

CANADA / JUDGMENT

Constantinescu v. Istrate

2015 BCCA 306

COURT

British Columbia Court of Appeal

DECIDED

3 July 2015

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2015 BCCA 306 Constantinescu v. Istrate COURT OF APPEAL FOR BRITISH COLUMBIA Citation: Constantinescu v. Istrate, 2015 BCCA 306 Date: 20150703 Docket: CA40819 Between: Adriana Constantinescu Respondent (Claimant) And Michael Istrate Appellant (Respondent) Before: The Honourable Madam Justice Newbury The Honourable Mr. Justice Chiasson The Honourable Mr. Justice Frankel On appeal from: An order of the Supreme Court of British Columbia, dated March 15, 2013 (C.D. v. B.C., 2013 BCSC 915, Vancouver Docket E113186). Counsel for the Appellant: G.K. Thomas Counsel for the Respondent: G.E. Edwards Written Submissions filed: May 29, June 10 and 17, 2015 Place and Date of Hearing: Vancouver, British Columbia March 17, 2015 Place and Date of Judgment: Vancouver, British Columbia July 3, 2015 Written Reasons by: The Honourable Mr. Justice Chiasson Concurred in by: The Honourable Madam Justice Newbury The Honourable Mr. Justice Frankel Summary: On March 15, 2013, Madam Justice Dickson ordered the appellant to pay child support of \$1,116 per month, \$40,698 for retroactive child support and expenses and joint custody and guardianship of the son by consent. She also established a parenting arrangement. Dickson J. also awarded the respondent costs of the action and double costs after January 15, 2013. The appellant filed a notice of appeal on April 19, 2013. He seeks an order changing the parenting arrangement and dismissing the order for retroactive child support. At the hearing of the appeal he challenged the award of double costs. The respondent applied to vary the March 15, 2013 order. At the appellant's request it was adjourned on terms that considerably varied the March 15, 2013 order as it pertained to the parenting arrangement. The appellant did nothing to bring the matter back to court and did not appeal the March 27, 2014 order. Held: appeal dismissed. Insofar as the appeal concerns the parenting arrangement, it is moot. The appellant did not begin to pay child support until June 2012, which was after the respondent amended her notice of family claim to seek child support. He offered to pay daycare expenses for the son in the summers of 2010 and 2011, but did not do so. In the circumstances of this case, the judge properly considered this to be blameworthy conduct that was relevant to her consideration of retroactive child support. The judge did not err in her consideration of the respondent's delay claiming retroactive child support. The judge made no error in her consideration of the respondent's pre-trial offer as forming a foundation for an award of double costs. Reasons for Judgment of the Honourable Mr. Justice Chiasson:

Introduction

- [1] This appeal concerns the appropriateness of retroactive child support and a double costs order in the context of a family dispute.

Background

- [2] The parties began to cohabit in May 2001. Their son was born in November 2007. The respondent left the family home and moved into her own apartment in November 2009. An issue in this case is when they actually "separated". In October 2011, the respondent filed a notice of family claim for a parenting arrangement. Subsequently, the claim was amended to add a claim for child support and a claim for retroactive child support. The appellant counterclaimed seeking a parenting arrangement and child support.
- [3] On March 15, 2013, Madam Justice Dickson ordered the appellant to pay child support of \$1,116 per month, \$40,698 for retroactive child support and expenses and joint custody and guardianship of the son by consent. She also established a parenting arrangement. The son's primary residence was with the respondent. Dickson J. also awarded the respondent costs of the action and double costs after January 15, 2013.
- [4] The appellant filed a notice of appeal on April 19, 2013. He seeks an order changing the parenting arrangement and dismissing the order for retroactive child support. He sought costs of the appeal and of the proceedings in the Supreme Court.
- [5] The respondent applied to vary the March 15, 2013 order of Dickson J. For the second time, on March 27, 2014, the appellant sought to adjourn the application. Dickson J. concluded that it was in the interests of justice and in the best interests of the son to adjourn the hearing, but, because the adjournment would be fairly long, she held that it was necessary to address the situation between then and the rescheduled hearing by imposing terms.
- [6] The hearing was adjourned generally "without prejudice to the [appellant's] position on a full hearing of the application on its merits " on the basis that the March 15, 2013 order was varied in considerable detail as it pertained to the parenting arrangement.
- [7] The appellant did nothing to bring the matter back to court and did not appeal the March 27, 2014 order.
- [8] After hearing counsel for the appellant, we advised that the appeal of the March 15, 2013 order, insofar as it concerns the parenting arrangement, is dismissed as moot. The respondent was asked to address the order for retroactive child support on a limited basis and the parties were given leave to file written submissions on costs because the material before this Court was insufficient to enable us to address the issue. They did so, concluding on June 17, 2015. Discussion Parenting Arrangement

- [9] Simply put, that portion of the March 15, 2013 order that put in place a parenting arrangement was supplanted by the March 27, 2014 order. The appeal from the parenting arrangement portion of the March 15, 2013 order is moot. There is no basis on which it would be appropriate for this Court to entertain the appeal on this issue. Retroactive Child Support
- [10] The appellant asserts that the order for retroactive child support should be set aside for three reasons: the judge erred in determining that the parties separated in 2009; she erred in concluding that the appellant was guilty of misconduct; she failed to take into account the respondent's delay in requesting child support.
- [11] At trial and on appeal, the appellant contended that the parties did not separate until 2011. The trial judge did not agree. She stated:
- [25] I am satisfied that from November 2009 onward the parties were in fact separated from one another, although until 2011 both hoped for a reconciliation. This hope was not realistic.
- [12] This conclusion was reached after the judge assessed the credibility of the parties and reviewed the evidence relevant to the issue. It amply supported her conclusion. There is no basis on which this Court could interfere with the judge's determination. We advised the respondent that it was not necessary to address this aspect of the retroactive child support issue.
- [13] The appellant did not begin to pay child support until June 2012, which was after the respondent amended her notice of family claim to seek child support. He offered to pay daycare expenses for the son in the summers of 2010 and 2011, but did not do so.
- [14] The Supreme Court in *D.B.S. v. S.R.G.*, 2006 SCC 37, made it clear that blameworthy conduct is relevant to a consideration of retroactive child support:
- [106] Courts should not hesitate to take into account a payor parent's blameworthy conduct in considering the propriety of a retroactive award. Further, I believe courts should take an expansive view of what constitutes blameworthy conduct in this context. I would characterize as blameworthy conduct anything that privileges the payor parent's own interests over his/her children's right to an appropriate amount of support.
- [107] No level of blameworthy behaviour by payor parents should be encouraged. Even where a payor parent does nothing active to avoid his/her obligations, (s)he might still be acting in a blameworthy manner if (s)he consciously chooses to ignore them. Put simply, a payor parent who knowingly avoids or diminishes his/her support obligation to his/her children should not be allowed to profit from such conduct[.] [Citations omitted.]
- [15] The judge concluded that the appellant's "refusal or failure to contribute to [the son's] support prior to June of 2012 is blameworthy conduct" (para. 69). It was open to her on the evidence to do so. The finding is consonant with the comments of the Court in *D.B.S.*

- [161] Relying on comments in D.B.S., the appellant contends the judge erred in ordering retroactive child support because the respondent did not claim it until the second amendment to her notice of family claim in January 2013.
- [171] In D.B.S. at para. 95, the Court stated that "it will not always be appropriate for a court to enforce this obligation once the relevant time period has passed". That said, the Court cautioned that it was not discouraging retroactive awards and stated further:
- [101] Delay in seeking child support is not presumptively justifiable. At the same time, courts must be sensitive to the practical concerns associated with a child support application. They should not hesitate to find a reasonable excuse where the recipient parent harboured justifiable fears that the payor parent would react vindictively to the application to the detriment of the family. Equally, absent any such an anticipated reaction on the part of the payor parent, a reasonable excuse may exist where the recipient parent lacked the financial or emotional means to bring an application, or was given inadequate legal advice. On the other hand, a recipient parent will generally lack a reasonable excuse where (s)he knew higher child support payments were warranted, but decided arbitrarily not to apply.
- [102] Not awarding retroactive child support where there has been unreasonable delay by the recipient parent responds to two important concerns. The first is the payor parent's interest in certainty. Generally, where the delay is attributable to unreasonableness on the part of the recipient parent, and not blameworthy conduct on the part of the payor parent, this interest in certainty will be compelling. Notably, the difference between a reasonable and unreasonable delay often is determined by the conduct of the payor parent. A payor parent who informs the recipient parent of income increases in a timely manner, and who does not pressure or intimidate him/her, will have gone a long way towards ensuring that any subsequent delay is characterized as unreasonable. In this context, a recipient parent who accepts child support payments without raising any problem invites the payor parent to feel that his/her obligations have been met.
- [103] The second important concern is that recipient parents not be encouraged to delay in seeking the appropriate amount of support for their children. From a child's perspective, a retroactive award is a poor substitute for past obligations not met. Recipient parents must act promptly and responsibly in monitoring the amount of child support paid. Absent a reasonable excuse, uncorrected deficiencies on the part of the payor parent that are known to the recipient parent represent the failure of both parents to fulfill their obligations to their children.
- [104] In deciding that unreasonable delay militates against a retroactive child support award, I am keeping in mind this Court's jurisprudence that child support is the right of the child and cannot be waived by the recipient parent. In fact, I am not suggesting that unreasonable delay by the recipient parent has the effect of eliminating the payor parent's obligation. Rather, unreasonable delay by the recipient parent is merely a factor to consider in deciding whether a court should exercise its discretion in ordering a retroactive award.

This factor gives judges the opportunity to examine the balance between the payor parent's interest in certainty and fairness to his/her children, and to determine the most appropriate course of action on the facts. [Citations omitted; emphasis added.]

[18] The trial judge stated:

[68] In so far as [the respondent] delayed in advancing her claim I find she had a reasonable excuse for so doing: her misguided hope that in not pressing the point she would somehow be able to advance [the son's] best interest by increasing harmony between herself and [the appellant].

[19] It is apparent from this comment that the judge was well aware of the controlling jurisprudence. She considered the respondent's delay as a relevant factor and was satisfied on all of the evidence that she should exercise her discretion and order retroactive child support.

[20] I see no basis on which this Court would interfere with the judge's exercise of her discretion.
Costs

[21] Although the appellant's notice of appeal does not specifically appeal the judge's costs (it merely seeks the costs of the appeal and the proceedings in the Supreme Court), in his factum he asks that "the trial costs order be set aside and be replaced by an order that each party bear their own trial costs". He seeks the costs of the appeal.

[22] On May 21, 2013, the trial judge delivered her decision on costs stating: THE COURT: I have taken into account the factors that are set out in the rules, including Rule 11-1(6), and applied the principle that costs follow the event. The parties accept that the claimant was substantially successful on all significant issues. There was an offer that was delivered on January the 15th, 2013. It was reasonable and ought reasonably to have been accepted. [The appellant's] financial circumstance is such that an order of costs in favour of the claimant is reasonable. His income is higher than hers, and all of the relevant factors taken into account, I conclude that costs in the ordinary scale should be ordered to the date of the offer, but then double costs after January 15th, 2013.

[23] The appellant concedes that the respondent was successful on all of the trial issues, but asserts that if he is successful in this Court on the issue of retroactive child support the award of costs should be reviewed. He has not succeeded on that issue.

[24] The appellant contends that the judge "misdirected herself on the law relating to double costs in particular, whether the appellant should have accepted the offer made by the respondent on January 15, 2013". Referring to *Hartshorne v. Hartshorne*, 2011 BCCA 29, in his submission the appellant states the following factors should be considered when a judge is determining whether to order double costs (at para. 26):

(a) whether the offer to settle was one that ought reasonably to have been accepted, either on the date that the offer to settle was delivered or on any later date;

- (b) the relationship between the terms of settlement offered and the final judgment of the court;
- (c) the relative financial circumstances of the parties;
- (d) any other factor the court considers appropriate.

[25] He continued:

17. The Court of Appeal in Hartshorne said at paragraph 27 of the decision the following:

[27] The first factor - whether the offer to settle was one that ought reasonably to have been accepted - is not determined by reference to the award that was ultimately made. Rather, in considering that factor, the court must determine whether, at the time that the offer was open for acceptance, it would have been reasonable for it to have been accepted: *Bailey v. Jang*, 2008 BCSC 1372, 90 B.C.L.R. (4th) 125 at para. 24; [*A.E. v. D.W.J.*, 2009 BCSC 505 at para. 55]. As was said in *A.E. v. D.W.J.*, "The reasonableness of the plaintiff's decision not to accept the offer to settle must be assessed without reference to the court's decision" (para. 55). Instead, the reasonableness is to be assessed by considering such factors as the timing of the offer, whether it had some relationship to the claim (as opposed to simply being a "nuisance offer"), whether it could be easily evaluated, and whether some rationale for the offer was provided. We do not intend this to be a comprehensive list, nor do we suggest that each of these factors will necessarily be relevant in a given case.

[26] The appellant asserts that the offer was flawed in a number of ways: it contained contradictory statements; the respondent was to have final authority for parent/child decisions in a high conflict relationship; there was no rationale provided for the offer. He contends "the offer was not one that the [appellant] should have accepted". He also states that the judge should have undertaken a detailed analysis of the offer.

[27] The respondent takes issue with the appellant's criticism of the offer.

[28] An order for costs is discretionary. This Court will interfere only if "the trial judge has made an error in principle or if the costs award is plainly wrong" (*Lightle v. Kotar*, 2014 BCCA 469 at para. 30, quoting from *Hartshorne* at para. 23).

[29] In my view, no error of principle by the trial judge has been established. Her reasons, albeit short, demonstrate that she was alive to the appropriate factors relevant to the exercise of her discretion. I see no merit in the contention that the offer was deficient because no rationale was offered for it. I take this to suggest that counsel was not able properly to evaluate the offer. There is no basis to so conclude in this case (*Paskall v. Scheithauer*, 2014 BCCA 26 at paras. 83-87).

[30] There is no basis on which I could conclude that the award of double costs is plainly wrong.

Conclusion

[31] I would dismiss this appeal. "The Honourable Mr. Justice Chiasson" I agree: "The Honourable Madam Justice Newbury" I agree: "The Honourable Mr. Justice Frankel"

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Prepared on 30 October 2026 · Esheria