
CANADA / JUDGMENT

T.M.J. v. A.I.F.

2012 BCSC 551

COURT

Supreme Court of British Columbia

DECIDED

17 April 2012

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2012 BCSC 551 T.J.M. v. A.I.F.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

T.J.M. v. A.I.F.,

2012 BCSC 551

Date: 20120417

Docket: E037805

Registry: New Westminster

Between:

T.J.M.-F. a.k.a. T.J.M.

Claimant

And

A.I.F. a.k.a. A.I.F.

Respondent

Before: The Honourable Mr. Justice Truscott

Reasons for Judgment

Counsel for the Claimant:

B.C. Hirsch

The Respondent, appearing on his own behalf:

A.I.F.

Place and Date of Trial:

New Westminster, B.C.

February 27, 28, and 29, 2012

Place and Date of Judgment:

New Westminster, B.C.

April 17, 2012

- [1] The claimant seeks a divorce and a change of name, retroactive and ongoing child support, and a contribution towards special or extraordinary expenses. Property issues have been settled between the parties directly.
- [2] The parties were married in a religious ceremony on July 13, 2001 and again in a civil ceremony on July 19, 2002. They separated on March 26, 2010.
- [3] The claimant is now 34 years of age and the respondent 35 years of age. They have two children, both girls, T. age 8 (born November 14, 2003) and J. age 6 (born August 22, 2005).
- [4] The parties agree to joint custody and guardianship of the two children.
- [5] Both children presently reside with the claimant and she wishes to maintain their principal residence while the respondent wishes to provide principal residence for the children 50 percent of the time under a shared custody regime, with an entitlement to contribution from the claimant for child support. The respondent also seeks spousal support from the claimant.
- [6] The parties agreed on a without prejudice basis in an interim consent order of July 4, 2011 to joint custody and guardianship of the children and principal residence with the claimant with the respondent to have access every second weekend. The respondent also agreed to pay child support of \$100 per month commencing July 1, 2011.
- [7] At the end of trial I ordered the parties divorced effective 31 days after February 29, 2012. I also granted the claimant a change of last name to M.
- [8] In addition I authorized the claimant to take the two children to Disneyland in the period of time May 21 - 27, 2012 and ordered the respondent to provide the necessary authorization in return for his right to have his access time with the children made up at another time should any of the days of the trip fall on his scheduled access time.

Joint Custody and Guardianship

- [9] The parties agree to joint custody and guardianship and the terms of guardianship will be as set out in the Joyce Model, with the claimant having the right to make any major decision if the parties are not able to agree despite their best efforts, and the respondent having the right to seek a review of that decision in Court under s. 32 of the Family Relations Act, RSBC 1996, c. 128.

Shared Custody/Principal Residence

- [10] The respondent presently lives in an apartment with another woman and her two children. There are only two bedrooms in the apartment and when his children come to visit they camp out in the living room or double up with others in a bedroom.
- [11] Sometimes the respondent exercises access at his sister's place which already has three occupied bedrooms, or at his mother's place where the children are able to sleep in their own bedroom. The respondent owns a two bedroom condominium himself which he purchased shortly after separation for \$310,000, but has rented out those premises for \$1,400 per month because he says he ran into financial difficulties and could not afford to live there himself. He owes \$290,000 on the purchase of his condominium.
- [12] He says when the lease expires on his condominium he intends to move back in and provide a separate bedroom for his two daughters if he is entitled to shared custody of them 50 percent of the time.
- [13] For the time being I consider it in the childrens' best interest to maintain their principal residence with their mother, the claimant, with expanded access to the respondent. The respondent's request for shared custody is denied and joint custody will continue.
- [14] The claimant took her \$120,000 from the sale of the matrimonial home, together with money she obtained from her parents, and purchased a three bedroom condominium for her and the children for approximately \$430,000. She carries a \$230,000 mortgage on that condominium. I consider this suitable living accommodations for the children.

Access

- [15] The respondent will have access to the children pursuant to the following schedule commencing immediately:
1. Every second weekend from Friday at 2:45 p.m. to Sunday at 7:30 p.m.;
 2. Two mutually agreed upon full weeks, from Friday at 2:45 p.m. to the following Friday at 7:30 p.m., in July or August each year;
 3. August 22nd from 2:45 p.m. to 8:00 p.m. to celebrate J.'s birthday; and
 4. November 13th from 2:45 p.m. to 8:00 p.m. to celebrate T.'s birthday.

(the "Regular Access Schedule")

[16] The holiday access schedule which will override the Regular Access Schedule will be as follows:

School Spring Break

1. The school Spring Break will be split between the parties with the claimant to have the children for the first half of the school Spring Break in 2013 and the respondent to have the children in the second half of 2013 with the times reversed each year thereafter.

Easter Weekend

2. The children will be with the respondent on this weekend in even numbered years from Friday at 2:45 p.m. to Monday at 5:00 p.m. and with the claimant in odd numbered years.

Respondent's Birthday - April 28th

3. If the children are not otherwise with the respondent on this day, the children will be with him from 2:45 p.m. to 8:00 p.m. that day.

Mother's Day Weekend

4. If the children are not otherwise with the claimant on this weekend the children will be with her on the Mother's Day weekend from Saturday at 9 a.m. to Sunday at 5:00 p.m.

Victoria Day Weekend

5. The children will be with the respondent on this weekend in even numbered years from Friday at 2:45 p.m. to Monday at 5:00 p.m. and with the claimant in odd numbered years.

Father's Day Weekend

6. If the children are not otherwise with the respondent on this weekend, the children will be with him on the Father's Day weekend from Saturday at 9:00 a.m. to Sunday at 5:00 p.m.

Canada Day

7. The children will be with the respondent on this holiday in even numbered years from June 30th at 2:45 p.m. to July 1st at 8:00 p.m. and with the claimant in odd numbered years.

August 21st

8. If the children are not otherwise with the claimant on this day, the children will be with her that day to celebrate J.'s birthday.

August Long Weekend

9. If the children are not otherwise with the claimant on this weekend the children will be with her on the August long weekend.

Claimant's Birthday - August 2nd

10. If the children are not otherwise with the claimant on this day, the children will be with her from 2:45 p.m. to 8:00 p.m. that day.

Thanksgiving Weekend

11. The children will be with the respondent on this weekend in even numbered years from Friday at 2:45 p.m. to Monday at 5:00 p.m. and with the claimant in odd numbered years.

Eid - Muslim Holiday

12. If the children are not otherwise with the respondent on this holiday the children will be with him for 48 hours from the evening that Eid commences.

November 14th

13. If the children are not otherwise with the claimant on this day, the children will be with her that day to celebrate T.'s birthday.

Christmas

14. The children will be with the respondent on this holiday in even numbered years from 5:00 p.m. on Christmas Eve to 5:00 p.m. on Boxing Day and with the claimant in odd numbered years.
- [17] If either party plans a vacation with the children out of the Lower Mainland during their scheduled time with the children, that party will give the other a detailed itinerary at least 14 days before it begins, including the name of any flight carrier and flight times, accommodation, including address and telephone numbers, and details as to how to contact the children during the trip.
- [18] If either party plans a vacation outside of Canada with the children during their scheduled time with the children, the other party will provide the express written permission required authorizing the children to travel.
- [19] The children's passports will stay with the claimant unless required for travel by the respondent. Upon his return to Canada he will return the children's passports to the claimant forthwith.
- [20] Either party traveling with the children will ensure the children have appropriate medical coverage/insurance for the duration of the trip and that party will cover all costs of the medical coverage/insurance for that trip.

Ongoing Child Support

- [21] The respondent is responsible for paying ongoing child support for his two daughters until there is a material change in circumstances or they reach the age of majority. The issue is what his income level should be considered to be for the purpose of this ongoing support.
- [22] The claimant submits that the respondent's 2010 total income of \$34,039 should be used to determine ongoing child support of \$525 per month for both children.
- [23] The respondent submits that he is only able to make a base amount of \$18,000 per year and can only increase that to about \$28,000 per year if he meets all of his commission targets. For this year in fact his income will be even higher by another \$16,800 or so from his rental income.
- [24] The respondent has worked in the cell phone industry since 2002. He started working for a Telus Mobility dealer and continued working there until August 2008. He started in the position as a sales representative but became a manager in 2006.
- [25] On July 12, 2008 he was involved in a motor vehicle accident in which he says in pleadings that he injured his back, shoulders, left leg, and head. Presently the claim remains in litigation.
- [26] On August 2, 2008 he was laid off by his employer. He says the cell phone industry was contracting at that time leading to this layoff.
- [27] Between August 2008 and February 2009 he says he was not working and was paid wage indemnity benefits by ICBC arising out the motor vehicle accident.
- [28] On February 6, 2009 he joined another Telus dealer as a communications consultant. He worked there until February 5, 2010 when he says he was terminated for cause, although he says he knows nothing about the alleged cause.
- [29] He then moved to another telecommunications dealer in April or May 2010 in a management position and remained there until another motor vehicle accident on January 14, 2011 in which he says he again injured his back as well as his neck and suffered from headaches, memory loss, concussion, depression, and soft tissue injury, for all of which he has also started a law suit which is still presently in litigation.
- [30] He says that for the period of time January to September 2011 he was off work receiving ICBC wage indemnity benefits as well as EI benefits. On September 15, 2011 he was laid off from this Telus dealer.
- [31] A letter from the dealer of that date indicates that with the closure of all Blockbuster store locations in which the dealer operated, there were layoffs.
- [32] The respondent was given a total of four weeks' pay, less applicable payroll deductions, as a severance payment.

- [33] Thereafter he commenced working in November 2011 for another wireless dealer where he presently works as a sales representative making a base amount of \$1,500 per month or \$18,000 per year. For the year 2011 he says he made that amount even with his work interruptions.
- [34] The respondent has no clear explanation of what he did with most of the \$120,000 he received from the sale of the matrimonial home. I accept that some of it went into the purchase of his own condominium but from the purchase price of \$310,000 and the mortgage amount remaining on it of \$290,000 it could not have been any more than about \$20,000.
- [35] A review of his Visa statements indicates a fairly prolific spending pattern following separation. In the early times he kept his balance owed fairly in check on a \$15,000 credit limit, but by May 2011 the balance owed was up to over \$10,000 on this line of credit. In that pay period he purchased a \$60,000 Mercedes-Benz motor vehicle by trading in another vehicle for \$30,000, putting \$5,000 down towards a deposit and paying the balance.
- [36] Only recently has he recognized the extravagance of this purchase with his income and family responsibilities and has traded the Mercedes vehicle in for a cheaper vehicle.
- [37] At one point in time he also purchased a \$3,500 watch.
- [38] The balance on his Visa statement remained high because he was not paying it off every month.
- [39] In the year 2010 from April to December he incurred Visa charges of \$51,470.03.
- [40] In July 2011 his credit limit was increased to \$17,000 and he reached that limit in spending by September 2011.
- [41] In the year 2011 from January to December he incurred Visa charges of \$38,035.
- [42] He made a number of ATM deposits to his bank account for which he cannot provide any source. His bank account also indicates a number of on-line banking transfers for which there is no explanation.
- [43] The respondent has spent close to 10 years in the wireless industry, although he has had some interruptions in his employment from layoffs and motor vehicle accidents. He has not produced any medical evidence of injuries so it is impossible to determine if any injuries are continuing to have any effect on him.
- [44] I do not consider that taking the respondent's income for 2011 of approximately \$18,000 is a fair number to use for child support because the respondent has done better in the past and most of 2011 was lost with the consequences of the motor vehicle accident of January 14, 2011.

- [45] I consider the fairest way to determine the respondent's Guideline income going forward is to base it on his pattern of income over the last three years as s. 17 of the Federal Child Support Guidelines authorizes the Court to do. The average of his last three years income is \$31,475.66.
- [46] I will set the respondent's Guideline income at \$31,475.00 going forward, which produces a required child support payment for the two children of \$487 per month under the new Federal Child Support Guidelines in force December 31, 2011.
- [47] I therefore order the respondent to pay to the claimant \$487 per month on the first of every month commencing May 1, 2012 for the support of his two children, to be continued on the 1st of every month thereafter until T. reaches the age of majority or until further court order affecting that child, and thereafter according to the Guideline amount then in effect until J. reaches the age of majority or until further order of the Court.

Arrears of Child Support

- [48] The respondent has not abided by the consent order he entered into on July 4, 2011 to pay child support of \$100 per month on a without prejudice basis.
- [49] He has only paid \$800 to date. His explanation in part is that when the parties sold their matrimonial home and divided the net proceeds each received \$120,000. Because he says they were getting along and they had received this money and he had supported the family for nine and half years while the claimant did not work, he considered that she should use some of the money she obtained from the sale of the matrimonial home to provide for the children.
- [50] In 2008 the respondent's income tax return indicated total income of \$43,788 to include EI benefits of \$6,525.
- [51] In 2009 his total income was substantially the same to include \$2,349 of EI benefits.
- [52] In 2010, the year of separation, his total income was \$34,039, to include \$4,598 of EI benefits. In that tax return he also included a claim of \$7,000 for family support payments made for which there is no evidence of such payments having been made.
- [53] The claimant seeks retroactive child support from April 1, 2010 based on the respondent's income for that year of \$34,039. That produces a required child support payment for two children of \$529 per month for that year.
- [54] Giving the respondent the benefit of his payment of \$800, that leaves an amount of \$3,961 unpaid for Guideline child support to the end of 2010, based upon that income.
- [55] For 2011 on an imputed income of \$31,475 arrears of child support for the year are \$5,916 at \$493 per month. For the first four months of 2012 arrears are \$1,948 at \$487 per month.

[56] The order of July 4, 2011 was without prejudice to the claimant's right to seek a higher amount of child support from the time of separation. In view of the respondent's total failure to even pay \$100 per month as he had consented to, I order him now to pay arrears of child support of \$11,825 to the end of April 2012. This order will be satisfied by a payment of \$1,000 per month commencing May 1, 2012 until it is completely paid off.

Special or Extraordinary Expenses

[57] The claimant seeks a contribution from the respondent towards the following yearly expenses she has incurred that she seeks to have approved as special or extraordinary expenses:

2010 - School tuition \$4,700

2011 - (a) School tuition \$6,120;

(b) After school care \$595; and

(c) Dance class \$1,040.

[58] The school tuition is for a private Catholic school, although neither parent is Catholic. The claimant considers that a private school has better moral standards and says the parties had always agreed to put their children in a private school.

[59] The respondent says that he only initially agreed to a private school because the claimant wished that, but he is no longer in favour of it because of its high costs. He is Muslim.

[60] Claimant's counsel cites McDonald v. McDonald, 2001 BCCA 702 in support of a private school cost as a legitimate special or extraordinary expense.

[61] While the Court of Appeal in McDonald did uphold the trial judge's decision to include a private school expense as an special or extraordinary expense within s. 7 of the Federal Child Support Guidelines the Court questioned whether the expense should be considered reasonable having regard to the means of the parents at the time of separation.

[62] The mother was only earning a deemed income of \$10,000 and the father had expenses in excess of his income. The private school was the only s. 7 expense. The trial judge had found that both parties had always believed it to be in the best interests of the children to attend private school.

[63] Total tuition costs there were \$6,100 per year.

[64] In this case before me I accept the respondent's evidence that he only agreed to the private school because the claimant wanted it.

[65] I do not consider this expense to be necessary in relation to the children's best interests nor reasonable in relation to the parties' present financial means. I deny the claim for contribution towards the private school for 2010 and onwards.

- [66] I will allow the after school care as a s. 7 expense but I assume this number will change from the past going forward because the parties are agreed the respondent's mother may pick up the children from school on those days when the respondent is entitled to access.
- [67] For 2011 I will accept the after school care of \$595 for the year. I will also accept the dance classes for the girls of \$1,040. As stated, the total of the dance classes and after school care for 2011 is \$1,635. The claimant in that year earned \$37,425 and I will accept \$31,475 for the respondent. The respondent will pay 46 percent of those expenses to the claimant in the amount of \$752.
- [68] For 2012 and following the s. 7 expenses for the after school care and dance classes will have to be determined and the parties will be obliged to contribute to those costs in the same proportions failing any material change in circumstance.
- [69] The parties will exchange their completed and filed Income Tax Returns with all schedules and Notices of Assessment by June 1st of each year commencing in 2013 so they may determine whether there is any material change in circumstances for either.

Spousal Support

- [70] I have accepted a Guideline income for the respondent going forward of \$31,475. The claimant is presently making \$36,000 per year.
- [71] In my view the incomes are so close the respondent should not be entitled to any spousal support from the claimant.
- [72] I decline to issue any order against the respondent that he provide any information to the claimant regarding his motor vehicle claims. Both accidents occurred after separation.

Costs

- [73] The issue of costs is reserved for further submissions by the parties.

"The Honourable Mr. Justice Truscott"

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