
CANADA / JUDGMENT

C.H. v. M.H.

2018 BCSC 258

COURT

Supreme Court of British Columbia

DECIDED

22 February 2018

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2018 BCSC 258 C.H. v. M.H.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

C.H. v. M.H.,

2018 BCSC 258

Date: 20180222

Docket: E30121

Registry: New Westminster

Between:

C.H.

Claimant

And

M.H.

Respondent

Before: The Honourable Mr. Justice Jenkins

Reasons for Judgment

Counsel for Claimant:

C.H.

(Appearing in Person)

Counsel for Respondent:

M.H.

(Appearing in Person)

Place and Date of Hearing:

New Westminster, B.C.

October 26, 2017

Place and Date of Judgment:

New Westminster, B.C.

February 22, 2018

- [1] M.H., ("the respondent") has applied for an order that her former common law partner pay a percentage special and extraordinary expenses that fall under s. 7 of the Federal Child Support Guidelines, S.O.R/97-175 [FCSG]. These expenses were incurred for the child of their relationship, from June 2008 to September 2017. The respondent also seeks payment of a proportion of the same expenses prospectively from September 2017.
- [2] A short history of the orders made in this family proceeding will explain how the parties came to this point.

Factual Background

- [3] The common law relationship between C.H. ("the claimant") and the respondent parties commenced in 2002 and ended in January 2008.
- [4] There is one child of the relationship, J.H., who was born in March 2005 and is now 12 years old.
- [5] At a Judicial Case Conference on September 12, 2008, a consent order was entered in which the parents were appointed joint guardians of J.H., and the respondent was given sole custody and primary responsibility for J.H.'s care.
- [6] J.H. has resided with the respondent, since the separation.
- [7] On July 23, 2009, Master Caldwell granted an order which included:
 - a) An order that C.H. pay interim child support of \$326 per month for so long as J.H. is a child as defined in the Family Relations Act, R.S.B.C. 1996, c. 128.
 - b) An order that C.H. "shall pay. . .[M.H.]. . .the sum of \$318.36 per month for the child's interim special and/or extraordinary expenses commencing August 1, 2009 and continuing for so long as the Defendant requires child care for the child "
- [8] Although J.H. is now 12 years of age, he has continued to require some pre-school care due to attention deficit disorder.

- [9] Since the date of the order of Master Caldwell, the claimant has continued to pay the monthly child support and the sum ordered for special and extraordinary expenses of \$318.36, principally through the Family Maintenance Enforcement Program (the "FMEP") with whom the respondent had registered the order of Master Caldwell.
- [10] The order of Master Caldwell did not reference or include any s. 7 expenses that may be incurred for J.H. other than for child care and the amount of the payment was based upon the monthly child day care costs being incurred at the time by the respondent.
- [11] The claimant has deposed that he had no knowledge of any other expenses being incurred by the respondent for J.H. between 2009 and when this application was filed in 2017. The respondent's lack of knowledge may be explained by the lack of contact between himself and the respondent for many years.
- [12] There were no other orders until the parties came before Saunders J. on June 29, 2017, both represented by counsel, and an order was granted which included the following:
1. By Consent, clause 1 of the order of Master Caldwell dated July 23, 2009 (the "Order") be varied such that the Claimant shall pay child support to the Respondent for the Child in the sum of \$401 per month commencing July 1, 2017 and continuing on the 1st day of each month thereafter for so long as the Child is a "child" of the marriage as defined in the Family Law Act.
 2. By Consent, clause 2 of the Order be varied such that the Claimant will no longer pay to the Respondent the sum of \$318.36 per month for the Child's child care expense effective July 1, 2017.

The order of June 29, 2017, also included counselling for the child (although there was no mention in the order as to who would pay for counselling), provisions to work towards "reintegrating the Claimant into the child's life" and that the claimant's application for parenting time be adjourned generally.

- [13] The respondent has deposed that she lost contact with the claimant in 2009. Between 2009 and early 2017 the respondent incurred costs for J.H.'s care for medical, dental, educational and recreation expenses and had been contributing to an RESP which both she and the claimant had initiated for J.H. while they had been living together. It is not disputed that the claimant had no knowledge of the costs which were being incurred by the respondent for J.H., save for the RESP contract which he had signed soon after the birth of their son. The respondent now seeks an order that the claimant pay a portion of the costs, which can generally be described as special and extraordinary costs as contemplated under s. 7 of the FCSG. Her claim is based upon the relative incomes of the parties since 2009. The costs included dental, cell phone, RESP contributions and costs incurred for the extra-curricular activities of J.H. and total \$24,907.94.

Applicable Law

[14] The same principles respecting the payment of basic child support are applicable to the payment of retroactive s. 7 expenses. There is a difference, however, in the case of s. 7 expenses in respect of which the payor often has no advance notice of the expenses being incurred unless the payee communicates the expense has been incurred. That is the situation in the case before me.

[15] The most significant case in the area of retroactive child support is the Supreme Court of Canada decision in *D.B.S. v. S.R.G.*, 2006 SCC 37 [D.B.S.] at para. 15, in which the court referred to the core principles relating to retroactive child support orders which were found to include, as summarized in the Family Law Sourcebook for British Columbia, 2017 update, c. 3.71 at 3-88, as follows:

1. Child support is the right of the child;
2. The right to support survives the breakdown of a child's parent's marriage;
3. Child support should, as much as possible, provide children with the same standard of living they enjoyed when their parents were together; and
4. The specific amounts of child support owed will vary based upon the income of the payor parent.

The latter core principle should, I believe, also include reference to the income of the payee parent as well as the income of the payor parent.

[16] The court has discretion in making a retroactive child support order and in these cases the court is to consider the circumstances surrounding the delay in applying, the payor parent's conduct, the child's circumstances and any hardship which may be caused by a retroactive award: see *D.B.S.* at paras. 99-116.

[17] Considering the four circumstances referred to above:

- The circumstances regarding the delay in applying rest with the respondent. She deposed that she had not been made aware by her then solicitor that she could claim, in addition to the costs of child care, for additional expenses including those for which she now seeks contribution.
- The conduct of the claimant could hardly be subject to question since he was paying basic child support plus, according to the order of Master Caldwell "the sum of \$318.36 for the child's interim special and/or extraordinary expenses continuing for so long as the Defendant requires child care". The claimant was unaware of additional expenses that were being incurred by the respondent. So far as the court is aware, the claimant was paying what he understood was the extent of his court obligation to pay for special and/or extraordinary expenses for J.H.

- Regarding the child's circumstances, there is no evidence before the court that J.H. has done without care or the benefits of programs which would be expected to be available for a young child including those incurred for extra-curricular expenses in addition to the costs of child care.
- It is clear that it would be very difficult for the claimant to find the funds required to meet the amount now being claimed. This hardship on the payor is to be considered in light of the relative incomes of the parties and the claim now being advanced by the respondent.

[18] Also, in D.S.B., the Supreme Court of Canada found it to be inappropriate to make a support award retroactive to a date more than three years before formal notice is given by the payee.

[19] In this case, the first notice received by the claimant of a claim for the special and extraordinary expenses was in the notice of application issued September 20, 2017.

Decision

[20] The circumstances summarized above do not support an order that the claimant pay the full amount of the expenses being claimed by the respondent.

[21] The claimant had no notice prior to September 2017 that the respondent would be making a claim for these expenditures. He had been paying child support plus a monthly payment ordered for the cost of child care included in the order of Master Caldwell without demand for a contribution to any further expenditures. The respondent's explanation was that she had no contact with the claimant and did not know where he could be located. The claimant's response is that it was known to the respondent that he had continued employment at the same company for many years and she was aware of where his parents lived and through whom messages could be passed on to him. As well, as FMEP were enforcing collection of the child support payments for many years and the claimant was paying through FMEP. As such, it is submitted that a claim could easily have been advanced.

[22] Also, the respondent blames her former lawyer for not telling her she could claim for the special and extraordinary expenses which, if correct, is not a failure that can be charged to the claimant. This is not a case where the child has done without the benefit of special and extraordinary expenses since his mother has been paying for the same.

[23] Based upon the legal principles referred to above and applied to the facts relevant to this application, the application is dismissed with one exception.

[24] The exception is the cost of the RESP for J.H. which the parties jointly purchased in 2005 and, as I understand the application form for the same, involved monthly payments of \$108.90. The claimant is responsible for one-half of the premiums paid on the RESP since separation of the parties. Being uncertain as to what payments had been made from the joint account and subsequently, if the parties cannot determine the amount for which the claimant is responsible, they may apply for directions in that respect before me.

- [25] In conclusion, I dismiss the respondent's claim for retroactive s. 7 expenses incurred between 2009 and September 2017 save for a contribution for one-half of payments made on behalf of the RESP.
- [26] Prospectively, i.e. from September 2017, the claimant shall be responsible for his proportionate share of s. 7 expenses based upon the incomes of the parties. The respondent shall provide advance notice to the claimant of any anticipated s. 7 expenses. If the parties do not agree as to whether specific expenses qualify as s. 7 expenses, either party may apply to this court for a determination.
- [27] There will be no costs on this order.

"Jenkins J."

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