
CANADA / JUDGMENT

Caldwell v. Caldwell

2011 BCSC 1019

COURT

Supreme Court of British Columbia

DECIDED

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2011 BCSC 1019 Caldwell v. Caldwell

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Caldwell v. Caldwell,

2011 BCSC 1019

Date: 20110728

Docket: E050266

Registry: Vancouver

Between:

Lauren Elizabeth Caldwell

Claimant

And

Rhyon Caldwell

Respondent

Before: The Honourable Mr. Justice Affleck

Reasons for Judgment

In Chambers

Counsel for the Claimant:

A. Demeulemeester

Counsel for the Respondent:

J.R. Bode

Place and Date of Trial/Hearing:

Vancouver, B.C.

July 19, 2011

Place and Date of Judgment:

Vancouver, B.C.

July 28, 2011

- [1] This is an application by Rhyon Caldwell to vary child support and to cancel arrears of about \$6,500. At the hearing, Mr. Caldwell asked the Court to eliminate his maintenance obligation for his two children, who are ages 15 and 13, and to reverse the obligation of child support so that the application respondent (hereafter "Ms. Cherkizoff") would pay the applicant for the support of the children.
- [2] Mr. Caldwell and Ms. Cherkizoff were married in 1994, separated in 2004, and divorced on November 28, 2005, by order of this Court.
- [3] Ms. Cherkizoff works for B.C. Hydro and has a total income of about \$93,000, which includes a small sum for rental income from her basement suite. Mr. Caldwell was employed full-time for about 18 years with Vancouver Community College but was laid off in May 2009. Thereafter, he has been working part-time for the College and has had some additional income from "part-time teaching contracts at night and on weekends." I have been given no details of his income from such contracts.
- [4] In the year he was laid off, Mr. Caldwell reported his employment income as \$62,249.95, and a rental loss of about \$8,030.71. This is explained by his interest in three rental apartments in Vancouver against which he claims expenses which exceed the rental income. I am told Mr. Caldwell has been asked to provide details of the expenses related to the apartments but has not done so.
- [5] Mr. Caldwell rents an apartment to his father at a rate which he acknowledges is not the market rate, and another apartment to his brother. Mr. Caldwell asserts his brother is entitled to a half interest in the apartment in which he lives and the evidence is that the brother pays \$325 per month rent.
- [6] There is little or no evidence supporting the brother's one-half interest in the apartment. If there is such an interest, the brother has not purchased it at fair market value and it appears unlikely that the rent the brother is paying on the apartment is consistent with the market. I cannot say on a balance of probabilities that Mr. Caldwell is reasonably utilizing his two apartment properties to earn income. I have concluded he is not.

- [7] In the absence of evidence about market rates, imputing rental income to Mr. Caldwell can be only a rough estimate. Mr. Caldwell's evidence is that his brother pays "the government subsidy amount for rent." This is because the brother's entire income, it appears, is from disability assistance from the provincial government. Mr. Caldwell understandably does not wish to evict his brother who he considers to be his responsibility to support. However, he must support his children in priority to his support for his brother. Mr. Caldwell acknowledges the rent paid by his father on another of the properties is "a small reduction from market rent." It seems the father resides at the apartment about three or four days a week.
- [8] The modest rent paid by Mr. Caldwell's brother could probably be at least doubled at market rates, and I estimate about another \$250 of income could be generated from the rental at market rates on the apartment now used part-time by Mr. Caldwell's father. Those figures suggest Mr. Caldwell could increase his gross income by almost \$600 which coincidentally is the amount he is now obliged to pay for the maintenance of his two children.
- [9] I am told Mr. Caldwell has not provided Ms. Cherkizoff with information about mortgages registered against the three apartments nor a breakdown of the expenses. That is another reason why I am inclined to impute income to Mr. Caldwell.
- [10] In 2010, which was the last full year after his layoff from his full-time employment at Vancouver Community College, Mr. Caldwell reported employment income of \$31,945. The income tax return shows gross rental income from his real property of \$21,545 and a loss after expenses of almost \$3,000. That loss would not exist if Mr. Caldwell took reasonable steps to earn income from his real property.
- [11] Mr. Caldwell hopes to return to full-time employment with Vancouver Community College but says he needs a Master's degree to do so. He was accepted at Simon Fraser University in September 2009 for that purpose. When laid off, he was advised he was entitled to receive a \$62,000 severance payment so long as he took it within 2½ years from the date of the layoff. He has been reluctant to do so because once he obtains the payment he says he will have no prospect of returning to full-time employment with VCC and his current contract from which he earns a modest income will be terminated. The severance payment is clearly income to Mr. Caldwell. It was paid to him or will be paid to him in lieu of his continued employment. Not to take it into account is a form of self-induced reduction of employment income which does not sit easily with an application for the variation of his child support obligations. See: *Watts v. Willie*, 2004 BCCA 600.
- [12] Mr. Caldwell also has an interest in some parcels of real property in Point Roberts which I am told are undeveloped and perhaps undevelopable. I do not take them into account on this application.

- [13] At the time of the divorce in November 2005, the order scheduled minutes of settlement providing for joint custody of the children with their primary residence to be with Ms. Cherkizoff. The minutes of settlement reflect Mr. Caldwell's agreement to pay \$600 per month basic support for the two children. He was also to make payments for their special or extraordinary expenses.
- [14] Ms. Cherkizoff paid \$165,000 to Mr. Caldwell in exchange for which she obtained title to the family home at 4750 Pine Crescent, Vancouver. In the same agreement, Mr. Caldwell retained title to the apartment in which he now lives on Keefer Street in Vancouver as well as the three apartments in Vancouver and the two properties in Point Roberts.
- [15] Ms. Cherkizoff complains Mr. Caldwell does not contribute to any of the children's special or extraordinary expenses notwithstanding his agreement to do so. These include \$181 per month as the children's portion of an Arbutus Club membership fee; the cost of lessons and summer camps which Ms. Cherkizoff calculates at an average of \$254 per month spread over a year; and in addition skiing lessons and ski passes. Mr. Caldwell does not challenge this evidence, and I have not heard any suggestion that these activities should be curtailed to save money.
- [16] The minutes scheduled to the divorce order set out a parenting schedule. I understand that schedule has not significantly changed; however, Mr. Caldwell submits that under the shared custody arrangement his time with the children now meets or exceeds 40% and therefore Part 9 of the Child Support Guidelines comes into play. I am not able to accept this submission because it is not possible for me on the evidence I have read to conclude Mr. Caldwell's submission is correct. I cannot determine that Mr. Caldwell's time with the children meets or exceeds 40% and therefore I conclude that the test s. 9 imposes does not have application in this matter. A further factor is that in the minutes of settlement, Mr. Caldwell agreed that he could not apply for a reduction in child support "solely on the basis of existing parenting requirements "
- [17] I am influenced in this conclusion by the reasoning of Hinkson J. (as he then was) in *Huntley v. Huntley*, 2009 BCSC 1020, where the learned judge comments as follows at paras. 12-16:
- [12] The onus rests on the parent seeking to invoke s. 9 of the Guidelines to establish care of the children for more than 40% of the time: *Crofton v. Sturko*, [1998] B.C.J. No. 38 at para. 17.
- [13] In *Berry v. Hart*, 2003 BCCA 659, 233 D.L.R. (4th) 1 [Berry], Saunders J.A., speaking for the majority of the Court of Appeal, considered how courts should calculate parenting time and determine the applicability of s. 9 of the Guidelines to a given parenting regime. She said at para. 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.

[14] In *Maultsaid v. Blair*, 2009 BCCA 102, Saunders J.A. recently clarified the comments that she had made in *Berry*. After referring to *Berry*, Saunders J.A. said at para. 30 of *Maultsaid*:

I recognize this calculation brings the matter close to 40 per cent and appears arbitrary. However, in my view, it is not open to the court, faced with the express wording of s. 9, a court order particularizing "the right to access", and a measure of the time that falls short of the requisite 40 per cent, to ignore the words, the mandatory requirement, chosen by Parliament. In the words of the Alberta Court in *L.C. v. R.O.C.*, 2007 ABCA 158, "there is no place for 'deeming' parenting time to be what it is not".

[15] I have concluded that I cannot measure the plaintiff's time with the children based on affidavits alone. While the onus is on the plaintiff to establish that he has spent more than 40% of the time with the children in order to come within the ambit of s. 9 of the Guidelines, I would have been prepared to permit him to attempt to do so after cross-examination of the parties on their affidavits had been conducted.

[16] However, after careful consideration of the parties' positions with respect to the applicability of s. 9 of the Guidelines, I have concluded that it is not open to the plaintiff to seek to vary his child support payments by relying on s. 9 of the Guidelines. The plaintiff only contemplated or advocated for this change to the foundation of his child support obligations if the Court changed the parties' parenting schedule. This has not occurred. Further, the defendant has not consented to such a fundamental change in the calculation of support payments. To borrow a turn of phrase from the plaintiff, a resort to s. 9 of the Guidelines, at this time would not live up to the "terms and spirit" of the parties' separation agreement.

[18] Any justification for a reduction in Mr. Caldwell's support obligations for his children must be limited to a change in his financial circumstances. I acknowledge the financial pressures he frequently experiences and which at times must be embarrassing but he is taking steps to improve his circumstances by obtaining a Master's degree, and even a modest degree of optimism suggests that he will be successful in obtaining that degree and improving his employment prospects. In the meantime, the law does not permit him to refuse to receive employment income to which he is entitled. He cannot decline to accept the severance payment available to him from Vancouver Community College and at the same time apply to this Court for a reduction in child support on the basis that his income is inadequate. If he obtains the severance money and the net portion after taxes is taken into his income, it will

provide him with the means to make the child support payments he had agreed to make at the time of the divorce. I conclude that the severance payment ought to be imputed to him in its entirety. If that is done, I believe he will have sufficient income to meet his support obligations. Therefore I dismiss the application to vary child support.

[19] Mr. Caldwell also asked the Court to cancel the arrears of child support. I can do so only if I am satisfied "it would be grossly unfair not to do so." See Family Relations Act, s. 96 (1.3)(ii). In *Earle v. Earle*, a decision of Madam Justice Martinson on January 18, 1999, cancellation of arrears was addressed as follows:

[21] The cancellation or reduction of arrears of maintenance is a form of variation. There are two points that have to do with arrears that should be kept in mind.

a. Significant Change

[22] Because cancellation or reduction of arrears is a form of variation, there is a substantial onus (a heavy duty) on the person asking for a reduction or a cancellation of arrears to show that there has been a significant and long lasting change in circumstances.

[23] The courts are generally reluctant to reduce or to cancel arrears. Under the Family Relations Act arrears will not be reduced or cancelled unless it is grossly unfair not to do so. This principle is similar to the one applied to the Divorce Act, which requires a material and long lasting change.

[20] Part of Mr. Caldwell's submission to me has been that his financial circumstances have changed and that fact should relieve him of the obligation to pay the arrears. I do not accept they have changed to the extent that he says they have when all factors are taken into account and in any event I am not satisfied that he has given full financial disclosure, and I am left in some uncertainty as to his current income. As Martinson J. said in *Earle*, one of the common arguments made in favour of reducing arrears is that the applicant's financial circumstances deteriorated. In those circumstances, Martinson J. found at para. 27 that:

[27] People making this argument have a heavy onus. It is not good enough just to say that they could not pay because they earned less. They can only get a reduction or a cancellation of arrears if they present detailed and full financial disclosure, under oath (usually in the form of an affidavit) that:

i. the change was significant and long lasting and

ii. the change was real and not one of choice and

iii. every effort was made to earn money (or more money) during the time in question, and those efforts were not successful.

[21] In my opinion, Mr. Caldwell has good reason to believe he has long-term prospects of steady employment and I do not accept that he will not have in the future the means to pay the arrears. I am not persuaded he can meet the test to have them cancelled.

[22] The application to cancel arrears is dismissed.

"Affleck J."

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