
CANADA / JUDGMENT

Ball v. Ball

2012 BCSC 227

COURT

Supreme Court of British Columbia

DECIDED

15 February 2012

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2012 BCSC 227 Ball v. Ball

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Ball v. Ball,

2012 BCSC 227

Date: 20120215

Docket: E074178

Registry: Vancouver

Between:

Mathew Charles Norman Ball

Claimant

And

Diane Theresa Mary Ball

Respondent

Before: The Honourable Mr. Justice Ehrcke

Reasons for Judgment

Counsel for the Claimant:

K. Duhra

Appearing on her own behalf:

D.T.M. Ball

Place and Date of Trial:

Vancouver, B.C.

January 31, 2012

February 1-3, 2012

Place and Date of Judgment:

Vancouver, B.C.

February 15, 2012

INTRODUCTION

- [1] Mathew Ball and Diane Ball were married on November 29, 1980. They have three children, C.B. who is now 27, M.B. who is now 25, and E.B. who is now 23 years old.
- [2] The parties separated in the summer of 2006. They entered into a separation agreement on June 26, 2006, which dealt with spousal support, child support, and division of assets. Ms. Ball filed that agreement in this Court on August 16, 2006.
- [3] Mathew Ball commenced this family law proceeding on December 5, 2007, seeking a divorce, a termination of his obligation to pay child support, and a review of his obligation to pay spousal support pursuant to the separation agreement.
- [4] Ms. Ball filed a counterclaim on March 14, 2008, in which she seeks child support, an order that the provisions of the separation agreement remain in force, and in the alternative, an order for spousal support and reapportionment of family assets.
- [5] In July 2009, Ms. Ball sought the assistance of the Family Maintenance Enforcement Program ("FMEP") for the collection of support payable under the terms of the separation agreement. Based on the information that she provided to them, FMEP calculated "arrearage at enrollment" on July 31, 2009 at \$38,562.
- [6] On May 12, 2011, Mr. Ball filed a notice of application seeking a reduction in support payments and a cancellation or reduction of arrears.
- [7] On July 4, 2011, N. Smith J. made an interim order that Mr. Ball continue to pay child support for E.B. in the amount of \$992 per month and spousal support in the amount of \$3,136 per month based on an income of \$120,000 per year.
- [8] The trial of this matter came on before me on January 31, 2012. Both Mr. Ball and Ms. Ball testified, and both introduced numerous documentary exhibits. At the conclusion of the trial on February 3, 2012, I made an order granting the divorce that was sought by both parties, and I reserved judgment on the remaining issues.

ISSUES

[9] The live issues between the parties revolve around the effect of the separation agreement, whether the parties orally agreed to a variation of the terms of the agreement, whether the Court should order a variation based on changes in Mr. Ball's income since the time of the agreement, and whether E.B. continues to be a child of the marriage despite the fact that she is now 23 years old.

[10] Section 2 of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), defines "child of the marriage" in this way:

"child of the marriage" means a child of two spouses or former spouses who, at the material time,

- (a) is under the age of majority and who has not withdrawn from their charge, or
- (b) is the age of majority or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessities of life.

In British Columbia, the age of majority is 19.

[11] An additional issue is a computation of the amount that Mr. Ball has already paid as support, and whether FMEP's calculation of arrears is inaccurate. Mr. Ball's position is that he has paid more than he was obligated to, and that as a result, there should be a declaration that he has no arrears owing, and that the amount of his overpayment should be credited against his future support obligations.

BACKGROUND FACTS

[12] Mr. Ball is a geologist. He is 53 years old. Ms. Ball is 58 years old, and is not currently employed outside the home.

[13] Ms. Ball was born in Montreal and graduated from high school there. She studied biochemistry for three years at McGill University and then spent a year travelling in Europe. Upon her return to Canada, she spent the next three years studying geology at the University of British Columbia in the Bachelor of Science program, but she did not complete her degree. In 1978 she started working for Cominco doing geotechnical work in the Arctic. She testified that she had a high salary and was able to buy a car.

[14] She met Mr. Ball, and they married on November 29, 1980. They moved to Alberta, where they both had lucrative jobs working for different oil companies.

[15] Around 1983, they moved to Kingston, Ontario, where Mr. Ball pursued a Masters degree. They lived on his student grants. He obtained his degree, and they moved to British Columbia, where their first daughter, C.B., was born in December 1984.

- [16] Ms. Ball worked part-time as a geologist, and Mr. Ball worked full-time for the same company. Their second daughter, M.B., was born in January 1987, and their third child, E.B., was born in October 1988. They bought a house in Vancouver. Ms. Ball continued to work on and off, and Mr. Ball started working on his Ph.D., which he eventually obtained in 1998.
- [17] In 1992, Mr. Ball found himself out of work for a period of time, and they sold their Vancouver house and bought a home in Whistler. In 1994, they sold that house and bought one on Bowen Island.
- [18] In 1995, Mr. Ball obtained work for a company in Papua New Guinea. Ms. Ball and the children remained in British Columbia until the end of the school year, and then met him in Australia in September 1995 before going on to Papua New Guinea. In her evidence, Ms. Ball described this as being a difficult period. There was a drought in 1997. She went to Australia with the children, where they attended school. Around this time, M.B. underwent an operation for a non-cancerous tumour.
- [19] Around 2000, Mr. Ball lost his job in Papua New Guinea, and the family moved back to British Columbia, where he eventually found work. Ms. Ball worked as well, but she described these jobs as menial. Around this time she also took an evening computer course at BCIT.
- [20] In 2005, Mr. Ball obtained employment with Uganda Gold Mining Corp. ("U.G.M."), where he earned \$120,000 in U.S. dollars annually. In addition, he had a generous benefit package, which included his residence and the cost of travel back to Canada four times per year, as well as stock options.

THE SEPARATION AGREEMENT

- [21] The parties separated in the summer of 2006. Mr. Ball obtained a form for a separation agreement from an office supply store. He discussed it with Ms. Ball and he filled it out. Neither of them had any legal advice before they both signed it on June 26, 2006. Both their signatures were witnessed on the document by their eldest daughter, C.B., who was then 21 years of age. M.B. was 19 at the time, and E.B. was 17.
- [22] The recitals at the beginning of the agreement set out the details of the marriage, and the names, ages, and dates of birth of all three of their children.
- [23] The agreement provided in paragraph 6 that both parties would have joint custody of E.B., but Ms. Ball would have primary residence.
- [24] Paragraph 9 provided that Mr. Ball would pay Ms. Ball \$992 per month for the maintenance of E.B., based on his income of \$120,000, commencing on July 15, 2006 and continuing on the first day of each month thereafter "for so long as each child of the marriage remains a child of the marriage."
- [25] Paragraph 10 dealt with extraordinary expenses. It read:

In addition to the amount above described, the Husband/Wife shall pay to the Wife/Husband, for special expenses, the sum of \$ NIL to be paid at the same time as the payment described in paragraph 9.

[26] Spousal support was dealt with in paragraph 8. It provided:

The Husband shall pay to the Wife for her own support, the sum of \$5,000 per month, commencing on the 15 day of July, 2006, and continuing on each and every month thereafter until the 15 day of April 2018, (or) until such time as the Wife dies, remarries, or commences cohabitation with another person, in what is generally referred to as a common-law relationship, whichever shall occur first.

Following that paragraph, the parties added the words: "Based on Current Income."

[27] In the remainder of the agreement, the parties listed their assets and liabilities. They did not own a house at this time, and there were no savings or RRSPs. It was agreed that he would have the 1988 Ford Explorer valued at \$5,000, a sailboat valued at \$3,500, and some tools valued at \$500. He also agreed to take sole responsibility for the \$4,000 vehicle lease. Ms. Ball was given china, crystal and silverware valued at \$5,000, and furniture valued at \$10,000. No liabilities were assigned as her responsibility. In addition, it was agreed that she would have 50% of U.G.M. stock option net proceeds, as per an employment agreement of January 17, 2005, to be determined on sale of the stock after any applicable capital gains.

[28] Mr. Ball testified that he never exercised the U.G.M. stock options, because he did not have the money.

SUBSEQUENT EVENTS

[29] Mr. Ball lost his employment with U.G.M. on July 15, 2006, shortly after the separation agreement was signed. He obtained a short term contract until August 9, and then in September 2006 he secured a contract with Mosquito Gold Mines. From September 2006 to December 2008, Mr. Ball was a director of Mosquito, earning \$10,000 Canadian per month and stock options. His pay was temporarily withheld during the last several months of his employment, but by the spring of 2009, he had been paid the \$20,000 that he was owed.

[30] Mr. Ball then had no full-time work until April 2009, when he began work with Bralorne Gold Mines. In January 2010 he was appointed director and chief operating officer for Bralorne. He continues to consult for them about 50% of his time, and the rest of his time he consults for various other companies.

[31] Mr. Ball earned \$115,112 in 2008, and \$118,270 in 2009. In 2010 he had gross earnings of \$131,860, and net earnings of \$107,391, plus capital gains on stock options of \$13,086, for a total income on line 150 of his income tax return of \$120,477. On his most recent form F8 financial statement dated June 14, 2011, he listed his annual income for support purposes as \$120,483.

- [32] Ms. Ball testified that following the separation, she decided that she wanted to go into nursing. She took courses, including anatomy and biology at Capilano University and Langara College, and she obtained a diploma in psychology from Langara in 2010. She also did some course work at Simon Fraser University. She says that her current intention is to enter a three-year nursing program at Vancouver Community College.
- [33] Ms. Ball's last employment was working part-time as office manager for Geoinformatics from 2003 to 2005. She earned \$12 per hour. On her 2005 income tax return, she indicated employment income of \$5,018.

DISCUSSION

- [34] Although neither party had the benefit of professional legal advice at the time, I am satisfied that the agreement they signed on June 26, 2006 is a valid separation agreement. Neither party has put before me a substantial basis for setting that agreement aside. Indeed, in Ms. Ball's counterclaim, she seeks an order that the provisions of the agreement remain in force. Subject to the variation I will discuss below, the agreement remains in force, and it constitutes the triggering event under s. 56 of the Family Relations Act, R.S.B.C. 1996, c. 128.
- [35] Among other things, the agreement dealt with the division of property. It does not appear that there was any unfairness in that division that would justify a reapportionment. There was no house or investments to divide. The stock options were never exercised. The chattels were divided in a way that resulted in Ms. Ball acquiring a somewhat greater value than Mr. Ball. In addition, although the agreement provided that Mr. Ball was to have the vehicle and pay the lease payments, as things turned out, it was Ms. Ball who used the vehicle, while Mr. Ball paid the expenses. There is no basis for a reapportionment as requested in the counterclaim.
- [36] With respect to child support, both parties considered that C.B. and M.B. had ceased to be children of the marriage as of the date of the separation agreement. That was a reasonable view for them to take, as both girls were then over 19 years of age, and neither of them was living at home. E.B. was the only child living with Ms. Ball at that time.
- [37] I am not persuaded that subsequent events should result in an order for child support for either C.B. or M.B. C.B. is now 27 and has a university degree. M.B. has a Bachelor of Science degree in biology from U.B.C. Although she has some health problems, the medical evidence placed before me is sketchy. A few letters have been filed, but nothing that would qualify as an expert report under the Rules of Court. Ms. Ball testified that M.B. is now living with her, but it is unclear for how long. Apparently, she recently had surgery for a non-cancerous, slow growing tumour. According to Ms. Ball, M.B. has been offered a position at the Bamfield Marine Centre, and once she recuperates from her surgery, she intends either to take up that position or to attend graduate school. On the material before me, I am unable to find that M.B., who is now 25 years old, is a child of the marriage within the meaning of the Divorce Act. I decline to make any order for child support for either C.B. or M.B., and

that aspect of the counterclaim is dismissed.

- [38] The agreement set out specific amounts to be paid as basic child support for E.B. and as spousal support for Ms. Ball. In both cases, there was a temporal limitation on the support payments. Child support was to be for so long as E.B. remained a child of the marriage, and spousal support was to be until April 15, 2018. There was an additional qualification placed on the amount of spousal support. The agreement stipulated that the spousal support was "based on current income."
- [39] The latter limitation is significant, because Mr. Ball lost his job and his income went down almost immediately after the agreement was signed. Both parties acknowledge that because of this change they verbally agreed to a reduction in support payments. Ms. Ball testified that she felt sorry for Mr. Ball when he lost his job, and she agreed to accept total support payments of \$5,000 per month, rather than \$5,992, which would have been the combined amount of child and spousal support under the original terms of the written agreement.
- [40] Although the parties did not specify what part of the \$5,000 would be considered child support and what part would be spousal support, I think the proper view of the matter is that Mr. Ball would continue to pay child support for E.B. at \$992 per month, and the remainder of the \$5,000, that is, \$4,008, would be for spousal support.
- [41] The parties take differing views on the duration of this oral variation of the agreement. Ms. Ball testified that it was only a temporary arrangement based on the fact that Mr. Ball had lost his job with U.G.M. Mr. Ball takes the position that it was a permanent variation. Various email messages that were exchanged between the parties at the time shed some light on this matter.
- [42] In an email dated July 29, 2006, Ms. Ball discussed with Mr. Ball the possibility of a divorce and then stated, "I will cover the cost if I can depend on the \$5000/month." In an email dated September 21, 2006, Ms. Ball wrote, "All I want is the \$5000 a month so the kids can get through the term. If you're really lucky I may be out of your life for good within the year." In another email dated September 28, 2006, Ms. Ball set out a schedule of payments based on the \$5,000 figure, for the months of August, September, October, and November. It was not until an email dated June 19, 2007, that Ms. Ball first told Mr. Ball she was no longer willing to limit the support payments to \$5,000 per month. She wrote: "I don't really want to go after past payments just those as of June 15, 2007." However, there is nothing in that email, or in any of the previous emails, to indicate that the variation had always been intended to be temporary.
- [43] From all the evidence, I find on a balance of probabilities that the oral variation of the separation agreement was intended to continue for so long as Mr. Ball's income remained significantly below what it was at the time that the written agreement was signed. This is consistent with the terms of the written agreement itself, which provided that the amount of the spousal support was based on Mr. Ball's income at the time.

- [44] In June 2006, Mr. Ball was working for U.G.M. and earning \$120,000 in U.S. dollars per year. His benefit package included his residence and most of his living expenses. His current salary of \$120,483 per year is in Canadian dollars, and he must pay for his residence and all his living expenses out of this income. Although no evidence was led at trial of the exchange rate in 2006, I can take judicial notice that at that time, the Canadian dollar was equivalent to about 86 cents U.S. Mr. Ball's income in June 2006, therefore, was equivalent to approximately \$139,500 Canadian, in addition to which, most of his living expenses were paid by his employer. It is clear, therefore, that his current income remains substantially below what it was at the time he signed the written separation agreement. He says that while he thought he could pay \$5,000 per month in spousal support when he was employed by U.G.M., this has proved to be impossible on the lower level of income he has been able to earn since then. He submits, therefore, that the oral variation of the separation agreement should continue. In the alternative, he submits that the Court should order a variation in spousal support consistent with his current income.
- [45] Counsel for Mr. Ball has provided calculations based on the Spousal Support Advisory Guidelines which show that based on an income of \$120,000 for the payor, and \$25,000 for the payee, the amount of spousal support would range from \$1,837 to \$2,579 using the "with child support" formula, and from \$2,969 to \$3,893 using the "without child support" formula. I agree with counsel for Mr. Ball that for these purposes it is appropriate to attribute an income of \$25,000 to Ms. Ball, as she could be earning at least this much if she chose to seek employment.
- [46] In her testimony, Ms. Ball said that when she and Mr. Ball signed the separation agreement, they settled on a higher amount of spousal support in recognition of the fact that the support would be for a fixed duration. It was on this basis that they agreed to \$5,000 per month payable until April 15, 2018.
- [47] While that may be true, it must also be remembered that the written agreement specified that the \$5,000 figure was based on current income, and Mr. Ball's income has consistently been significantly lower since the time of the agreement.
- [48] In recognition of the fact that Mr. Ball's income has never recovered to the level it was on June 26, 2006, but also recognizing that the parties agreed to a higher than average amount because support would not be for an indefinite period, I conclude that spousal support should continue at the level of \$4,008 per month, until April 15, 2018. This is, in effect, the amount the parties agreed to in their oral variation the written agreement. It is higher than the top end of the range indicated by the Spousal Support Advisory Guidelines, but it is for a limited duration, whereas it would be indeterminate under the Guidelines.
- [49] The next issue for determination is whether E.B. continues to be a child of the marriage, and if not, the date on which she ceased to be a child of the marriage. Ms. Ball testified that E.B. was a student from 2006 through the fall of 2011, and that she required support for her education. However, I do not find Ms. Ball's testimony on this issue to be credible. I note that

Mr. Ball has long been requesting proper documentation of E.B.'s status as a student, and this has not been forthcoming. I note as well that Ms. Ball was required to attend an examination for discovery on September 28, 2011, and she failed to attend.

- [50] The parties attended a Judicial Case Conference on July 15, 2008, at which time Ms. Ball was ordered to provide copies of any documents relating to E.B.'s expenses. In subsequent correspondence, counsel for Mr. Ball repeatedly requested documentation to confirm E.B.'s student status. The documentation that has been provided does not show that E.B. is currently enrolled as a student. The materials filed by Ms. Ball include a couple of receipts for books from the U.B.C. Bookstore, but these are dated in 2008, and there is no indication who they are for. The remainder of the documents filed appear to be for accounts past due. There are accounts from Corpus Christi College which appear to relate to the Fall term of 2007, and some courses in 2008. There is also an invoice from Kwantlen University dated December 15, 2009 showing a past due amount, but there is no indication of when those expenses were incurred. What is notably lacking is any documentation, such as transcripts of grades, to show that E.B. actually attended any classes, and if so, when. In cross-examination, Ms. Ball conceded that E.B. is not at the present time a child of the marriage.
- [51] In all the circumstances, I accept the submission of counsel for Mr. Ball that the proper inference to be drawn is that E.B. ceased to be a child of the marriage at the conclusion of the 2007/2008 academic year, which would be June 2008. Accordingly, I find that Mr. Ball's obligation to pay child support for E.B. ended on June 30, 2008.

THE FMEP CALCULATION OF ARREARS

- [52] FMEP has done a calculation of the amounts owing by Mr. Ball, the amounts paid by him, and resulting arrears. Those calculations were based on information provided to them by Ms. Ball, and they are inaccurate. Although Ms. Ball provided FMEP with a copy of the separation agreement, she did not inform them of the oral variation of that agreement. As well, the information she provided about Mr. Ball's actual payments was not completely accurate.
- [53] Taking account of the oral variation of the separation agreement, and the date on which E.B. ceased to be a child of the marriage, I find that the proper calculation of the amount of support payable by Mr. Ball to Ms. Ball from the time of separation until January 31, 2012 is as follows:

2006: (July 15 to December 31 = 5½ months at \$5,000) = \$27,500

2007: (January to December at \$5,000) = \$60,000

2008: (January to June at \$5,000 and July to December at \$4,008) = \$54,048

2009: (January to December at \$4,008) = \$48,096

2010: (January to December at \$4,008) = \$48,096

2011: (January to December at \$4,008) = \$48,096

Jan 2012: \$4,008

- [54] Thus, Mr. Ball's total support obligation, including both spousal and child support, from the time of separation until January 31, 2012 was \$289,844.
- [55] The amount that Mr. Ball has already paid was calculated by FMEP as \$177,150 up to July 30, 2009, and \$130,113 (rounded to the nearest dollar) from then until January 6, 2012, for a total of \$307,263.
- [56] At trial, Mr. Ball presented detailed evidence of the payments he actually made, based on bank records and correspondence. Ms. Ball generally agrees with his analysis of the payments made, but she takes issue with what some of the payments were for. For example, Mr. Ball referred to a \$4,000 transfer on February 12, 2008 from his bank account to the account used by Ms. Ball. He claims that this was a support payment. Ms. Ball, however, produced an email of the same date in which Mr. Ball wrote, "I have put 4000 in your account today which is \$2500 for support and the remainder for the truck." I agree with Ms. Ball's submission that only \$2,500 of the \$4,000 payment on that date was earmarked as a support payment.
- [57] Having considered all the evidence, I find that the amount of support Mr. Ball has actually paid (rounded to the nearest dollar) is as follows:

2006: \$27,139

2007: \$66,188

2008: \$56,500

2009: \$56,000

2010: \$48,787

2011: \$54,769

Jan 2012: \$3,057

These amounts total \$312,440.

- [58] Mr. Ball submitted that he should be credited with additional payments that he made over the years to Ms. Ball for various reasons. For example, he made a number of payments to her for vehicle repairs and maintenance, as well as leasing and insurance. I do not agree that these should be considered as support payments, as under the terms of the separation agreement, the vehicle was to be his, even though, as things turned out, he allowed Ms. Ball to use it most of the time.

- [59] Mr. Ball also made a number of payments for C.B. and M.B. Some of these payments were made to Ms. Ball, and others were made to C.B. and M.B. directly, but all of the payments were intended for them. These payments totalled \$12,540 for C.B. and \$32,609 for M.B. Although C.B. and M.B. were not children of the marriage, Mr. Ball voluntarily made these payments for their benefit. These payments do not form part of the support he was required to pay under the separation agreement. I do not accept Mr. Ball's submission that Ms. Ball kept this money for herself. There is no admissible, non-hearsay, evidence before me to establish that contention.
- [60] Mr. Ball also made a number of additional payments to Ms. Ball intended for E.B. These total \$4,729. These were, in effect, voluntary payments in lieu of payment of extraordinary expenses, and they should not be credited to Mr. Ball in satisfaction of his basic child support obligations.
- [61] Finally, Mr. Ball gave evidence that he paid \$166 in bank overdraft fees for Ms. Ball, and that he also paid \$805 for a BC Hydro bill. He should be credited with those amounts, totalling \$971.
- [62] The total amount of support actually paid by Mr. Ball is therefore \$312,440 plus \$971, for a total of \$313,411. Comparing this amount with the actual amount of his support obligations, \$289,844, I conclude that Mr. Ball is not in arrears as calculated by FMEP, but rather has paid \$23,567 more than he owed.
- [63] I therefore cancel the arrears, interest and fees as calculated by FMEP.
- [64] As there are 75 months remaining in Mr. Ball's obligation to pay spousal support, I would reduce the monthly amount of each of the remaining payments by \$308 in recognition of his \$23,567 overpayment. His payments going forward, therefore, are set at \$3,700 per month.

SUMMARY

- [65] To summarize, my conclusions regarding the relief sought in the statement of claim are as follows. The divorce was granted at the conclusion of the trial. The application for an order terminating child support for E.B. is granted. E.B. ceased to be a child of the marriage on June 30, 2008, and Mr. Ball's child support obligations then ceased. Mr. Ball's spousal support payable to Ms. Ball, as varied by oral agreement of the parties, is \$4,008.
- [66] With respect to the counterclaim, Ms. Ball's application for current and retroactive child support for all three daughters is dismissed. None of them is currently a child of the marriage, and C.B. and M.B. were not children of the marriage at the time of separation. E.B. ceased to be a child of the marriage on June 30, 2008.

- [67] The provisions of the separation agreement, including spousal support, remain in force, except that they were varied by oral agreement of the parties as discussed above. Under the agreement as varied, Mr. Ball had an obligation to pay Ms. Ball \$4,008 per month spousal support to April 15, 2018, subject to reduction going forward in recognition of his overpayment.
- [68] Ms. Ball's application for a determination and reapportionment of family assets is dismissed, as that was properly dealt with in the separation agreement.
- [69] The arrears, interest and fees calculated by FMEP are set aside. From the time of separation through January 2012, Mr. Ball was required to make child and spousal support payments to Ms. Ball totalling \$289,844. His actual payments for that period total \$313,411, amounting to an overpayment of \$23,567.
- [70] As Mr. Ball is no longer required to make payments for child support, and as he has no arrears, and in recognition of his past overpayment, his continuing obligation is to pay spousal support to Ms. Ball in the amount of \$3,700 per month, on the 15th day of each month, from February 15, 2012 up to and including April 15, 2018.

The Honourable Mr. Justice W.F. Ehrcke

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