CANADA / JUDGMENT

Buchanan v. Buchanan

2020 BCSC 1209

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Supreme Court of British Columbia

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2020 BCSC 1209 Buchanan v. Buchanan

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Buchanan v. Buchanan,

2020 BCSC 1209

Date: 20200730

Docket: L29817

Registry: Cranbrook

Between:

Curtis Aron Buchanan

Petitioner

And

Rachelle Lynn Buchanan

Respondent

Before: The Honourable Mr. Justice Marchand

Oral Reasons for Judgment

Counsel for the Petitioner (appearing via teleconference):

D.F. Collins

No one appeared on behalf of the Respondent:

Place and Date of Hearing:

Kamloops, B.C.

July 30, 2020

Place and Date of Judgment:

Kamloops, B.C.

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Introduction

[1] Curtis Buchanan has filed a petition to vary a final child support order made by the Court of Queen's Bench for Saskatchewan on July 25, 2017. Mr. Buchanan seeks a final variation order under ss. 5(1) and 17(1) of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp) [DA] rather than a provisional variation order under s. 18(2) of the DA.

[2] The respondent, Rachelle Buchanan, was personally served with Mr. Buchanan's petition but has not filed a response or any other materials. She did not appear at the hearing of the petition. Nevertheless, Mr. Buchanan submits that he may seek a final variation order because Ms. Buchanan has attorned to the jurisdiction of the court through the registration of previous support orders made by the Court of Queen's Bench of Saskatchewan in the Provincial Court of British Columbia for enforcement purposes.

[3] For the reasons that follow, I am making the variation order sought by Mr. Buchanan, but on a provisional basis only. In the circumstances, I cannot find that Ms. Buchanan has accepted the court's jurisdiction.

Background

[4] Curtis and Rachelle Buchanan were married on July 1, 2001 in Prince Albert, Saskatchewan. They separated in January 2011. The Buchanans have three children: Miranda, born July 17, 1998 (now 22); Makayla, born May 14, 2001 (now 19); and Hayley, born June 19, 2004 (now 16).

[5] After the parties separated, an action was commenced in the Court of Queen's Bench for Saskatchewan in the Judicial Centre of Prince Albert. On October 6, 2011, Mr. Buchanan was ordered to pay Ms. Buchanan child support in the amount of $1,722 per month for the support of the three children. After the October 6, 2011 order was made, the parties moved to a two-week-on/two-week-off rotation with the children. According to Mr. Buchanan, as a result of Ms. Buchanan's drug and alcohol problems, on July 31, 2012, the court made an interim order suspending the parenting-time schedule until Ms. Buchanan obtained a residence for herself and put forth a credible parenting plan. Child support payments were also suspended.

[6] On July 29, 2013, a further interim order was made, returning to the shared parenting arrangement and ordering Mr. Buchanan to pay Ms. Buchanan $797 per month in child support based on a set-off. At the same time as this order was made, Mr. Buchanan relocated to Yahk, British Columbia for employment purposes. Mr. Buchanan has resided in B.C. ever since.

[7] On August 27, 2013, a consent order was made granting primary residence of all three children to Ms. Buchanan. Mr. Buchanan was ordered to pay Ms. Buchanan $1,664 per month for the support of the children, commencing September 1, 2013.

[8] On March 12, 2015, the parties entered into minutes of settlement to vary the earlier orders. The minutes of settlement included the following terms:

1. The oldest child, Miranda, was to continue to primarily reside with Mr. Buchanan, where she had lived since January 2014.
2. The middle child, Makayla, was to remain with Mr. Buchanan, where she had resided since January 2015, but was to return to Ms. Buchanan's care after the school year.
3. The youngest child, Hayley, was to remain in the care of Ms. Buchanan in Saskatchewan.
4. Child support was payable by Mr. Buchanan to Ms. Buchanan on a set-off basis, with Mr. Buchanan paying Ms. Buchanan $1,451 per month in child support and Ms. Buchanan paying Mr. Buchanan $222 per month in child support.

[9] Further changes in the children's living arrangements and child support arose in 2017. In May 2017, Makayla moved back to British Columbia to live with Mr. Buchanan. On July 17, 2017, Miranda turned 19 and was no longer eligible for child support.

[10] On July 25, 2017, the final court order, which is the subject of this petition, was made. That order included the following terms:

1. With Makayla continuing to reside with Mr. Buchanan and Hayley continuing to reside with Ms. Buchanan, child support was set at $863 per month, pursuant to s. 15.1 of the DA, commencing May 1, 2017, on a set-off basis.
2. The parties were to immediately inform the other if the child in their care was no longer residing with them.
3. Mr. Buchanan was to pay Ms. Buchanan $48,784.87 by August 23, 2017, failing which that amount would be enforceable as retroactive child and spousal support arrears.

[11] At some point in the midst of all of these orders, Ms. Buchanan enrolled with the Family Maintenance Enforcement Program of British Columbia ("FMEP"). On January 7, 2014, the orders made to that date were registered in the Provincial Court of British Columbia for enforcement purposes only.

[12] By March 18, 2019, Mr. Buchanan had paid all amounts owing under the various court orders. He says that he made these payments without various credits or tax deductions he was entitled to under the orders.

[13] In any event, soon after the final order was granted on July 25, 2017, Hayley moved to British Columbia and began living with Mr. Buchanan. She continues to do so. More recently, Makayla moved back to Saskatchewan in October 2019 to live independently. As she had already turned the age of majority in Saskatchewan, she was no longer eligible for child support.

[14] Since August 2017, FMEP has not enforced the ongoing child support owing under the July 25, 2017 order. FMEP has only enforced the lump sum amount owing under that order.

[15] Mr. Buchanan is now petitioning the court for a variation of the July 25, 2017 order to require Ms. Buchanan to pay to him child support for his care of Makayla and Hayley since September 1, 2017. Mr. Buchanan says he was unable to bring his petition sooner because he was unable to locate Ms. Buchanan and, due to the amount owing under the July 25, 2017 order, he was unable to afford further court proceedings.

The Relevant Legislation

[16] Under s. 5(1) of the DA:

A court in a province has jurisdiction to hear and determine a variation proceeding if

(a) either former spouse is ordinarily resident in the province at the commencement of the proceeding; or

(b) both former spouses accept the jurisdiction of the court.

[17] Under s. 17(1) of the DA, on application by a former spouse, the court may vary, rescind, or suspend a child support order, prospectively or retroactively. In order to do so, s. 17(4) requires that there must have been a material change in the circumstances.

[18] Under s. 17.1 of the DA:

Where both former spouses are ordinarily resident in different provinces, a court of competent jurisdiction may, in accordance with any applicable rules of the court, make a variation order pursuant to subsection 17(1) on the basis of the submissions of the former spouses, whether presented orally before the court or by means of affidavits or any means of telecommunication, if both former spouses consent thereto.

[19] Despite ss. 5(1)(a) and 17(1) of the DA, under s. 18(2) of the DA, where the court is asked to vary a child support order made in another jurisdiction, in certain circumstances the court may only do so provisionally. Section 18(2) of the DA provides as follows:

Notwithstanding paragraph 5(1)(a) and subsection 17(1), where an application is made to a court in a province for a variation order in respect of a support order and

(a) the respondent in the application is ordinarily resident in another province and has not accepted the jurisdiction of the court, or both former spouses have not consented to the application of section 17.1 in respect of the matter, and

(b) in the circumstances of the case, the court is satisfied that the issues can be adequately determined by proceeding under this section and section 19,

the court shall make a variation order with or without notice to and in the absence of the respondent, but such order is provisional only and has no legal effect until it is confirmed in a proceeding under section 19 and, where so confirmed, it has legal effect in accordance with the terms of the order confirming it.

[20] In cases where a provisional order is made to vary child support, ss. 18 and 19 of the DA establish a procedure to transmit the order to the other jurisdiction for a confirmation hearing.

Analysis

[21] As noted, Mr. Buchanan submits that, by registering previous orders in the Provincial Court of British Columbia for enforcement purposes, Ms. Buchanan has attorned to the jurisdiction of this court. Mr. Buchanan did not provide any authority in support of his submission and I was unable to find any authority directly on point. The closest I was able to find was Muzechka v. Muzechka, [2002] A.J. No. 1313 (Q.B.).

[22] In Muzechka, the court considered an application by the husband to vary a Saskatchewan-issued decree nisi. At para. 18, Murray J. held that, by filing and registering a decree nisi in Alberta with the Court of Queen's Bench and with Alberta Justice (for maintenance enforcement purposes), the wife had effectively invited the court to deal with the validity of the claim she was making under the final order. Murray J. held that such acts on the part of the wife, constituted attornment on her part. In the result, Murray J. found that the case fell under s. 5(1)(b) of the DA and that the Alberta Court of Queen's Bench had the power to make a final variation order.

[23] A similar result was reached in somewhat similar circumstances in McLaren v. Brunner, 2005 NWTSC 68. In McLaren, a consent order granted by the Ontario Superior Court of Justice included a provision that required the mother to register the order in the Supreme Court of the Northwest Territories for recognition and enforcement. Schuler J. reasoned that a registration of the order in the Northwest Territories was for the father's benefit and, by requesting that the order be registered with the Supreme Court of the Northwest Territories, the father was attorning to the jurisdiction of the court. In the result, Schuler J. concluded it was appropriate for the court to exercise jurisdiction to make a final variation order.

[24] The distinguishing feature between Muzechka and McLaren on the one hand, and Mr. Buchanan's situation on the other is that Ms. Buchanan registered various orders in the Provincial Court of British Columbia, not in a superior court. The Provincial Court of British

Columbia has no jurisdiction to vary child support orders made under the DA by a Superior Court in another province, and Ms. Buchanan has not looked to this court to recognize or enforce her orders. In these circumstances, I am simply unable to conclude that, by virtue of registering Saskatchewan Court of Queen's Bench child support orders in the Provincial Court of British Columbia, Ms. Buchanan has accepted the jurisdiction of this court to vary the final child support order made by the Court of Queen's Bench in Saskatchewan.

[25] The authorities support the proposition that acceptance of this court's jurisdiction requires that a party who resides in another jurisdiction take a step that is considered to be "substantive" in nature. For example, in Buck v. Buck, 2013 BCSC 449, Macaulay J. concluded that, by filing a counterclaim, property and financial statements, and participating in a judicial case conference, the respondent had effectively attorned to this court's jurisdiction: paras. 12-15.

[26] By contrast, in Sidhu v. Sidhu, 2014 BCSC 296, Arnold-Bailey J., citing Buck, found the respondent did not attorn to the jurisdiction of Alberta merely by seeking an adjournment and signing a consent adjournment form: paras. 36-40.

[27] Similarly, in Van Huynh v. Nu Huynh, 2006 BCSC 973, Truscott J. concluded that the respondent had not accepted the jurisdiction of the court, as the respondent had not filed any response or affidavits, nor appeared at the hearing: paras. 11-12.

[28] Finally, in Gnanaseelan v. Gnanaseelan, 2011 BCSC 1824, the respondent informed the court orally that he had spoken to the claimant by telephone and indicated that the claimant did not oppose the application. Nevertheless, Griffin J., as she then was, declined to find the claimant had accepted the jurisdiction of the court. The claimant had provided no evidence nor appeared before her.

[29] Returning to the case at hand, Ms. Buchanan has taken no steps, substantive or otherwise, in this court. She has not filed a response, has not communicated with Mr. Buchanan, and did not appear before me. Having taken no substantive steps, I am unable to conclude that Ms. Buchanan has accepted the jurisdiction of the court or consented to the application of s. 17.1.

[30] All that remains is a consideration of whether I am satisfied that the issues can be adequately determined by way of a provisional order and, in short, I am.

[31] I am aware that our Court of Appeal has called the procedure of obtaining provisional orders in one jurisdiction and having them confirmed in another "unwieldy and unsatisfactory": Burgie v. Argent, 2013 BCCA 247. I am also aware that Parliament has passed comprehensive amendments to the DA, including the introduction of a new procedure to reduce the time and costs associated with the current two-stage hearing procedure. Unfortunately, due to the COVID-19 pandemic, these amendments are not scheduled to come into force until 2021.

[32] In the circumstances, the provisional order procedure under ss. 18 and 19 of the DA is the most cost-effective procedure available to Mr. Buchanan and is one that offers Ms. Buchanan procedural protections. Further, Mr. Buchanan has provided sufficient evidence to enable the court to determine the issues on a provisional basis. For these reasons, I am satisfied that I can adequately determine the issues by proceeding provisionally under ss. 18 and 19.

[33] I turn next to the merits of Mr. Buchanan's application to vary child support on a retroactive and ongoing basis.

[34] The leading case on the retroactive variation of child support remains D.B.S. v. S.R.G., 2006 SCC 37. In D.B.S., the Court held that in determining whether to make a retroactive award, the court should take a holistic view and decide each case on the basis of its particular facts. The payor parent's interest in certainty is to be balanced with the need for fairness to the child and for flexibility. In doing this, the court should consider:

1. the reason for the recipient parent's delay in seeking child support;
2. the conduct of the payor parent;
3. the past and present circumstances of the child, including the child's needs at the time the support should have been paid, and
4. whether the retroactive award might entail hardship.

[35] Once the court determines that retroactive child support should be ordered, the award should, as a general rule, be retroactive to the date of effective notice by the recipient parent, but to no more than three years in the past. Effective notice does not require the recipient parent to take legal action. The recipient parent need only broach the topic. In cases where the payor parent has engaged in blameworthy conduct, the date when the circumstances changed materially will be the presumptive start date of the award. At the end of the day, the court must ensure not only that the quantum of a retroactive support award is consistent with the statutory scheme under which it is operating, but also that it fits the circumstances.

[36] In this case, Mr. Buchanan has explained why he delayed in seeking a retroactive adjustment in child support. To his credit, he was busy paying his arrears and, further, he could not find Ms. Buchanan.

[37] Next, despite being aware that child support must be varied when the parenting arrangements change, Ms. Buchanan did not keep Mr. Buchanan apprised of her whereabouts or offer to pay him child support. Given that her child support obligations would have been modest and could have been offset against the lump sum amount Mr. Buchanan was obliged to pay her, I consider this to be blameworthy conduct.

[38] Next, while Mr. Buchanan has not provided any evidence regarding the children's needs, I know that they have mostly been living with him since the July 25, 2017 order. During this time, he was working very hard to pay the money he owed to Ms. Buchanan. As a result, Mr. Buchanan was not in a financial position to pursue his variation application. I am also prepared to conclude that the children's activities and standard of living were negatively affected by Ms. Buchanan's failure to pay Mr. Buchanan child support.

[39] Finally, as Ms. Buchanan has not responded to the petition, I do not know whether she will suffer any hardship as the result of a retroactive variation of child support. Given that arrears can be paid over time, I have no reason to think that a retroactive award would impose a substantial hardship on Ms. Buchanan.

[40] In all of the circumstances, I consider it appropriate to retroactively vary child support to September 1, 2017, as requested by Mr. Buchanan. This is the date by which none of the children were residing with Ms. Buchanan and she must have been aware of the need to adjust child support. Instead of facilitating that process, she made it more difficult by not keeping Mr. Buchanan apprised of her whereabouts. I note that this date is only two and a half years prior to the date she was served with the petition and is well within the rule of thumb established by the Supreme Court that retroactive awards should not be made more than three years in the past.

[41] Mr. Buchanan proposes that Ms. Buchanan pay child support based on both Makayla and Hayley living with him effective September 1, 2017 until Makayla ceased to be a child of the marriage when she moved to Saskatchewan in October 2019.

[42] Further, Mr. Buchanan proposes that Ms. Buchanan pay him child support based on an imputed income of $33,337. While I have no current income information concerning Ms. Buchanan, I note that she consented to an imputed income in this amount in the July 25, 2017 order. Imputing the same income to Ms. Buchanan now appears to be the fairest approach I can take.

Order

[43] For all of these reasons, I make the following order:

1. Under s. 18(2) of the DA, the order granted July 25, 2017 in the Court of Queen's Bench for Saskatchewan is provisionally varied as set out in this order.

2. Child support payable by Mr. Buchanan to Ms. Buchanan is terminated effective September 1, 2017.

3. The court finds that Makayla and Hayley began residing primarily with Mr. Buchanan effective September 1, 2017.

4. The court finds that Makayla ceased to be a child of the marriage effective November 1, 2019.

5. Effective September 1, 2017, Ms. Buchanan is found to be a resident of Saskatchewan and is imputed to have a gross annual income of $33,337.

6. Ms. Buchanan will pay to Mr. Buchanan child support in the following amounts:

a) $450.64 per month for September, October, and November 2017 for Makayla and Hayley;

b) $486.84 per month from December 1, 2017 to October 1, 2019 for Makayla and Hayley; and

c) $262.02 per month, commencing November 1, 2019 and continuing on the 1st day of each and every month thereafter, for Hayley, for as long as Hayley is eligible for support under the DA or until further agreement of the parties or further court order.

[44] In the absence of evidence regarding Mr. Buchanan's costs, I decline to award him the lump sum costs of $3,500 that he seeks. Instead, I award Mr. Buchanan his costs on the scale for matters of ordinary difficulty.

[45] So, Mr. Collins, does that cover everything?

[46] Mr. COLLINS: Yes, most everything, My Lord. A point or two of clarification. The amount of child support for September, October, and November 2017 is $467 per month?

[47] THE COURT: It is $450.64 per month. That is based on the previous Guidelines for Saskatchewan.

[48] Mr. COLLINS: And Your Lordship then ordered a further amount up to November 1, 2019, but I didn't catch the amount, My Lord.

[49] THE COURT: The next amount was $486.84 --

[50] Mr. COLLINS: Okay. And the final amount is $262?

[51] THE COURT: $262.02.

[52] Mr. COLLINS: And, My Lord, s. 17(11) requires that a copy of the order be sent to the Saskatchewan court. Is that something that needs to be included as a term of the order? I realize it's a statutory requirement, but should that be included as a term of the order?

[53] THE COURT: I am not sure, but I think it would be best if I gave a direction to the court registry to send a copy of the variation order, certified by me, to the Court of Queen's Bench for Saskatchewan (Family Law Division) in the Judicial Centre of Prince Albert, under Action Number DIV. #08125 of 2011.

[54] THE CLERK: Thank you, My Lord.

[55] Mr. COLLINS: Thank you.

"L.S. Marchand J."

MARCHAND J.

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