

CANADA / JUDGMENT

Wettlaufer v. Wettlaufer

2007 BCSC 137

COURT

Supreme Court of British Columbia

DECIDED

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2007 BCSC 137 Wettlaufer v. Wettlaufer IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: Wettlaufer v. Wettlaufer, 2007 BCSC 137 Date: 20070130 Docket: E0628057 Registry:

Prince George Between: Ellen Denise Wettlaufer Plaintiff And William Joseph Wettlaufer

Defendant Before: Master Baker Reasons for Judgment In Chambers Counsel for the plaintiff:

R.C. Gibbs, Q.C. Counsel for the defendant: F. Fatt Date and Place of Hearing: January 15, 2007

Prince George, B.C. ISSUE

- [1] Ms. Wettlaufer seeks support, both child and spousal. Mr. Wettlaufer acknowledges his responsibility to support the parties' children, but disagrees with Ms. Wettlaufer's assessment of his income for Child Support Guideline purposes. Further, he argues that her cohabitation with her new partner precludes her claiming spousal support. Restated, therefore, the issues
- a) Are does cohabitation with a new partner prevent or affect a claim by Ms. Wettlaufer for spousal support?
- b) In any event, what is Mr. Wettlaufer's income for support purposes?

BACKGROUND

- [2] Ms. Wettlaufer is 36 and Mr. Wettlaufer is 39. Both are in good health. They married in May 1998 following a cohabitation that began in September 1996 (Mr. Wettlaufer says the cohabitation began in 1997; the difference is not important to this application). They have two children: Darby, now 8½ years old, and Jacob is 4½ years of age. Ms. Wettlaufer left school after grade 11 in 1989, but completed her GED in 1994. She has no further academic or formal qualifications. Prior to marrying Mr. Wettlaufer she worked in retail or service roles. She has been a full-time mother and homemaker for the past eight years.
- [3] Mr. Wettlaufer finished grade 12 and began working for his father, who owned a car dealership. He and his father eventually became partners and sold the business in 1991. Mr. Wettlaufer then sold vehicles for another dealer for several years, but eventually developed his own business snow-clearing, landscaping and, in 2003, excavating. The business, Bench Rentals ("Bench") grew; it now has four trucks, three excavators, three loaders, a Bobcat, and

at least six employees. Its business (primarily in excavation) has grown substantially with the housing and construction boom in Prince George in recent years. It is Mr. Wettlaufer's personal income from this business, especially in the light of its recent rapid growth, that is one of the principal issues in this proceeding. During the marriage the parties split some of the income from Bench by maintaining Ms. Wettlaufer on the books as an employee and paying her \$24,000.00 per year together with a 2005 bonus of \$1,000.00. As well she used a company gas card for personal use, and the company, she says, for the past three or four years made a \$2,000.00 "grocery shop" and a \$5,000.00 liquor purchase, all for the personal benefit of the parties. During this income-splitting regime Mr. Wettlaufer received a salary of \$31,200.00 per year.

- [4] During Spring Break 2006 the Wettlaufer family was invited to spend some time at the Whistler home of Dr. P. This holiday proved cataclysmic for two families. During the stay in Whistler Ms. Wettlaufer and Dr. P. realized they had feelings for each other, began a relationship, and each advised their respective spouses and families of this. This immediately caused two separations. Dr. P. left his wife and family, and Mr. and Ms. Wettlaufer separated.
- [5] From Spring Break until June Ms. Wettlaufer remained in the family home in Prince George. Then, with financial assistance from Dr. P., she purchased another residence in Prince George. I will discuss the nature and implications of that assistance below. Since moving from the parties' family home Ms. Wettlaufer has lived in the new residence with Dr. P., Darby, and Jacob. Once she left the family home Bench stopped paying Ms. Wettlaufer's salary and Mr. Wettlaufer began to pay her child support of \$669.00 per month, based on an annual income of \$44,000.00, the sum that he feels should be attributed as his income. Ms. Wettlaufer remains a stay-at-home mother, with no financial assistance other than this child support and a one-time \$1,800.00 payment for spousal support in August of 2006. PARTIES' POSITIONS
- [6] Ms. Wettlaufer. Ms. Wettlaufer receives no economic benefit or financial assistance from Dr. P., who she says, cannot afford to assist her. She acknowledges that he helped her in the purchase of her home by gifting her \$103,000.00. Dr. P.'s affidavit evidence is that this sum was gathered by redeeming an RSP of \$37,500.00 and by borrowing the rest. Ms. Wettlaufer points out that, at law, Dr. P. is not legally liable to support her.
- [7] Ms. Wettlaufer cannot support herself, she argues, due to the role assumed in marriage (by agreement with Mr. Wettlaufer, she says) that kept her at home and out of the job market. She has few, if any, employment skills. At present she has borrowed the maximum allowed by her VISA account (\$6,000.00) and is dependent upon the financial assistance of her parents to make ends meet. Her Financial Statement lists total monthly expenses of \$5,277.37, including housing costs of \$1,434.00, utilities of \$451.00, and food and meals outside the home of \$1,000.00. There is no indication that Dr. P., residing with Ms. Wettlaufer, is sharing in the common costs of housing and utilities.

- [8] Ms. Wettlaufer submits that Mr. Wettlaufer's estimate of his income from Bench (\$44,000.00 per year) grossly underestimates the real income and/or value that he receives from the company, either directly or indirectly. She argues that the income is much higher, evidenced by
- a) the direct payments (salaries, liquor, food, gas) listed in para. 3, above;
 - b) work done in trade (as, for example, trading landscaping for dental care[1]);
 - c) vacations to places such as Mexico, New Orleans (including a cruise), and Toronto;
 - d) membership in a local golf and curling club;
 - e) houseboat trips each summer;
 - f) a trip to Vancouver in the Fall of 2006 for Mr. Wettlaufer and Darby to see Elton John, including "scalped" tickets to the concert;
 - g) formation of a company, All Earth Landscapes Ltd., by Mr. Wettlaufer with a partner; and
 - h) a 2003 income tax return for Mr. Wettlaufer reporting his net income of \$77,450.00. This last allegation should be noted; Ms. Wettlaufer states it on recollection. Mr. Wettlaufer, on the other hand, appends a spreadsheet to his affidavit[2] that shows "closed retained earnings" of \$72,881.00. Perhaps Ms. Wettlaufer confuses this entry in her recollection. Certainly the parties' tax documents for 2003, appended to Mr. Wettlaufer's affidavit, do not confirm \$77,450.00 income for either or both of them.
- [9] Ms. Wettlaufer also points to the increasing (sometimes dramatically) gross revenues for Bench - 2000 \$118,706.00 2001 181,331.00 2002 202,496.00 2003 528,443.00 2004 524,129.00 and submits that the increasing gross revenues must logically point to increased net income for Mr. Wettlaufer.
- [10] Mr. Wettlaufer. Mr. Wettlaufer argues first against spousal support. He says that by leaving the marriage to live with Dr. P. Ms. Wettlaufer has, in effect, transferred financial responsibility for her to Dr. P. Dr. P. can well afford to assist Ms. Wettlaufer, says Mr. Wettlaufer, just as he did with the purchase of her new residence.
- [11] There is no mistaking Mr. Wettlaufer's perspective on this; Mr. Fatt, his counsel, was clear and emphatic that the economic implications of Ms. Wettlaufer's choice to leave her husband for Dr. P. should not be visited on Mr. Wettlaufer. To do so, as Mr. Fatt expressed it, is simply wrong. It would, in effect, require that Mr. Wettlaufer subsidize her relationship with Dr. P. Evidence of cohabitation in a relationship such as Ms. Wettlaufer and Dr. P.'s, argues Mr. Fatt, creates an onus that Ms. Wettlaufer and/or Dr. P. must rebut i.e. that Dr. P. has undertaken financial responsibility for her.
- [12] The second argument that Mr. Wettlaufer makes is that his income is not, and has not been, as high as Ms. Wettlaufer suggests. His responses can be summarized as -

- a) The sudden increase in revenues in 2003 signalled the change from snow-removal to landscaping concurrent with a building boom in Prince George. The sudden increase meant purchasing more equipment and hiring more people, such that, for the present, the growth has not translated into increased profits;
- b) The separation means that he will do less hands-on work with Bench, so that he can spend more time with the children;
- c) The family has always spent whatever the company generated, and more, and carried on only with infusions of loans, either from institutions, Mr. Wettlaufer, or his family;
- d) He acknowledges receiving payment in kind occasionally, but says that has been a very small part of Bench's work;
- e) As recently as June 2006 Bench's bank has said that the company's required loan payments are not being met, but also noted " the shareholder/related party injections "
- f) All Earth Landscaping Ltd. is essentially inactive and produces no significant income;
- g) The draft 2005 statements for Bench show an initial loss of \$93,587.00 of expenses less revenues, reduced to \$18,559.00 by asset disposal, tax recovery, and retained earnings. Overall, then, Mr. Wettlaufer argues that the company, historically, has not been as profitable as Ms. Wettlaufer might think or the family's lifestyle might have suggested. Overly-rapid growth and the recent marital problems have exacerbated this, he says.

ANALYSIS

- [13] The first issue is how Dr. P. factors into Mr. Wettlaufer's responsibility for spousal support. In my view, he has little, if any, relevance to the question before me.
- [14] To the extent that Mr. Wettlaufer considers Ms. Wettlaufer's conduct in leaving him for Dr. P. to be immoral or reprehensible, s. 15.2(5) of the Divorce Act[3] precludes her conduct from consideration in her application for support[4]. Beyond this, however, numerous cases have considered the impact that cohabitation may have on a claim for spousal support.
- [15] In *Kitts v. Kitts*[5] the court found that Ms. Kitts was financially secure in her new relationship (at para. 47): Ms. Kitts has entered a new relationship with Mr. Malone who owns significant assets in the United States and who enjoys an annual income in excess of \$100,000 U.S. She does not require spousal maintenance from Mr. Kitts to maintain her standard of living. And further : There is no question that, in some circumstances, continued spousal maintenance is necessary to alleviate or redress the adverse economic effects of divorce. This is not such a case.

- [16] Nevertheless, the court found the circumstances appropriate for a compensatory lump sum award of maintenance. Granted, Kitts decided permanent support, and Ms. Wettlaufer's application is for interim support, a form of application that typically weighs means and needs against ability to pay, but the case still demonstrates the reduced weight, if any, the court will give to a new relationship.
- [17] Without too much difficulty one could present a plethora of cases citing the same principle. But Mr. Fatt offers two cases in particular that he argues, at the very least, create an onus on Ms. Wettlaufer, or perhaps a rebuttable presumption that Dr. P. can and should support her. The first of these cases is *Rideout v. Rideout*[6] wherein, at para. 16, the court commented: Furthermore, there is no explanation as to her male friend's financial circumstances although she concedes he does contribute to her groceries and utilities. I accordingly conclude that I should infer that Mr. Deadmarsh is capable of and indeed is in fact maintaining the wife.
- [18] It is interesting that, on the chronology presented in *Rideout*, it is clear that at the time of the application Ms. Rideout had not been cohabiting with her new partner for two years, so that the new partner certainly was not a "spouse" within the terms of the Family Relations Act[7]. The court makes no reference to any of the authorities considering cohabitation as a factor in spousal support. Despite this conclusion and comment, the court also concluded that the marriage was a traditional one, "that to some degree at least the wife has suffered some economic hardship because of the breakdown of the marriage" and that she was therefore entitled to some support.
- [19] The other case cited by Mr. Fatt references many of the authorities touching on the point. In *Boudreau v. Bradbury*[8] the court cited six cases and summarized them at para. 19: the consensus in the more recent authorities is that a new relationship does not disentitle a former spouse to continued spousal maintenance, although the receiving spouse will be required to satisfy the court that spousal maintenance is appropriate in the circumstances. [Emphasis added]
- [20] It is this final comment (emphasised above), argues Mr. Fatt, that creates the specific onus on Ms. Wettlaufer and, inferentially, on Dr. P., to demonstrate that Dr. P. cannot assist her. I doubt that Saunders J.'s comment was intended to be taken that specifically. In fact, in the immediately following paragraph Saunders J. quotes the Supreme Court's observation in *Moge v. Moge*[9] that "All four of the objectives defined in the Act must be taken into account when spousal support is claimed or an order for spousal support is sought to be varied". In my view the simple result is that while cohabitation may (and typically does) have some financial implications for the applicant spouse, it does not create any presumption against support, nor does it create a specific onus on the claiming spouse or on his/her new partner to prove that the new partner has not, somehow, supplanted the other spouse's economic responsibility.

- [21] If I am wrong in this, and if there is a legal onus to demonstrate that Dr. P. is not assisting Ms. Wettlaufer, or cannot replace the assistance that Mr. Wettlaufer might be required to provide, I am more than satisfied that this onus has been met. Dr. P.'s affidavit amply demonstrates that he was able to assist Ms. Wettlaufer with the home purchase only by redeeming an RSP for roughly one third of the total sum advanced and by borrowing the remaining two thirds. He has adequately explained his own income and expense situation, including his obligations to his own separated spouse. I accept that he has few financial resources at present that could go to Ms. Wettlaufer's support.
- [22] The next question is Mr. Wettlaufer's imputed income. To recap: he says it is \$44,000.00 and Ms. Wettlaufer says it is at least \$63,200.00 (totalling the sums in para. 3 above), or \$77,450.00 (para. 8, above), or higher.
- [23] It is common, of course, for people to live at the very limit of their means, and often a small family company assists in this. A private or closely-held company can offer financial flexibility to a family that ordinary employment does not. Shareholders can, in effect, borrow from the company or use its credit for personal purposes, giving the impression of greater income from the company than is the fact. The company can, and often does, pay personal expenses such as vehicle costs, utilities, sometimes a portion of mortgages, entertainment, travel, or the like, all without attracting the ire of the Canada Revenue Agency. The company can be used to split its true income among the shareholders, reducing the aggregate personal income tax on that income.
- [24] I conclude that all of these means, to some degree, have been used by the Wettlaufer family and Bench. With particularly small companies (eg. one-person companies) one can often review the company's reported expenses with a critical and sceptical eye and attribute some of those expenses to the individual, effectively increasing the true personal income of the individual. I do not think that an easy task, at this point, with Bench. Bench has, as Mr. Wettlaufer says, grown in the past three years to have numerous employees, considerable capital invested in equipment, and substantial (i.e. greater than \$500,000.00) annual revenues.
- [25] Allowing for the possibility that the company gives Mr. Wettlaufer economic benefits that are not reflected in his personal income, one must be cautious given firstly his bank's concerns about the company's failure to meet its loan obligations (para. 12, above) and Mr. Wettlaufer's good faith (I assume) stated intention of reducing his involvement with the company to spend more time with his children. In the circumstances, therefore, I accept that past income financial records, including the fact of the parties' combined stated income and "perks" of \$63,200.00 (para. 3, above) together with other benefits equivalent to income are the best guides to Mr. Wettlaufer's current imputed income. I therefore conclude that he receives, or is capable of receiving, \$70,000.00 per year income from Bench.

- [26] This conclusion does not ignore Mr. Wettlaufer's assertion that the sudden growth of Bench starting in 2003 may have placed temporary financial stresses on the company, but in the first year of that growth (2003), apparently, his personal income was recorded as above.
- [27] The first result of this attribution is that Mr. Wettlaufer's child support obligation is \$1,053.00 monthly. The question then becomes: what is an appropriate sum for spousal support?
- [28] The Spousal Support Advisory Guidelines[10] ("SSAG"), using the parameters particular to Mr. and Ms. Wettlaufer's marriage, number and age of children, and respective incomes, suggests a range of spousal support from \$1,044.00 to \$1,333.00 monthly. How do such numbers affect the parties' respective economic circumstances?
- [29] Ms. Wettlaufer has no earned income and her Financial Statement lists monthly expenses of \$5,277.37. It is interesting that she says in the preface to her Statement that she has attempted to apportion various of the expenses between her and the children, but makes no such apportionment to Dr. P. In fact, her affidavit[11] and Dr. P.'s affidavit[12] leave the unavoidable conclusion that Dr. P. is not contributing anything to the on-going household expenses. One half of these (\$1,434.67 housing and \$451.00 utilities) are properly attributable to Dr. P., so that Ms. Wettlaufer's expenses are reduced accordingly by \$942.83.
- [30] While most of Ms. Wettlaufer's remaining expenses seem reasonable, I further reduce her food expense of \$1,000.00 to \$500.00 as being excessive for one adult and two young children, and discount her entry for vacation (\$400.00) as inappropriate for an interim application. Both she and Mr. Wettlaufer have claimed expenses for the children's activities and entertainment, so I reduce each by half, in Ms. Wettlaufer's case \$112.50. Ms. Wettlaufer's cumulative reduction is therefore \$1,955.34, rounded to \$1,950.00, leaving a net requirement of \$3,327.37, rounded to \$3,325.00.
- [31] Mr. Wettlaufer claims expenses of \$3,925.89. He does not have a new partner to share housing and utilities costs that total \$1,755.34, but his expenses can be reduced by compulsory deductions (already factored into support tax tables and computer programs) of \$803.89, child care for Jacob (\$100.00), as the children are primarily resident with Ms. Wettlaufer at present, and one half (\$90.00) of child entertainment and activities. His cumulative reduction is therefore \$993.89, leaving a net requirement of \$2,932.00, rounded down to \$2,925.00.
- [32] The reality is, of course, that there is, on Mr. Wettlaufer's imputed income, insufficient funds to support both parties without shortfalls. Using DIVORCEmate's calculations of "with child support" SSAG, if Mr. Wettlaufer were required to pay \$1,033.00 spousal support and child support he would have a net disposable income of \$2,474.00. That sum would leave a shortfall for him of approximately \$450.00. Ms. Wettlaufer, on the other hand, would have a net disposable income of \$2,703.00, and a consequent shortfall of approximately \$625.00. It is perhaps axiomatic that it is impossible to perfectly equalize the economic difficulties caused by separation and divorce; I conclude therefore that spousal support of \$1,000.00 is appropriate in the circumstances. SUMMARY

[33] In sum, therefore:

1. Mr. Wettlaufer's income is imputed to be \$70,000.00;
2. Child support will therefore be fixed at \$1,053 per month;
3. Spousal support will be fixed at \$1,000.00 per month;
4. Support will commence January 1, 2007; and
5. Costs will be in the cause. "Master D. Baker"

[1] Plaintiff affidavit #1 para. 13

[2] Affidavit #1, exhibit "L"

[3] R.S.C. 1985 c. 3

[4] with a narrow range of exceptions (viz. Leskun v. Leskun, 2006 SCC 25) which does not apply in this case

[5] (1998) 42 R.F.L. (4th) 167 at 179

[6] (1995) 13 R.F.L (4th) 191

[7] R.S.B.C. 1996 c. 128

[8] (1998) 38 R.F.L. (4th) 1

[9] (1992) 3 S.C.R. 813 at 842

[10] <http://www.justice.gc.ca/en/dept/pub/spousal/project/index.html>

[11] Affidavit #1, para. 30

[12] Affidavit #1, para. 11

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