

CANADA / JUDGMENT

Burrows v. Burrows

2012 BCSC 874

COURT

Supreme Court of British Columbia

DECIDED

14 June 2012

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2012 BCSC 874 Burrows v. Burrows IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Burrows v. Burrows, 2012 BCSC 874 Date: 20120614 Docket: 27003 Registry: Kamloops Between: Alison Mary Burrows Claimant And Michael Burrows Respondent Before: The Honourable Madam Justice Hyslop in Chambers Corrected Judgment: The text of the judgment was corrected at para. 46 on February 14, 2013 Reasons for Judgment Counsel for the Claimant: J.H. Grover Counsel for the Respondent: R. McLeod Place and Date of Hearing: Kamloops, B.C. April 12, 2012 Place and Date of Judgment: Kamloops, B.C. June 14, 2012

- [1] The respondent, Michael Burrows, seeks to end his obligation to pay child support to his former wife, the claimant, Alison Mary Burrows, now known as Alison Mary Sinclair. The claimant seeks to vary the order of Master Powers, as he then was, dated July 12, 1999 (the "Powers' Order"), and seeks retroactive child support for the children, Michelle Burrows, born May 16, 1987, now age 25, and Andrew William Burrows, born March 5, 1993, now age 19.
- [2] The Powers' Order required the respondent to pay to the claimant the sum of \$919.00 per month for the support of the children. The Powers' Order found at that time that the respondent's income was \$69,954.00 and the claimant's income was \$13,627.80.
- [3] On June 14, 2000, and by a separate order, the claimant was granted sole custody of the two children with reasonable and generous access to the respondent.

Background

- [4] The claimant and respondent lived together from September of 1983 until 1998, when they separated. In November of 1987, they married. The claimant is a resident of Kamloops, British Columbia and the respondent is a resident of Edmonton, Alberta.
- [5] The Powers' Order has never been varied. The respondent has always made his payments, except for a period in 2011, when Andrew was at Camp Trapping in the Prince George area. The payment made by the respondent has always been the same as contained in the Powers' Order, despite the eldest child completing her education and entering the workforce.

- [6] Michelle has completed her education. Michelle was away from home while attending college and university, and would return to the claimant's home between university sessions. The respondent provided Michelle with money for travel from time to time. Michelle paid for her education through student loans, employment, and some help from the claimant.
- [7] It is agreed that Michelle, as of April 2011, is no longer a child of the marriage pursuant to the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp). With that admission, I can also conclude that Michelle is not a child as defined by the Family Relations Act, R.S.B.C. 1996, c. 128 [FRA].
- [8] The claimant is age 49; the respondent is age 50. The claimant is a lottery employee who earns \$48,000.00 per year (rounded); the respondent is a long-time railway employee who earns \$109,400.00 per year (rounded).
- [9] The claimant swears to Andrew having a number of mental health difficulties. They are particularized in paragraph 28 of her affidavit #2:
28. My son Andrew has been diagnosed with Attention Deficit Hyperactivity Disorder since age 5, and has been diagnosed Tourettes Syndrome, Social Anxiety Disorder, Oppositional Disorder, Obsessive Compulsive Disorder, and was in the care of Kamloops child psychiatrist Dr. Hosenbocus for approximately 10 years.
- [10] Andrew got in trouble with the law in December of 2010, and was placed, at the request of the claimant, at Camp Trapping in Prince George. Andrew attended Camp Trapping from February 7, 2011 to June 14, 2011, with the exception of a one-week period when he stayed with the claimant.
- [11] While Andrew was at Camp Trapping, the claimant maintained a residence for Andrew, was in regular contact with him, as well as his youth worker.
- [12] During the time Andrew was at Camp Trapping, the claimant redecorated Andrew's bedroom and purchased new furnishings for it. While Andrew was at Camp Trapping, the claimant sent him reading material, purchased clothing, food, bought him a digital camera for his 18th birthday, and maintained payment on his cell phone.
- [13] Before returning to the claimant's residence, Andrew spent two weeks visiting the respondent in July and August of 2011. In September 2011, the respondent took Andrew on a trip to Scotland. Upon his return from Scotland, Andrew returned to reside with the claimant.
- [14] At the hearing of this application, I was told that Andrew had taken employment and was now living at the Lower Mainland. I was given no further details. Positions
- [15] The respondent's application was brought in September of 2011 to terminate the Powers' Order. It was done under the mistaken belief that Andrew was going to live with him and not with the claimant.

- [16] The respondent argues that he was not obliged to pay child support for Andrew while Andrew was at Camp Trapping.
- [17] The claimant's position is that while Andrew was at Camp Trapping, she still had the custody of him, maintained a residence for him, and continued to be financially responsible for him.
- [18] The claimant also argues that she is entitled to retroactive child support for Michelle and Andrew. The claimant argues that despite Michelle no longer being a child of the marriage at the time this application was brought, which is November 22, 2011, it is within the court's discretion to allow retroactive child support for a child who is no longer a child of the marriage under the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp) or a child as defined by the FRA.

Issues

- [19] The issue before the court is whether the court can make a retroactive child support order for either Michelle or Andrew, or both of them.
- [20] If a retroactive child support order can be made, then what is the amount that should be awarded for retroactive child support? Jurisdiction for Retroactive Child Support
- [21] In order to obtain a retroactive child support order for a child, the claimant must prove that at the time the application was made, the child was a child of the marriage pursuant to the Divorce Act or a child as defined by the FRA.
- [22] In *D.B.S. v. S.R.G.*, [2006] 2 S.C.R. 231, Mr. Justice Bastarache addressed this issue:
- [88] The situation under the Divorce Act is more complex. Under s. 15.1(1), an order may be made that requires a parent to pay "for the support of any or all children of the marriage". The term "child of the marriage" is defined in s. 2(1) as 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;
- The question then arises when the "material time" is for retroactive child support awards. If the "material time" is the time of the application, a retroactive child support award will only be available so long as the child in question is a "child of the marriage" when the application is made. On the other hand, if the "material time" is the time to which the support order would correspond, a court would be able to make a retroactive award so long as the child in question was a "child of the marriage" when increased support should have been due.
- [89] In their analysis of the Guidelines, J. D. Payne and M. A. Payne conclude that the "material time" is the time of the application: *Child Support Guidelines in Canada* (2004), at p. 44. I would agree. While the determination of whether persons stand "in the place of ... parent[s]" is to be examined with regard to a past time, i.e., the time when the family functioned as a unit, this is because a textual and purposive analysis of the Divorce Act leads to this

conclusion; but the same cannot be said about the "material time" for child support applications: see *Chartier v. Chartier*, [1999] 1 S.C.R. 242, at paras. 33-37. An adult, i.e., one who is over the age of majority and is not dependent, is not the type of person for whom Parliament envisioned child support orders being made. This is true, whether or not this adult should have received greater amounts of child support earlier in his/her life. Child support is for children of the marriage, not adults who used to have that status.

- [90] Under both the Parentage and Maintenance Act and the Divorce Act, therefore, it will not always be possible for a court to enforce an unfulfilled child support obligation by the payor parent because of the limited enforcement jurisdiction of courts as conferred by statute. [My emphasis]
- [23] I do not have the jurisdiction to award retroactive child support for Michelle. Jurisdiction is discussed and found wanting in *Crepnjak v. Crepnjak*, 2011 BCCA 177, an application made under the Divorce Act, and *de Rooy v. Bergstrom*, 2010 BCCA 5, an application made under the FRA.
- [24] At the time the claimant filed the application, Andrew was a child of the marriage and a child as defined by the FRA. As a result, there is the jurisdiction to consider retroactive child support for Andrew.
- [25] I have concluded, as in the facts in *Cochrum v. Lyons*, 2010 ONSC 1681, that the claimant had custody of Andrew, maintained a home for him, and provided financial support for Andrew, despite not being resident with her for a period of time, when he was at Camp Trapping and with his father after Camp Trapping. The Law
- [26] The awarding of retroactive child support is based on certain principles which Mr. Justice Bastarache summarized in *D.B.S.*:
- [54] In summary, then, parents have an obligation to support their children in a way that is commensurate with their income. This parental obligation, like the children's concomitant right to support, exists independently of any statute or court order. To the extent the federal regime has eschewed a purely need-based analysis, this free-standing obligation has come to imply that the total amount of child support owed will generally fluctuate based on the payor parent's income. Thus, under the federal scheme, a payor parent who does not increase his/her child support payments to correspond with his/her income will not have fulfilled his/her obligation to his/her children. ...
- [27] It is the responsibility of both parents that a child receives the right amount of support. Mr. Justice Bastarache stated:
- [59] Still, the fact that the current child care regime is application-based does not preclude courts from considering retroactive awards. Parliament and the Government of Alberta have placed responsibility on both parents to ensure that their children are receiving a proper amount of support. While the payor parent does not shoulder the burden of automatically adjusting payments, or automatically disclosing income increases, this does not mean that

[page262] (s)he will satisfy his/her child support obligation by doing nothing. If his/her income rises and the amount of child support paid does not, there will remain an unfulfilled obligation that could later merit enforcement by a court.

- [28] A parent who makes all his payments under a court order is presumed to have met his or her obligations; however, that does not absolve either the payor or recipient of child support from making sure that the child is receiving the right amount of support. Child support is the right of the child.
- [29] D.B.S. sets out the factors to consider when retroactive child support should be ordered. The claimant's counsel sets out those factors in his written submissions:
52. The Supreme Court of Canada in *D.B.S. v. S.R.G.*, 2006 SCC 37 (TAB 1) held that in exercising its discretion to determine whether an award of retroactive support is appropriate, a court should consider four factors:
- (a) Is there a reasonable excuse for why support was not sought earlier?
 - (b) Was there any blameworthy conduct on the part of the payor parent?
 - (c) Is a retroactive award appropriate in light of the child's past and present circumstances?
 - (d) Will a retroactive award cause hardship to the payor parent or to his or her other children?
- [30] In considering these factors, none of the factors are decisive and "at all times a court should strive for a holistic view of the matter and decide each case on the basis of its particular factual matrix." [D.B.S., para. 99] Delay
- [31] The claimant swears that during the marriage she suffered from anxiety and depression. She swears that she is still under medical care and being treated by her doctor for chronic stress and anxiety for which she receives regular counselling.
- [32] The claimant explains her delay in seeking an increase in child support as a result of the respondent's abusive behaviour towards her during the marriage, and his threatening and harassing behaviour after their relationship ended. The respondent denies this. No particulars are detailed by the claimant. The claimant claims that she signed a separation agreement under threat by the respondent. No details of those threats are in evidence. Throughout the negotiations, and finally the signing of the agreement, the claimant was represented by counsel.
- [33] The claimant alleges that the respondent would be late with his child support payments which resulted in her registering with the Family Maintenance Enforcement Program ("FMEP"). The claimant stated in her affidavit #2 at paragraph 26 that when the respondent was contacted by her: ... the Respondent would become abusive towards Paula [Michelle] and Andrew would tell them that if I took him back to court for child support that he would never speak to them again.

- [34] The respondent denies these allegations. Followed by these denials, the respondent swears in his affidavit #2:
7. At no time did the Claimant ever seek to vary the Order made July 12th, 1999 although it was always open for her to do so.
8. At no time did the Claimant ever discuss with me additional financial support for the children's special or extraordinary expenses. I believe that she did not do so because she was aware that I was providing additional financial assistance particularly to Paula [Michelle] after she had moved out of the Claimant's care and that I was continuing to pay child support to the Claimant for Paula even though Paula no longer was in her care.
- [35] Although I have concluded that Michelle was a child of the marriage until April 2011, and lived with the claimant, even though she was attending school, it is apparent from paragraph 8, quoted above, that the respondent was aware of additional support required by Michelle to which he responded to from time to time. I find that there has been unreasonable delay on the part of the claimant. However, this is just one of the factors that I must consider. Conduct of the Payor Parent
- [36] The respondent continued to pay child support after Michelle graduated from high school. The respondent provided his daughter with money to travel to and from Japan as an exchange student, financed a trip to Scotland, where Michelle worked to save money for college, and then financed trips to Scotland for both Andrew and Michelle in the summer of 2011. I cannot conclude that the respondent knowingly diminished his support obligation. However, the respondent's emphasis was that he always paid the same amount, no matter what the children were doing, and that he took on financial responsibilities for the children, in particular, Michelle, over and above his monthly obligations. I conclude that the respondent's conduct is not blameworthy. Circumstances of the Child
- [37] There is no evidence before me that as a result of the child support payments not being current with the respondent's income, that Andrew enjoyed a lesser standard of living. However, I can conclude that the claimant met those responsibilities; probably to her prejudice. Hardship
- [38] I have reviewed the respondent's financial statement and find that given the respondent's present income, his expenses, and his assets, the respondent would not experience hardship if retroactive support was ordered. I conclude that Andrew is entitled to retroactive child support from the respondent. The Amount of Retroactive Child Support
- [39] Having determined that child support for Andrew should be retroactive, the court must determine the date to which the award should be retroactive, and the amount which quantifies and meets the payor parent's deficient obligations during that time.

- [40] The date for retroactivity is determined by ... the date when an application was made to a court; the date when formal notice was given to the payor parent; the date when effective notice was given to the payor parent; and the date when the amount of child support should have increased. [D.B.S., para. 118]
- [41] The notice that a recipient parent must give is defined in D.B.S. at para. 121: ... I am referring to any indication by the recipient parent that child support should be paid, or if it already is, that the current amount of child support needs to be re-negotiated. Thus, effective notice does not require the recipient parent to take any legal action; all that is required is that the topic be broached. Once that has occurred, the payor parent can no longer assume that the status quo is fair, and his/her interest in certainty becomes less compelling.
- [42] No notice was given by the claimant to the respondent until she filed her application on November 22, 2011. As a result, in accordance with D.B.S., the retroactive child support for Andrew will be three years before the notice, which is November 22, 2008.
- [43] The court has a discretion in ordering the quantum of retroactive support. The court is not obliged to adhere to the tables in the Federal Child Support Guidelines (the "Guidelines"). Undue hardship pursuant to s. 10 of the Guidelines can also be considered. That is not the situation in the case of the respondent. Another way of dealing with quantum is by altering the time period for the retroactive award.
- [44] It is my view that the best way to deal with the amount of retroactive child support is to use the Guidelines. However, this is a challenge as the child support payments were based on and paid for the support of two children. As I have determined, I do not have jurisdiction to award retroactive child support for Michelle, I will make adjustments when considering the Guideline tables.
- [45] The respondent's total income for the following years are as follows: 2008: Less union dues: \$86,060.00 <\$972.00> \$85,088.00 2009: Less union dues: \$92,994.00 <\$990.00> \$92,004.00 2010: Less union dues: \$95,380.00 <\$1,020.00> \$94,360.00 2011: Less union dues: \$109,411.00 <\$1,064.00> \$108,347.00 2012 (estimated): \$110,000.00
- [46] I have decided to resolve this dilemma by taking the respondent's income for each year, determine the difference between the amount for two children and the amount that the respondent should have paid and the amount ordered to pay, and then divide that difference in half. This is not a perfect solution as the Guidelines do not increase child support equally depending on the number of children. Year: Retroactive Support: No. of Months and Amount Owning: 2008: \$1,252.00 <\$919.00> \$333.00 $\$166.50 \times 2 = \$333.00$ 2009: \$1,342.00 <\$919.00> \$423.00 $\$423.00 \div 2 = \$211.50 \times 12 = \$2,538.00$ 2010: \$1,372.00 <\$919.00> \$453.00 $\$453.00 \div 2 = \$226.50 \times 12 = \$2,718.00$ 2011: January - April inclusive (Powers' Order) \$1,552.00 <\$919.00> \$633.00 $\$633.00 \div 2 = \$316.50 \times 4 = \$1,266.00$ 2011: (One Child) May - December - \$975.00 $\$975.00 \times 8 = \$7,800.00$ 2012: January - May \$1,004.00 $\$1,004.00 \times 5 = \$5,020.00$
TOTAL: \$19,675.00

- [47] According to the Family Maintenance Enforcement Program ("FMEP"), the amount owing as of February 22, 2012 is \$6,358.37. This does not include interest or the provincial government fee summary. According to the FMEP statement, the last payment made was February 22, 2012 for \$1,000.00. Together with the retroactive payments described above, which are \$23,575.00, and the arrears recorded by FMEP, the amount owing is \$29,933.37, less any payments made by the respondent after February 22, 2012. If further payments have been after February 22, 2012 by the respondent, those shall be credited to him. The respondent shall also have to pay his interest payments as assessed by FMEP. Costs
- [48] There has been some divided success in this matter, but not equal success. The respondent believed that Andrew was going to live with him and was attempting to terminate the payment of all support. I find that was a reasonable belief when he filed his application.
- [49] The claimant has not been successful in claiming retroactive child support for Michelle. I will award the claimant two-thirds assessed party/party costs, scale B, and all her disbursements which will include any applications or applications which resulted in an order to obtain financial disclosure from the respondent. "H.C. Hyslop J." HYSLOP J.

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/SC/12/08/2012BCSC0874cor1.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/burrows-v-burrows-2012>

Prepared on 29 October 2026 · Esheria