 4, 2012, she received a cheque for \$3,000.00 from him which, apparently, was intended to represent his contribution to the first term tuition and residency costs.
- [15] The parties have agreed that for the period of September 2012 to May 2013 Terri's education expenses, after application of the Yukon Grant, were as follows:

TERRI PUBLICOVER - EDUCATION EXPENSES - SEPTEMBER 2012 TO MAY 2013

Tuition - 1st semester

\$1708

Tuition - 2nd semester

\$1504

Books and supplies (estimated)

\$1000

Residence - 1st semester

\$3679

Residence - 2nd semester

\$2979

Food @ \$125 per week for 32 weeks

\$4000

Flights home (2 trips)

\$1800

Total

\$16,670

Yukon grant 1st term

(\$3588)

2nd term

(\$1788)

Total

(\$5376)

Total to be paid by Parties

\$11,294

Terri's savings

0

Scholarships/Bursaries

0

[16] Dealing with the parties respective incomes taken from line 150 of their income tax returns:

The Respondent:

Mr. Publicover

The Claimant:

Ms. Publicover

2009

\$ 74,754

2009

\$13,133

2010

52,504

2010

17,410

2011

118,834

2011

14,598

[17] Mr. Publicover's current Form F8 Financial Statement lists assets he values at a total of \$1,572,102.65, including five properties - one in Prince George; one in Lethbridge, Alberta; one in Coaldale, Alberta; and two in Honduras.

[18] A portion of the assets he lists, under Financial Assets, include bank accounts, investment accounts and various RRSP holdings totalling some \$1,025,054.05.

[19] It seems clear that his decision not to pay his child support obligations does not flow from any inability to do so but rather from a choice he made.

DISCUSSION

[20] The first issue to be addressed is whether or not the daughter of the marriage, Terri, remains a "child of the marriage" within the meaning of s. 2(1) of the Divorce Act, R.S.C. 1985, c-46.

[21] The definition provided by the legislation is as follows:

"child of the marriage" means a child of two spouses or former spouses who, at the material time,

- (a) is under the age of majority and who has not withdrawn from their charge, or
- (b) is the age of majority or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessities of life;

[22] It is always desirable when dealing with these types of applications to have material in the form of an affidavit from the child who has reached the age of majority setting out her circumstances and plans. That type of material is absent here.

[23] The circumstances are such however as to allow the court to determine this issue on the basis of the material before the court.

- [24] The respondent does not seriously contest the fact that Terri remains a child of the marriage within the meaning of the definition. In fact, through submissions of counsel, the respondent advised the court that he had agreed to pay his proportionate share of her expenses. The difficulty lies in his assertion that he believes all three should share those costs equally. I am aware of no persuasive authority which advances such a proposition.
- [25] In *Beninger v. Beninger*, 2010 BCSC 1509, Fenlon J. reviewed the law in this area in the context of a child seeking a second university degree. Her reasons are directly relevant to the present application and the proper approach to its resolution.
- [26] Fenlon J., in paras. 9 to 15 of her decision, summarized the law and the proper approach in this way:
- [9] There is no automatic rule that a child is no longer a child of the marriage once a first university degree is completed. As noted by Madam Justice Levine in *Neufeld v. Neufeld*, 2005 BCCA 7, W.P.N. v. B.J.N. [2005] B.C.J. No. 12, at para. 30:
- [30] The jurisprudence supports the view that there is a wide range of factors to be considered in the determination of whether a child is a "child of the marriage" and that individual factors will be of varying importance in different cases. All of the relevant factors must be considered. There is no arbitrary cut-off point based on the number of degrees or the eligibility of the student for financial assistance.

[Italics emphasis in original]

- [10] A spouse may be ordered to pay for the support of a child of the marriage under s. 15.1(1) of the Divorce Act. The definition of a child of the marriage includes a child who:

2(1)(b) is the age of majority or over and under [her parents'] charge but unable, by reason of illness, disability or other cause, to withdraw from [her parents'] charge or to obtain the necessities of life;

- [11] While the pursuit of education qualifies as "other cause" for continuing dependence of a child over the age of majority, it is not on its own sufficient. As the Court of Appeal noted in *Neufeld* at para.18:

In determining whether a child pursuing an education is unable to withdraw from her parents' charge or obtain the necessities of life a court must consider the surrounding circumstances.

- [12] The relevant factors to be considered in determining whether a child pursuing an education cannot withdraw from her parents' charge includes those listed by Master Joyce (as he then was) in *Farden v. Farden*, [1993] B.C.J. No. 1315 (S.C.):

- (1) whether the child is in fact enrolled in a course of studies and whether it is a full-time or part-time course of studies;

- (2) whether or not the child has applied for or is eligible for student loans or other financial assistance;
 - (3) the career plans of the child, i.e. whether the child has some reasonable and appropriate plan or is simply going to college because there is nothing better to do;
 - (4) the ability of the child to contribute to his own support through part-time employment;
 - (5) the age of the child;
 - (6) the child's past academic performance, whether the child is demonstrating success in the chosen course of studies;
 - (7) what plans the parents made for the education of their children, particularly where those plans were made during cohabitation;
 - (8) at least in the case of a mature child who has reached the age of majority, whether or not the child has unilaterally terminated a relationship from the parent from whom support is sought.
- [13] This list of factors is not exhaustive, and does not constitute a minimum set of criteria which must all be satisfied. As stated in Neufeld at para. 22: "They are relevant factors to be considered, along with others that are relevant in the circumstances. The determination is fact-specific."
- [14] In Neufeld, the court identified an additional factor: the ability of a parent to continue to support his child beyond a first degree:
- [27] The father cited in support of his argument *Maurice v. Maurice*, [1993] B.C.J. No. 1461 (S.C.) (QL), where the Court found that daughters aged 26 and 21, pursuing "achievable, realistic and legitimate" educational goals in second degrees were no longer entitled to child support. The judge in that case considered the age, educational levels and abilities of the children, and also the "age of the respondent, his income and the state of his health".
- [28] In this case, the evidence is that the father has sufficient income to support J.'s achievable, realistic and legitimate educational goals, and there is no evidence that anything about his age or health would limit his ability to assist her. Nothing in the separation agreement precluded post-graduate education.

[*Italic emphasis in original*]

- [15] It is apparent from these factors that whether a child who is 19 years or older remains a "child of the marriage" cannot be determined simply by asking (as the language of s. 2(1) of the Divorce Act suggests), whether the child can support herself while attending school. The test is much broader; it requires the court to determine whether an "adult" child should be entitled to continued support from her parents given her particular academic, financial, and family circumstances. That is the question I must now answer in relation to Kelsey Beninger.

[Underlining emphasis added]

[27] The criteria touched on in this passage and in particular in Farden as expanded by Neufeld are to be considered in each case. However, any single factor is not determinative.

[28] In my view the evidence provided in support of this application establishes:

- That Terri is enrolled in a full time course of studies;
- That Terri has obtained a Yukon grant which is assisting with the cost of her studies and that she applied for but did not obtain other scholarships;
- I am satisfied that Terri has embarked upon a course of studies to obtain a nursing degree. In my view this is a reasonable and appropriate plan;
- I am satisfied that the child has and will continue to contribute to her own support within the limits of her program;
- I am satisfied from her performance and records from high school that she has achieved reasonable academic success;
- It is clear from the material before the court that both parents and grandparents had considered and anticipated that Terri would pursue post-secondary education. Indeed, the respondent was specifically involved in that process and attended with her at the University of Victoria;
- It is equally clear that the respondent has the means and the income to support these ambitions but has, at least in part, hampered those ambitions by unilateral decisions he has made;
- The claimant and Terri continue to make Whitehorse their home.

[29] In my respectful view, on a consideration of the evidence as a whole and the circumstances of the parties, I conclude that Terri remains a "child of the marriage" while she pursues her nursing degree.

[30] The next question to be addressed is to determine the quantum of support. The approach in such circumstances is that set out in s. 3(2) of the Federal Child Support Guidelines, which provides:

3.(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

- a) the amount by applying these Guidelines as if the child were under the age of majority; or
- 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.

[31] The proper approach, in my view, to these provisions is that formulated by Martinson J. in *Wesemann v. Wesemann* (1999), 49 R.F.L. (4th) 435 (B.C.S.C.).

- [32] Utilizing this four-step process I have already made the finding necessary under step one.
- [33] I conclude that in this case the appropriateness of the usual Guideline approach is challenged by both sides.
- [34] I turn to step three, namely the determination of whether it has been proven that the usual Guideline approach is inappropriate.
- [35] In this case the claimant and the daughter reside in Whitehorse in the Yukon Territory where they have resided for the past 10 years since their move there in 2003.
- [36] Terri is in full time attendance at Thompson Rivers University in Kamloops from September to May. In my respectful view, given the distances involved and the other expenses associated with this course of studies, the Guideline approach is inappropriate for the period of time Terri is in attendance for her course of studies.
- [37] I have considered with some care the submissions made on behalf of the claimant and have concluded that the submission that the Guidelines are appropriate for the summer months when Terri has returned to her home but not while she is living in Kamloops.
- [38] As Levine J.A. concluded at para. 35 of Neufeld on behalf of the Court:

In rejecting the father's argument that he should apply s. 3(2)(b) of the Guidelines, the chambers judge did not consider the developing jurisprudence in B.C. Supreme Court and other jurisdictions that has found that where an adult student is living away from home, determining child support by using the "table amount" and adding "special and extraordinary expenses", as directed by s. 3(1) of the Guidelines for children under the age of majority is, in principle, "inappropriate". In those cases, child support has instead been determined by applying s. 3(2)(b).

- [39] At para. 42, Levine J.A. went on to explain the reasoning for this approach:

In my opinion, in principle, support for an adult child who is entitled to child support because of his or her attendant at a post-secondary institution generally should be determined under s. 3(2)(b). The "table amount", as noted by Martinson J. in Wesemann, contemplates a contribution by the non-custodial parent to the expenses borne by the custodial parent in providing a home for the child. The fact that the "table amount" increases incrementally and not absolutely for additional children supports that interpretation of the intention of the Guidelines. The "table amount" does not contemplate a child's contribution, which is an important factor in considering the amount of support a student requires.

- [40] Although it seems a somewhat unusual application of the law, in my view it meets the principles outlined above to apply the Guidelines during the time Terri has returned to the home.
- [41] On a consideration of the evidence before the court I find the respondent's income to be \$88,677 and the claimant's to be \$14,598. The Guideline child support is \$824 per month for the period I have specified.

[42] In the table I have set out above, Terri's education expenses are set out for the period from September 2012 to May of 2013. Credits are applied for the amount of the Yukon Grant and on the form provided by counsel lines are provided to allow credits for Terri's savings and advances from scholarships or bursaries she may obtain.

[43] These expenses are to be allocated and paid proportionally with the claimant contributing 14.1% and the respondent 85.9%.

CONCLUSION

[44] In summary, I make the following orders:

- There will be a declaration that the child Terri Elizabeth Publicover, born November 5, 1993, is a "child of the marriage" as defined by the Divorce Act;
- There will be an order that the respondent, Richard Darrel Publicover, pay to the claimant, Angela Publicover, retroactive child support in the amount of \$824 per month commencing on April 1, 2012 until and including August 1, 2012, and thereafter from the 1st of May to and including the 1st of August in each year for so long as she remains a child of the marriage;
- There will be an order that the respondent, Richard Darrel Publicover, pay to the claimant, Angela Publicover, his proportionate share (85.9%) of the post-secondary education costs of the child Terri Elizabeth Publicover, born November 5, 1993, to specifically include costs for tuition, books and supplies, residency, food and spending money, and travel home, net of any grants, scholarships, bursaries and savings of the child, retroactive to September 1, 2012. This proportionate share is to be paid directly to the claimant. This order will continue for the period from September 1, 2012 to the 1st of May 2013 and thereafter for the same months in each academic year so long as she remains a "child of the marriage".

[45] I have considered that portion of the Notice of Application which seeks an order related to the respondent maintaining medical, dental and extended health coverage. Such an order would appear to duplicate if not conflict with para. 10 of the order of Chamberlist J.

[46] Counsel have leave to address this issue if necessary.

[47] If counsel are unable to agree on costs they may be spoken to.

"W. G. Parrett, J."

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