

CANADA / JUDGMENT

Rushworth v. Aleliunas

2007 BCSC 1406

COURT

Supreme Court of British Columbia

DECIDED

21 September 2007

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2007 BCSC 1406 Rushworth v. Aleliunas

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Rushworth v. Aleliunas,

2007 BCSC 1406

Date: 20070921

Docket: E877

Registry: Chilliwack

Between:

Vivian Elaine Rushworth

Plaintiff

And

Romas Aleliunas

Defendant

Before: The Honourable Madam Justice Dickson

Reasons for Judgment

The Plaintiff

Appeared on her own behalf

The Defendant

No appearance

Date and Place of Hearing:

May 7, 2007

Chilliwack, B.C.

INTRODUCTION

- [1] Vivian Rushworth seeks an order that the revised Federal Child Support Guidelines be applied retroactively to her Guidelines income and that of Romas Aleliunas in connection with their respective child support obligations. In addition, she seeks a retroactive variation, as of October 1, 2006, to her child support payable for Rika Aleliunas and an order fixing arrears owed to her by Mr. Aleliunas for section 7 extraordinary expenses.

BACKGROUND

- [2] Ms. Rushworth and Mr. Aleliunas have three children: Rika, Krista and Nikolas Aleliunas. Rika is 20, Krista is 18, and Nikolas is 16.
- [3] Rika and Krista are university students. They are both children of the marriage, as is Nikolas.
- [4] Pursuant to the December 19, 2003 order of Mr. Justice Joyce, Mr. Aleliunas' Guidelines income is \$210,000. Pursuant to the April 18, 2005 order of Madam Justice Kirkpatrick, Ms. Rushworth's Guidelines income is \$76,608.
- [5] The first term of the April 18, 2005 order of Madam Justice Kirkpatrick provides as follows:
1. By consent, the parties agree to pay to each other their proportionate shares of the children's university expenses for the first university degree consisting of tuition, residence, meal plans and text books in addition to Guidelines child maintenance for all three of their children, namely Rika, Krista and Nikolas Aleliunas while the children remain children as defined by the Family Relations Act.
- [6] Until October, 2006, Rika's primary residence was with Mr. Aleliunas, although for the past three years she has lived on campus while attending the University of British Columbia. Krista and Nikolas live with Ms. Rushworth.
- [7] Pursuant to the June 13, 2005 order of Master Caldwell, Mr. Aleliunas is obliged to pay Ms. Rushworth \$1,698 per month, commencing January 1, 2004, as the offset child support payment. In addition, he is obliged to pay 73% of section 7 extraordinary expenses for Rika, Krista and Nikolas.
- [8] Mr. Aleliunas has not paid any child support for Krista and Nikolas since March, 2005. In addition, he has not paid outstanding arrears for 2003, 2004, 2005, 2006 and 2007 or his portion of the section 7 extraordinary expenses due for 2005, 2006 or 2007.

- [9] In October, 2006, Mr. Aleliunas left his home in Abbotsford and defaulted on his home mortgage payments to the Toronto Dominion Bank. His current whereabouts are unknown to Ms. Rushworth, as is the extent to which he provides any financial support to Rika.
- [10] The Toronto Dominion Bank's foreclosure petition with respect to Mr. Aleliunas' mortgage default was heard on April 12, 2007. An order nisi was granted and a six month redemption period was set.
- [11] The lease for Rika's shared suite at the University of British Columbia is \$7,363 for the period September 1, 2006 to August 15, 2007. Her tuition fees for the 2006/07 term are \$4,972.98. In 2006, Rika earned \$4,103 from summer employment. She does not intend to return to Mr. Aleliunas' abandoned home in Abbotsford at the end of the 2006/07 university term.

ISSUES

- [12] I must decide the following questions:
1. What amount of maintenance should be payable by both parties based on the revised Guidelines?
 2. Should Ms. Rushworth's child support obligation for Rika be varied retroactively to October 1, 2006 because, as of that date, the table amount is inappropriate?
 3. What is the sum of outstanding arrears for section 7 extraordinary expenses owed by Mr. Aleliunas to Ms. Rushworth?

DISCUSSION

- [13] Pursuant to section 3(1) of the Guidelines, unless otherwise provided, the amount of child support payable is the amount set out in the applicable table and an amount, if any, for extraordinary expenses. The table amount of Guidelines child support payable was revised as of May 1, 2006.
- [14] Pursuant to the orders of Mr. Justice Joyce, Madam Justice Kirkpatrick and Master Caldwell, Ms. Rushworth is obliged to pay the table amount of child support for Rika, and Mr. Aleliunas is obliged to pay the table amount of child support for Krista and Nikolas. Taking into account the parties' Guidelines incomes, the Guidelines revisions and the usual Guidelines approach to quantification, I grant Ms. Rushworth's application for a retroactive variation and order that, as of May 1, 2006, she should pay \$711 per month in child support for Rika and Mr. Aleliunas should pay \$2,082 per month in offset child support for Krista and Nikolas.
- [15] Section 3(1) of the Guidelines provides:
3. (1) Unless otherwise provided under these Guidelines, the amount of a child support order for children under the age of majority is

(a) the amount set out in the applicable table, according to the number of children under the age of majority to whom the order relates and the income of the spouse against whom the order is sought; and

(b) the amount, if any, determined under section 7.

[16] Section 3(2) of the Guidelines deals with children who have reached the age of majority or over. Rika is such a child. Section 3(2) 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 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.

[17] The usual Guidelines approach to quantification of support applies to a child over the age of majority unless the person claiming that the usual approach is inappropriate proves that this is so: *Wesemann v. Wesemann*, [1999] B.C.J. No. 1387 (QL) (S.C.) at ¶ 13. In such circumstances, the court may exercise its discretion to move away from the Guidelines. Section 3(2)(b) does not specify how the court is to decide whether the usual Guidelines approach is inappropriate.

[18] In *Wesemann*, Martinson J. considered the basis upon which the usual Guidelines approach might be inappropriate for children over the age of majority. She stated:

¶ 16 The usual Guidelines approach is based on certain factors that normally apply to a child under the age of majority. That is, the child resides with one or both parents. The child is generally not earning an income and is dependent on his or her parents.

¶ 17 The usual Guidelines approach is, in most cases, based on the understanding that, though only the income of the person paying is used to calculate the amount payable, the other parent makes a significant contribution to the costs of that child's care because the child is residing with him or her.

¶ 18 The closer the circumstances of the child are to those upon which the usual Guidelines approach is based, the less likely it is that the usual Guidelines calculation will be inappropriate. The opposite is also true. Children over the age of majority may reside away from home and/or earn a significant income. If a child is not residing at home, the nature of the contribution towards the child's expenses may be quite different.

[19] In *Davis v. Davis* (1999), 90 A.C.W.S. (3d) 103, and *Whitley v. Whitley*, [1997] B.C.J. No. 3116 (QL) (S.C.), the court decided the usual Guidelines approach was inappropriate where the child at issue was over the age of majority, enrolled in post-secondary education and not

living in either parent's home. In these circumstances, the approach adopted was to determine the amount of support the child should reasonably expect, taking into account factors such as the child's commitment to the program, ability to earn income and access to educational funding, and to share support at that level between the parents on a proportionate basis as contemplated by section 7 of the Guidelines.

- [20] Children over the age of majority have an obligation to make a reasonable contribution to their own education. This does not mean, however, that all of a child's earnings must necessarily be used in this way. Rather, if reasonably possible, it is desirable to allow a child to enjoy personal benefit from the fruits of his or her labour by retaining some or all of the earnings received: *Wesemann* at ¶ 22.
- [21] In this case, I am satisfied that the usual Guidelines approach to quantification of child support for Rika is inappropriate. This is so because, since October, 2006, she has been a university student who lives independently and can reasonably expect proportionately shared child support from her parents to assist with her educational needs.
- [22] Accordingly, I grant Ms. Rushworth's application to vary her child support payable for Rika, retroactive to October 1, 2006. From that date, she is obliged to pay 27% of Rika's university residence fees, tuition, books and living costs and Mr. Aleliunas is obliged to pay 73%.
- [23] There was no specific evidence presented regarding Rika's living costs other than those related to her residence and tuition fees. Taking into account those fees, together with her need for books, food, and clothing, and deducting a \$1,000 contribution from her summer earnings, I assess Rika's reasonable needs for which child support is payable at \$17,000 per year.
- [24] Since June, 2005, Ms. Rushworth has paid \$21,321.59 in extraordinary expenses for Rika, Krista and Nikolas. Included within those expenditures is the cost of computer purchases for Rika and Krista for university purposes. I am satisfied that these are appropriately included within the section 7 extraordinary expense category: *Yensen v. Yensen* (2003), 125 A.C.W.S. (3d) 119, (B.C.S.C.). Mr. Aleliunas's proportionate share of section 7 arrears is \$15,562.67.
- [25] Ms. Rushworth is entitled to costs.

"Dickson J."

The Honourable Madam Justice Dickson

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