
CANADA / JUDGMENT

D.P.G. v. M.A.G.

2011 BCSC 290

COURT

Supreme Court of British Columbia

DECIDED

9 March 2011

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2011 BCSC 290 D.P.G. v. M.A.G.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

D.P.G. v. M.A.G.,

2011 BCSC 290

Date: 20110309

Docket: E8722

Registry: Chilliwack

Between:

D.P.G.

Claimant

And

M.A.G.

Respondent

Before: The Honourable Mr. Justice Joyce

Reasons for Judgment

The Claimant appearing in person:

D.P.G.

Counsel for the Respondent:

J.E. Kovacs

Counsel for the Director of Maintenance Enforcement:

P. Hundal

Place and Date of Hearing:

Chilliwack, B.C.

February 28, 2011

Place and Date of Judgment:

Chilliwack, B.C.

March 9, 2011

- [1] The claimant applies to retroactively vary a child support order made under the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), and thereby effectively cancel or reduce his arrears of support. He also applies for an order to cancel all enforcement proceedings by the Director of Maintenance Enforcement and for an order that he be entitled to the return of his passport.
- [2] The parties were married in 1996, separated in June 2005 and were divorced by order dated March 6, 2009. They have two children, who reside with the respondent.
- [3] The claimant deposed that during the divorce proceedings, the parties attended at a Judicial Case Conference [JCC] on November 24, 2008, at which a consent order was made that he pay child support in the amount of \$1,050.00 per month based on a Guidelines income of \$40,188.00 per year. It appears that a draft order to that effect was prepared, but there is no evidence that it was ever signed by the parties or their counsel, or that it was entered at that time. It may be that the parties negotiated the consent order when they attended at the JCC, but if it was pronounced, it was not entered.
- [4] However, on February 3, 2009, the claimant applied for a desk order for divorce together with consent orders dealing with the corollary relief. On March 6, 2009, a Judge of the Court signed the desk order, which included terms identical to those contained in the draft order of November 2008, including the following terms regarding child support:
 - 6. On finding that the Plaintiff's Child Support Guideline income is \$40,188.00 for so long as he is on long-term disability, the Plaintiff will pay to the Defendant for the support and maintenance of the children of the marriage, namely, [M.B.G.] and [N.M.G.], the amount of \$1,050.00 per month, which amount will include the Defendant's share of extraordinary expenses incurred by the Defendant, which payments shall commence December 1, 2008, and be payable on the 1st day of each month until reviewed as set out in paragraph 7 below.
 - 7. Child support will be reviewed at such time as the Plaintiff returns to full-time employment, or there is a change in circumstances pursuant to Section 14 of the Child Support Guidelines.

- [5] The circumstances of the claimant's income, leading up to and at the time the order was made, were in fact as follows. For some years prior to 2009, the claimant was an employee of British Columbia in the Sheriff Services. In October 2007, he was involved in a car accident which resulted in his being placed on long term disability. The claimant received disability income of \$40,188.00 per year.
- [6] On February 1, 2009, two days before he filed the desk order application, the claimant accepted a "buy-out" from Sheriff Services and resigned his position. The claimant deposed that he took the buy-out because his medical condition prevented him from returning to work as a Sheriff. However, in December 2008, his disability case manager was proposing a graduated return to work for the claimant commencing in January 2009, which his doctor supported. Surveillance evidence obtained in December 2008 indicated that the claimant was able to undertake a number of physical activities. I am not satisfied that the claimant was physically unable to return to his job. I am satisfied that the claimant made a voluntary decision to resign his position and that his medical condition did not force his retirement.
- [7] In any event, even if the claimant was not able to return to this job as a Sheriff, under the disability insurance program he was eligible for a 25-month period of "own occupation" disability, which would not have expired until May 18, 2010. Thus, he would have been able to maintain his income at the level of \$40,188.00 per year at least until that date.
- [8] Further, when the claimant resigned, he received a lump sum payment of \$40,765.00, which provided him with an income equal to that which he had been receiving on disability for another year.
- [9] Consequently, the claimant cannot show a material change in his income justifying any reduction in child support prior to March 2010, at the earliest.
- [10] In February 2008, prior to deciding to leave Sheriff Services, the claimant purchased a company that is engaged in the business of tree maintenance and removal, [HTS Ltd.]. Since March 2010, the claimant has paid himself a salary of \$600.00 every two weeks or \$15,600.00 per year from his company. He maintains that, at the present time, he is unable to earn any more than this amount through the operation of the business.
- [11] The claimant has provided financial statements for HTS Ltd. for the year ended November 30, 2009, with comparable figures for the year ended November 30, 2008. The claimant failed to provide a detailed breakdown of wages and subcontracts, which total \$282,005.00 for 2009, despite the respondent's request for that information. As a consequence, it is not possible to determine whether there are any non-arm's length transactions reflected in that figure.
- [12] Even if the salary that the claimant draws from his company is only \$15,600.00 per year, in determining his Guidelines income the court is entitled to include, under s. 18 of the Guidelines, part or all of the company's pre-tax income. In determining pre-tax income, amortization is added back to the company's net income as are salary and wages paid to persons who are not at arm's length to the company.

- [13] Assuming there are no non-arm's length transactions, the pre-tax income for HTS Ltd. for 2009 is \$56,923.00. The difference between the Guidelines income on which the current support order is based and what the claimant now pays himself in salary is less than one-half of the pre-tax income. The claimant has not provided any evidence upon which it can be found that the company's pre-tax income should not be available for the support of the children.
- [14] I conclude, therefore, that the claimant's Guidelines income and his ability to support his children has not diminished from what it was when the order was made. While he has undergone a change in the nature of his employment, he is working full-time and there has been no material change in his ability to earn income with which to support his children. Consequently, I dismiss his application for a reduction in the amount of child support.
- [15] I turn next to the orders sought with respect to enforcement proceedings brought under the Family Maintenance Enforcement Act, R.S.B.C. 1996, c. 127 [FMEA]. The respondent has registered the order with the Director of Maintenance Enforcement and the material establishes that the claimant owes child support in excess of \$12,000.00. The Director has a statutory mandate to enforce the payment of support orders. The actions taken by the Director in this case included the issuance of notices of attachment to various parties, the issuance of a Federal Licence Denial pursuant to the Family Orders and Agreements Enforcement Assistance Act, R.S.C. 1985, c. 4 (2nd Supp.) [FOAEAA] and the registration of the support order against the claimant's interest in land under s. 26 of FMEA.
- [16] I agree with the submission of the Director that his ability to enforce support orders should not be lightly interfered with and the claimant has not provided any evidence to support setting aside any of the attachment orders or the registration of the order against his interest in lands.
- [17] As for the application concerning the claimant's passport, under s. 67 of FOAEAA the Director may apply to the Minister of Justice for the suspension of federally issued licences and the denial of the issuance of new licences, including a passport, to a debtor who is in persistent arrears under a support order. A Federal Licence Denial can only be challenged by way of a judicial review: see *G.B.I. v. British Columbia (Director of Maintenance Enforcement)*, 2005 BCSC 1145. The claimant's application for relief in respect of his passport is not properly brought and must also be denied.
- [18] The claimant's application is dismissed.

B.M. Joyce J.

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