
CANADA / JUDGMENT

C.G.R. v. J.L.R.

2020 BCSC 842

COURT

Supreme Court of British Columbia

DECIDED

8 June 2020

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

C.G.R. v. J.L.R.,

2020 BCSC 842

Date: 20200608

Docket: E46559

Registry: New Westminster

Between:

C.G.R.

Claimant

And

J.L.R.

Respondent

Before: The Honourable Justice Shergill

Reasons for Judgment - Application by Written Submissions

Counsel for the Claimant:

T. Watkins

Counsel for the Respondent:

P.R. Evans

Application by Written Submissions:

New Westminster, B.C.

May 26, 2020

Place and Date of Judgment:

New Westminster, B.C.

June 8, 2020

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I. Overview

- [1] This application is brought pursuant to the Supreme Court of British Columbia COVID-19 Notice #14 dated April 27, 2020, permitting Applications by Written Submission ("AWS"). The claimant, C.G.R., seeks an order for interim child support from the respondent, J.L.R., in the amount of \$1,324 per month.
- [2] The parties' five-and-a-half year relationship ended with separation in January 2014. The relationship produced two children - J. who was born in May 2012, and T. who was born in December 2013.
- [3] Family law proceedings were commenced by the claimant in May 2014. Despite the passage of time, no final resolution of this matter has ever been achieved. Rather, the parties have operated under two Consent Orders, the first pronounced by Master Keighley on October 10, 2014, providing for interim child support payable by the respondent to the claimant in the amount of \$800 per month "without prejudice to the determination of the proper quantum of further child support". The second Consent Order was entered into on December 18, 2014, at a Judicial Case Conference before Justice Williams. Master Keighley's interim child support order of \$800 per month was extended through to the end of April 2015.

- [4] In March 2015, the respondent notified the claimant that he had lost his employment. He made no further payments of child support to the claimant after April 2015. The claimant took no steps in the family law proceeding until March 2020, when she served a Notice of Intention to Proceed on the respondent.
- [5] Shortly thereafter, the respondent made a small payment of \$352 to the claimant for support of the children. On May 22, 2020, the respondent made an AWS for increased parenting time. The decision was released on May 28, 2020, indexed at C.G.R. v. J.L.R., 2020 BCSC 790.
- [6] There is a five-day trial currently scheduled for November 2020 to address issues related to parenting time and child support.

II. Issue

- [7] The parties do not dispute that the children are "children of the marriage" pursuant to the Divorce Act, R.S.C., 1985, c. 3 (2nd Supp.) [DA] and thereby entitled to support. Their dispute is about the quantum of support that is payable.
- [8] The claimant submits that the respondent should pay child support of \$1,324 per month based on employment income of \$85,692 (all figures are rounded to the nearest dollar).
- [9] The respondent argues that his Federal Child Support Guidelines, S.O.R./97-175 [CSG] income should be set at \$80,998, resulting in a monthly child support obligation of \$1,254. However, he argues that this monthly support award will cause him undue hardship and as such his interim child support obligation should be reduced to \$977 per month.
- [10] The claimant is currently not seeking any contribution from the respondent for section 7 expenses, as the children's child-care and extra-curricular activities have been put on hold due to the COVID-19 pandemic.

III. Legal Framework

- [11] Child support is the right of the child. It survives the breakdown of the marriage and is intended to provide the child with the same standard of living which the child enjoyed when the spouses were together: H.U.V. v H.M.W., 2008 BCCA 177 at para. 41.
- [12] The specific amount of child support that is owed may vary based on the income of the payor spouse, but the duty to provide support does not. This is reinforced by s. 147(1) of the Family Law Act, S.B.C. 2011, c. 25 [FLA], which stipulates that each parent and guardian of a child has a duty to provide support.
- [13] Both the FLA (s. 150(1)) and the DA (s. 15.1(3)) adopt the use of the CSG to determine the appropriate amount of child support, which is based on the parties' incomes (the "table amounts"). Deviation from the CSG is allowed in limited circumstances: FLA, s. 150 and DA, s. 15.1(8).

- [14] Child support calculations are generally based on the previous year's income of each spouse: *J. (K.M.) v. N. (J.H.D.)*, 2014 BCSC 1895 at para. 114.
- [15] Sections 16 to 19 of the CSG distinguish between taxable income (often referred to as Line 150 income), and income for support purposes. Pursuant to s. 17(1) of the CSG, the court may consider income patterns or fluctuations to arrive at an amount that is fair and reasonable.
- [16] Section 10(1) of the CSG permit the court to depart from the table amount if the court finds that the table amount would cause "undue hardship" to the applicant. An application for undue hardship can be made by the payor parent, or by the recipient parent on behalf of a child.
- [17] Section 10(2) sets out circumstances which may cause a spouse or child to suffer undue hardship. These include situations where the payor parent "has a legal duty to support a child, other than a child of the marriage": CSG, s. 10(2)(d).
- [18] Even where the court has determined undue hardship under subsection (1), the court must deny an application if it is of the opinion that the household of the applicant spouse would have a higher standard of living than the household of the other spouse: CSG, s. 10(3).
- [19] In *Kelly v. Kelly*, 2011 BCCA 173 at paras. 33 and 34, the Court noted that a claim for undue hardship advanced under s. 10 of the CSG involves a two-step analysis. First, the parent applying for relief must demonstrate that undue hardship will be caused by paying table amount support. Second, if the court accepts that undue hardship is established, it must compare the standard of living in each parent's household to ensure that the payor parent does not have a higher standard of living than the recipient parent, if a reduction in guidelines support is made.
- [20] The threshold for finding undue hardship is high. The hardship that results must be "excessive, extreme, improper, unreasonable, or unjustified": *Van Gool v. Van Gool* (1998), 59 B.C.L.R. (3d) 395 (C.A.) at para. 48.
- [21] The Court in *Van Gool* at para. 51 provided guiding principles for determining applications based on undue hardship, which are summarized below:
- a) The onus lies on the applicant to lead cogent evidence to establish why the table amount would cause undue hardship.
 - b) Undue hardship is hardship that is exceptional, excessive, or disproportionate in all of the circumstances.
 - c) Undue hardship will not be presumed simply because the applicant has the legal responsibility for another child or children, or because the standard of living of the applicant's household is lower than that of the other spouse.
- [22] I turn now to determining the issues.

IV. Analysis

[23] The parties have each filed Form F8 Property and Financial Statements ("PFS"), as well as affidavits in support of their respective positions.

A. CSG Income

- [24] The claimant lives in Maple Ridge with the two children and a common-law spouse. She is employed as an insurance broker. She has been able to work from home during the COVID-19 pandemic, and expects her 2020 income to be similar to her 2019 earnings. Her 2019 income tax returns disclose a T4 income of \$59,457. The claimant had minor additional income of about \$200 from taxable dividends and a cash prize from her employer. The respondent has not asked for this additional income to be included in the claimant's income for CSG purposes.
- [25] The respondent is a marketing manager and a self-employed musician. He resides in Maple Ridge with his common-law partner. His 2019 T4 income is \$85,692, which is derived solely from his current employment as a marketing manager. In addition, the respondent had "other income" of \$113, and a business loss of \$4,807 from his musical endeavours.
- [26] The parties disagree on whether the business loss should be factored into determining the respondent's CSG income. The claimant argues that the interim support calculation should be based on the respondent's T4 income from his primary employment only. She challenges the legitimacy of the business losses. In addition, the claimant suggests that the respondent may be under-reporting his self-employment income.
- [27] Alternatively, the claimant submits that the respondent can eliminate the business losses by simply ceasing his self-employment activities, since they have consistently produced losses over the years.
- [28] I conclude that the respondent's business losses should be factored into determining his income for CSG purposes. In doing so, I note first that the claimant has provided no legal authority to support her argument that the support calculations should be based on the respondent's T4 income alone. Indeed, s. 16 of the CSG allows the court to consider income from self-employment earnings when determining income for CSG purposes.
- [29] Second, the claimant has provided no evidence to support her contention that the business losses are not reliable or are not legitimate. Nor is there any evidence that the respondent manufactured these losses solely for the purposes of avoiding his support obligations. The losses were reported prior to the claimant's application for child support, and are consistent with those reported by him in previous years.

- [30] Third, I do not accede to the claimant's argument that the respondent should simply cease being a musician in order to avoid his business losses. The respondent acknowledges that he has lost money as a musician. However, he is hopeful that he will earn more money in the future. In the event that he does, the claimant will no doubt be seeking an increase in child support. It would be unfair to only consider his self-employment activities when they benefit the claimant.
- [31] Fourth, I note that this is an interim application, and not a final order. The claimant will have an opportunity to renew her arguments at trial where the presider will be better suited to determining the validity and reliability of these expenses, having had the benefit of hearing the viva voce testimony of the parties and their witnesses.
- [32] In his sworn PFS, the respondent states that he does not anticipate any significant changes to the information set out in it. The PFS attaches the respondent's pay stubs from his current employer. Those suggest that he is on pace to earn the same income in 2020 as he did in 2019.
- [33] I conclude that it is fair and reasonable to set the respondent's income for CSG purposes, at \$80,998.

B. Hardship

- [34] The respondent claims expenses of \$111,000 per year, against an annual income of about \$81,000. Included in the respondent's income are child support obligations for two daughters from a previous relationship: Q., who is 14.5 years old, and E., who is 13. They do not live with the respondent. The respondent currently pays \$407 per month in child support for these children, with an additional \$170 per month for special expenses related to the care of Q. and E.
- [35] The respondent argues that payment of child support at the table amount will cause him undue hardship, as it will increase his annual expenses by another \$15,000. He submits that he will be required to sell his home and car in order to meet his support obligations at the table amounts indicated in the CSG. If he sells his car, it will be difficult for him to exercise parenting time with his two older children given where they live and the number of extracurricular activities in which they are involved.
- [36] The evidence does not support a finding of undue hardship. Given the respondent's evidence that his annual expenses already exceed \$110,000, reducing his monthly child support payment from \$1,254 to \$977 only provides a saving of about \$3,300 per year. This represents only 3% of his overall annual expenses. The respondent would still be obliged to pay almost \$12,000 in additional annual child support. I find it hard to believe that the respondent would be forced to sell his home and his car because of an added burden of \$3,300 per year.

- [37] As noted earlier, establishing undue hardship requires the respondent to provide cogent evidence of hardship that is severe, excessive, or otherwise disproportionate in all the circumstances. The respondent has failed to do so. While I accept that the respondent may experience hardship by having to pay child support at the table amount, the evidence does not support a finding that the hardship is undue.
- [38] I conclude that the respondent is required to pay child support at the table amount. Based on an income of \$80,998, the table amount of child support for two children is \$1,254 per month.

V. Orders Made

[39] I make the following interim orders:

- a) The claimant's income for CSG purposes is set at \$59,457.
- b) The respondent's income for CSG purposes is set at \$80,998.
- c) Subject to any right of set-off triggered by s. 9 of the CSG, the respondent shall pay the claimant \$1,254 per month for interim child support for J. and T.
- d) The parties shall exchange full income tax returns with attachments, and notices of assessment or reassessment, by June 30 of each year.
- e) Interim child support payments shall be adjusted annually on July 1, based on the parties' incomes for the prior tax year.
- f) The first adjustment of interim child support is to occur on July 1, 2021.
- g) The parties shall share the children's section 7 expenses in proportion to their respective incomes as per s. 7(2) of the CSG.

VI. Costs

- [40] Costs ordinarily follow the event. Where success is divided in a family law proceeding, costs are awarded to the party that has achieved substantial success.
- [41] Neither party has achieved substantial success. As such, I order that each party bear their own costs of this application.

"Shergill J."

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