

CANADA / JUDGMENT

D.L.M. v. H.M.B.

2003 BCSC 136

COURT

Supreme Court of British Columbia

DECIDED

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Citation:	D.L.M. v. H.M.B.
Date:	20030127 2003 BCSC 136
Docket:	E020267 Registry: Vancouver IN THE SUPREME COURT OF BRITISH COLUMBIA
BETWEEN:	D.L.M. PLAINTIFF
AND:	H.M.B. DEFENDANT

REASONS FOR JUDGMENT

OF THE

HONOURABLE MADAM JUSTICE MORRISON

Counsel for the Plaintiff

Marnie Dunnaway

Counsel for the Defendant

David Unterman

Date and Place of Trial:

November 13, 2002

and January 2, 2003

Vancouver, BC

- [1] Both parties have made a number of applications under Rule 18A for orders involving divorce, custody and access of children, determination and division of family assets and debts, and costs. The matter first came before me on November 13, 2002 and on that day, thanks to considerable effort by both counsel and a willingness to compromise by both parties, the parties were able to achieve consent on the difficult matters of custody and access in dispute at that time. A lengthy order resulted from that day's efforts, and the remaining issues were put over to January 2, 2003 for determination. Those issues include whether the defendant, Mr. H.M.B., should be found in contempt of the order of May 1, 2002 with regard to non-payment of maintenance, the determination and reapportionment of family assets and debts, and a final order with regard to spousal maintenance and child maintenance.
- [2] The plaintiff wife, age 40, has been a homemaker and primary caregiver of the two children of the marriage. She has a Masters degree in education, obtained during the marriage, although she has not worked as a teacher or in any extensive way outside the home during the course of the marriage.
- [3] The defendant husband, age 42, is a research scientist and environmental consultant, whose employment over the past several years has seen the family living in W.[], and then in Spain, from 1998 to 2000.
- [4] The parties began cohabiting in August 1989. They went through a type of commitment ceremony in 1991 and were married on October 6, 1998. They separated October 31, 2001 and a divorce was granted November 13, 2002. There are two children of the marriage, C.L.M., born [], 1991, presently aged 11 and in grade six, and L.R.M., born [], 1993, presently eight years of age and in grade four. C.L.M. has been diagnosed with Attention Deficit Hyperactivity Disorder (ADHD) and is currently taking the drug Ritalin. In addition to being very active, C.L.M. is highly intelligent, as is L.R.M..
- [5] On May 1, 2002, Madam Justice Kirkpatrick of this court made a number of orders including the following: by consent, there would be spousal maintenance paid by the husband to the wife of \$1,080. The husband's income was determined to be \$70,000 a year, for purposes of the Guidelines. Child maintenance payments were assessed in the amount of \$920 a month. There was an order for joint custody and joint guardianship, with primary residence of the children to be with the wife. There would be telephone access, and the husband would have alternate weekend access from ten o'clock Saturday to 4:30 p.m. Sunday. Overnight access would be supervised at that time by S.B., and the father, the defendant, was to consume no alcohol during access visits. In addition, there would be access from Saturday 10:00 a.m. to 7:30 p.m., and Wednesdays, 6:30 to 8:30 p.m. The husband and wife were not to enter each other's homes unless by express invitation, and the husband was to seek treatment through an alcohol counsellor. There was to be a monthly maintenance payment of \$2,000 by the husband to the wife from October 1 to April 2002, and a review of maintenance was to occur

as to whether or not the wife was able to obtain a job. Both parties were restrained from disposing of assets, unless by agreement otherwise, and the plaintiff was to have exclusive occupation of the matrimonial premises.

- [6] On August 9, 2002, Mr. H.M.B. quit his job, effective August 30, 2002.
- [7] On November 1, 2002, these parties came before Mr. Justice Williamson who made an order that Mr. H.M.B. was to pay spousal maintenance and arrears of \$5,400, which would include both the months of November and December 2002. Those payments were to be made from the RRSP of Mr. H.M.B. and the wife was to get costs thrown away of the day. Those costs have now been agreed upon in the amount of \$3,000, and they remain unpaid.
- [8] The defendant acknowledges that he is an alcoholic and he has been going to Alcoholics Anonymous and receiving assistance, and also going for private counselling. He has been sober now for 10 months. In his most recent affidavit, the defendant estimates that he hopes to earn \$26,400 before expenses in a six-month period between January and June 2003, estimated on billings of \$4,400 per month, based on 20 billable hours per week at the maximum rate. He deposes that he believes it would be very unwise for him to work full time at the present time because of his psychological problems and his alcoholism; that he found continuing to work at his prior job too stressful, plus the stress of this litigation has put his recovery at risk.
- [9] According to the affidavit sworn December 22, 2002, Mr. H.M.B. intends to allow himself sufficient opportunity to spend more time with his children, and to stay out of the mainstream of corporate environmental consulting and other high-stress work environments for at least one year. He wants to commit himself to high quality parenting time with the children and to ensure that the children "cope effectively with the aftermath of the separation and divorce."
- [10] Although the plaintiff has a university education, she argues that she has no marketable job skills. She has been unable to find employment teaching at colleges, for which she is trained, so she has just completed a secretarial training course at P.[] College as of December 2002, which she hopes will equip her to find employment. She stresses that she will need continuing spousal support until she finds full time employment. She has had minimal part-time work as a tutor, earning approximately \$1,200 in 2002.
- [11] The plaintiff estimates her monthly expenses for herself and the two children to be \$3,352 a month. The defendant estimates his monthly expenses to be \$3,900.

Contempt

- [12] The consent order of May 1, 2002 provided that the husband pay to the wife \$1,080 per month as spousal support. That was in addition to the \$920 child support. On July 9, 2002, the husband sent an e-mail to the wife expressing his concern over two major issues, the continuing supervision of overnight access, and secondly, her cooperation in unfreezing

sufficient assets so that he could pay his legal expenses. The wife characterizes this e-mail as an ultimatum to her, and certainly the tone was uncompromising. The defendant wrote that if the wife did not drop the supervised access at once, and unfreeze sufficient assets so he could clear his legal debts, and agree to mediate joint parenting, that there would "be no further cooperation from me regarding any business matters between us." He stated he would continue to support the children. Later that month, he advised the plaintiff he would not be paying spousal support and, in fact, he has made no voluntary payments of spousal support since that date; and then in August, 2002, he quit his job.

- [13] Counsel for the plaintiff argues that the defendant has wilfully refused to pay when he was still employed, and clearly had the capacity to pay, and then chose to quit his job so that he would make himself unable to pay. That the consequence of these actions should not be visited upon the plaintiff and the two children.
- [14] Counsel for Mr. H.M.B. argues that contempt has not been proven beyond a reasonable doubt, and that the only reason that the wife wants a finding of contempt is to place before a judge in the future to challenge the husband's credibility.
- [15] The case of *Koch v. Koch*, [1996] B.C.J. No. 1871 DRS 96-17673 (Romilly J.) was cited by counsel for the plaintiff. That was an application by a wife for an order that the husband be committed for contempt of court for failure to pay spousal maintenance. In that case, the court found that the husband had failed to make full disclosure of his means, and it was evident that any change of financial circumstances had been brought about by the husband himself. Further, that he had lied under oath and demonstrated that he had no intention of obeying the court order for spousal maintenance. The arrears that had accrued were \$77,690. Mr. Justice Romilly found that this was the most egregious case of contempt that he had encountered in 22 years.
- [16] In the case before me, I am not satisfied that contempt has been proven beyond a reasonable doubt. Mr. H.M.B. did quit his job, but that is something that he had been saying that he was going to do for a number of years, for reasons of stress and other reasons, according to the plaintiff's own affidavit. Mr. H.M.B. had clearly consented to paying spousal maintenance in May, but by July, his frustration over other matters had reached the point where he and his wife were exchanging imperious communications to one another. Contempt is a matter of criminal dimension, with serious consequences. It must be proved beyond a reasonable doubt. Although I have no doubt that Mr. H.M.B. may be posturing and exaggerating his problems, and he clearly thinks his well-educated wife should be out working, I am not satisfied that the standard of proof with regard to contempt has been met in these circumstances.
- [17] The defendant needed to have access to some of his assets in order to pay off his debts, and was frustrated by the lack of cooperation on the part of his wife in unfreezing some of those assets. He subsequently sought to vary the order for spousal support, but an order was made by Justice Williamson that he pay the child support to the end of December, 2002.

- [18] Counsel for the plaintiff points to the fact that the defendant says he will only be working 20 hours per week, and that this is wilful underemployment. That may be, but that does not amount to contempt under these circumstances. As counsel for the defendant has pointed out, that is 20 billable hours, which may mean more hours of actual work. And in any event, that goes more to the issue of what income to impute, rather than contempt, in my view.

Family Assets and Family Debts

1. The former matrimonial home in W.[]

- [19] The assessed value of this property is \$85,800, and the property is currently rented. There is a mortgage of approximately \$67,000 on the home, and there was a shortfall last year of about \$925 between rental income and expenses, paid for by the wife, who is managing the property. The net equity is \$19,120.

- [20] The wife has sought cooperation from the husband in either having the property assessed and/or sold to the present tenants. The husband has not agreed to this point. Counsel for the husband now suggests that the property be sold, and that the wife have conduct of the sale. The wife suggests that the husband receive the property and he can deal with it. I think the wife's suggestion is the more realistic, and there will be an order that this property be transferred solely to the husband, the defendant, for his own use absolutely. The defendant will make all possible efforts to have the wife removed as a co-mortgagor on the property, and if he is unable to have her removed from the mortgage, the husband shall execute an indemnification in favour of the wife with regard to responsibility for payment of that mortgage.

- [21] It will further be an order of this court that the plaintiff will not place any encumbrance upon this property for payment of either spousal or child maintenance or any arrears. It is essential that the husband be able to deal with this property and sell the property in a way that is advantageous to him, and therefore to his responsibilities for payment of maintenance.

2. RRSPs

- [22] The plaintiff retains RRSPs in her possession in the amount of \$22,469. The husband has RRSPs in his possession of approximately \$29,000. The plaintiff suggests that all RRSPs should be transferred into the wife's name, and that she will be responsible for all family debts. Counsel for the defendant suggests that if there is to be a transfer of all RRSPs to the wife, that the husband be given a credit of \$10,000 toward present and/or future payments of maintenance. That suggestion is rejected. There will be an order that the husband transfer all his RRSPs to the wife for her own use absolutely.

3. Dispositions

[23] In November 2001, the husband cashed in a term deposit of \$4,000 which funds he retained and used. There was a bank withdrawal by the plaintiff, of \$8,899, which she retained for her use. Finally, there were RRSPs cashed in by the defendant of \$16,819, although \$5,801 came from the wife's RRSP for payment of the husband's maintenance obligations. This was more advantageous as far as taxes were concerned and was done with the agreement of both parties. The remainder of those RRSPs cashed in by the defendant were retained by him.

4. Household Goods, Vehicles and Boats

[24] There is little value in all of these items combined, and the parties agree that the total value is \$3,275. Each party will keep their own household goods in their possession, which were divided shortly after separation. The wife's current vehicle is a 1991 Toyota which was, in effect, a gift from her father after separation. The husband's vehicle and boats are the main items in a valuation of \$3,275 for personal goods, and he will retain these items for his own use absolutely.

5. Debts

[25] There is a Mastercard debt of \$2,486, plus Mastercard interest which has been paid by the wife of \$328. There is a disputed bill to Dr. Bowder of \$1,300, which was incurred at the time the husband had his employment, and medical insurance would have paid \$900 of this amount. The husband refused to cooperate in making a claim, and the wife has had to pay that herself. There were house expenses over revenue of \$925, previously mentioned, and legal costs and fees owing by the husband to the wife of \$3,000, as yet unpaid.

[26] Finally, there is a debt of \$7,715 owing to D.M., the mother of the plaintiff. This was originally a \$10,000 debt, and the husband and wife had been paying monthly payments on principal and interest on this during the time that they lived together. The funds were used to purchase RRSPs. The defendant says this is not a family debt, that the wife is not expected to repay this to her mother. I accept the evidence of the plaintiff that this is indeed a family debt, that it was money borrowed and used to purchase a family asset, RRSP funds, and there is clearly a record of monthly payments which reduced the principal and interest owed by the parties to the plaintiff's mother.

[27] The total of those amounts is \$14,829. The wife has agreed to assume responsibility for that amount, and to pay those amounts that she has not already paid, and, in effect, to forgive the legal fees and costs of \$3,000 which were ordered by Mr. Justice Williamson on November 1, 2002. That seems an equitable division of assets and debts, in my view, and there will be an order that the plaintiff will be responsible for all of those amounts listed under this sub-heading of debts.

[28] I reject the defendant's suggestion that he be given a credit of \$10,000 to apply toward future maintenance obligations.

6. Spousal Maintenance and Child Maintenance

- [29] Both parties are extremely well-educated, obviously bright, and apparently unable to find or obtain full-time employment. I trust that situation will not exist for long. If it seems that no matter how well-educated and smart one may be, one cannot get full-time employment, questions will persist, and trust will never be re-established between these parties. Both parties seem unaware of or forgetful of two useful and self-fulfilling maxims: economic freedom is the first freedom, and success is the best revenge.
- [30] The plaintiff has put a great deal of material before the court to show how many contacts she has made in an effort to find employment, and that she is unable to. So she took a business course and now hopes to find employment in what would amount to another field. I agree with counsel for the plaintiff that the plaintiff has been at a disadvantage throughout the years of the marriage and living together, in that she has not been in a position to develop her career. Rather, she has been at home raising two children, and has been living in different locations such as W.[] and Spain, following her husband's employment, and not giving precedence to her own career. She is therefore entitled to spousal maintenance, and the husband should recognize this as an investment, something that his wife is entitled to for a period of time. It is also his best insurance that the children will be cared for, in the event that something drastic should happen to his earning ability.
- [31] The parties have been separated since October, 2001, and the wife hopes to be employed within the near future, now that she has graduated from business college. In my view, she is entitled to spousal maintenance for at least a period of four months, and it is hoped that she will have found some employment by that time. Maintenance can be reviewed at the end of those four months, if necessary.
- [32] As for the amount of maintenance, that must depend upon the husband's earning ability. In 1999, the husband's income was \$72,785. In 2000, \$46,050 and in 2001, \$63,070. That would average out to \$66,000 a year over the past three years.
- [33] Counsel for the defendant suggests that an income of \$50,000 would be appropriate to impute to the husband under his present working conditions. Counsel for the wife suggests that \$70,000 would be a more appropriate figure. I am going to impute an income of \$60,000 for the defendant, for purposes of establishing spousal maintenance as well as child maintenance under the Guidelines, having regard to his past earning ability and present qualifications.
- [34] Commencing January 1, 2003, the defendant will pay to the plaintiff by way of spousal maintenance, \$1,000 a month.
- [35] Child maintenance under the Federal Child Support Guidelines for two children is \$816 a month, and that amount will be paid by the defendant to the plaintiff for child maintenance, commencing January 1, 2003.

[36] The \$600 a month for extraordinary expenses for the children, composed primarily of daycare expenses, will continue, and the defendant will pay that amount to the plaintiff in addition to maintenance under the Guidelines.

7. Costs

[37] Under the circumstances, I think it appropriate that each party pay their own costs of this action.

"N. Morrison, J."

Madam Justice N. Morrison

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