
CANADA / JUDGMENT

B .D. G. v. C .C. G.

2007 BCSC 989

COURT

Supreme Court of British Columbia

DECIDED

5 July 2007

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2007 BCSC 989 B.D.G. v. C.C.G.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

B .D. G. v. C .C. G.,

2007 BCSC 989

Date: 20070705

Docket: 00/4024

Registry: Victoria

Between:

B. D. G.

Plaintiff

And:

C. C. G.

Defendant

Before: The Honourable Mr. Justice Johnston

Reasons for Judgment

(In Chambers)

Counsel for the Plaintiff:

B. W. Johnson

Counsel for the Defendant:

B. R. Vining

Date and Place of Trial/Hearing:

20070621

Victoria, B.C.

- [1] The plaintiff and defendant were married May 12, 1979 and divorced by order of this Court, granted November 18, 2003. The divorce order was comprehensive, dealing with, among other things, child support for two children of the marriage: S.C.G., born November 2, 1989, and N.E.G., born December 20, 1991. The plaintiff now seeks a variation of the order to require the defendant to pay an increase in child support retroactive to January 1, 2003, which the plaintiff says will amount to a little over \$44,000, to vary the time set in the order for disclosure of financial information from June 1st to May 1st each year commencing May 1, 2008, and for other relief.
- [2] The order in question was arrived at after prolonged negotiations during which both parties were represented. The provision for child support was negotiated at a long meeting in February 2003. It took from then until November 2003 for the parties' lawyers to document the terms largely arrived at in February. The defendant's 2002 income tax return was finally disclosed in early November 2003 and showed a total income of \$229,126.
- [3] The order in its material parts reads:
5. the Plaintiff, B.D.G., having been found to have a Guideline income of Twenty-six Thousand Four Hundred (\$26,400.00) Dollars, and the Defendant, C.C.G., having been found to have a guideline income of Two Hundred Five Thousand (\$205,000.00) Dollars;

THIS COURT FURTHER ORDERS THAT:

6. the Defendant, C.C.G., shall pay to the Plaintiff, B.D.G., the sum of \$2,261.50 per month for the support of the children of the marriage, namely, N.E.G., born December 20, 1991, and S.C.G., born November 2, 1989, payable bi-weekly commencing the 1st day of May, 2003;
7. the Defendant, C.C.G., shall pay to the Plaintiff, B.D.G., pursuant to Section 7 of the Federal Child Support Guidelines the sum of \$1,830.00 per month for additional support of the children of the marriage, namely, N.E.G., born December 20, 1991, and S.C.G., born November 2, 1989, payable bi-weekly commencing the 7th day of March, 2003;
- ...
13. the Plaintiff, B.D.G., and the Defendant, C.C.G., shall exchange their individual income tax returns on or before the 1st of June in each and every year;
- [4] The defendant C.C.G. is a lawyer, a partner in a Lower Mainland law firm. The order provided that he was to retain his interest in the law practice, his shares in a practice-related corporation and his capital and partnership interest in the law firm's management.

- [5] The defendant's income for each year is his share of the profits of the partnership. The partnership fiscal year end is the calendar year end, and the accounts of the partnership are prepared some time between then and April 30 of the following year. Through the year the defendant draws a fixed amount monthly from the partnership and those drawings are debited against his share of the profits of the partnership when the partnership accounts are finalized. The defendant's child support obligations are paid from these monthly draws.
- [6] The defendant's total income in the years following the order, as disclosed in his tax returns, has been:

YEAR

AMOUNT

2003

\$303,756

2004

271,014

2005

296,336

2006I

323,493

- [7] The 2003 figure is inflated by \$50,000 which the defendant took out of his RRSP that year.
- [8] By contrast the defendant's Guidelines income of \$205,000 set out in the order appears to have been a negotiated reduction from the \$229,136 shown as total income for that year on his tax return.
- [9] The defendant did not deliver his 2003 tax return by June 1, 2004 as required by paragraph 13 of the order. The information contained in the defendant's 2003 tax return was not delivered until March 14, 2005. The 2004, 2005 and 2006 tax returns of the defendant have been delivered on or before June 1st each year as required by the order.
- [10] In approximately November 2005 the plaintiff retained a lawyer and that lawyer initiated contact with the defendant or defendant's counsel in order to assert the claim for increased child support.
- [11] In October 2006 the defendant agreed to increase child support to \$3,845 per month.
- [12] The s. 7 extraordinary or special expenses have remained the same and no application is made to vary that portion of the order.

- [13] The plaintiff's position is that the defendant should have been paying child support commensurate with his true income starting in 2003, and that the defendant's delay in delivering his 2003 tax return was deliberate. The plaintiff says that the defendant, by delaying disclosure of his 2003 income for almost an additional year, prevented her from learning of the substantial increase in his income over the amount upon which the consent order had been based.
- [14] Both parties have relied on the recent decision in the Supreme Court of Canada, *D. B. S. v. S. R. G.*, 2006 SCC 37. From that decision I extract the following principles that relate to this application to vary an existing order:
1. The order is binding until varied or set aside;
 2. The order does not absolve either parent from seeing that their children receive the proper amount of support;
 3. An increase in income is a material change in circumstance that would permit an increase in the amount of child support payable;
 4. It is the responsibility of both parents to ensure that C.C.G., as the payor in this case, pays the proper amount of support; and
 5. Complying with a child support order is not full and complete fulfillment of a payor's obligation to pay an appropriate amount of child support.
- [15] In this case the increase in the defendant's income has been a material change in circumstance that warrants an increase in child support. Whether that increase should be retroactive is determined after considering factors set out in *D. B. S. v. S. R. G.*
- [16] The first factor inquires into whether there is a reasonable excuse for not seeking an increase in child support earlier. This inquiry flows in part from the fact that child support is still an application-driven process with increases (or decreases) not flowing automatically from changes in income on the part of the payor.
- [17] Here, B.D.G. says that she did not get C.C.G.'s 2003 tax return until March 2005. She complains that even then she got it in machine readable form that would not print on her computer and there was some further delay until the defendant delivered a paper copy.
- [18] B.D.G. says that she had been in a motor vehicle accident and suffered a concussion. She swears that:
35. As a result of the motor vehicle accident I was physically and emotionally drained from the experience. I was not able financially or emotionally to deal with the thought of engaging a lawyer's services to pursue the Defendant for retroactive child support until the end of October.

36. In early November 2005 I borrowed money from my parents to retain a lawyer to compel the Defendant to pay retroactive child support and ongoing child support based upon his guideline income.
- [19] I do not view the plaintiff's explanation for the delay in pursuing an increase in child support as reasonable in these circumstances. The evidence that the effect of the automobile accident hindered the plaintiff from pursuing this issue is inadequate in my view and I am not persuaded that that injury, coupled with the plaintiff's financial and emotional circumstances, sufficiently explain the delay in seeking an increase.
- [20] I bear in mind that a retroactive child support order is of less benefit to children than payments in the proper amount made when they should be made.
- [21] The next question is whether the payor has engaged in blameworthy conduct. Here, the plaintiff argues that the delay in providing the 2003 tax return is blameworthy conduct. The plaintiff also points to difficulties she encountered in obtaining financial disclosure leading up to the consent order and as well to some difficulties in getting post-dated cheques as and when required by the order.
- [22] While it might lend some colour to the blameworthy conduct alleged after the order, I do not view the conduct of the defendant leading to the entry of the consent order as a type of blameworthy conduct contemplated by *D. B. S. v. S. R. G.*
- [23] As to the late delivery of the 2003 tax return, notwithstanding the defendant's explanation that he delayed delivery because of a reassessment by Canada Customs and Revenue Agency, I consider that the defendant has no adequate excuse for failing to deliver that tax return as required by the order of the court, when required to do so. I consider that to be blameworthy conduct on the part of the defendant. The delay permitted the defendant to have a greater share of his increase in income than he would have available to him had he disclosed earlier and had an earlier application been made for a variation.
- [24] The third factor is whether the children will benefit from a retroactive award. The children involved enjoy a relatively high standard of living. For example, S.C.G. has his own car and both children attend private school. The plaintiff alleges that in 2005 she had to borrow \$9,500 from her parents "... in order to make ends meet". This is in addition to \$240,000 the plaintiff owes her parents. In addition, the plaintiff complains that the defendant insists that payment for items such as boots for S.C.G. should come out of the child support paid or that she pay ferry costs for a one way trip when the children visit their father. The plaintiff asserts that the children enjoy a standard of living far below "... what other children of wealthy families, such as their father's, would enjoy".
- [25] In his affidavit the defendant points to the fact that the plaintiff is a trained pharmacist, was a member of the College of Pharmacists to 2003, and argues that the plaintiff is herself capable of employment and of contributing to the support of their children. In this regard, I note that the plaintiff has sworn:

8. I last worked as a pharmacist in October, 1991. I tried to retrain in the fall of 1999 and again in the spring of 2005 but it was evident that academic studies were necessary to be able to practice as a pharmacist again. I have no desire to return to that profession because I've not practiced for such a long time and I am not interested in studying, re-qualifying and working as a pharmacist at this point in my life.
- [26] I raise this here because it seems to me that an assertion that the children might have enjoyed a higher standard of living had their father paid more in child support (which he was demonstrably able to do) should be weighed in light of the mutual obligation on both parents to contribute to the support of their children.
- [27] I am not persuaded that a retroactive award now will be of any significant benefit to either or both children. The evidence in that regard falls short in that it lacks the sort of detail that would assist in assessing whether a current payment of a retroactive award would materially alter the children's lives or give them any significant benefit.
- [28] The fourth factor is whether the retroactive award would be a hardship on the defendant. The defendant does not really plead hardship. I note however that his monthly draw from his law firm currently leaves little room after payment of child support and special expenses and that the defendant now has a new partner who has a child and that the defendant is contributing to the support of both.
- [29] The defendant concedes that the appropriate current amount of child support should be adjusted to \$4,116, effective May 1, 2007.
- [30] With respect to the factors outlined above, the Supreme Court of Canada has said no one factor should be decisive but that retroactive award of child support need not be seen as exceptional.
- [31] Having considered all of the factors, and having weighed the extent of the defendant's blameworthy conduct, in light of the payments he has made for both child support and special and extraordinary expenses, I conclude that a retroactive award in this case is not warranted. The application to vary the award to require the defendant to pay retroactive child support is dismissed.
- [32] The defendant shall commence paying \$4,116 per month in child support beginning May 1, 2007. The evidence was not clear if that figure, to which the defendant has agreed, is based on a Guideline income different than his total income. For the purposes of an order, the total income figure of \$323,493 can be used as the defendant's Guideline income unless the parties agree to a different figure.

- [33] The application for a \$5,000 penalty to be paid by the defendant is dismissed as is the application that the date for exchange of financial information be altered from June 1st to May 1st of each year. The penalty fails with the dismissal of the application for retroactive child support, and no sufficient reason has been shown for a variation of the date for disclosure.
- [34] It follows that the application for interest on any retroactive payments is dismissed.
- [35] The defendant, who might otherwise have been awarded costs of this application, has indicated that the parties should bear their own costs and that is so ordered.

"The Honourable Mr. Justice Johnston"

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Prepared on 27 October 2026 · Esheria