IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *E.G.P. v. S.L.P.,*
2009 BCSC 1221

Date: 20090904
Docket: E080212
Registry: Vancouver

Between:

E.G.P.

Plaintiff

And

S.L.P.

Defendant

Before: The Honourable Mr. Justice Hinkson

Reasons for Judgment

Counsel for the Plaintiff:	Angela E. Thiele
Counsel for the Defendant:	Fred C.M. Lowther
Place and Date of Hearing:	Vancouver, B.C. August 14, 2009
Place and Date of Judgment:	Vancouver, B.C. September 4, 2009

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Introduction

[1] On May 25, 2009, I handed down Reasons for Judgment on many of the issues in this action. Those reasons for judgment are indexed as 2009 BCSC 685 (the "Original Reasons"). Without further submissions from counsel I was unable to decide the issues of retroactive and future child support and retroactive spousal support, and did not address the issue of costs.

[2] I have now had the benefit of the parties' further submissions, and I can resolve the outstanding matters.

[3] In my Original Reasons, I resolved the entitlement of the plaintiff to future spousal support for the fourteen months following the trial in this action. Therefore I will not deal with the submissions of counsel for the defendant with respect to future spousal support.

[4] I have agreed that the parties may make written submissions as to costs following the publication of these reasons for judgment. Future spousal support, if any, other than the lump sum awarded in my earlier reasons for judgment, may be addressed when a review of that issue occurs, if either party wishes such a review.

Future Child Support

[5] The parties ceased cohabitation in October 2007, and since that time have shared custody of their son, A., on a equal time basis. L., the plaintiff's daughter from a relationship that preceded her cohabitation with and marriage to the defendant, has resided solely with the plaintiff, and has essentially declined to see the defendant since the parties' separation.

[6] I have already found that the defendant's income for the purposes of child maintenance and spousal support is $40,000.00 together with a further $20,000.00 in non-taxed benefits, the latter to be grossed up for income tax purposes. The parties have agreed that such a finding results in annual taxable income for the

purposes of the ***Federal Child Support Guidelines,*** S.O.R./1997-175, as amended [***CSG***] of $68,500.00. The same income applies for the purposes of the ***Spousal Support Advisory Guidelines*** (***SSAG***).

[7] I also previously determined that the plaintiff's annual income for ***CSG*** and ***SSAG*** purposes is $15,000.00.

[8] I further determined that the defendant must pay child support for both children. That determination presents pragmatic problems in quantifying the payments that the defendant must make given that the parties share custody of A. but the plaintiff has sole custody of L.

[9] Counsel for the plaintiff described the parties' parenting situation as a "hybrid" one, as L. spends all of her time with the plaintiff, and A. spends one-half of his time with each of the plaintiff and the defendant. She adopted this term from and relied on the reasoning of Zisman J. in ***Sadkowski v. Harrison-Sadkowski***, 2008 ONCJ 115 [***Sadkowski***], where the issue of child support was resolved in circumstances similar to those in this case.

[10] Counsel for both parties argued that I have considerable discretion with respect to child support. The plaintiff asserted that that discretion stems from an application of the principles set out by the Supreme Court of Canada in ***Contino v. Leonelli-Contino***, 2005 SCC 63, [2005] 3 S.C.R. 217 [***Contino***]. The defendant submitted that support for L. was entirely discretionary pursuant to s. 5 or s. 9 of the ***CSG***.

[11] ***Contino*** established that the set-off approach to a shared custody situation is the starting point in the exercise of a court's discretion in determining child support, but that in addition the court must specifically consider the factors in ss. 9(b) and (c) of the ***CSG***. This exercise recognizes that the total cost of raising a child or children may be greater in a shared than in a sole custody situation, as in the former both parents will have fixed costs that to some extent duplicate each other.

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[12] This recognition is not as straightforward in this case, as the plaintiff must provide for the fixed costs of a son and a daughter, whereas the defendant must only provide for the fixed costs of a son.

[13] The plaintiff has calculated her monthly expenses at $3,000.00 for her, L. and A. She attributes $400.00 of these costs solely to A., but argues that her daycare costs will increase as a result of the loss of a subsidy for his daycare, given the result of this litigation. The defendant has only provided an estimate of his monthly expenses without attributing any specific amount to A.

[14] The defendant's share of A.'s daycare costs will now be greater than the plaintiff's share. To date the plaintiff has purchased most if not all of A.'s clothing, but I have concluded that the defendant has a genuine desire to provide for A., and I expect that he will purchase at least some of A.'s clothing in the coming year. If he does not, some modification of the child support payments will have to be considered when the payments are reviewed. For the present, I conclude that the costs of the plaintiff and the defendant attributable to A. will be comparable.

[15] Using the set-off approach, described in s. 8 of the ***CSG***, and the incomes of $15,000.00 per year for the plaintiff, and $68,500.00 for the defendant, the amount payable to the plaintiff by the defendant for two children would be $1,032.00, and the amount payable to the defendant by the plaintiff for A. would be $125.00. This leaves a net difference of $907.00 per month payable by the defendant to the plaintiff.

[16] The plaintiff argued that the disparity between her income and that of the defendant could warrant an amount greater than that resulting from the set-off approach. She referred to the decision of the British Columbia Court of Appeal in ***Green v. Green***, 2000 BCCA 310, 6 R.F.L. (5th) 197. In that case, the father had the children 40% of the time, and the mother 60%. The father's ***CSG*** income was $84,000.00 per year, and the mother's was $30,000.00. Although the father was ordered to pay only $750.00 of a ***CSG*** $1,040.00 amount, Prowse J.A., for the court, stated at para. 27:

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> As earlier stated, one of the policy considerations giving rise to s. 9 was the recognition that parents who exercise extensive access to their children often incur additional child care expenses beyond those experienced by parents who exercise lesser access. While this is a legitimate consideration, it must be tempered by the fact that not every dollar spent by a parent in exercising access over the 40 percent threshold results in a dollar saved by the custodial parent. The potential problems created by failing to recognize this fact are referred to by Professor Carol Rogerson in an article, "Child Support Under the Guidelines in Cases of Split and Shared Custody" (1998) 15:2 *Can. J. Fam. L.* 11, at pp. 20-21:
>
> > Increased time spent with a child does not necessarily entail increased spending on the child. Furthermore, dollars spent by an access or secondary custodial parent do not necessarily translate into a dollar for dollar reduction in expenditures by the primary custodial parent, many of whose major child-related costs are fixed – such as housing and transportation; any savings will typically be only with respect to a small category of expenditures for food and entertainment. Particularly in cases where there is a significant disparity in income between the parents, reductions in the basic amount of child support may undermine a lower-income custodial parent's ability to make adequate provision for the child or children and will certainly exacerbate the differences in standard of living between the two parental homes.
>
> In other words, in cases in which the access parent has a significantly higher income than the custodial parent (as is the situation in the majority of cases), the more probable it will be that a decrease in the amount of support payable under the Guidelines will operate to the detriment of the standard of living in the custodial parent's home. In those cases, there is a real concern that a reduction in the amount payable under the Guidelines will not serve the best interests of the children.

[17] Without reference to any authority, counsel for the defendant argued that when parents share time with a child or children equally, the ***CSG*** table amount is commonly reduced by 40-50%. As 60% of $1,032.00 is $615.00, the defendant argued that this would be reasonable in all of the circumstances.

[18] I have concluded that, in this case, the approach ultimately employed by Zisman J. in ***Sadkowski*** is preferable to the alternate "rough justice" approach that has been adopted by some courts, and might be said to describe the approach for which the defendant advocated.

[19] In ***Sadkowski***, the parents had agreed that they would share custody of the two girls, 19 and 18 years old, on an alternating-week rotation, and that the mother

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would pay $185 per month in child support. The elder girl then chose to live permanently with her father. The father argued that there had been a material change in circumstances in that he had maintained the elder girl's primary residence since 2006. The issue was the appropriate method to calculate support.

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[20] Mr. Sadowski argued that he should receive the full amount of child support, based on the ***CSG***, for the elder daughter. Therefore, the mother should be required to pay him in accordance with the ***CSG*** for one child and based on the mother's income. For the younger daughter, who split her time equally with both parents, the calculations would be for one child and then a set-off between the respective parents' incomes.

[21] Ms. Harrison-Sadkowski argued that the support should be based on setting off two children in the father's care against one child in her care.

[22] Zisman J. reviewed what she termed the father's proposed "two-stage approach" and the mother's suggested "economies of scale approach" and concluded that the approach contended for by the mother was to be preferred.

[23] I have concluded that I should employ a similar approach in this case. There are arguments that favour each of the plaintiff and the defendant, under the rubric of the factors set out for shared custody in s. 9(c) of the ***CSG***: "the conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought." However, the overall objectives of the ***CSG*** are "to establish fair levels of support for children from both parents upon marriage breakdown, in a predictable and consistent manner": ***Francis v. Baker***, [1999] 3 S.C.R. 250, 50 R.F.L. (4th) 228 at para. 39.

[24] I consider that the factor set out in s. 9(b) of the ***CSG***, "the increased costs of shared custody arrangements", does not warrant child support different from the set-off amount in this case.

[25] To meet these objectives in the year following my Original Reasons, I find that I should employ the ***Contino*** set-off approach argued for by the plaintiff. As a result I

order the defendant to pay the sum of $907.00 per month to the plaintiff, beginning on the date of trial, with appropriate adjustments for payments during the months that have passed since my Original Reasons.

[26] I will discuss the payments made during the relevant months below.

Retroactive Child Support

[27] I previously found, in my Original Reasons, that the defendant was obliged to pay retroactive support for both L. and A. in an amount to be determined pursuant to the application of the ***CSG***, once the defendant's income for the purposes of the ***CSG*** was established.

[28] As I have explained above, my application of the ***CSG*** results in an obligation on the defendant to pay to the plaintiff the sum of $907.00 per month. I find that the defendant ought to have been paid that amount to the plaintiff for child support beginning on November 1, 2007, and up to the date of trial. For these 16 months, this totals $14,512.00.

Retroactive Spousal Support

[29] I found that the plaintiff is entitled to retroactive support from November 2007 to March 2009, when the trial in this matter began. I also found that I must allow for the amounts that she has received from the defendant to date, with the exception of the $30,000.00 she received from the refinancing of the Residential Property, which I addressed in dealing with the family assets.

[30] I further found that the amount of the retroactive spousal support depends on the defendant's annual income and the application of that annual income and the plaintiff's $15,000.00 annual income to the ***SSAG***.

[31] The plaintiff made reference in her submissions to a figure that the defendant agreed to pay to her for interim support for herself and the two children. I do not regard that figure as meaningful, as it was always without prejudice and subject to

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retroactive variation based upon the evidence and the conclusions reached at the trial of this matter.

[32] Recognizing that the ***SSAG*** are what they say that they are, advisory, they are to be followed in cases that are not exceptional: see ***Kerr v. Baranow***, 2009 BCCA 111, 66 R.F.L. (6th) 1 at para. 84, and the cases cited therein. I do not regard this case as an exception to the general practice, and so I will apply the ***SSAG***.

[33] In my Original Reasons, I set the plaintiff's annual income for ***SSAG*** and ***CSG*** purposes at $15,000.00. I have attributed income for the defendant of $68,500.00 per annum for this period.

[34] The plaintiff provided me with different ***SSAG*** calculations based on various characterizations of the defendant's income, and argued that I should not characterize it in such a way as to credit the defendant for Canada Pension Plan payments or other payments which he has not made.

[35] I do not consider the fact that the defendant is not obliged to pay Canada Pension Plan contributions sufficiently alters his income for the purposes of either the ***CSG*** or the ***SSAG*** to be a factor of significance in this case. I conclude it is most appropriate to characterize the entire $68,500.00 agreed to by the parties as self-employment income.

[36] Based on the calculations provided by the plaintiff, characterizing the defendant's income this way results in a range of monthly spousal support from $421.00 to $845.00, with a middle figure of $627.00.

[37] Bearing in mind that I am awarding retroactive interim spousal support, I do not consider that the defendant's failure to pay amounts that he consented to in court orders warrants a higher award for retroactive support that the plaintiff would otherwise be entitled to. In light of the other orders I have made, including the division of assets, I conclude that the middle figure, $627.00, is appropriate in the circumstances.

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[38] For the 16 months between November 2007 and March 2009, this totals $10,032.00.

Payments by the Defendant to the Plaintiff

[39] Other than funds derived from a refinancing, which I already dealt with in my Original Reasons in the distribution of family assets, the defendant made various support payments to the plaintiff beginning in February of 2008 as follows:

February 2008	$1,300.00	toward rent
	$500.00	for car and insurance
	$2,200.00	cheque
March 2008	$1,300.00	toward rent
	$2,700.00	cheque
April 2008	$1,300.00	toward rent
	$2,700.00	cheque
May 2008	$2,500.00	cheque
June 2008	$3,500.00	cheque
July 2008	$3,500.00	cheque
August 2008	$2,000.00	cheque
September 2008	$878.00	cheque
October 2008	$878.00	cheque
November 2008	$878.00	cheque
December 2008	$500.00	cheque
January 2009	$500.00	cheque
February 2009	$500.00	cheque
March 2009	$500.00	cheque
Total	**$28,134.00**	

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[40] There is no evidence before me that the defendant made any payments to the plaintiff between their separation in November 2007 and February 2008 other than payments for wages. Since I have already taken the plaintiff's wages into account in determining her income, I will not deduct those payments from spousal support.

[41] The defendant's retroactive obligation for child support from November 2007 until March 2009 is $14,512.00 and for retroactive spousal support is $10,032.00. The total of the two is $24,544.00.

[42] In the result, the payments made by the defendant are greater than the award for retroactive child and spousal support. The defendant is therefore entitled to a credit for the difference, $3,590.00, against the other awards which I made in my Original Reasons.

Summary

[43] The defendant will pay the plaintiff the sum of $907.00 per month for child support, from the date of trial. As set out in my Original Reasons and under the conditions set out therein, either party may apply one year after the date of my Original Reasons to vary this obligation.

[44] If the defendant has continued to make support payments in the time between trial and the release of these reasons, he is entitled to credit for those. This credit will go first toward the child support ordered herein for the period between trial and these reasons. Any credit beyond that will go against the other awards in my Original Reasons.

[45] The defendant is further entitled to a credit of $3,590.00 against the awards which I made in my Original Reasons for overpayment of spousal and child support from the date of separation to trial.

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[46] The parties will make written submissions as to the costs of this case.

"Hinkson J."

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