
CANADA / JUDGMENT

S.B. v. A.S.

2012 BCSC 2205

COURT

Supreme Court of British Columbia

DECIDED

30 March 2012

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2012 BCSC 2205 S.B. v. A.S.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

S.B. v. A.S.,

2012 BCSC 2205

Date: 20120330

Docket: 99-0824

Registry: Victoria

Between:

S.B.

Plaintiff

And:

A.S.

Defendant

Notice: This judgment was edited for publication purposes
on March 5, 2014

Before: The Honourable Mr. Justice G.R.J. Gaul

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

G. E. Coad

Counsel for the Defendant:

T. Rodgers

Place and Date of Hearing:

Victoria, B.C.

March 19-20, 2012

Place and Date of Judgment:

Victoria, B.C.

March 30, 2012

[1] THE COURT: By means of a notice of application filed 15 March 2012, the claimant S.B. seeks the following:

- a) sole custody and guardianship of the parties' daughter, A;
- b) an end to his child support obligation;
- c) child support from the respondent A.S., now Mrs. R., as well a direction that she pay her proportionate share of A.'s section 7 extraordinary expenses based upon an imputed income;
- d) reimbursement from A.S. for the special and extraordinary expenses he has already paid for A.; and
- e) costs.

[2] The history of this family law case has been recounted and reviewed by no less than six judges and one master of this court over the past 13 years. I see no point in reviewing the history once again. Suffice to say that from day one of this litigation, the focal point of the parties' acrimonious dispute has been the custody and care of their daughter.

Issues

[3] The issues raised by S.B.'s application require me to answer the following questions:

- 1. What custody arrangement is in A.'s best interest?
- 2. Should S.B.'s obligation to pay A.S. child support for A. be terminated?
- 3. If A.'s principal residence is to be with S.B., then what, if any, child support should A.S. pay to S.B., what proportion of A.'s section 7 expenses should A.S. pay, and how should those amounts be calculated?
- 4. What, if any, of the past expenses that S.B. is claiming, is A.S. responsible for?

Custody / Guardianship / Access

- [4] It is with a not insignificant amount of regret and sadness that A.S. has accepted that A. does not, at the present time, want a relationship with her. Counsel for A.S. has quite properly pointed to my reasons for judgment from previous hearings and my observations that S.B. has been intolerant of the way in which A.S. has parented A.. Moreover, I found that S.B. was principally responsible for the tremendous stress that A. has felt with respect to choosing where she wanted to live.
- [5] It is in that context and with a desire to eliminate her daughter's stress and anxiety, that A.S. is, in essence, "waiving a white flag" in surrender and accepting the inevitability that A.'s principal residence should be with S.B. In agreeing to this, A.S. asserts with conviction that she continues to fervently wish to be a part of A.'s life as much as she can, and as much as A. will allow her.
- [6] I have previously found that the parenting styles of the parties are as different as chalk and cheese. S.B. is focused and regimented to the point of being, in my view, overbearing. A.S.'s approach to parenting appears to be more laissez-faire and unstructured. It is quite clear to me that S.B. cannot tolerate the manner in which A.S. parents A.
- [7] In my opinion, S.B. has been disrespectful of A.S.'s rights and abilities as a parent of A. He has been aggressive, not in the physical sense, but more in an emotional and dictatorial sense. Everything with respect to A. appears to have to be his way. His intransigence and desire to control the situation regarding A., even when she has been in the care of A.S., has verged on the obsessive. None of this reflects well on S.B.; nor might I add has it made the situation any easier for A.
- [8] I must make one last comment before leaving this topic. It recently came to light that A. did not have all of her health care immunization shots. This upset S.B. I accept that this also upset A.S.. In email correspondence to S.B., A.S. expressed her regret that this had happened and she apologized for this oversight on her part. This response from A.S. was not satisfactory to S.B.. He thought and told A.S. in email correspondence that she should apologize directly to A. Let me be clear, in the court's opinion there are no grounds for S.B. to make this request or this suggestion. It is not for him to tell A.S. what she should or should not say or do with A. in this regard. Equally important is S.B. should not tell A. that she should expect these things from her mother. That is not his role, and I find he has improperly and grievously overstepped his parental boundary.
- [9] Notwithstanding all of this, the key issue remains A.'s best interest. The situation continues to be a stressful and unhealthy one for the child, and in my view the time has come to provide a greater degree of certainty in her life. It is unfortunate that the relationship between A. and her mother has soured to the degree that it has. Hopefully with time and maturity, A. will want to re-establish a positive relationship with her mother. Time will tell.

- [10] There are no grounds for a joint parenting regime in this case, and regretfully the court must now acknowledge that there never were. To a great degree, the reason for that lies at the feet of S.B. and his desire to be in control.
- [11] The hope expressed by the court on more than one occasion during this protracted litigation that the parties would be able to rise above their differences and co-parent A. in a respectful and nurturing way was expecting too much from them. Generally, a child benefits from his or her parents' ability to set aside their personal differences so that they can co-parent the child in a constructive manner. However in this case, the animosity and distrust between S.B. and A.S. has been too great and has prevented them from co-parenting A. in any meaningful way.
- [12] I previously found that S.B. and, to a lesser degree, his wife Mrs. S.B. placed inappropriate pressure on A. to decide where she wanted to live. I also found that S.B. should have done more to assist and encourage A. to spend time with her mother. Regretfully and for reasons that are not understood by the court, S.B. has been unable or unwilling to do that.
- [13] It is, however, time to close the chapter of this story that held out the ill-fated hope of a positive co-parenting regime. There will be no winner in this case. All that can be hoped for is some peace and stability for A.
- [14] Although the means by which A.'s present home environment have been established have been far from perfect, and here I am referring to S.B.'s drive to highlight what he believes is the proper and healthy one he offers as opposed to the disorganized and unhealthy one offered by A.S., it would appear that the end result has been a safe and reasonably comfortable home for A. As I said earlier, perhaps with time and maturity, A. will find the will to reconnect with her mother. But for now she is with her father and although there continues to be a significant amount of stress around her, she appears to be doing well in all of her personal endeavours. In reaching this conclusion, I have taken note and given serious consideration to the evidence of Doug Emid, an experienced registered clinical counsellor who has, for some time now, been seeing A. and helping her manage the stress and confusion this family law litigation has created for her.
- [15] To her credit, A.S. recognizes and accepts A.'s need for stability in her life and to avoid any further stress for the child, A.S. is prepared to agree to S.B.'s request for sole custody.
- [16] Pursuant to s. 35 of the Family Relations Act, I will grant S.B. custody of A. That means he will be the principal custodial parent responsible for the day-to-day care of A.
- [17] With respect to the guardianship of A., I make the following order:
- a) S.B. and A.S. will share the guardianship of the estate of A.;
 - b) In the event of the death of either parent, the remaining parent will be the sole guardian of A.

[18] Let me pause for a moment and comment on this term of my order. At paragraph 12 of his affidavit number 27, sworn 17 March 2012, S.B. asserts that by wanting to be A.'s sole guardian in the event of his death, A.S. is placing her personal agenda ahead of A.'s wellbeing. I reject this contention and find this is another example of S.B.'s overbearing attempt to denigrate A.S.'s desire to be A.'s mother. In my view this behaviour is destructive and it should stop. Although she has reluctantly relinquished legal custody of A., A.S. has made it patently clear to the court that she wishes to remain a part of her daughter's life. This term of my order recognizes that fact.

[19] I will now return back to the terms of my guardianship order.

- c) S.B. will have, subject to what I have to say in a moment, the exclusive decision-making authority regarding all matters relating to A., including but not limited to her medical care and treatment, education, travel within Canada and abroad, and her extracurricular activities.
 - d) Within 30 days of this order, S.B. is to provide A.S. with:
 - i. the name and contact information for any school or other educational institution that A. presently attends;
 - ii. the name and contact information for all of A.'s current sport coaches;
 - iii. the name and contact information for the person or persons presently responsible for each of A.'s non-athletic extracurricular activities;
 - iv. the name and contact information for all of A.'s current healthcare professionals; and
 - v. the name and contact information for all of A.'s current third-party caregivers, such as after-school care.
 - e) If, over time, there are any additions or deletions to this list of individuals, then S.B. is to send A.S. a revised list within three days of him becoming aware of any such change.
 - f) A.S. has the absolute right to obtain information relating to A. directly from any of the individuals, institutions, or organizations recorded on the said list.
 - g) No later than 14 days prior to any non-emergency medical treatment for A., S.B. is to advise A.S. in writing of the nature of the proposed treatment and the name and contact information of the treating physician.
- [20] A.S. is to have liberal and generous access to A. and may, in her own discretion, initiate contact with the child by whatever means she deems appropriate, including but not limited to contact by mail, email, telephone, or other electronic communication such as Skype.
- [21] If and when A. wishes to have contact with A.S. or any other member of A.S.'s household, then S.B. is to permit A. to initiate such contact.

S.B.'s Child Support Obligation

- [22] The order of Mr. Justice Joyce pronounced on 29 February 2008, directed that S.B. pay A.S. \$364 per month in child support for A.
- [23] On 17 December 2010, I suspended S.B.'s child support obligation because A. was residing principally with him and would, on an interim basis or until further order of the court, continue to do so. That situation has not changed and A. continues to reside with S.B.
- [24] In light of the present circumstances, A.S. accepts there is no reason for the child support provision of Mr. Justice Joyce's order to continue.
- [25] Effective immediately, paragraph 7 of Mr. Justice Joyce's order is vacated.

A.S.'s Child Support Obligation and her Share of Special Expenses

- [26] A.S. acknowledges that she will now be responsible to pay S.B. some form of child support for A. The issue that needs to be resolved is the calculation of the amount of child support and what proportion of A.'s special expenses A.S. should pay.
- [27] A.S. argues her Guideline income for the determination of child support is the line 150 amount recorded on her annual income tax return, minus any universal child care benefit she receives. A.S. also maintains that any income A.S.'s family receives from the rental suite they have in their home should not be attributed to her, as her husband, Mr. R., claims all of that income on his income tax returns. Using the formula advocated by A.S., her 2011 Guideline income would be \$12,200.
- [28] S.B. argues that I should impute an annual income of approximately \$20,725 to A.S. In reaching this figure, S.B. points to the fact that in 2008, prior to A.S.'s marriage to Mr. R., her income, based upon her disability pension and social assistance grant, was approximately \$16,000. On account of her marriage to Mr. R., A.S. ceased receiving the social assistance grant, and consequently her income has decreased to approximately 11,500.
- [29] S.B. asserts that the social assistance amount should be added back to A.S.'s income for the purposes of calculating her Guideline income. He also maintains that half of the rental income the R. family receives should be attributed to A.S., as she is a co-owner of the premises. The evidence before me at the hearing in 2010 indicated that the R. family were receiving \$800 per month for the suite.
- [30] On the application currently before me, the evidence presented by A.S. relating to the income she and her husband receive for the rental suite is incomplete. The reason for that is unclear. This is concerning to the court, given the income was one of the key reasons why the matter was adjourned for later determination.
- [31] The affidavits of Mr. R. sworn on 14 and 19 March 2012 are vague and unhelpful when addressing the question of the rental suite income. On the one hand, Mr. R. claims to have made renovations and improvements to the suite; yet on the other hand, he speculates that

he will only receive or they will only receive approximately \$600 per month in rent. I do not accept this evidence. This was, as I say, an important facet of the previous hearing before me. The parties knew this and I expected more detail from A.S. regarding this aspect of her financial circumstances.

- [32] In my opinion, this is an appropriate case to impute a greater income to A.S. than what is shown on her tax returns.
- [33] I do not accept that the deletion of the social assistance grant should be included in the calculation of A.S.'s income. The grant was eliminated because of A.S.'s marriage to Mr. R. In my view she should not be penalized for this life decision and I find including the grant back into the calculation of her income would do just that.
- [34] What should be included in A.S.'s income is a one-half share of what one would expect to be the rental income from the suite in the A.S. household. I accept the submission of counsel for S.B. that the rental income should be the amount that was in evidence at the earlier hearing before me, that is \$800 per month. It makes little sense to the court that after renovations of a suite, the rental income would be less than what was received before it was renovated.
- [35] For the purposes of this application, I find the yearly gross rental income for the suite should be \$9,600. Deducting \$5,000 from this amount for the expenses incurred in operating the suite, I find the net rental income for the suite is \$4,600. A.S.'s share of this amount is therefore \$2,300.
- [36] I consequently find that A.S.'s Guideline income was:
- a) \$15,928 in 2008;
 - b) \$12,030 in 2009;
 - c) \$14,025 in 2010;
 - d) \$14,500 in 2011.
- [37] A.S. had argued that the calculation of her 2008 income should include a further deduction because of an overpayment of pension benefits. A letter from Great West Life Assurance Company dated 16 January 2009 attached to A.S.'s affidavit number 21, sworn 5 August 2010, was the principal evidence offered in support of this argument. I have examined the letter and its lack of detail leaves me unpersuaded that A.S.'s 2008 Guideline income should be reduced in the way she claims.
- [38] Based upon the annual incomes of S.B. for the same years, A.S.'s proportionate share of special expenses A. would be 23 percent for 2008; 17 percent for 2009; 20 percent for 2010 and 21 percent for 2011.

Retroactive Reimbursement for Past Special Expenses

[39] At Exhibit F of S.B.'s Affidavit Number 27, sworn 17 March 2012, he lists the various extraordinary expenses for the years 2008 to 2012 for which he seeks a proportionate reimbursement from A.S. For the following reasons, I am denying S.B.'s request relating to the expenses for 2008 to 2011 inclusive.

[40] I find S.B. is not entitled to the compensation he seeks because, in my respectful view, he does not come to the court with clean hands. That is, he has not been candid with the court regarding his own financial affairs and he has shown a consistently cavalier approach to abiding by court orders. That will not be condoned.

[41] In my order of 24 May 2011, I directed that S.B. pay A.S. \$560 in compensation for the amount she had paid for A.'s counselling with Mr. Emid. The wording of paragraph 11 of the order was clear:

The Claimant shall pay to the Respondent the sum of FIVE HUNDRED SIXTY (\$560.00) DOLLARS to reimburse her for the payment of more than THIRTY (30%) per cent of the costs of counselling with DOUG EMID.

[42] On 29 October 2011, A.S. sent S.B. an email asking him, amongst other things, when he will pay her the \$560. S.B.'s email replied on 2 November 2011 indicating:

As for any other funds you may be owed, we can offset that amount against what you owe me.

[Emphasis added.]

[43] In my view, S.B.'s response reflects what I have concluded is his generally self-serving approach to interpreting court orders. The \$560 was not an amount that "may be owed"; it was a sum certain that was owed. It was not for S.B. to interpret the order in the way he did. He was ordered to pay A.S. \$560; he has not and I find there is no excuse for that conduct. The fact that S.B.'s affidavit number 27, sworn 17 March 2012, is silent with respect to the issue is further evidence that he has no valid excuse for his failure to make the necessary payment.

[44] Similarly, S.B.'s conduct and the steps he has taken regarding the establishment of a trust account or RESP for A. is, in my view, less than admirable. I accepted S.B.'s evidence at the hearing before me that he had been paying regular child support to the Family Maintenance Enforcement Program ("FMEP") and that these funds were being held by that authority pending a court determination. I ordered that those funds be released to S.B. and that he deposit them into the trust account for A. or a Registered Education Saving Plan ("RESP") in her name. Paragraph 9 of my order dated 17 December 2010 is clear:

The child support currently held by the Family Maintenance Enforcement Program . . . shall be released to the Claimant and the Claimant shall deposit such funds into an interest-bearing Trust Account for the benefit of the child, or into a Registered Education Savings Plan . . . for her, with both parties being the Trustees of such account or RESP; and the signatures of both parties shall be required to withdraw funds from such Account or RESP;

[45] I am now advised that FMEP only processed one of S.B.'s payments, and consequently held only approximately \$360. This represented the one cheque that was cashed in June of 2010. FMEP did not have the approximate \$4,300 that I was led to believe. It was suggested before me that S.B. was not aware that the cheques he had been providing to FMEP were not being cashed. I reject this suggestion. It is clear to me that S.B. is a very organized, focused, and aware individual. S.B. asks too much of this court when he says I should accept the fact that he was not aware that his cheques were not being cashed by FMEP.

[46] Irrespective of the amount that was to go into an account for A., S.B. failed to comply with the order. In her email of 29 October 2011, A.S. enquired of S.B.:

I would like to know the status of the educational fund you were ordered to obtain, with both of our names as trustees.

[47] S.B.'s email response of 2 November 2011 included:

Regarding A.'s education fund, I should be able to resolve that situation when my RRSP matures in 2014. I would be able to transfer funds from that account and that way I would not have to go further into debt in order to satisfy this expense.

[48] At paragraph 19 of his affidavit number 27, S.B. explains why he has not yet created or complied with the terms of my order as follows:

. . . I spoke to several financial institutions including TD Canada Trust. They have informed me that they do not set up trust funds for such a small amount as ordered by the Court. A. would require a Social Insurance Number in order to set up an RESP. She is only 13 years old and I believe does not qualify for a number. I have as an alternative set up a \$4304 savings account in A.'s name only . . .

[49] S.B.'s assertion makes little sense and I simply do not believe him. Where he gets the idea that a child of 13 cannot obtain a social insurance number, is unknown. What is known is he is incorrect in that belief. Moreover, the irrationality of his position, that is, a child under the age of 13 cannot be the named beneficiary of an RESP, should be obvious.

[50] On 15 March 2012, S.B. opened a "youth account" with TD Canada Trust in A.'s name. On the same date he obtained a \$4,303 guaranteed investment certificate in A.'s name and deposited it into her account. S.B. has provided no explanation why it took him so long to open the account, nor has he explained why he did not comply with my order that directed that A.S. be signatory on the account. This, in my view, is yet another example of S.B.'s cavalier approach to court orders made in this family law proceeding, and once again the court

cannot condone such behaviour.

[51] I am therefore denying S.B.'s claim for retroactive special expenses and I am doing so because of his failure to comply with previous court orders. I should also note parenthetically that in any event, I am not persuaded on the evidence before me that many of the expenses claimed would fall within the category of extraordinary expenses as that term has been interpreted in the jurisprudence.

[52] For 2012, A.S. will be responsible for 21 percent of A.'s section 7 expenses. That percentage is based upon A.S.'s 2011 income.

Order

[53] The terms of my order will be as follows:

- a) S.B. will have sole custody of A.
- b) S.B. will have the exclusive decision-making authority regarding all matters relating to A., including but not limited to her medical care and treatment, education, travel within Canada and abroad and extra-curricular activities.
- c) Within 30 days of the date of this order, S.B. is to provide A.S. with a list containing:
 - i. the name and contact information for any school or other educational institution that A. presently attends;
 - ii. the name and contact information for all of A.'s current sport coaches;
 - iii. the name and contact information for the person or persons presently responsible for each of A.'s non-athletic extracurricular activities;
 - iv. the name and contact information for all of A.'s current healthcare professionals; and
 - v. the name and contact information for all of A.'s current third-party caregivers, such as after-school care.
- d) If, in the future, there are any additions or deletions to the said list, then S.B. is to send A.S. a revised list within three days of him becoming aware of any such change.
- e) A.S. has the absolute right to obtain information relating to A. directly from any of the individuals, institutions, or organizations recorded on the said list.
- f) No later than 14 days prior to any non-emergency medical treatment for A., S.B. is to advise A.S. in writing of the nature of the proposed treatment and the name and contact information of the treating physician.
- g) A.S. is to have liberal and generous access to A. and may, in her own discretion, initiate contact with A. by whatever means she deems appropriate, including but not limited to mail, email, telephone, or other electronic communication such as Skype.

- h) If and when A. wishes to have contact with A.S. or any other member of her household, then S.B. is to permit A. to initiate such contact.
- i) Paragraph 7 of the order of Mr. Justice Joyce pronounced 29 February 2008 is vacated.
- j) A.S. shall pay S.B. child support for A. in accordance with the Federal Child Support Guidelines, based upon A.S. having an income of \$14,500, commencing 1 April 2012 and continuing thereafter on a monthly basis.
- k) For 2012, A.S. will pay 21 percent of A.'s section 7 expenses.
- l) S.B.'s claim for retroactive reimbursement of section 7 expenses for the years 2008 to 2011 inclusive is dismissed.
- m) The parties have leave to speak to the issue of costs. If, within the next 14 days, a hearing date has not been scheduled, then the parties will bear their own costs.
- n) I will remain seized of all matters relating to this family law matter.

Postscript

[54] One last comment. This has been a difficult matter for both families. I also have no doubt that it has been very upsetting for A. The level of distrust and animosity exhibited by the parties has made this case a challenging one for everyone involved, counsel and the court included. Notwithstanding the high emotions and bad feelings of their clients, counsel performed their duties in an admirable and professional manner. They advanced their clients' cases in a respectful but vigorous way, and their submissions assisted the court in addressing the complicated issues in dispute.

[55] I thank counsel for their fine efforts.

"G.R.J. Gaul J."

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