

CANADA / JUDGMENT

C.B.C. v. P.D.M.

2007 BCSC 1588

COURT

Supreme Court of British Columbia

DECIDED

31 October 2007

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2007 BCSC 1588 C.B.C. v. P.D.M. IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: C.B.C. v. P.D.M., 2007 BCSC 1588 Date: 20071031 Docket: F940459 Registry: Vancouver Between: C. B. C. Plaintiff And P. D. M. Defendant Before: The Honourable Madam Justice Garson Reasons for Judgment Plaintiff Self-Represented Defendant Self-Represented Place of Trial/Hearing: Vancouver, BC September 21 and October 15, 2007

- [1] These are my reasons for judgment on the cross applications before me concerning the ongoing payment of child support, payment for special or extraordinary expenses and payment by P.D.M. in respect to arrears.
- [2] These applications were before me on September 21, 2007, for one day. I gave judgment following the September 21, 2007, hearing in respect to all the issues concerning custody and guardianship and I will not repeat those orders in this judgment, except with one respect. Having considered the matter further, I think it is advisable that P.D.M.'s application in her Notice of Motion (that the court order R. A. C. (known as K.C.) to attend counselling) be adjourned rather than dismissed. Consequently, that application, and the related applications in the Notice of Motion (date stamped September 12, 2007) returnable for September 21, 2007, at numbers 3(b),(c),(d) and (e) stand adjourned to the next date in which the parties are before me, rather than dismissed. I have asked the parties to arrange for a return date for one hour before normal court hours in about two months. That date should be selected to coincide with P.D.M.'s day off work. My reason for adjourning these applications is that it may become appropriate for K.C. to see a counsellor, although as I indicated on September 21, 2007, I had concluded from my interview with K.C. that it was not now in her best interests to be compelled to see a psychiatrist or psychologist. I had met privately with K.C. at her request supported by both her parents.
- [3] I now turn to the issues concerning child support. I heard further submissions from the parties in respect to child support on October 15, 2007. These written reasons take into account the further submissions and replace the oral reasons pronounced on September 24, 2007.

- [4] The remaining issue is the question of P.D.M.'s ongoing obligation to pay child support. She says that her son, A.C., spends about 50% of his time at her home. She concedes that at the moment K.C. is living at her father's home and spending little or no time at P.D.M.'s home. She also asks that her responsibility for child support payments for the months of November to January, 2007, be cancelled because both children lived with her, while C.B.C. moved and re-established his home in Vancouver.
- [5] I have carefully reviewed the chambers briefs provided by both C.B.C. and P.D.M.
- [6] I will recap the main points of contention and the positions of the parties.
- [7] I pronounced judgment on Friday, October 27, 2006, concerning child support, arrears, and s. 7 expenses. The main terms of my order were the following: I imputed Guidelines income to both parties as follows: P.D.M. - \$31,000 C.B.C. - \$45,000 I set child support arrears in the amount of \$3,971 to August 31, 2006 and ordered that P.D.M. pay \$150 per month in reduction of the arrears, commencing September 1, 2006. I ordered that s. 7 expenses be divided in the proportion of 41% payable by P.D.M. and 59% payable by C.B.C.
- [8] At the time of the hearing before me on October 27, 2006, C.B.C. was residing in Port Coquitlam and P.D.M. in the Kitsilano area of Vancouver. About two weeks later, C.B.C., having sold his house in Port Coquitlam, moved to Vancouver and eventually settled in a house not far from P.D.M. The children transferred to a nearby high school. C.B.C. asked that the children reside with P.D.M. for two weeks while he was busy with his move. That two weeks lasted three months as I describe later in these reasons.
- [9] I consider this move a positive development for the two children of the marriage. It enabled them to have a closer relationship with their mother, and her new family, and for the children to move freely back and forth between their parents. There is also no doubt that the move constituted a change of circumstances entitling P.D.M. to ask this court to review the question of child support because the children thereafter spent, according to her, about one-half their time living with her.
- [10] C.B.C. disputes this. He accuses P.D.M. of prevailing upon the children to spend more time with her so that her child support obligations are reduced. C.B.C. also accuses her of keeping track of all the time the children spend with her in order to bolster her argument that she should be relieved of her child support obligations.
- [11] No one disputes that C.B.C. has been the primary caregiver of these two children throughout most of their lives. He has borne the financial brunt of supporting these children, much of the time without the necessary assistance from P.D.M. However, the present application does not turn on the historical situation, but rather on the question of whether P.D.M. is obliged to continue to pay child support.

- [12] P.D.M., her husband and small child live in a three bedroom co-op apartment. She requires three bedrooms so as to enable her son A.C. to continue to spend significant periods of time with her and for him to feel free to easily travel back and forth between his parents. In a moment I will detail what has happened with respect to K.C.'s residence since October 2006, but it is important for P.D.M. to have accommodations available for K.C., when K.C. visits with her.
- [13] When the children are with P.D.M., she incurs a real cost, which is at least equivalent to child support. There can be no argument that caring for teenage children is an expensive proposition. I recognize, as C.B.C. says, that even when the children are not with him, he must continue to maintain and pay for the home he has acquired that is suitable for a family of three. So does P.D.M. At the moment, C.B.C. has sole custody of the children and the primary residence is his. K.C. is not spending time with her mother at the moment; I view this as a temporary situation. A.C. is spending much more time with his mother.
- [14] Both parties and more importantly K.C. have expressed to me the desire to finalize the child support issues once and for all.
- [15] In *Berry v. Hart*, 48 R.F.L. (5th) 1, 2003 BCCA 659, Saunders J.A. discussed the tension between parents in circumstances where the children spend substantial amounts of time with both parents and thus both parents incur real costs in supporting both children, but one parent is required to pay child support. It is worth quoting at length from *Berry* because it is apt to the circumstances in which C.B.C. and P.D.M. finds themselves, even though in this case C.B.C. has sole custody. Saunders, J.A. said at paras. 1-10:
- [1] Section 9 of the Federal Child Support Guidelines provides:
9. Where a spouse exercises a right of access to, or has physical custody of, a child for not less than 40 per cent of the time over the course of a year, the amount of the child support order must be determined by taking into account
- (a) the amounts set out in the applicable tables for each of the spouses;
 - (b) the increased costs of shared custody arrangements; and
 - (c) the conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought.
- [2] The main issue in this appeal is the application of this section to a joint custody regime in which the four children of the marriage reside very nearly 40 percent of the time with their father. There is a factual dispute whether they spend 41 percent of the time with Mr. Berry as he alleged or 39.37 percent of the time as Ms. Hart alleged.
- [3] Mr. Berry seeks an order entitling him to withhold some of the Guidelines level support from Ms. Hart on the basis that he, too, incurs significant child support expenses in connection with the children's time with him, and on the basis that the child support is "the right of the child" and should follow the child. These submissions misconceive the scheme

of child support which permits a parent receiving table level child support to spend the money as that parent sees fit. The basis for relief from payment of the table amount is established in s. 9 which, not necessarily proportional to the time the child is with the paying parent, must take into account each parent's Guidelines amount, the increased costs of shared custody arrangements, and the conditions, means, needs, and circumstances of each parent. Nevertheless, the submissions bring into issue the degree of exactitude required before a Court is entitled to move from the table amount of child support required by the Guidelines into the discretionary provisions of s. 9.

- [4] One view of s. 9 requires parents near the 40/60 time divide to become, in effect, time accountants. A court may be presented with evidence as to the hours, part days, days or weeks of a year that are spent by the children in the respective homes, at school or under the supervision of others, on school and non-school days. Often the evidence is in conflict and, if one is able to determine the time split between the parents, there is still the question of the "type" of time that falls into the account column. In effect, rather than assessing the essence of the situation to determine whether there is truly shared custody or not, this approach turns a court into a calculator and the hearing into an accounting exercise.
- [5] Prior to promulgation of the Guidelines a formal connection between child support obligations and time spent with children was eschewed where possible, at least in British Columbia. As a result any reward for denial of access was minimized. Parliament has altered that stance through the power given to the Governor in Council to establish guidelines. Although Parliament did not directly address the situation of child time-sharing in statutory language, s. 9 of the Guidelines now formally links time to money.
- [6] In a world where the budget of one or both parents is likely to be pinched, this linkage can create real pressure to increase or decrease parent-child time where it is near the 40/60 divide, creating financial reward or penalty that may be disproportional to the short time that is said to qualify or disqualify a situation from the application of s. 9. While I do not say such is the case here, I note that the learned Chambers judge queried whether one or other of the parents was manipulating time for financial reason. Courts would be unrealistic, in my view, in failing to recognize that the 40 percent provision of s. 9, if approached with slavish accounting of small units of time, aggravates both the s. 9 financial incentive and financial disincentive inherent in an increase of a child's time with the minority-time parent.
- [9] One must also ask, considering that this approach may satisfy only the law of unintended consequences, whether the minutiae of such record keeping really determines whether s. 9 of the Guidelines applies. Rarely can anything be measured with precision. Even science recognizes that all measurements are subject to a margin of error.
- [10] In my view the issue is a matter of judgment not amenable to simply a time accounting exercise. I consider that in determining whether the threshold level for application of s. 9 is met the question is whether the paying parent spends such a sizeable percentage of time with a child or children that, on any reasonable view of the evidence and considering the

advantage that may accrue to a child in spending the occasional additional day, part day or hour with a parent, one can say reasonably that the 40 percent or more level is achieved. It follows, in my view, that a court may assess child-parent time as meeting the s. 9 criteria without a tight accounting. That assessment should be made by considering the broader context of the parenting arrangement. It perhaps bears mentioning, further, that simply finding that a parental regime comes within s. 9 does not compel an automatic reduction in child support. That determination must be made considering all of the criteria in ss. (a) to (c) of s. 9.

- [16] I turn now to examine the circumstances of K.C. and A.C.'s residence since November 2006 to September 2007.
- [17] As already noted, shortly after the October, 2006, order was pronounced, C.B.C. advised P.D.M. that he was moving. He requested her assistance in accommodating the children on a full-time basis while he re-established himself in Vancouver. She agreed. The children came to live with P.D.M. and her husband and daughter originally for two weeks, but stayed, on a full-time basis, until the end of January 2007. There is no real dispute between the parties as to this time period and I order that the child support payable by P.D.M. be cancelled for the three months of November, December, 2006 and January 2007.
- [18] I now turn to examine the evidence of the childrens' residence from February 1, 2007 to Sept 21, 2007, the date of this hearing.
- [19] I have read with care all the e-mails exchanged between the parties. From this evidence as well as the affidavits filed by both parties it is apparent that P.D.M. wants the children to be able to stay with her as frequently and as much as they wish, but she says she cannot afford to do so unless she is given some reprieve from her child support obligations.
- [20] C.B.C. points out quite correctly that he has supported the children as the custodial parent for much of their lives and without help from P.D.M. He complains bitterly that she wishes in effect to charge him for her time with the children. He claims that for the most part the children adhere to the access regime set many years ago, which is every other weekend with their mother, plus one further day.
- [21] P.D.M. says that A.C. plays basketball at the community centre near her home, and likes to then join her, her husband and their daughter for dinner. She says he frequently stays over, even when it is not an access night.
- [22] P.D.M. produced a calendar in which she has recorded the days that the children have stayed at her home. C.B.C. disputes the accuracy of P.D.M.'s calendar, and produced his own calendar. I have for comparative purposes reproduced the two calendars below: K.C. Days with P.D.M. - according to P.D.M. Days with P.D.M. - according to C.B.C. February 3 days February 0 days March 8 days March 3 days April 12 days April 6 days May 31 days May 31 days June 16 days June 16 days July - in California July - in California August 9 days August 0 days September 0 days September 2 days

- [23] As can be seen from the calendar, the parties are in substantial agreement about where K.C. lived for most months. By way of explanation, K.C. moved back to live with C.B.C., in his new home, in February, 2007. In May she moved out of C.B.C.'s home and into P.D.M.'s home. In June she spent about one-half her time with each parent and then she went to California to stay with her aunt for July. C.B.C. paid her plane fare to California. She returned home in August, and had a dispute with P.D.M. that resulted in her moving back to C.B.C.'s home, followed by no contact with her mother.
- [24] P.D.M. should not be required to pay child support for K.C. for the month of May, 2007.
- [25] I now turn to the contentious issue of the amount of time that A.C. spends at each parent's home. A.C. Days with P.D.M. - according to P.D.M. Days with P.D.M. - according to C.B.C.
February 8 days February 6 days March 13 days March 6 days April 8 days April 6 days May 8 days May 6 days June 10 days June 8 days July 12 days July 6 days August 20 holiday August 15 holiday September 5 days September 6 days
- [26] With respect to A.C., if I base my findings on P.D.M.'s calendar, he appears to spend between 30 - 40% of his time with his mother and her family. C.B.C. estimates that the time is somewhat less. Their calculations are not dramatically different as can be seen from the calendars above. A.C. spends informal time with his mother because of the proximity of her home to the community centre where he plays basketball. P.D.M. has written e-mails telling C.B.C. that the children must adhere to the court ordered access schedule unless she is given some reprieve from her child support obligations. C.B.C. says that these e-mails are proof that she does not want A.C. to be able to freely come and go between the two homes.
- [27] This case is a dramatic illustration of the tension discussed in Berry above. If P.D.M. must pay full child support for A.C., she says, she cannot continue to feed him meals, and incur other costs in caring for him, on her limited income as a dental receptionist. She says she must then limit his time with her which is not in A.C.'s best interests. On the other hand, C.B.C. is and has always been the sole custodial parent and A.C.'s time with P.D.M. does not come quite to the 40% threshold in s. 9 of the Guidelines. Berry is authority for the proposition that courts do not have to slavishly adhere to 40%. A.C. is now 14 years of age and it may no longer be appropriate for him to slavishly follow a rigid access formula, given the proximity of his parents' homes to each other. I am satisfied that he typically spends between at least 30 - 40% of his time with his mother. The pattern is variable, sometimes it is more, sometimes it is less. In these circumstances, I consider that it is in A.C.'s best interests to be able to move freely between his parents home. Taking into account the factors set out above in s. 9, and particularly the quite limited income of P.D.M., I order that A.C.'s child support, that is one-half of the present total child support, be reduced by one-half of the table amount applicable to two children, retroactive to February, 2007. P.D.M.'s table amount of income for two children is \$486. One-half of this amount \$243, is attributable to A.C.'s child support. A.C.'s child support should be reduced to \$121.50. This order does not affect the payment P.D.M. makes towards arrears.

- [28] The parties should contact the Family Maintenance Enforcement Program in order to adjust their accounts in accordance with these reasons for judgment.
- [29] These reasons for judgment should not encourage the parties to return to court on a regular basis having kept track of the time with each parent to ask for an adjustment. There should be no further review of child support for A.C. before twelve months, and then only if the parties are unable to agree to an adjustment if one is justified. If there is a significant change in circumstances, such as A.C. moving his primary residence to P.D.M., then if the parties are unable to agree, a further court application could be made. But no further applications should be made for adjustment, based on s. 9, before twelve months has expired.
- [30] Similarly with respect to K.C., if she begins to share her time on a basis similar to A.C. then the parties should try to agree on a formula for adjustment consistent with these reasons.
- [31] I turn now to the question of s. 7 expenses. K.C. expressed to me the firm desire to be re-enrolled in ballet and piano. I agree with K.C. that to do so is in her best interest. I do not think that either parent disagrees. I order that K.C. be immediately re-enrolled in these programs by C.B.C. C.B.C. is to immediately thereafter provide P.D.M. with written confirmation that K.C. is enrolled and information about the costs of same, which must be borne by C.B.C. and P.D.M. in the proportion already mentioned. The Family Maintenance Enforcement Program has been assessing P.D.M. \$105 per month (for additional court ordered expenses). C.B.C. should provide P.D.M. with an accounting of expenses that he has so incurred within ten days of the date of this order. P.D.M. should provide to C.B.C. copies of expenses she says are s. 7 expenses which is limited to additional expenses for extracurricular activities. P.D.M. shall prepare an accounting of amounts that she owes or is owed from November 1, 2006 to September 1, 2007. If the parties are unable to agree on the accounting for s. 7 expenses, they may submit the accounting to me with brief affidavits and I shall settle this matter when the parties reappear before me in two months time. Summary of Disposition
- [32] The order of October 27, 2006, is varied as follows: · P.D.M.'s child support payments for November 2006 through to and including January 2007 are cancelled. · From February 2007 and continuing she must pay \$121.50 in child support for A.C. · From February 2007 she must pay \$243 per month for K.C., except for the month of May, 2007, in which month her child support obligation is cancelled.
- [33] There should be no further applications to vary A.C.'s child support apportionment for the next twelve months.
- [34] P.D.M. should prepare one draft order reflecting these reasons for judgment as well my oral reasons pronounced on September 21, 2007.
- [35] I remained seized of this matter only for the adjourned hearing concerning custody and guardianship of K.C. now set for November 26, 2007.

[36] C.B.C.'s application to hold P.D.M. in contempt of court is dismissed.

The Honourable Madam Justice Garson

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Prepared on 25 October 2026 · Esheria