

CANADA / JUDGMENT

S.M.W. v. R.E.W.

2013 BCSC 2362

COURT

Supreme Court of British Columbia

DECIDED

23 December 2013

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2013 BCSC 2362 S.M.W. v. R.E.W. IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: S.M.W. v. R.E.W., 2013 BCSC 2362 Date: 20131223 Docket: 1781 Registry: Invermere Between: S.M.W. Claimant And R.E.W. Respondent Before: The Honourable Mr. Justice Melnick Reasons for Judgment Counsel for the Claimant: J. Lalonde, A/S Counsel for the Respondent: J. Gelber Place and Date of Hearing: Cranbrook, B.C. December 2 and 4, 2013 Place and Date of Judgment: Invermere, B.C. December 23, 2013

- [1] These are cross-applications principally regarding child support for the parties' two children who are of the age of majority. I. BACKGROUND
- [2] The parties have been separated since 2001. They were divorced in 2002. They have two children, D. a male aged 23 and C. a female aged 21. The respondent, R.E.W., is paying child support to the claimant, S.M.W., pursuant to the order of Mr. Justice Pearlman dated December 13, 2010, in the amount of \$583 a month based on an income of \$38,000 a year. The order states that the payment of child support should continue as long as the children continue to be children of the marriage.
- [3] D. suffers from both Autism Spectrum Disorder ("ASD") and Obsessive Compulsive Disorder ("OCD"). He continues to live with the claimant. He works part-time at a fast food restaurant. His employment consists of stocking shelves two mornings a week, about six to eight hours in total each week.
- [4] D. also applies for, and receives, income assistance. The claimant is a bookkeeper with a home-based business. She assists D. to make the application which is required each month although, at times, she is too busy with her own work. D., she suggests, is incapable of completing the forms in a consistently error-free manner. Such errors result in the income assistance being cancelled. In 2012, D.'s income was \$12,200 from both income assistance and his employment. However, says the claimant, expenses for his care far exceed this income. His shoes are unusually wide and cost \$1,150 a year. He needs orthotics. D.'s OCD results in the claimant having to wash his clothing far more often than would usually be required. Cleaning products and water are about \$200 a month. Clothing expense is about \$4,500 a year (D. is 6 foot 3 inches tall and weighs 280 pounds). His sensitivity to light results in over \$500 a year in expense for sunglasses. He is reliant upon but hard on computers.

- [5] D. is not able to obtain a driver's licence. As there is no public transportation where the claimant and D. live, she must provide it.
- [6] D. takes courses, one at a time, on-line from Thompson River University. This is intended to lead to an Associate of Science degree, a 60 credit program usually completed in two years of full-time study. D. has been studying daily on the courses since September 2010.
- [7] The parties contributed to education funds for each of the two children with the Canadian Scholarship Trust Plan ("CSTP"). C. has used hers already. But there is about \$14,000 in a plan for D. The claimant wishes to have access to it for D.'s "tuition and expenses". She does not say what the tuition or expenses are. The respondent does not object, he says, to releasing it (he must sign a release as a joint contributor) as long as D. is eligible to receive benefits from the CSTP and they are paid directly to the institution. But correspondence from him to the claimant shows that his original position is that he would release the CSTP only if the claimant gave up any claim for child support. In that case, he said in correspondence, the claimant could deal exclusively with the CSTP and use it as she saw fit. If D. cannot qualify to use the CSTP, then the respondent wants the fund paid out pursuant to certain terms in a separation agreement between the parties dated November 9, 2001. Section 8(3) of that agreement provides: The Husband shall contribute to the Registered Education Savings Plans in the amount which the spouses have been contributing to the Plans during the marriage and the spouses shall be named as the joint trustees for the Plan. In the event that the funds are not fully paid out from the Registered Education Savings Plans for the children's education, the funds remaining shall be equally divided between the children after payment of any taxes arising from the release of funds from the Registered Education Savings Plans.
- [8] I was not provided with the terms of the CSTP.
- [9] C. is in the fourth and last year of an engineering program at a university in Alberta. She will complete her degree in the spring of 2014. There is no affidavit from her respecting her financial circumstances or further study goals. The claimant says that C. intends to pursue a further degree in architecture. She also says that C. cannot have a part-time job during the school year due to the high course load she carries. She does work during the summer. She earned \$15,000 in 2012. She also received student aid from Student Aid BC of \$7,668. Her total education costs were noted to be \$18,668 for the 2012-2013 school year in a form appended to an affidavit by the claimant. As of September 2013, she owed \$17,673 in Canada/ British Columbia student loans. The claimant says she gives C. \$4,480 a year to pay for her rent while at university.
- [10] The claimant purchased a car for C. in November 2008 at a cost of \$8,300. The respondent refused to contribute to the cost of the car.
- [11] The claimant also maintains that the respondent is a violent man and that she is very afraid of him. She lives in Invermere, he in Grand Forks, a considerable distance apart. She does not recount any incident of physical violence in recent years. She said he yelled obscenities

at her when, in 2008, she requested money to assist with the purchase of the car. She says this behaviour is a common feature of any telephone discussion they may have. She says the physical violence directed toward her was during the marriage. Her fear of him has, she says, resulted in her not being candid with him about such information as D. having applied for and received income assistance in the past.

[12] The claimant's 2012 income was \$51,794. The respondent's 2012 income was \$59,168. II. DISCUSSION

1. Child Support for C.

[13] Any consideration of C.'s continuing need for child support is properly considered under s. 3(2)(b) of the Federal Child Support Guidelines, SOR/97-175 as amended ("the Guidelines"). Section 3(2) of the Guidelines 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.

[14] The relevant factors that I must consider are stated in *Farden v. Farden* (1993), 48 R.F.L. (3d) 60 [Farden] at 64:

- (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.
- [15] Because C. lives away from home, consideration of continued child support under the Guidelines would not be appropriate. She is enrolled in full-time studies, has applied for and received financial aid and is assisted as well by the claimant. Whether it is appropriate in her circumstances for her to pursue another degree in another field is a very good question. She contributes to her own needs by working during the summer. I accept that part-time employment during the school year is not a realistic option for her. At 21, she has demonstrated a real commitment to study and hard work for which any parent should be proud. She gets excellent marks. The parties clearly planned during their cohabitation for C. to attend a post-secondary institution by the establishment and funding of C.'s CSTP. Finally, C. and the respondent do not communicate. I doubt that state of affairs is due only to her attitude to her father although, without evidence from her, I cannot say.
- [16] Overall, I am satisfied that, until C. completes her current course of studies in Alberta in the spring of 2014, she will continue to be a child of the marriage for whom the respondent must pay child support in that she cannot, at this time, withdraw from the charge of her parents. Thereafter, the claimant and C. will have to establish that she still qualifies as such. At present, however, the respondent has the means to continue assisting with her support. I will deal with quantum later in these reasons.
2. Child Support for D.
- [17] As D. still lives at home, the more appropriate measure by which to consider his need, if any, for support is pursuant to s. 3(2)(a) of the Guidelines.
- [18] Given the extent to which his ability to function is affected by his medical conditions of ASD and OCD, I am satisfied that D. cannot withdraw from the charge of his parents (really the claimant) or even obtain the necessities of life. The income assistance he applies for monthly in addition to the very nominal amount he earns does not provide him with sufficient income to come anywhere close to meeting his needs. I see no end in sight for this unfortunate state of affairs. The claimant may well say that a discernable goal will be a state of semi-independence for D. but, not due to any fault of his, that will be a long way off if ever. Given the root causes of his disability, the "Farden factors" are not of as much assistance to me as they were in dealing with C.'s status.
- [19] D. is enrolled in a part-time course of study which he apparently works at diligently. Whether he can realistically expect to ever graduate from the course of study he is pursuing with the diploma and tools with which to become financially independent of the claimant and the respondent, or even semi-independent in a realistic way, is doubtful to me on the material I have considered. That said, he should not be denied the life-enriching satisfaction of the pursuit of that study, even at the pace at which he appears capable.

[20] At 23 years of age, his prospects for any realistic form of financial independence are slim. I have no doubt that he continues, and will for the foreseeable future continue, to be unable to withdraw from the charge of his parents or to obtain the necessities of life. The respondent must continue to provide the claimant with child support for him.

3. Quantum of Child Support

[21] With what I find to be his income of \$59,000 for the purposes of the Guidelines, the respondent is responsible for paying \$546 a month if paying for one child, or \$895 if paying for two children, if one uses the Guideline amounts. But I find that, in considering the need of C. under s. 3(2)(b) of the Guidelines, given her education expenses, the financial ability of each of her parents to assist her needs, her own income, and government loan support available, a monthly contribution to her of \$200 is sufficient. I would make that responsibility retroactive to September 1, 2013. Thus, if the respondent has been paying more than that he is entitled to a credit. If he has been paying less, or not at all, there will be an order for retroactive support accordingly.

[22] With respect to D., I am satisfied that his income from employment is so nominal as to not be a factor. The income assistance he receives falls far short of his realistic needs. It is fair and reasonable that the respondent pay child support to the claimant for D. based on the Guideline amount for one child, or \$546 a month.

[23] Thus, the total Guideline obligation of the respondent to pay child support to the claimant is \$746 a month through to and including April 2014 and \$546 thereafter. But the claimant has specifically asked only that the respondent continue paying the current \$583 a month. So that is what I order, except that support will reduce to \$546 a month as of May 1, 2014. The claimant also advances a claim for extraordinary expenses. In many ways, perhaps because of the needs associated with his disability, some of the expenses she details do, in fact, strike me as extraordinary. In the result, I am not comfortable about making such an order absent independent affidavit evidence as to the necessity of these expenses such as clothing, sunglasses and so on. I would not allow that claim.

4. CSTP

[24] In paragraph 19 above, I gave my view as to the value of D. of continuing with the on-line program of distance education in which he is involved. I do not know the criteria set by the CSTP for what constitutes appropriate use of this fund for education purposes. But if anyone should have to be convinced of what is valuable and useful for D. it should be the CSTP, not the respondent. I find that his real objective in not cooperating with making these funds available for D. was to avoid paying further child support; subsequently making it appear that he was willing if it could be justified to be proper education.

[25] I suspect that the CSTP has criteria that will have to be satisfied. But it should now be left to the sole responsibility of the claimant to do so as she has shouldered the entire burden of caring for D. and, indeed, educating him to the extent he is capable of pursuing it. I direct that within 14 days the respondent provide to the claimant whatever form of consent she requires to vest the sole decision-making authority respecting the CSTP for D. in her name. Liberty to apply if it is not forthcoming as directed.

5. Financial Information

[26] The respondent shall provide to the claimant by June 30 each year, his income tax return or notice of assessment and any other financial data that is relevant to determining his income for the purpose of calculating child support under the Guidelines. As I have not allowed the claimant's claim for extraordinary expenses, there is no concurrent obligation on her to provide information on her financial status to him. She shall, however, provide him with D.'s income tax return or notice of assessment for each year that he continues to be a child of the marriage by June 30. She shall also provide him with an annual accounting of the use of D.'s CSTP and account to him for any amount that may be refundable to him if the plan is collapsed. I would not place the burden on the claimant of the extensive financial disclosure sought by the respondent other than the above.

6. Protection Order

[27] I accept that the claimant harbours a fear of the respondent based on what she alleges was his treatment of her during the marriage. But this is historical conduct, not recent, and apart from occasional telephone conversations, the parties are unlikely to be in contact. The material does not justify my binding the respondent to the onerous terms of a protection order respecting the claimant and the two children. And again, there is no affidavit from C. saying she has any fear of harm from her father. III. CONCLUSIONS

[28] I conclude that:

1. C. and D. are both children of the marriage for whom the respondent must pay child support;
2. The amount of child support payable is, at the request of the claimant, fixed at \$583 a month for C. and D. until and including April 2014. Thereafter it will be \$546 a month for D. only;
3. The claimant's claim for extraordinary expenses for D. is dismissed;
4. The respondent will provide financial disclosure to the claimant as noted above by June 30 each year. The claimant will provide financial disclosure respecting D.'s income and D.'s CSTP as noted above by June 30 each year;
5. The respondent will provide the claimant with an executed document she will create to make her the sole person responsible for determining the educational use of D.'s CSTP;
6. The claimant's claim for a protection order is dismissed;

7. The respondent's application that child support for D. be varied to account for D.'s income and ability to work is dismissed;
8. The respondent's application to reduce child support for D. is dismissed;
9. The respondent's application that there be a retroactive review of child support paid by the respondent for D. is dismissed;
10. The respondent's requests for financial disclosure by the claimant are dismissed except to the extent set out above;
11. As the claimant was largely successful on these applications, she is entitled to her costs on Scale B. "Melnick J."

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