

CANADA / JUDGMENT

Douville v. Douville

2022 BCSC 2500

COURT

Supreme Court of British Columbia

DECIDED

23 August 2022

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2022 BCSC 2500 Douville v. Douville

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Douville v. Douville,

2022 BCSC 2500

Date: 20220823

Docket: E221259

Registry: Vancouver

Between:

Sarah Nicole Douville

Claimant

And

Bradley Donald Douville

Respondent

Before: The Honourable Justice Iyer

Oral Reasons for Judgment

In Chambers

Counsel for the Claimant:

A. Duncan

Counsel for the Respondent:

A. Wormeli

A. Ngom

Place and Date of Hearing:

Vancouver, B.C.

August 17, 2022

Place and Date of Judgment:

Vancouver, B.C.

August 23, 2022

- [1] THE COURT (by videoconference): I am going to give you my reasons on this application, and I should say before I start that I reserve the right to make editorial changes such as filling in full citations or correcting minor errors in the event that a transcript is ordered. I will not change anything of substance.
- [2] This application was scheduled for one day. The issues in dispute included child support, spousal support, and/or a remedy for allegedly undisclosed property. Upon my advising the parties that it was not possible to address all of these issues in a day, they agreed to proceed only on the child support issue. Accordingly, the other issues are adjourned generally.
- [3] I have limited my consideration of the evidence to that relevant to the child support issue. As the other issues may be adjudicated in future, it is not appropriate for me to find facts beyond what is necessary to decide child support.
- [4] The parties were married for approximately 20 years. They have two children: Georgia is nearly 21 and a full-time university student living away from home; Sadie is 15 and lives with the claimant. The claimant did not work outside the home after the children were born. The respondent is a business executive and earns a substantial income.
- [5] After the parties separated in January 2017, they entered into a separation agreement in January 2019. Among other things, it provided that the respondent would pay child support to the claimant. It also provided for annual review of child support and special expenses starting in 2019, based on the parties exchanging income tax returns on May 31 of each calendar year, reviewing them by June 30, with the amended payment scheduled to run from July 1 to June 30 of the following year.
- [6] The relevant clauses state:
- 5.1 The Husband shall pay to the Wife as maintenance for the Children commencing on the 1st day of the month following the completion of the sale of the Family Residence and on the first day of each and every month thereafter, the sum set out in the Federal Child Support Guidelines using the Husband's Guideline income in the preceding calendar year.

...

5.3 Child maintenance and special expenses will be reviewed annually. The Husband and Wife will exchange income tax returns no later than May 31st of each calendar year to review the basic amount of child support and the sharing of special and extraordinary expenses, with the review to occur no later than June 30th of each year and the first review to occur no later than 2019. Each year the amended payment schedule for child maintenance and special expenses will run from July 1st until the following June 30th.

- [7] In 2017, the respondent changed employers because the subsidiary company he was working for was sold and became a standalone company. The respondent became CEO of that new company. This transition affected the respondent's compensation. In particular, he relinquished the long-term investment plan (LTIP) which gave him the potential to earn share-based compensation with his former employer in exchange for a different LTIP with his new employer. As a result, his 2019 tax return shows that he earned \$290,438 from employment and \$745,162 in "other income". This latter amount reflects the deemed acquisition value of the new LTIP.
- [8] The respondent did not have those funds available to him until sometime between January and May 2021.
- [9] The parties disagreed about what the respondent's income was in the 2019 and 2021 taxation years for child support purposes. They attempted to resolve that dispute through an exchange of correspondence between counsel. On July 4, 2022, the respondent's counsel confirmed that they had agreed on the amount of child support payable from July 1, 2022, to June 30, 2023, based on the respondent's 2021 income. The amounts were \$6,900 per month paid to the claimant as child support for Sadie, and \$1,100 per month paid to Georgia directly for her support.
- [10] On July 15, 2022, the claimant's counsel wrote to the respondent's counsel stating that the claimant's agreement to the respondent's proposal for child support in 2022-2023 was premised on the understanding that it complied with the Guidelines. Having learned that it did not, the claimant no longer agreed with the offer and was seeking the table amount of child support for Sadie which the claimant calculated at \$10,389 per month based on the respondent's income, including the actual capital gains he received that year.
- [11] The parties agree that the respondent's income for 2022 was \$294,405 and that the child support payable in 2021-2022 for the children was \$3,863 per month.
- [12] Accordingly, the issues I must decide are:
- a) what is the amount of child support owed for 2020-2021;
 - b) is there an enforceable agreement that the parties concluded in July 2022 for child support payable in 2022-2023;

- c) if not, what amount of child support must the respondent pay in 2022-2023.
- [13] While the claimant initially took the position that the respondent's 2019 income on which child support for 2020-2021 is based should include the deemed \$745,162, in her reply submissions she acknowledged that these funds did not actually become available to him until early 2021. I agree with the respondent that this income should be attributed to him for the purposes of child support in the year it actually becomes available to him: *Brown v. Brown*, 2014 BCCA 152.
- [14] As it became available to him in the 2021 taxation year, the separation agreement requires that it be included in the calculation of child support for 2022-2023. Although the claimant argued that the fact that it became available to him during the 2021-2022 child support year means he should have paid it in child support that year, that is not what the separation agreement requires.
- [15] I conclude that the respondent has satisfied his child support obligations for the 2020-2021 child support year based on his income of \$290,438 in the 2019 tax year.
- [16] Turning to the question of whether the parties entered into a binding agreement in July 2022, the claimant submits that she agreed to the amounts proposed by the respondent based on her counsel's mistaken understanding that it complied with the Guidelines. Her counsel clarified that, in advising her client at the time, she did not consider that a Schedule 3 adjustment was needed to gross up the taxable gain the respondent reported on his 2021 tax return to the actual amount of the gain.
- [17] The claimant informed the respondent about this on July 15, 2022. She submits that she never intended to bargain away child support which is the right of the child. Child support is the right of the child, but the amount of child support is frequently settled by parties, including in the separation agreement in this case. Courts routinely enforce such agreements.
- [18] The test for determining whether there is an enforceable contract is concisely summarized in *Piga v. Uffelman*, 2022 BCSC 983 at para. 97:
- [97] A determination of whether there is an enforceable contract involves a contextual analysis of all the material facts and circumstances. A court is to analyze the evidence to determine whether, in all the circumstances, it is clear to the objective, reasonable bystander that the parties intended to contract, and whether the essential terms of that contract can be determined with a reasonable degree of certainty. The subjective intentions of the parties are irrelevant: *Berthin v. Berthin*, 2016 BCCA 104 at para. 46.

[19] The court may consider the parties' subsequent conduct, as well as prior conduct, in making this determination. The fact that parties appear to have reached an agreement, after which negotiations resume, may or may not mean that they never reached agreement in the first place. The court must look at all of the circumstances: *Bate v. Smith*, 2017 BCSC 1261 at paras. 56-57.

[20] Here the negotiations commenced with the respondent's offer to the claimant on May 20, 2022. In that letter, he disclosed both the taxable capital gain he received that year and the grossed-up actual gain. He proposed that his income for the 2021 tax year on which child support for 2022-2023 is calculated be \$861,068. He went on to refer to s. 4 of the Guidelines, which addresses situations where a payor's annual income is over \$150,000. His proposal was to pay \$6,900 per month in child support to the claimant for Sadie and to pay \$1,100 per month to Georgia directly for her support.

[21] On June 3, 2022, the claimant responded that she agreed with that proposal as follows:

Ms. Greenwood-Douville agrees that the amount of support proposed for Sadie for the next year accords with the Federal Child Support Guidelines, based on Mr. Douville's 2021 income and is therefore appropriate. She also agrees to his proposal for Georgia. She assumes the adjusted payments for both children will take effect on July 1, 2022.

[22] On July 4, 2022, the respondent wrote to the claimant as follows:

Thank you for your letter dated June 3, 2022. We confirm that we have an agreement with respect to child support payable . . . on July 1, 2022, based on the income for 2021, which is summarized as follows:

1. Pursuant to s. 4 of the Federal Child Support Guidelines:
 - a. Commencing July 1, 2022, Mr. Douville will pay \$6,900 per month in child support to Ms. Douville, for the support of Sadie.
 - b. Commencing July 1, 2022, Mr. Douville will pay \$1,100 per month directly to Georgia.
2. The next review will occur in June 2023, and will be based on previous year's income in accordance with the separation agreement.

[23] As noted, the claimant responded on July 15, 2022. Her letter enclosed the notice of the present application. She stated:

You will note that Ms. Douville's application for support for Sadie is not confined to the \$6,900 proposed in your correspondence of May 20. As set out in my correspondence of June 3, Ms. Douville agreed to that amount on the understanding that it complied with the Child Support Guidelines.

Upon further review of the materials, we note that because a substantial portion of Mr. Douville's income was received in the form of capital gains, a Schedule III adjustment is required to replace the taxable gain with the actual gain. When this adjustment is made, his guidelines income exceeds \$1,300,000. Ms. Douville's intention throughout has been to ensure that the children get the support to which they are entitled.

- [24] Importantly, this letter does not refer to s. 4 of the Guidelines at all. There is no indication that the claimant took issue with its applicability. Her notice of application does not mention s. 4. The claimant knew from the May 20 letter that the respondent was basing his proposal on his actual capital gain, not the amount that was taxable. She also knew from that letter and from the letter of July 4 that his proposal was based on applying s. 4 of the Guidelines. She did not say that she was under any misapprehension about that.
- [25] Based on this, I find that the parties concluded an enforceable agreement on July 4, 2022. The claimant accepted the respondent's proposal, knowing that it was based on s. 4 of the Guidelines. Her subsequent effort to withdraw from it was not based on any misapprehension about s. 4. It was based on her discovery about the applicability of s. 6 of Schedule 3, a provision that the respondent had already expressly acknowledged as applicable in his May 20 letter.
- [26] I conclude that the respondent's child support obligations for 2022-2023 are as set out in the July 4 agreement. That is, \$6,900 per month to the claimant for the support of Sadie, and \$1,100 per month to Georgia directly.
- [27] The application is dismissed. Is there anything further?
- [28] CNSL A. WORMELI: Just the issue of costs. It was a full-day hearing, so I think there should be costs on the ordinary scale for a full-day hearing.
- [29] THE COURT: Ms. Duncan?
- [30] CNSL A. DUNCAN: I accept that, given your rulings, the respondent was substantially successful and that costs follow the result. I feel my friend and I can work that out.
- [31] THE COURT: All right. I order costs on Scale B for a one-day hearing. Thank you.

"Iyer J."

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