

2002 CarswellAlta 1501, 2002 ABQB 538

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M. (D.A.) v. M. (A.E.)

D.A.M., Plaintiff and A.E.M., Defendant

Alberta Court of Queen's Bench

Nation J.

Heard: May 22, 2002

Judgment: June 4, 2002

Docket: Calgary 4801-108109

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Counsel: *Diann P. Castle*, for Plaintiff

Catherine E. Wood, for Defendant

Subject: Family

Family law --- Custody and access — Joint custody — General.

Family law --- Support — Child support under federal and provincial guidelines — Determination of award amount — General.

Family law --- Support — Child support under federal and provincial guidelines — Determination of award amount — Extraordinary expenses — General.

Family law --- Support — Child support under federal and provincial guidelines — Shared custody.

Family law --- Support — Child support under federal and provincial guidelines — Retroactive award.

Family law --- Support — Spousal support under Divorce Act and provincial statutes — Entitlement — General.

Regulations considered:

Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.)

Federal Child Support Guidelines, SOR/97-175

Generally

s. 7

s. 9

APPLICATION by mother for joint custody, child support, special expenses and spousal support.

Nation J.:

Introduction

1 This decision arises out of an application heard on May 22, 2002, which was further to a domestic special application which was heard on November 16, 2001. The situation at the afternoon special application on November 16, and the directions that I gave are best expressed in correspondence dated November 21, 2001, a copy of which is attached as Exhibit A to this memorandum.

2 In the application heard on November 16, 2001, Ms. D.A.M. asked for the following relief:

- a) Joint Custody with primary care to her and specified access to Mr. A.E.M. as recommended by Dr. Fong;
- b) Retroactive and ongoing child support;
- c) Retroactive and ongoing section 7 expenses and;
- d) Spousal support.

3 At the November application, the parties agreed they were willing to accept and implement Dr. Fong's recommendations and as a result, joint custody and specified access were not dealt with further.

4 At the November application, at which Mr. A.E.M. had filed no material, ongoing base support was ordered based on the guideline income which at that time was agreed on at \$104,000, so the base amount was \$1,748.00.

5 The parties believed that they could work out section 7 expenses, but had requested that I rule on the nanny expenses as that would be of assistance to them. The issue of spousal support was also dealt with by me.

6 As a result, retroactive and ongoing section 7 expenses and retroactive child support were not dealt with as it was believed that disclosure was necessary to deal with retroactive matters, and I made an order for disclosure. It was felt that the parties may be able to agree on these matters once disclosure occurred.

7 Despite one other appearance in court in January 2002, the parties had been unable to agree, and as a result, they put before me the retroactive child support including base amount and section 7 expenses that Ms. D.A.M. suggests. Mr. A.E.M. set forth his position in an affidavit which was filed the morning of May 22, 2002.

8 Plaintiff's counsel wished that all matters be dealt with in the order dated November 16, 2001. This is inappropriate as certain things were determined on November 16, 2001 and certain things were not determined as the parties thought they may agree on them and an order was made for disclosure. The child and spousal support order that was granted on Friday, November 16, 2001 is attached as Exhibit B. It deals with the base support from December 1, 2001, it deals with spousal support from December 1, 2001 and it deals with the order that was made for disclosure. Those are the matters dealt with as the result of the argument I heard November 16, 2001. Now the disclosure has occurred and the parties are unable to agree, I will deal with the balance of matters that

have not been agreed by them.

9 As a result of a review of the documentation provided to me, I have decided the following:

1. Custody and Access Matters

At the hearing on May 22, 2002, it was indicated that the parties are attempting to reduce Dr. Fong's recommendations to a court order. I directed that Ms. Castle's office is to draft a proposed order and provide it to Ms. Wood's office by May 31, 2002. If Ms. Wood has any difficulties with the draft, she is to respond by June 14, 2002 and if Ms. Castle's office has any difficulties with this, she is to respond by June 28, 2002. This correspondence is to be copied to myself, and once it is obvious what the stumbling blocks are, if any, I will deal with the procedure to finalize a custody and access order.

2. Issue of Shared Custody

Ms. Wood and Ms. Castle both in their submissions raised the issue of shared custody. Where there is shared custody, and the paying spouse has physical custody of the child for not less than 40% of the time, the guidelines give discretion to a trial judge, and designate the amount of the child support must be determined looking at a) the amount set out in the applicable tables for each of the spouses; b) the increased cost of the shared custody arrangements and c) the conditions, means, needs and other circumstances for each spouse and for any child for whom support is sought.

At the time of the hearing on November 16, 2001, there was no argument in relation to shared custody, the information before me was that the parties had agreed on the recommendation of Dr. Fong, which loosely was nine days with Ms. D.A.M. and five days with Mr. A.E.M. in a two week period. Mr. A.E.M. feels that as he now has the children approximately 40% of the time, taking into account the income of both him and Ms. D.A.M., the increased costs of shared custody arrangements and the conditions, means, needs and other circumstances of each spouse and of the child, that maintenance set out in the order of November 16, 2001 should be varied. I am not willing to do so. In making that determination, I am primarily taking into account the disparity between the guideline income of the two individuals. It is a wide disparity. I am also considering the fact that Ms. D.A.M. still incurs all the usual costs in terms of shelter for the children, even though I recognize that Mr. A.E.M. also has to equip a home for them. I am considering the fact that this rotation is a nine-day/ five-day rotation, and that Mr. A.E.M. spends additional time with the children at their extracurricular activities and splits holidays in the summer and other vacation periods. I am considering that although Mr. A.E.M. indicates that he may pay for some clothes, some recreational and educational material while the children are with him, the major school costs, fees, and items of that nature are being dealt with as section 7 expenses.

In making this determination, I am not making any comment on Mr. A.E.M.'s involvement with his children or parenting. Section 9 is not directive, it merely indicates that when the 40% time is reached, the guidelines may not necessarily be followed, but one has to look at the incomes of each spouse, the increased cost of the shared custody arrangement and the circumstances of each spouse and the children. With the disparity in the guideline incomes here and having reviewed the recommendations of Dr. Fong in terms of the children, I am not varying the order of November 16, 2001 in terms of the base line amount that was to commence December 1, 2001 is to continue until further order.

3. Section 7 Expenses

The split on section 7 expenses based on the order of November 16, 2001 would be based on the defendant having a guideline income of \$104,000 and the plaintiff having a guideline income of \$7,000 plus any spousal support which gives her an annual income for the split of section 7 expenses of \$22,600. Thus, 18% will be paid by Ms. D. A.M. and 82% will be paid by Mr. A.E.M..

Ms. D.A.M. provided an estimate of section 7 expenses for the year 2002 to 2003. It looks reasonable and she estimated the result would be \$411 a month paid by Mr. A.E.M. and \$34 per month paid by Ms. D.A.M..

As this couple obviously makes detailed lists of section 7 expenses, it is appropriate to set a monthly amount that will be paid by Mr. A.E.M. to Ms. D.A.M., with a reconciliation at the end of the year based on the actual amount spent and an application of the formula. I am directing that amount be \$400 per month commencing July 1, 2002 until further order, with a reconciliation to be done at the end of December with a list of the actual expenses from June 1 to December 31 and an application of the percentage split, with a similar recalculation in December of each year.

4. Retroactive Child Support

Ms. D.A.M. now asks for retroactive child support since as a result of the disclosure which was ordered November 16, 2001, Mr. A.E.M.'s actual income for the years from 1999 onward is known, with his employment income in the year 2000 being \$224,756 and for 1999 being \$121,783.12. The straight math reconciliation is \$76,678.87 (the base line amounts that should be paid from November 1, 1999 to May 31, 2002) less the \$45,880.18 paid to May 4, 2002 for an amount owing of \$30,798.69. The correction to this is that the guideline amount from January through to May of 2002 should have been \$1,748 not \$1,549 for an increase of \$995. As a result the only issue is whether there should be an adjustment from the total of \$31,793.69 (\$995 plus \$30,798.69) for the fact that there was shared parenting. Mr. A.E.M. has put no evidence before me in his affidavit of the past amount of time he has spent with the children to suggest that he is at the 40% amount, the evidence that I have about the access to the children is in Ms. D.A.M.'s affidavit filed October 19, 2001, which is not contradicted in terms of the historical perspective. From this, I would understand that for a period of some months after August 24, 2000, the children were spending 50% of the time with their father. However, considering all of the factors in section 9, I am not inclined to deviate from the guideline amounts from this period and as a result, I am setting the arrears in base child support at the sum of \$31,793.69 up to May 31, 2002.

5. Retroactive Section 7 Expenses

In terms of arrears of section 7 expenses, Ms. D.A.M. takes the position that these were \$9,171 to May 22, 2002 less \$1,540 paid for a total of \$7,631. Mr. A.E.M. acknowledges that he owes \$3,821 as calculated in the schedule attached is Exhibit A to his affidavit of May 21, 2002. Having reviewed the entirety of the calculations, I am setting the section 7 expenses owed until the end of June 2002 in the amount of \$5,021.65, being the calculation formed by Mr. A.E.M. on Exhibit A worked out at the 80% figure.

Order accordingly.

END OF DOCUMENT