

CANADA / JUDGMENT

Apperley v. Apperley

2023 BCSC 1621

COURT

Supreme Court of British Columbia

DECIDED

13 September 2023

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2023 BCSC 1621 Apperley v. Apperley

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Apperley v. Apperley,

2023 BCSC 1621

Date: 20230913

Docket: E212439

Registry: Vancouver

Between:

Kyla Ann Apperley also known as Kyla Ann Boucher

Claimant

And

Michael Taylor Apperley

Respondent

Before: The Honourable Justice A. Ross

Reasons for Judgment

Counsel for the Claimant:

J. Broadhust

The Respondent, appearing in person:

M. Apperley

Place and Date of Trial/Hearing:

Vancouver, B.C.

August 2-3, 2023

Place and Date of Judgment:

Vancouver, B.C.

September 13, 2023

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Introduction

[1] This application comes in the midst of a family law dispute between the claimant and the respondent.

- [2] The notice of application seeks 35 separate paragraphs of interim relief which fall into the following broad categories:
- a) Child and Spousal support (Retroactive and Prospective)
 - b) Issues to be Resolved at Arbitration
 - c) A Review of Parenting Orders
 - d) Conduct Orders
 - e) Interim Distribution of Funds
- [3] It is, to say the least, unruly to attempt to address 35 separate paragraphs of relief on a two-day application. The claimant submits that she was forced to bring this all-encompassing application for four reasons:
- a) all prior attempts at resolving these issues resulted in one issue being determined and other issues being adjourned due to insufficient time available in court;
 - b) the respondent has manipulated all past agreements to his own benefit;
 - c) she requires this relief, including the child and spousal support, because existing interlocutory orders are expiring or due for review; and
 - d) there is an urgent issue relating to parenting time in August 2023.
- [4] To the credit of the parties, of the original 35 paragraphs of relief sought by the claimant, through discussion and compromise during the hearing, they were able to reach agreement on 23 paragraphs. I reserved on the remaining 12 paragraphs plus the issue of costs, and these are my reasons relating to those areas of relief.
- [5] I also note that the respondent made preliminary objections to this application. He argues that the claimant was seeking to vary a parenting order. However, that order, which I discuss below, provided for review in June 2023. Hence, to the extent that the parenting order is changed, it is based upon a "review" standard, and is not an application to "vary".
- [6] For the clarity of understanding of the parties, I have listed the paragraphs of the application below, followed by an indication of whether agreement was reached. Where no agreement was reached, I have indicated that fact and then addressed the issue below.

Background Facts

- [7] The parties commenced living together in 2015 and married in 2017. They separated on June 21, 2021. The claimant is 41 and the respondent is 38. They have two children, ages 6 and 4. The respondent is employed as a firefighter. The claimant did not work during the marriage. Since separation she has started a childcare business. I discuss her income below.

Prior Orders

[8] There are four prior orders in this action:

- a) December 16, 2021: Master Harper (Interim Parenting Schedule)
- b) October 3, 2022: Final Consent Order (Parenting Schedule and Terms)
- c) January 10, 2023: Consent Conduct Order (Expires August 31, 2023)
- d) January 23, 2023: Order of Justice Chan (Interim Child and Spousal Support) (Child Support of \$1,103 and Spousal Support of \$1,082. Expired June 30, 2023).

Areas of Agreement

[9] The parties reached agreement on the paragraphs of relief set out below during the course of the application. Agreement was not reached regarding the paragraphs noted to be "reserved". For ease of reference, I have followed the numbering in the notice of application:

- a) Paragraph 1 and 2: Reserved.
- b) Paragraph 3: On an interim basis, commencing July 1, 2023, and until further agreement of the parties or court order, the respondent will pay to the claimant his proportionate share for the children's special or extraordinary expenses including, but not limited to, expenses incurred for childcare, summer camp, extracurricular activities that have been mutually agreed to and the uninsured portion of any medical expenses, within seven days of the claimant providing an invoice for the children's special or extraordinary expense.
- c) Paragraphs 4 and 5: Reserved.
- d) Arbitration:
 - i. Paragraph 6: Pursuant to s. 224(1) of the Family Law Act, S.B.C. 2011, c. 25 [FLA], the respondent and the claimant agree to, and are required to, arbitrate all issues relating to property division on or before September 30, 2023, subject to the availability of the Arbitrator, Lisa Hamilton, K.C., and the medical condition of the claimant.
 - ii. Paragraph 7: Pursuant to s. 19.6 of the FLA, Lisa Hamilton, K.C. is appointed to act as the Arbitrator.
 - iii. Paragraph 8: Pursuant to s. 224(2) of the FLA, the retainer requested by the Arbitrator shall be paid out of the sale proceeds of the former matrimonial home currently held in trust by the respondent's counsel, within seven days of request.
 - iv. Paragraph 9: Pursuant to s. 224 of the FLA, the respondent shall sign the retainer agreement of the Arbitrator.
- e) Summer Parenting Schedule:

- i. Paragraphs 10 and 11: For the month of August 2023, the respondent is entitled to the currently scheduled time with the children subject to the respondent providing two days with the claimant between the dates of August 16 and 22, 2023.
 - f) Counselling:
 - i. Paragraph 12: An order that the older child will attend counselling sessions with Ana Maria Comia at Crossroads Collective, for a minimum of two times per month, commencing immediately such that each party books at least one counselling session during their respective parenting time each month.
 - ii. Paragraph 13: An order that the younger child will attend counselling with Colleen Vantol at Crossroads Collective, a minimum of two times per month commencing immediately such that each party books at least one counselling session during their respective parenting time each month.
 - iii. Paragraph 14: An order that the respondent will pay the upfront cost of the children's counselling fees owing after the respondent's Pacific Blue Cross coverage has been applied, subject to the proviso that if one of the counsellors is not eligible for payment by Pacific Blue Cross, the claimant will pay the full amount of that counselling.
 - iv. Paragraph 15: An order, by consent, that any amounts payable over the maximum payable by Pacific Blue Cross will be divided as s. 7 payments.
 - v. Paragraph 16: Neither party will be permitted to cancel a counselling appointment booked by the other party.
 - g) Parenting Orders:
 - i. Paragraph 17: An order that paragraph 7(v) of the Final Consent Order filed October 12, 2022 (the "Parenting Order") is replaced as follows:
 - (1) Day 5: In the event that the exchange occurs on a school day, the claimant will drop the children off at the school at 8:30 AM, and the respondent does not need to attend.
- In the event that the exchange occurs when there is no school, the exchange shall occur at the recreation centre closest to where the claimant lives. Currently, that is the Grandview Heights Aquatic Centre.
- ii. Paragraph 18: Reserved.
 - iii. Paragraph 19: An order that paragraph 18(a)(iii) of the Parenting Order is replaced as follows:
 - (1) The respondent shall have the first week and the claimant shall have the second week. This provision will be in place for a period of three years.
 - iv. Paragraphs 20 and 21 relate to parenting at Easter and Thanksgiving and are reserved.
 - v. Paragraph 22 was dealt with by the parties before the application.

- h) Conduct Order:
- i. Paragraph 23: The current Conduct Order, set to expire on August 31, 2023, is renewed with the following revisions:
- (1) Pursuant to s. 225 of the FLA, the respondent and the claimant are restrained from directly or indirectly communicating with or contacting each other, except as follows:
- (i) in writing through the application, OurFamilyWizard;
- (ii) in writing through email or text messages in case of emergencies;
- (iii) while in attendance at mediation with respect to the above-noted matter;
- (iv) while in attendance at a court appearance with respect to the above-noted matter;
- (v) while in attendance at a parenting coordination meeting with respect to the above-noted matter;
- (vi) while in attendance at a counselling session with respect to the above-noted matter; or
- (vii) communicating indirectly through a lawyer, parenting coordinator, or counsellor.
- ii. Paragraph 24: Pursuant to s. 227(c) of the FLA, both parties are restrained from attending at or near the residence of the other party or the workplace were of the other party.
- iii. Paragraph 25: The paragraph of the Conduct Order that deals with attending at the elementary school is renewed.
- iv. Paragraph 26: Pursuant to s. 227(c) of the FLA, the claimant will only attend to volunteer in the daughter's classroom on days that the daughter is scheduled to be in her care unless consented to in writing by the respondent prior to the attendance through OurFamilyWizard.
- v. Paragraph 27: Pursuant to s. 227(c) of the FLA, for any exchanges of the children that require a transition between the parties directly, the location shall be as follows:
- (1) at the Grandview Heights Aquatic Centre located at 1685 524th Ave., Surrey, BC, in the parking lot; or
- (2) at a neutral location that both parties agree to in advance in writing; and
- (3) during any transition, the parties shall maintain a minimum of 25 feet from each other.
- vi. Paragraph 28: Pursuant to s. 227(c) of the FLA, the parties are restrained from following each other.
- i) Paragraphs 29-32: Reserved.
- j) Paragraph 33: An order dispensing with the requirement of the respondent's signature on the children's passports.
- k) Paragraph 34: Reserved.

- l) Paragraph 35: An order pursuant to s. 89 of the FLA for an interim distribution to each party in the amount of \$50,000 from the funds currently held in trust from the house sale proceeds.
- m) Paragraph 36: Costs are discussed below.

Issues Reserved

- [10] Having addressed the consent items, I now move on to the items upon which I reserved. The starting point for several of those items is the order of Justice Chan dated January 23, 2023, and the income ascribed to each party in that order.
- [11] The interim support order of Justice Chan made the following provision for child support and spousal support. It ascribed income levels to each party:
 - 1. On an interim basis, commencing on January 1, 2023, and continuing on the 1st day of each and every month thereafter, up to and including June 1, 2023, the Respondent, Michael Taylor Apperley, will pay to the Claimant, Kyla Ann Boucher, \$1,103 per month, being set-off child support for Taylor Apperley, born November 25, 2016, and Evie Apperley, born October 17, 2018, based on the Respondent's guideline income of \$107,727, the Claimant's guideline income of \$32,400, and their shared parenting schedule.
 - 2. On an interim basis, commencing on January 1, 2023, and continuing on the 1st day of each and every month thereafter, up to and including June 1, 2023, the Respondent will pay \$1,082 per month to the Claimant in spousal support.
- [12] I note that Justice Chan's order only addressed the period from January 1-June 30, 2023. It did not address retroactive support for the years 2021 and 2022. I address the retroactive support payments along with the other issues below.
- [13] I now address the disputed paragraphs in the notice of application.

Income for Support Purposes

- [14] Several of the items of relief discussed below are predicated upon the income levels for the parties in 2023. For that reason, I address that issue first.
- [15] There is no dispute about the amounts actually earned in prior years. The claimant earned \$4,335 in 2021, and \$17,839 in 2022. The respondent earned \$99,443 in 2021, and \$110,445 in 2022.
- [16] On the calculation of current (2023) income, each party disputes that the opposite party's guideline income has remained the same as in Justice Chan's order (above). Further, the respondent seeks to impute income to the claimant for 2023 and beyond.
- [17] First dealing with the respondent's income, I note that he is a salaried employee of a municipality. Determination of his income should not be complicated.

- [18] The claimant submits that the respondent's income should be in the range of \$109,132 for 2023. She bases that calculation on a pay stub produced by the respondent for the period up to June 30, 2023. That pay stub indicates gross employment income of \$52,025. The claimant asserts that, in the remainder of the year, the respondent will earn more money. By the claimant's calculation, the full-year earnings will be \$109,132. The claimant also notes that in 2022 the respondent's income was \$110,445 and that it is unlikely to go down.
- [19] The respondent says that the June 30 pay stub shows half of his yearly gross earnings. Hence, he will gross approximately \$104,050 in 2023. He will also pay union dues of approximately \$2,000. Hence, his income for support purposes will be approximately \$102,445.
- [20] He says that his income for 2022 was inflated by a retroactive payment due to a late-negotiated collective agreement.
- [21] I accept the respondent's position. I set his income for support purposes on this interim application at \$102,445 for 2023.
- [22] The claimant's income is more difficult to estimate. She projects that she will earn \$32,400 in 2023.
- [23] The claimant provides outdoor recreational programming for children, before and after school. Her business is in the nascent stages, but she hopes to grow it. As of June 22, 2023, the claimant's gross "paid invoices" totalled \$32,671. She says that that she will not double that figure during remainder of 2023 because:
- a) some of the funds received (by the end of June) represented deposits (or "pre-payments") for summer programs that had not yet occurred;
 - b) she would be required to pay for an employee during the summer months; and
 - c) she is pregnant, and will not be able to put her full efforts toward the business after September 2023.
- [24] The respondent disputes the claimant's evidence regarding the prior invoices and her estimates for the year:
- a) If the funds received were "paid invoices", then the work must be completed. Further, the bank records show no large deposits that look like prepaid amounts.
 - b) The claimant's evidence is that she will have to pay an employee in the range of \$3,000 per month for the summer months. Hence, the employee will out-earn the employer on a monthly basis.
 - c) Given the receipts to June 22, and the prospect of increased revenue in the summer months when children are off school, the claimant's estimate of annual income is low.

- [25] In addressing applications for interim support, the court is to focus on the applicant's needs and the respondent's ability to pay. I am attempting to make a fair and just order, despite not embarking on an in-depth analysis of the circumstances.
- [26] In this case, I accept that the claimant's income will be decreased when her new baby arrives (expected in October). However, her "paid receipts" to June 22 (\$32,400) suggest that her net income for the year will exceed her estimate of \$32,000.
- [27] For interim support purposes, I estimate the claimant's income for 2023 in the amount of \$40,000.
- [28] I noted above that the respondent seeks to impute income to the claimant. In my opinion, the evidence of her attempts to become financially self-sufficient are well-documented. That evidence includes the claimant obtaining a childcare job at a business run by one of her friends. The claimant's employment was later terminated, apparently because the respondent attended at the childcare facility and harassed the owner. Given that history, I am loath to find that the claimant has not taken sufficient steps to become financially self-sufficient.

Paragraph 1: Child Support

- [29] It follows from my assessment above, on an interim basis, commencing July 1, 2023, and continuing on the first day of each month until further order of this Court, that the respondent is ordered to pay to the claimant child support in the amount required by the Federal Child Support Guidelines, SOR/97-175, based upon the respondent's income at \$102,445 and the claimant's income of \$40,000, and their shared parenting schedule, being set-off child support for their two children.

Paragraph 2: Section 7 Expenses

- [30] The notice of application seeks a division of section 7 expenses:
- a) 67.7% to the respondent;
 - b) 32.3% to the claimant.
- [31] I will leave it to the parties to perform the necessary calculations based upon my determination of income.

Paragraph 4: Spousal Support

- [32] The claimant's notice of application proposed a spousal support amount based upon slightly different income amounts. As a result, I will leave it to the parties to calculate the amount of spousal support payable using DivorceMate or similar software.

- [33] It follows from my assessment above that, on an interim basis, commencing July 1, 2023, and continuing on the first day of each month until further order of this Court, that the respondent is ordered to pay to the claimant spousal support in the amount set out in the Spousal Support Advisory Guidelines based upon the respondent's income at \$102,445 and the claimant's income of \$40,000. The spousal support will be paid at the mid-range and after accounting for the child support.

Paragraph 5: Retroactive Child Support

- [34] The claimant seeks retroactive child support for the period August 1, 2021, to the present. Again, there is no dispute regarding the past income amounts of the parties.
- [35] Counsel for the claimant presented a table of the payments made by the respondent. Some of those payments exceeded, and some did not meet, the ex post facto calculations performed by counsel. By his initial calculation, the retroactive amount owing was \$7,795. However, that amount:
- a) miscalculated the amount paid in January 2023; and
 - b) included July and August 2023 (which I have addressed above).
- [36] Based upon my calculations, in the period between July 2021 and January 2023, the respondent underpaid child support by \$5,316, and I order him to pay those amounts. Again, to be clear, this amount does not include July and August 2023, which I have ordered to be paid under Paragraph 1.

Paragraph 18: Time with Kids after School

- [37] It is important for the context of the parenting orders to know that the respondent has a job that schedules him 4-days on and then 4-days off. He gets the children when he is not working.
- [38] Paragraph 18 of the notice of application seeks an amendment to paragraph 7(viii) of the Parenting Order.
- [39] The current Parenting Order provides that the children are with each parent on a 4-on/4-off basis. Paragraph 7(viii) provides that, on day 8, the children are with the respondent until 6:00 PM.
- [40] The claimant seeks an order that the schedule be changed such that the claimant picks the children up at school (on school days). The proposed wording is:
- a) Day 8--In the event that the exchange occurs on a school day: the claimant will pick up the children from school at 3 PM, and the respondent does not need to attend.
- [41] The claimant proposes this amendment in order to reduce the number of interactions between the parties. The claimant presented evidence of prior conflict during exchanges.

[42] The respondent opposes this amendment. He indicates that his time with his children is very important to him. He does not want to lose this additional after-school time with them.

[43] Although the current application falls under the category of a "review" and not a variation, I am hesitant to interfere with the Parenting Order that the parties reached by consent. I give significant credence to the respondent's opposition to this change in the schedule. Given that the parties consented to the prior Parenting Order, I decline to make this change.

[44] I dismiss paragraph 18 of the application.

Paragraphs 20: Easter

[45] The claimant seeks a change to the Easter and Thanksgiving parenting schedules.

[46] At present, the Parenting Order provides, for Easter:

- a) The parties shall divide Easter Weekend equally with the respondent having end-of-school until Sunday, 9:00 AM and the claimant having the remainder of the long weekend until drop-off at school on Tuesday morning.
- b) If the respondent's work schedule makes him unavailable, he is permitted to switch the schedule so that he gets two days allocated to the claimant.

[47] The claimant proposes:

- a) Easter Weekend--The parties will alternate having the children for the Easter Weekend, which runs from pick up of the children on Thursday, until drop off of the children at school on Tuesday morning. In odd years, the respondent will have parenting time with the children. On even years, the claimant will have parenting time with the children. If Easter falls within Spring Break, the Spring Break schedule will override the Easter schedule.

[48] The respondent opposes this amendment.

[49] In my opinion, the amendment carries the significant risk that the respondent's work schedule will interrupt or prevent the proposed Easter Schedule from working. Put another way, in order for the proposed Easter Schedule to work, the respondent's work schedule would have to align perfectly with the Easter long weekend. He would need to start his "4-days off" exactly on Thursday afternoon on the year that he had the children. In the opposite years, he would have to make sure that he worked those four days.

[50] On that basis, I dismiss the claimant's application to replace the current Easter Schedule. Thus, the existing schedule, as negotiated by the parties and included in the Parenting Order, will continue.

Paragraph 21: Thanksgiving

[51] The present Parenting Order divides Thanksgiving weekend in a manner similar to the Easter weekend terms above.

- [52] The claimant seeks to replace the present provision with the following (which would, again, alternate years):
- a) Thanksgiving--The parties will alternate having the children for the Thanksgiving Weekend, which runs from pick up of the children on Friday, until drop off of the children at school on Tuesday morning. In odd years, the respondent will have parenting time with the children.
- [53] For the same reason that I dismissed the application to replace the Easter Weekend provisions, I dismiss the claimant's application to replace the Thanksgiving provisions. Hence, the existing schedule will remain in force.
- [54] If the parties wish to negotiate a variation to the current provisions of the Parenting Order relating to Easter and Thanksgiving, they are welcome to do so.

Paragraphs 29-30: Activities

- [55] I am informed that there have been disputes regarding the children's activities. One parent will sign a child up for an activity, but the other parent will not take the child to the activity during the other parent's time.
- [56] The current Parenting Order (paragraphs 37-40) provides for the parties to discuss and agree on sports and activities. Activities are not to be chosen unilaterally. They agree to use "best efforts" to get the children to the activities.
- [57] The claimant proposes that the existing provisions be replaced with:
37. Each party is at liberty to choose one activity for each child at any given period of time in consultation with the child where appropriate. There shall be no further activities booked for the Children, unless the other parent provides written agreement for same.
 40. The parties will pay the costs of the one activity per child per parent, in proportion to their respective incomes.
- [58] Based upon the evidence, it appears that there have been difficulties with activities. That is a common issue in these types of cases. In my opinion, the claimant's proposed provisions are reasonable and do not prejudice either party. They are in the best interests of the children.
- [59] I grant the relief sought at paragraphs 19 and 20 of the application.

Paragraphs 31-32: Telephone Contact

- [60] The claimant seeks an order (paragraph 31) that, on Day 7 of the Parenting Schedule (which is three days into the respondent's days), she is entitled to a phone or FaceTime call with the children at 3:00 PM. She seeks an order (paragraph 32) that this call be conducted in private (i.e., without the respondent in the room).

- [61] The respondent opposes this change. He notes that 3:00 PM is a busy time, involving pick-up of the children. He also raises suspicion about the reason for the claimant needing "private" discussions with the children.
- [62] Again, my prime consideration here is the best interests of the children. I fail to see how a telephone or FaceTime chat with their mother could be seen as a bad thing (by anyone other than the respondent). However, I accept that a hard-and-fast schedule for such a call may be difficult.
- [63] On that basis, I grant the relief sought in paragraphs 31 and 32, but I will not put a firm time on the call. The parties will have to arrange a time that is convenient to both parents, between 3:00 PM and 5:00 PM.

Paragraph 34: Children's Passports

- [64] I accept the claimant's evidence that, in order to apply for passports for the children, she obtained the respondent's signature on the documents. After she submitted the forms to the government, the respondent contacted the passport office and indicated that he was withdrawing his approval of the application. That raises concern that the respondent has taken steps to avoid the issuance of the passports.
- [65] Having a passport is obviously in the best interests of each child.
- [66] In my opinion, the correct manner to hold the children's passport is for me to direct that claimant's counsel hold them. Should there be a change of counsel, then Mr. Broadhurst must pass the passports to new counsel. If there is no new counsel, then Mr. Broadhurst will provide the passports to the claimant. If that occurs, the respondent is at liberty to apply to vary this paragraph of the order.
- [67] The existing Parenting Order deals with travel and the delivery of the passports. Those provisions remain in place.

Costs

- [68] Although there has been some divided success on this application, it is my impression that the necessity for the application was occasioned by the respondent. In that regard, a number of issues needed to be addressed, including retroactive and ongoing child support.
- [69] On that basis, the claimant is entitled to her costs of this application.

"A. Ross J."

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