
CANADA / JUDGMENT

R.J.M. v. E.M.

2016 BCSC 1813

COURT

Supreme Court of British Columbia

DECIDED

11 August 2016

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2016 BCSC 1813 R.J.M. v. E.M.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R.J.M. v. E.M.,

2016 BCSC 1813

Date: 20160811

Docket: E28098

Registry: New Westminster

Between:

R.J.M.

Claimant

And

E.M.

Respondent

Before: The Honourable Madam Justice W.J. Harris

Oral Reasons for Judgment

In Chambers

Counsel for the Claimant:

V.J.D. Van Sickle

Counsel for the Respondent:

M.M. Patton

Place and Date of Hearing:

Vancouver, B.C.

February 22, 2016

Place and Date of Judgment:

Vancouver, B.C.

August 11, 2016

[1] THE COURT: The parties' current applications raise a number of issues related to support and expenses for A.M. while she is attending university to obtain her bachelor's degree:

1. What child support should be payable to the respondent from May 2015 onward, while A.M. is attending university?
2. What is the claimant's share of special expenses related to A.M. from December 2014 onward?
3. What contribution, if any, should A.M. bear towards the cost of her education?
4. What conditions, if any, should attach to the payment of expenses related to A.M.'s attendance at university?

[2] The parties also seek clarification as to the costs awarded in their prior application.

[3] The parties were previously before me regarding support and expenses related to the children of the marriage. I issued a decision on March 17, 2015, indexed as R.J.M. v. E.M. 2015 BCSC 414.

Facts

[4] The parties were married on November 11, 1989 in Vancouver and separated in December of 2004. They have two children of the marriage J.R.M. (J.M.) born April 11, 1991; and A.E.M. (A.M.) born April 14, 1993. J.M. is no longer a child of the marriage.

[5] On separation the parties agreed to joint custody and joint guardianship of A.M. and the respondent would have sole custody of J.

[6] The claimant is employed as a constable with BC Transit. He previously retired from his position as a police officer with the City of Vancouver. The respondent is employed as a university professor at the California State University at Sacramento ("Sacramento University"). She has a second position at William Jessup University, which she took to supplement her income.

[7] The claimant has a new spouse. The respondent does not.

- [8] A.M. has been living with the respondent since she graduated from high school. She attended American River College (ARC) in Sacramento commencing in the fall of 2011. She began to attend Sacramento University in the fall of 2015. She has taken terms away from university and has worked during those periods.
- [9] She developed serious mental health issues in late adolescence. She received treatment for depression and anxiety, which included a period of hospitalization. She received some accommodations while attending college and to a lesser extent while at university.
- [10] A.M. received a partial fee waiver for her first year fees at Sacramento University as a result of her mother's status as a professor.
- [11] A.M.'s stated objective is to obtain a degree in psychology. She has expressed an interest in using her degree to obtain a job or pursue graduate work in psychology.
- [12] She has held a number of part-time jobs. At the time of the application she was working 24 to 32 hours at a community centre.

Position of the Parties

Claimant

- [13] The claimant's position is that he is willing to support A.M. while she is attending Sacramento University provided that she attends on a full-time basis (12 units per year) and provides him with evidence of her registration, attendance, course outline, information on assignments, exams, copies of marked papers and tests and final marks, as well as receipts for expenses in a timely and meaningful way. The claimant contends that this information is necessary to ensure she is attending school given what he considers to be her irregular and unfocused record of attendance at college and university. He seeks an order that the respondent provide copies of transcripts and diploma related to her attendance at American River College.
- [14] With respect to child support, the claimant submits that the amount of support should be determined in accordance with s. 3(2)(b) of the Federal Child Support Guidelines (the "Guidelines") He contends this appropriate given that A.M. is now 23 years of age and has spent five and a half years on a four year degree program.
- [15] In the absence of sufficient information from the respondent on educational and living expenses incurred by A.M., the claimant suggests it is reasonable to impute expenses for A.M. while she is at university at \$3,500 for transportation, clothing, etc.; \$3,500 for room and board; and \$4,152 for post-secondary expenses, for a total of \$14,761 (\$11,152 US).

[16] The claimant submits A.M. should contribute to the costs of her education and relies on the Court's decision in *C.A.M.T. v. A.P.G.T.*, 2011 BCSC 1456, for his submission that she should pay approximately 37% of her income (\$4,152 US) towards her expenses. He states that the respondent's guideline income should be established at \$96,214 US (\$127,351 Cdn) and the claimant's at \$136,388 (Cdn), resulting in a proportionate share of expenses of 48% by the respondent and 52% by the claimant.

Respondent

[17] The respondent claims \$4,700 in unpaid expenses, which she says have been incurred since December 2014 and must be reimbursed to her. The respondent submits she has incurred the following expenses with respect to A.M.'s studies:

Refund for Fall semester 2014 at ARC

\$750

Spring semester 2015 at ARC

\$926

Book rental

\$409

Summer 2015 course

\$165

Registration Fee for Sacramento University (fall 2015)

\$928

Registration Fee for Sacramento University (spring 2016)

\$1,854

Books

\$224

TOTAL

\$5,256

[18] The respondent objects to the claimant's calculation of A.M.'s income on the basis that A.M. is unlikely to work a consistent number of hours over the course of the year while she is a student and submits that \$8,800 is a better estimate of her annual income. The respondent submits accordingly that A.M.'s contribution to her education should remain at \$1,200.

[19] The respondent submits that the child support order should not be changed as A.M. continues to live at home.

Legal Principles

[20] Child support for a child of the marriage over the age of majority is governed by s. 3(2) of the Guidelines and the related jurisprudence. Section 3(2) provides that:

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 determined 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.

[21] Madam Justice Martinson articulated a four-stage test for determining whether s. 3(2)(a) or 3(2)(b) should be applied in *Wesemann v. Wesemann* (1999), 49 R.F.L. (4th) 435 (B.C.S.C.). At paragraph 6 she sets out the test as follows:

[6] The law with respect to support for children over the age of majority can be looked at as a four step procedure:

Step One

Decide whether the child is a "child of the marriage" as defined in the Divorce Act? If s/he is not, that ends the matter.

Step Two

Determine whether the approach of applying the Guidelines as if the child were under the age of majority ("the usual Guidelines approach") is challenged. If that approach is not challenged, determine the amount payable based on the usual Guidelines approach.

Step Three

If the usual Guidelines approach is challenged, decide whether the challenger has proven that the usual Guidelines approach is inappropriate. If not, the usual Guidelines amount applies.

Step Four

If the usual Guidelines approach is inappropriate, decide what amount is 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?

- [22] The jurisprudence also recognizes that in most cases adult children have an obligation to make reasonable contribution to their education: *Hamilton v. Popp*, 2014 BCSC 506 at para. 35; *Rebenchuk v. Rebenchuk*, 2007 MBCA 22.
- [23] Section 7 of the Guidelines sets out the type of expenses that a court may order, which are additional to the expenses included in the table amount of child support provided in the Guidelines. "Special or extraordinary" expenses may be included in a child support order depending on the necessity of the expense, the best interests of the child, the means of the child, the means of the spouses and the family's prior spending pattern. Post-secondary expenses are included within the definition of special or extraordinary expenses in s. 7.
- [24] The parties' 2008 settlement agreement, as reflected in the minutes of settlement, provides for the payment of child support and extraordinary expenses based on an initial income of \$86,000 for the claimant and \$61,000 for the respondent. I refer to sections 6, 7 and 9 of the settlement agreement:
- 6) The Plaintiff [father] shall pay to the Defendant [mother] (set-off basis) the sum of \$220 per month commencing January 1, 2009 and on the 1st day of each month thereafter as child support for so long as the child is a child of the marriage;
 - 7) The parties shall exchange the annual income tax returns by May 15 of each year commencing 2009, and they shall vary child support effect [sic] June 1/ each year commencing 2009, if necessary, using the set-off basis;
 - 9) The parties shall pay the children's extraordinary expenses, 60% to the Plaintiff and 40% to the Defendant, subject to annual adjustment if child support is varied, which shall include post-secondary expenses.

Decision

Amount of Child Support

- [25] Under the Guidelines, the court has the discretion to find that the usual Guidelines approach is inappropriate for dependent children over the age of majority, *Neufeld v. Neufeld*, 2005 BCCA 7.
- [26] In the instant case I am not satisfied that there has been a material change in circumstances since my previous order of March 17, 2015 to justify varying the amount of child support for A.M. In any event, I find that it is appropriate to apply the Guidelines amount. A.M. is still living at home. She is still working on her bachelor's degree, and the condition, means and needs of A.M. have not changed significantly. She has no savings and is still financially dependent on her parents to support herself. The financial means of the claimant also have not changed significantly in terms of his ability to pay support. Indeed his income has increased.

- [27] While A.M. is now 23 years of age and has taken time away from her studies for two semesters, the claimant was not required to pay support during the first of those periods (the fall semester of 2012) and is not obliged to pay support during the second of those periods (the fall semester of 2015). Although the claimant contends that A.M. has not been diligent in attending to her studies, as noted above, she has had serious mental health issues in the past. Recently, she has demonstrated more attention to her studies by taking 18 units and an online summer course so that she would be ready to enter university, and take a full complement of courses.
- [28] In that regard, I note that while the claimant is not now taking the position that A.M. should not be supported while she is attending university. The claimant's issue is the level of support she should receive and the conditions that should apply to her continued support. The claimant asserts A.M. should take greater responsibility for her education.
- [29] I agree that A.M.'s contribution to her education should be increased from \$1,200 a year, given the number of hours she is working and her income over the last year. It is apparent from A.M.'s part-time income that she is able to contribute a greater amount to her education than in past years. She has been working since October of 2015 between 24 and 32 hours per week at \$9.27 US per hour. This would equate to an annual income of between \$11,569 and \$15,425.
- [30] I accept that A.M. may not be able to work 32 hours each week. Based upon A.M.'s current income of \$9.27 US per hour and 24 hours per week, her annual income would be \$11,569. As she is living at home, I find she is able and should contribute approximately 30% of her annual income towards the cost of her education, which I calculated at \$3,400 US.
- [31] With respect to the claimant's contention that support is conditional on A.M. attending school on a full-time basis, I understand that her plans are to continue with university on a full-time basis. However, there is evidence from A.M. that sometimes students are unable to enroll in all the courses they require. She states that she has had to "crash" courses with a view to persuading the particular professor to allow her to enroll in the course. There may also be other circumstances that arise that prevent her from taking a full course load.
- [32] Accordingly, I consider that it is reasonable to provide a measure of flexibility. Her entitlement to child support while she is in university is dependent her attending on a full-time basis or near full-time basis. This would allow her to take one course less than a full load should she be unable to secure sufficient courses required to complete her psychology bachelor's degree despite her best efforts. Should A.M. be unable to enroll full time in university, the respondent or A.M. should advise the claimant of the reasons for this within 30 days of the start of the semester.
- [33] The claimant has also sought orders requiring that he be provided with proof of registration, course changes, course outlines, schedules for exams and papers marked, papers and tests and transcript of marks. The respondent has no objection to providing a transcript of A.M.'s marks and proof of registration. I agree that the transcript and proof of registration should

be provided to the claimant by the respondent or by A.M. within 30 days of their becoming available. I also agree that the claimant should be advised if A.M. drops any courses during the school term within 30 days of her notice to the university or of the university's notice to her.

- [34] With regard to other information requested by the claimant, I consider an order requiring this information to be unjustified. Of course, the claimant and A.M. may wish to discuss such matters with one another, and that is encouraged.
- [35] With respect to the claimant's request that he be provided with A.M.'s income tax return, I agree this information should be provided to the claimant within 30 days of it being filed with the responsible government agency.
- [36] Subject to her attending on a full-time or near full-time basis, child support for A.M. should continue until the conclusion of the fall term of 2017, which would allow A.M. to complete her bachelor's degree based upon the degree program plan which she submitted in her evidence when she was cross-examined on her affidavit.

Special Expenses

- [37] The claimant does not dispute that expenses have been incurred for tuition, books and supplies. However, the claimant does not agree that he should bear the cost of A.M.'s failure to make a timely request for the refund of the ARC tuition for the fall of 2014. I agree the claimant should not bear this cost. While the respondent notes that she paid the cost of tuition, unlike the claimant, the respondent was in a position to address this with A.M. in a timely manner. That said, in my view A.M. should be responsible for repaying her mother for this unnecessary expense.
- [38] With respect to the other expenses noted above, which I calculate to total \$4,506, I am satisfied that the respondent has established that these post-secondary educational expenses have been incurred and should be reimbursed on a proportionate basis. From the amount of expenses to be reimbursed each year, A.M.'s contribution to her expenses should be deducted for 2015 onward.
- [39] With respect to the proportionate share of expenses, I find on the basis of the evidence before me that the claimant's guideline income is \$136,388 Cdn., and the respondent's income I impute at \$127,351 Cdn. for 2015. If the respondent's 2015 income based on her income tax filings and returns is greater or less than that amount, her income and proportionate share should be adjusted for the following year. The claimant should be advised of any adjustment for 2015 by August 30, 2016.

- [40] With respect to future costs, the respondent shall provide expense claims to the claimant within 30 days to the claimant. Expense claims should be sufficient for the claimant to determine the nature and amount of the expense claimed. The claimant shall then pay his proportionate share of such costs within 30 days of receipt of the invoice. As the expenses are incurred in US dollars, payment should be in US dollars or equivalent.

Costs related to March 17, 2015 decision

- [41] The claimant submits that the parties should bear their own costs as there was divided success and suggests that there was an order of the court to this effect. The respondent disputes this.
- [42] I have reviewed the court's recording and I am satisfied that no order to this effect was made. That said, I have considered the parties' submission on costs related to the March 17, 2015 decision of the court.
- [43] The claimant submits that an examination of the relative success of the parties' financial claims at the hearing affirms that the success of the application was mixed, and overall favoured the claimant rather than the respondent, noting that neither party was successful in respect of whether J.M. was a child of the marriage; the final amount of the retroactive support in section 7 expenses was less than the respondent claimed; and ongoing support was not allowed for A.M. for periods she was not attending ARC.
- [44] The respondent submits that she was substantially successful in that the claimant was required to pay between 6.5 to 7.5 times more than the claimant said that he owed to the respondent. The respondent notes that she claimed \$45,194 for child support and \$20,892 for special expenses, while the claimant asserted he owed only \$4,272 in child support and \$2,500 in special expenses. The Court ordered \$41,775 in child support (less \$6,270 already paid) and \$5,779 for special expenses.
- [45] Under Rule 16-7(1), costs of a family law case must be awarded to the successful party unless otherwise ordered. A party is successful when they have achieved "substantial success", which has been equated to mean an approximately 75% success rate on disputed issues, *Fotheringham v. Fotheringham*, 2001 BCSC 1321.
- [46] Judicial discretion can be exercised so that costs do not follow the event, *Gold v. Gold* (1993), 82 B.C.L.R. (2d) 180 (C.A.). Such discretion must be exercised judicially. Factors which may be taken into account include hardship, earning capacity, the purpose of the particular award, the conduct of the parties, and the importance of not upsetting the balance achieved by the award itself.
- [47] In this case I agree that success was divided in the sense that the respondent was not awarded all of what she claimed. While she received close to what she claimed for child support, she did not receive all the expenses which she sought reimbursement for - largely because the evidence was insufficient to support the amounts claimed. In respect of the

special expenses, the respondent was not substantially successful. In that regard I observe that the issue of expenses was time consuming at the hearing of the application in large part due to the state of the records maintained by the respondent.

- [48] That said, in assessing the relative success of the parties it is necessary to look beyond the financial results of the decision to the positions taken by the parties in the application. For example, the claimant claimed that A.M. was no longer a child of the marriage when she was 18 years old because she was only attending school on a part-time basis; did not have a sufficient educational plan; and was ordinarily resident outside of Canada. I found that the claimant had sought to apply the Farden factors too strictly. Similarly, I found that the claimant did not have sufficient regard to J.M.'s circumstances, both in respect of his first year at college and not being initially able to work in the U.S. without a green card. While the respondent was not fully successful on these issues, she was substantially successful.
- [49] Accordingly, I conclude that the respondent is entitled to costs to 90% in relation to the application which was the subject of my March 17, 2015 decision. In respect of the parties' attendance in court on September 30, 2015, seeking clarification of my decision, both parties should bear their own costs.

Summary

[50] In summary, I have decided as follows:

1. A.M. continues to be a child of the marriage while she is in full time or near full time attendance at Sacramento University to obtain her bachelor's degree. During this period the claimant has an obligation to pay child support for A.M. as determined under s. 3(2)(a) of the Guidelines. Child support shall be based upon the claimant's guideline income, which for 2015 I find is \$136,388 Cdn. The claimant's obligation to pay child support is to continue while A.M. is attending university on a full time or near full time basis, as described above, until not later than the end of the fall 2017 term;
2. The claimant is to be notified within 30 days should A.M. change the number of courses she is taking during the semester (i.e. if she is attending less than full time);
3. Child support is not payable for the period A.M. was not enrolled in the fall semester of 2015;
4. A.M. is deemed to contribute \$3,400 US per year towards the cost of her education for 2015 onwards;
5. The claimant is to be provided with a copy of A.M.'s income tax return for the years 2015-2017 within 30 days of their filing;
6. The respondent must provide proof of A.M.'s registration and her transcripts of marks to the claimant within 30 days of such information becoming available. The respondent is to provide a copy of A.M.'s transcripts for the spring 2016 term within 10 days;

7. The parties are to share expenses associated with A.M.'s attendance at university on a proportionate basis, less A.M.'s contribution. The respondent's 2015 income for this purpose is imputed at \$127,351 Cdn.;
8. Expenses are to be submitted to the claimant within 30 days of their being incurred and the claimant is to pay such expenses within 30 days of receipt. If the claimant disputes any expense, he is to pay the other expenses and to notify the respondent in writing of the reason he is disputing the legitimacy of the expense claimed;
9. Costs of the application with respect to the March 17, 2015 decision are divided with the claimant bearing 90% and the respondent bearing 10% of the costs. The parties should bear their own costs of attending before the court on September 30, 2015.

"Madam Justice W.J. Harris"

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