
CANADA / JUDGMENT

Bennett v. Lariviere

2020 BCSC 2198

COURT

Supreme Court of British Columbia

DECIDED

2 October 2020

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2020 BCSC 2198 Bennett v. Larivière

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Bennett v. Larivière,

2020 BCSC 2198

Date: 20201002

Docket: E8728

Registry: Rossland

Between:

Kenneth Mark Bennett

Plaintiff

And

Anik Larivière

Defendant

And

Family Maintenance Enforcement Program

Third Party

Before: The Honourable Madam Justice Gropper

Oral Reasons for Judgment

In Chambers

The Plaintiff, appearing in person:

K. Bennett

Counsel for the Defendant:

M. Yates

No other appearances

Place and Date of Hearing

(via teleconference):

Rossland, B.C.

September 30, 2020

Place and Date of Judgment:

Rossland, B.C.

October 2, 2020

[1] THE COURT: I will now deliver reasons for judgment. If you could mute your phones I would appreciate it. I will begin with an introduction.

Introduction

[2] As this matter involves child support, I will refer to Mr. Bennett as "father" and to Ms. Larivière as "mother".

[3] In April 2019, the mother received a notice from the Family Maintenance Enforcement Program (FMEP) that the father had enrolled in the program and that he was seeking payment of retroactive child support from February 2007 to April 1, 2019, which, including penalties and interest, totalled \$127,017.56.

[4] This is an application by the mother for summary trial seeking, among other things, that there is no child support payable by her to the father.

Background

[5] The parties commenced a common-law relationship in the fall of 1995 and separated on November 28, 2006.

[6] They have three adult children together: a son born May 1997 who is presently 23, and two daughters, one born May 1999 and the other born in September 2000.

- [7] The family proceeding was commenced by the father in December 2006. He claimed relief including custody of the children, child support, spousal support, and reappportionment of family property in his favour. By way of counterclaim, the mother also sought custody including the ability to relocate the children to Quebec. She sought child support and property division.
- [8] At the time of the separation, the parties lived in Quebec. In January 2007, the father returned to British Columbia with the children. In February 2007, he applied to the court for interim custody of the children and the mother applied for an order granting her liberty to return the children to Quebec. The mother was still living in Quebec at the time of the interim hearing.
- [9] Master Keighley heard the interim motions on February 9, 2007. He ordered that the children would remain in the family residence in British Columbia pending trial. He made an interim order for child support requiring that the mother pay the father child support in accordance with the Quebec Support Guidelines (interim order).
- [10] After this hearing and the decision, the mother relocated from Quebec, back to the family residence within a month of the February 2007 hearing, as her interim motion to relocate the children to Quebec had been dismissed. She moved back into the family residence with the father and the children, although the parties remained separated. The parties jointly occupied the family residence with the children from March 2007 until the father bought out the mother's interest in January 2008.
- [11] The parties jointly cared for the children from March 2007 onward.
- [12] In March 2007, the parties agreed that the mother would not pay child support given that the care of the children was now shared and the mother and father and children were residing under the same roof.
- [13] In May 2007, a written agreement was reached through each party's counsel that the mother would pay a certain amount for the care and support of the children and this would offset the Guidelines child support.
- [14] The trial in this matter was heard by Mr. Justice McEwan in August 2007. He delivered reasons on August 31, 2007, indexed at 2007 BCSC 1320. The focus of the trial was on the mother's application to relocate with the children to Quebec. McEwan J. declined to order that the children be relocated to Quebec, but he encouraged a fresh relocation application when there was better evidence about the parties' respective financial positions. He also made the following orders after trial:
1. the parties are joint custodians of the children;
 2. neither party will remove the children from British Columbia without agreement or further order of the court; and

3. the family residence would be sold pursuant to the Partition of Property Act, R.S.B.C. 1996, c. 347 and the father had liberty to bid on the sale.
- [15] McEwan J. made no orders in respect to child support, although he did make reference to the interim order by recording that it had been made.
- [16] As noted, the father purchased the mother's interest in the family residence in January 2008. He obtained a mortgage on the property. The father says that he included the child support he was to receive from the mother in accordance with the interim order in support of his application for the mortgage. He had not provided a copy of that application in affidavit for the court in the summary trial. However, in an affidavit that he filed in August 2007 in support of his position that he be able to bid on the sale of the family residence, he referred to his ability to have obtained mortgage financing without referencing child support from the mother. He attaches a letter from the Kootenay Savings Credit Union approving the mortgage financing which does not refer to child support. The letter asks for written confirmation of rental income.
- [17] After the mother moved from the family residence in January 2008, both parties continued to care for the children equally on a week-on/week-off basis. The mother did not pay child support in accordance with the interim order. She maintains that she paid the majority of the children's basic living expenses and most of the bills associated with the children including their medical, dental, extracurricular, educational, and postsecondary costs. The father acknowledges that he paid less in support of the children, but says he made the appropriate contribution based on his lower income.
- [18] While the evidence on this is somewhat vague, the mother loaned the father some money in 2010 to enable the parties to establish a coffee company. It appears that the father ran the company. He says that it was always a losing-money proposition and, while it continues to operate, it continues to lose money.
- [19] The mother has at various times over the past 13 years provided information to the Canada Revenue Agency (CRA) in respect of the Canada Child Tax Credit and the eligible dependant tax deduction. In July 2009, the CRA revised the amount that the mother could claim for eligible dependants on the basis that the mother was required to pay child support. The mother wrote to the CRA and clarified that she and the father had joint custody of the children and that no child support was payable or paid after March 2007.
- [20] On March 29, 2016, the parties entered into a written agreement (the 2016 agreement) that clarified the parties' custody and support obligations to the CRA in the course of providing information concerning the Child Tax Credit and to the dependant tax deduction such that they both claimed the Child Tax Credit.

[21] The 2016 agreement is signed by both parties, although the father did not recall signing the agreement. The 2016 agreement includes that the parties swear its contents are true and had been in place since their separation; and will remain effective until each of the children reach their majority or until the parties notify the CRA of a change in status. It specified that the parties shared equal custody of the daughter and that they share equal custody of the son until July 2015, after which the son resided with the father.

[22] The 2016 agreement also states:

No support payment is required. Each party is responsible for their own costs and expenses, i.e., cost of maintenance for their own separate residence and for the living costs of the children when they are present. Any extracurricular or other expenses are being agreed between both parties and paid by one or another on a case-by-case basis.

[23] The agreement was sent to the CRA by the mother under cover of her letter dated March 29, 2016.

[24] The parties agree that the father did not claim for payment of child support under the interim order from the mother until he registered the order with FMEP.

[25] The mother says that she understood from the time she moved out of the family residence in early 2008 that the parties conducted themselves as described in the 2016 agreement.

[26] In 2017, the mother obtained a default judgment from the B.C. Provincial Court Small Claims Division in repayment of a \$2000 loan that she made to the father. The mother, having received that judgment, garnished payment of the judgment from the father's bank account. The father attempted to set aside the default judgment, but the court refused to do so.

[27] As a result, the father says, he considered his options. He did not have the financial resources to engage in further court disputes with the mother. Instead, he decided to claim the child support specified in the interim order from 2007 to 2019 and registered with FMEP in order to do so.

[28] In the father's submissions, but not in his affidavit, he says that he did not bring up the issue of child support being payable because he hoped that he and the mother would reconcile. He also submitted, but again, did not provide any evidence on this point through his affidavit material, that he and the mother often spoke about the fact that they owed each other money. Because the father did not raise these matters in his affidavit and only referred to them in his submissions in the hearing of this matter, the mother did not have the opportunity to address them.

[29] The mother says that over the 12-year period between 2007 and 2019 there was no correspondence showing the father was asking for support or even asking for financial assistance in lieu of Guidelines support to help with the expenses of the children. The first time that the father raised it was when he filed with FMEP. She also says that her conduct

over the years has been entirely consistent with the 2016 agreement. She says that she took responsibility for the expenses of the children without seeking any contribution from the father.

- [30] Just to update the status of the children, the son is no longer a child of the marriage as defined by the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp). The younger daughter ceased to be a child of the marriage in September 2019. The middle daughter is a full-time student and, thus, continues to be a child of the marriage. It appears from the affidavits that both parties provide support to the adult children.

Positions of the Parties

The Mother

- [31] The mother asserts that no further child support payments were paid or required to be paid under the interim order as of March 3, 2007, when the mother returned to the family residence and the parties resumed shared custody.
- [32] The mother argues that in accordance with s. 148 of the Family Law Act, S.B.C. 2011, c. 25, the parties agreed to vary the interim order by making reasonable arrangements for the support of the children in 2007 as reflected in the 2016 agreement.
- [33] The mother alternatively argues that the interim order ought to be varied retroactively in accordance with s. 150(2) of the Family Law Act to reflect the shared parenting arrangement that has been in place since 2007 and that the arrears of child support need to be cancelled under s. 174 of the Family Law Act.
- [34] The mother seeks the following orders:
1. a declaration that the mother has no outstanding child support payable to the father for the support of the children;
 2. any interest or penalties leveled by FMEP as against the mother be cancelled and relieved including interest that has accrued under s. 1 of the Family Maintenance Enforcement Act, R.S.B.C. 1996, c. 127;
 3. the money that FMEP seized via garnishment be returned to her;
 4. this action be dismissed; and
 5. costs.

The Father

[35] The father argues that he believes that the Guidelines for British Columbia were in effect at the time of the August 2007 trial, that child support under the Guidelines was fully in effect and specified by the court in the interim order at the time the parties agreed to buy out the family residence in 2008. He does not recall the 2016 agreement or that he signed it and, in his view, the interim order remains in effect and, thus, he is entitled to register and pursue child support in accordance with it.

Decision

[36] I find that the 2016 agreement is dispositive of the entire dispute between the parties. Despite the father not recalling the contents of the 2016 agreement or signing it, he did sign it. It clearly reflects how the parties conducted themselves over the years from 2007 to 2019 in respect of the custody and support of the children.

[37] They shared custody of the children on a 50/50 basis and each supported the children financially. While the statement about support does not refer to child support specifically, it is clear that it refers to each party being responsible for the living costs of the children when they are present in their separate residences.

[38] The father's submission that the parties discussed that they owed each other money from time to time cannot be accepted. As I have noted, he did not state that in his affidavit and the mother has not had a chance to respond to it. I would therefore accept the mother's evidence that the father did not raise the matter of child support being payable under the interim order from the mother at any time until he registered the interim order with FMEP in 2019.

[39] The leading case on retroactive orders for child support is *D.B.S. v. S.R.G.*, 2006 SCC 37. In that case, the Court stated that agreement between the parties about the support of children should be afforded great deference by the court provided that reasonable arrangements have been made for the support of the child. I refer to para. 78 where the Court said:

In most circumstances agreements reached by the [parties] should be given considerable weight. In so doing, courts should recognize that these agreements were likely considered holistically by the parents, such that a smaller amount of child support may be explained by a larger amount of spousal support for the custodial parent. Therefore, it is often unwise for courts to disrupt the equilibrium achieved by parents. However, as is the case with court orders, where circumstances have changed (or were never as they first appeared) and the actual support obligations of the payor parent have not been met, courts may order a retroactive award so long as the applicable statutory regime permits it

[40] The agreement between the parties concerning the financial support of the children had seen all three children cared for and fully supported financially. The father does not assert otherwise. On this basis, I find that the interim order is of no force and effect and the mother does not owe any retroactive support to the father under its terms.

[41] If I am wrong in my conclusion that the support of the children as reflected in the 2016 agreement is dispositive of the matter before me, I will address whether an order for retroactive child support ought to be made relying on the principles of D.B.S. I refer to para. 131:

Child support has long been recognized as a crucial obligation that parents owe to their children. Based on this strong foundation, contemporary statutory schemes and jurisprudence have confirmed the legal responsibility of parents to support their children in a way that is commensurate to their income.

[42] The Court set out the relevant circumstances in determining whether to make a retroactive award at para. 133 as follows:

- a) whether the recipient parent has supplied a reasonable excuse for his or her delay in seeking retroactive child support;
- b) the conduct of the payor parent;
- c) the circumstances of the children; and
- d) the hardship that a retroactive award might entail.

[43] In respect of the matter of delay, the father did not seek child support from the mother in accordance with the interim agreement at any time from 2007 until he registered with FMFP. He has given his reasons for doing so, but I do not accept those reasons. In fact, he agreed to the arrangements for child support that are reflected in the 2016 agreement. It is clear that the father only decided to claim retroactive child support in response to the mother having obtained a default judgment against him. Before that, the father never asserted that he was at a financial disadvantage as a result of not receiving child support from the mother.

[44] The delay in seeking to enforce the terms of the interim order through the FMFP is of great prejudice to the mother who must, after 12 years, attempt to justify her income and her expenses.

[45] I do not find that the mother engaged in blameworthy conduct. The mother took on the primary financial responsibility for the care of the children which was commensurate with her higher income and the father acknowledges that.

[46] The children's circumstances were and are is that they were supported by both parents and have not gone without.

- [47] In respect of hardship, I accept that the mother would experience hardship if she were required pay retroactive child support in accordance with the father's claim. She has provided the majority of the financial resources for the children in accordance with her belief that the parties agreed to the arrangement that they had about support of the children. Requiring that she do so again creates a hardship.
- [48] In the circumstances, I find that a retroactive award of child support is not justifiable having regard to the obligations of both parents to provide for their children and the Guidelines.
- [49] The mother also seeks an order that this action be dismissed on the basis of want of prosecution. In *Steil v. Monroe*, 2015 BCSC 2122, the Court reiterated the test to be applied at para: 42:
- (1) the length of the delay and whether it was inordinate;
 - (2) any reasons for the delay either offered in evidence or inferred from the evidence, including whether the delay was intentional and tactical or whether it was the product of dilatoriness, negligence, impecuniosity, illness or some other relevant cause, the ultimate consideration being whether the delay is excusable in the circumstances;
 - (3) whether the delay has caused serious prejudice to the defendant in presenting a defence and, if there is such prejudice, whether it creates a substantial risk that a fair trial is not possible at the earliest date by which the action could be readied for trial after its reactivation and
 - (4) whether, on balance, justice requires dismissal of the action.
- [50] In this case, there were no steps taken in this action since August 2007 by either party. The father did not demonstrate any intention of pursuing the action. I find the delay of 12 years to be inordinate. The father has not provided any cogent reason for the delay. His actions appear to have been in response to the mother obtaining a default judgment against him. Justice requires dismissal of the action. The action concerns the parties' separation and its aftermath including the separation, property, and the support of children, none of which remains in dispute beyond what these reasons address. On these bases, I dismiss the action.
- [51] Costs may be spoken to by the parties and they have leave to make arrangements to do so.
- [52] In accordance with these reasons, I make the following orders:
1. a declaration that the mother has no outstanding child support payable to the father for the support of the children;
 2. any interest of penalties leveled by the FMEP as against the mother are cancelled and relieved including interest accruing under the Family Maintenance Enforcement Act;
 3. the mother is entitled to the return of any money seized by the FMEP; and
 4. this action is dismissed.

"Gropper J."

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