
CANADA / JUDGMENT

Rotto v. Rotto

2014 BCSC 1320

COURT

Supreme Court of British Columbia

DECIDED

15 July 2014

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2014 BCSC 1320 Rotto v. Rotto

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Rotto v. Rotto,

2014 BCSC 1320

Date: 20140715

Docket: 06-4391

Registry: Victoria

Between:

Bradley Allen Rotto

Plaintiff

And:

Somphonethip Rotto

Defendant

Before: The Honourable Mr. Justice Johnston

Reasons for Judgment

(In Chambers)

Counsel for the Plaintiff:

G.N. Smith

Counsel for the Defendant:

D.E. Davison

Place and Date of Hearing:

Victoria, B.C.

June 18, 2014

Place and Date of Judgment:

Victoria, B.C.

July 15, 2014

- [1] Ms. Rotto applies to vary an order pronounced January 25, 2007, to require Mr. Rotto to pay child support for the child Tara who was born December 2, 1994, and to make the variation retroactive.
- [2] Ms. Rotto did not proceed with her application to vary extraordinary expenses.
- [3] The child support orders in question were contained in a desk order for divorce that provided that the child reside equally with the parents on an alternating week basis.
- [4] Since November 2011, the child has elected to live full-time with mother.
- [5] Father increased his child support payment to \$300 a month after the child started living full-time with mother.
- [6] In his filed response, father agrees that the order can be varied, and agrees that some child support should be paid in spite of the fact that the child has attained her majority. He says, however, that the Child Support Guidelines amount is not appropriate, and that some lesser amount should be ordered to reflect the child's needs, his ability to pay, and the child's ability to contribute to her own support.
- [7] The child has attended Camosun College since October 2012, with mixed success academically, and her father questions both her academic ability and her commitment to her schooling.
- [8] The relationship between child and father has become strained, and that may be a result of friction over funding of the child's education, or disagreements over some past claims for s. 7 expenses.
- [9] As the child has attained her majority, the onus is on the claimant mother to establish that she remains a child of the marriage, in this case, that the child is unable to withdraw from parental support because of reasonable educational goals.

- [10] In this case, the father's Application Response indicates consent to pay child support, subject to the qualifications set out above. I take that to be a concession that in spite of misgivings over the child's academic potential and commitment, for the time being the post-secondary academic pursuits are reasonable.
- [11] I would have found in any event that the child's educational pursuits are reasonable on the factors set out in *Farden v. Farden* (1993), 48 R.F.L (3d) 60, as follows:
- (a) the child is studying full-time, on the semester system offered by the institution;
 - (b) the child has applied for and is receiving student loans;
 - (c) while the career plans are not well defined in the evidence, the educational goal of pursuing a university business or commerce degree appears reasonable at this time;
 - (d) the child has been contributing through part-time employment, in spite of father's concerns that she may not be saving enough from that employment for her education and support;
 - (e) the child is still 19, will be 20 in six months, so it is early going in her post-majority period;
 - (f) I have little evidence on the child's past academic performance, in terms of high school marks, and agree that her performance at the college level has been mixed. She has consistently failed the mathematics courses she has attempted, as well as physics and chemistry but has scored A's, B's and C+'s in other courses. She may not be suited for disciplines requiring mathematics or sciences.
 - (g) I have little evidence of the parents' plans for their child's education other than the inference that might be drawn from the fact that they set up a mutual fund. I draw the inference that the parents had planned for post-secondary education, supported in part by the child's affidavit swearing that it was money her parents had put away for that purpose; and
 - (h) while the relationship between father and daughter is currently strained, it is not irretrievably broken, and in any event, I do not find that the child has unilaterally severed her relationship with her father. If anything, the child has shown a desire to maintain a relationship. It is reasonable for the child to look to her father for support.
- [12] I conclude therefore that the child is presently unable to withdraw from parental support, under either or both of the Divorce Act or the Family Law Act.
- [13] That does not automatically mean that support is payable, as I must also consider whether it is appropriate for the parents - in this case the father, to pay for the child's education: see *Nordeen v. Nordeen*, 2013 BCCA 178.
- [14] Here, there is an inconsistency between the father's Response to Application, in which he concedes that support is payable, and his argument on the application, where he says the child is capable of pursuing her education entirely on student loans and part-time work. Father says that with student loans of \$4,200 each semester (what the child has borrowed so far), and her earnings from part-time work of at least \$6,000 each year, she can cover tuition

and books which have cost around \$5,000 a year so far, and still have about \$13,000 to \$13,600 to live on.

- [15] Father also swears that his ability to pay child support is limited, as his business as a renovation contractor is failing, and his health impairs his ability to do hard physical work. He argues that it is reasonable to expect his daughter to incur debt to further her education before she turns to him for support.
- [16] It seems to me that the preferable approach, and the one I will adopt, is to treat parental contributions and student loan debt as necessary components of a package, so that neither has priority, in the sense that either must be exhausted before the other is taken up.
- [17] That is, an adult child can reasonably look to a parent for support while pursuing post-secondary education in order to contain or limit the amount of student loan or other debt needed to pursue that education.
- [18] Put another way, a parent who is able to contribute cannot require an adult child to take on additional debt in order to avoid parental contribution.

Ability to pay

- [19] Father's income tax information shows line 150 income of \$52,587 in 2010, \$11,077 in 2011, and \$66,000 in 2012.
- [20] Father swears that his business, which is carried out through a limited company, has been losing money since 2011, is close to bankruptcy, and likely will not survive the summer of 2014.
- [21] He swears that the income level stated in his tax returns is misleading, as the company has loaned him money in the last two years, so he could pay his mortgage, and this is reflected as income but really represents debt he owes to the company.
- [22] I can find nothing in the corporate financial statement of September 30, 2012, supporting the assertion that Mr. Rotto has borrowed from the company. The balance sheet indicates liabilities due to shareholders of \$249,220, and \$271,480 non-current liability due to related companies.
- [23] On the other hand, a more recent income statement, for the year October 2012 to September 30, 2013, shows a loan to Mr. Rotto of \$11,872, corroborating his evidence to some extent, although the size of the loan is not great.
- [24] Mr. Rotto swears that he has been told he is personally liable for \$130,000 of the company debt, and he may have to consider personal bankruptcy.
- [25] There is a non-current loan to HSBC shown at \$677,789 on the balance sheet.
- [26] On balance, I find that the company is not doing well, and cannot be counted on as a source of income.

- [27] If the company goes under, Mr. Rotto will lose benefits such as use of a company vehicle, access to entertainment expenses that counsel argue he has enjoyed to now, and should be considered as undeclared additions to his income.
- [28] Not in evidence that I can see, but stated by counsel, is that Mr. Rotto is not the sole shareholder/officer of the company, he has one or more partners.
- [29] Mr. Rotto is 44 years old: he has osteoarthritis that affects his ability to work. His doctor has recommended he seek a non-physical occupation, based on complaints of increasing pain, but has not said he cannot continue to work as a renovation contractor.
- [30] I conclude that Mr. Rotto has some ability to pay child support: his health does not preclude employment, if the company stops operating, he will find other work.
- [31] If I deduct the amount shown as a loan to Mr. Rotto in the 2012-2013 income statement, \$11,000, from the \$66,000 declared as income in 2012, and average the resulting income with 2010 and 2011, I come to about \$39,000.
- [32] The Guidelines amount based on that income would be \$361.
- [33] Recognizing the child's ability to contribute to her own education and support, a reduction is appropriate, and I order Mr. Rotto to pay child support of \$250 per month starting July 1.
- [34] Mr. Rotto will provide his complete tax return each year by May 30 to the mother, starting with his 2013 complete tax return.
- [35] The Child or her mother will provide to Mr. Rotto the child's tax return each year by May 30, as well as a copy of the child's college or university transcript for each semester within a week of receipt by the child.

Retroactivity

- [36] Mother asks that the child support be made retroactive to January 2013. Father paid \$300 per month to July, then \$400 per month from July until he stopped paying in November 2013, when the child turned 19.
- [37] A retroactive award is not appropriate in this case for several reasons.
- [38] First, any presumption in favour of child support ends when a child reaches majority; a parent seeking child support beyond that bears a burden of showing that the child is unable to withdraw from parental support, as discussed earlier.
- [39] Second, even if a payor parent ought to recognize entitlement to ongoing child support for an adult child, the quantum of such support is not merely a question of applying guidelines to the payor's guidelines income. Adult children are expected to contribute to their own support, if reasonably possible, and predicting the level of that contribution, and its deflationary effect on the payor's child support, is not easy.

[40] The application for retroactive support is dismissed.

[41] The applicant will have her costs of the application.

"R.T.C. Johnston, J."

The Honourable Mr. Justice Johnston

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