
CANADA / JUDGMENT

Dufault v. Dufault

2009 BCSC 1220

COURT

Supreme Court of British Columbia

DECIDED

4 September 2009

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2009 BCSC 1220 Dufault v. Dufault

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Dufault v. Dufault,

2009 BCSC 1220

Date: 20090904

Docket: 40197

Registry: Kamloops

Between:

Sheila Helen Dufault

Plaintiff

And

Phillippe Joseph Maurice Dufault

Defendant

Before: The Honourable Mr. Justice Truscott

Reasons for Judgment

In Chambers

Counsel for the plaintiff:

D.C. Dundee

Counsel for the defendant:

D. Komori

Place and Date of Hearing:

Kamloops, B.C.

July 22, 2009

Place and Date of Judgment:

Kamloops, B.C.

September 4, 2009

- [1] The plaintiff seeks an increase in her interim spousal support payable by the defendant while the defendant seeks an end to this obligation.
- [2] The plaintiff also seeks a reduction or cancellation of her obligation of child support while the defendant seeks an order increasing the plaintiff's obligation for that.
- [3] The defendant also seeks a divorce, sole custody of their child C.D. and a division of the matrimonial property and liabilities.
- [4] As this is a divorce action the provisions of the Divorce Act, R.S.C. 1985 c. 3 will apply.
- [5] The defendant seeks his orders under Rule 18A of the Rules of Court and as a consequence I will be issuing final orders on these issues.
- [6] The parties participated in two judicial case conferences and entered into certain consent orders on those occasions.
- [7] On October 10, 2007 the parties agreed that the plaintiff would have a boat and trailer as her property and they agreed on the values of a Sunfire motor vehicle at \$5,500 and a Ford truck at \$2,250.
- [8] On January 15, 2008 the parties agreed to an order for joint custody of their child C.D. with residence to be with the defendant's mother and not to be changed without further order of the court or without their mutual agreement.
- [9] In addition they agreed at that time that each party would be entitled to keep their own RRSPs, a Harley Davidson motorcycle would belong to the defendant with no claim forthcoming from the plaintiff, the plaintiff would take the boat and trailer at a value of \$1,000, both parties were to obtain an appraisal of a Prowler trailer with the defendant to get the loan balance for it, and the value of a quad was agreed at \$3,950 and a Suzuki motorcycle at \$1,150.
- [10] A check of the audio recording of the JCC on January 15, 2008 indicates that the Harley Davidson motorcycle was considered worthless as its debt was considered as being at least equal to its value, and it was "off the table".

- [11] In the time period between the two JCC orders the parties appeared before the court on a chambers application on November 5, 2007 where the court found the Guidelines income of the plaintiff to be \$28,200 and of the defendant to be \$68,640.
- [12] The court ordered the plaintiff to pay interim child support to the defendant of \$263 per month commencing November 1, 2007 and the defendant was ordered to pay interim spousal support to the plaintiff of \$950 per month commencing November 1, 2007 until further order of the court.
- [13] The child of the marriage, C.D., was born on December 18, 1991 and is now 17 years of age. As of November 27, 2007 she has not lived with either parent but has resided with the defendant's mother in Williams Lake.

Divorce

- [14] The parties married on February 12, 1999 and separated on June 29, 2007. There is no prospect of reconciliation and the other requirements for divorce are in place, save perhaps for a registrar's certificate of pleadings.
- [15] Subject to the filing of a registrar's certificate of pleadings I grant the parties a divorce effective 31 days hereafter.

Child Support

- [16] The first issue concerning ongoing child support is whether daughter C.D. remains a child of the marriage for the purpose of any continuing obligation on the plaintiff to pay child support.
- [17] The plaintiff lives in Chilliwack, the defendant in Kamloops, and C.D. with the defendant's mother in Williams Lake.
- [18] According to the affidavit evidence C.D. has always been a bit of a handful for both parents. The defendant says that while living with him in Kamloops in October 2007 she was suspended from school for a second time as a result of having liquor at the school. He says he decided at that time that she needed a change of schools and together with her and his mother arranged for her to live with his mother in Williams Lake. There, he says, she is doing very well in school and working part time.
- [19] However, the defendant also says that in May 2009 C.D. indicated an intention to live with her mother in Chilliwack and travelled there to be with her, although that did not work out and shortly thereafter she returned to Williams Lake.
- [20] The plaintiff in her affidavit says that C.D. came to see her in Chilliwack in May 2009 but she convinced her that it was in her best interest to return to school in Williams Lake.

- [21] The defendant says he has been paying his mother approximately \$400 per month for C.D. and if necessary he agrees that ongoing child support from the plaintiff could be paid directly to his mother.
- [22] In a July 21, 2009 affidavit the defendant says that C.D. is planning to return to school in Williams Lake in September 2009 after completing the previous school year in June 2009.
- [23] The defendant's mother confirms the agreement with C.D. and the defendant that C.D. come to live with her. She says the defendant calls C.D. three or four times a week and comes to Williams Lake once or twice a month when he takes C.D. shopping for clothes. She says he has a good relationship with C.D. and C.D. appreciates his visits.
- [24] She also says that to November 5, 2008, the defendant had paid her approximately \$2,300 for C.D.
- [25] Counsel for the defendant submits that C.D. is still a child of the marriage being under the age of majority and not having withdrawn from the charge of the defendant, and that being so the plaintiff should continue to pay child support either to the defendant or directly to his mother.
- [26] In *Bast v. Dyck* (1997), 28 R.F.L. (4th) 131, a 16-year-old girl went to live with her boyfriend who was unemployed and living with his own parents. The child's mother was buying her clothing and paying her school fees and giving her money for entertainment. She was also maintaining regular contact with her daughter.
- [27] The Saskatchewan Court of Queen's Bench was not prepared to find that the daughter had voluntarily withdrawn from the charge of her parents as there was no indication the present arrangement had any degree of permanence to it. She still maintained her relationship with both parents and the evidence did not satisfy the court that she had chosen to reject or withdraw from her parents and assume an independent lifestyle.
- [28] In *Felbel v. Felbel* (2007), 39 R.F.L. (6th) 340, the Manitoba Court of Queen's Bench considered the word "charge" and said that it imported connotations broader than financial care and denoted some level of continuing guidance or continuing influence over the child. It also connoted some continuing deference on the part of the child to at least one parent under whose charge they were.
- [29] In my opinion C.D. remains a child of the marriage under the charge of the defendant. She did not leave his home in Kamloops to pursue any independent lifestyle. She left only by agreement to attempt to straighten out her life. She is now pursuing her education in Williams Lake and she continues to need financial support. The defendant still has a responsibility for her care and upbringing and on the evidence he is attempting to meet that responsibility by placing her in better surroundings with his mother and in supporting her financially so that she can finish her schooling, and visiting her on a fairly regular basis.

- [30] I am satisfied that C.D. still remains under the charge of the defendant and is still therefore a child of the marriage.
- [31] The second issue concerning child support is whether it should remain at the same amount of \$263 per month and should continue to be paid to the defendant or to his mother.
- [32] The plaintiff says she has been working as a site manager for a company as of September 28, 2008. She says she initially started working long hours but no longer works those hours. She produces a recent pay stub for July 2009 that shows year-to-date income for her to July 11, 2009 of approximately \$22,000.
- [33] Defence counsel extrapolates that income over the rest of the year to equal approximately \$40,000 annual income.
- [34] The plaintiff says in her March 3, 2009 financial statement that her Guidelines income for basic child support is only \$31,200, but I am unable to determine how that can be so when her pay stub when extrapolated indicates otherwise and when the plaintiff herself does not offer any explanation for the discrepancy.
- [35] The plaintiff's change in income amount constitutes a material change in circumstance.
- [36] I vary the order of November 5, 2007 to set the plaintiff's Guidelines income for child support on a final basis at \$40,000 and increase her child support requirement to \$370 per month for support of C.D.
- [37] The plaintiff will continue to pay the defendant the child support of \$370 per month commencing on the 1st day of September 2009 and payable on the first of every month thereafter until C.D. is no longer a child of the marriage. I do not consider it appropriate to order the plaintiff to pay the defendant's mother directly as C.D. remains under the charge of the defendant, he remains responsible for her care and upkeep, and he should remain responsible for ensuring that the child support goes directly for her benefit.

Spousal Support

- [38] The interim order of November 5, 2007 requires the defendant to pay the plaintiff \$950 per month spousal support until further order of the court.
- [39] The defendant submits that the parties did not live in any traditional marriage where the plaintiff was in the home with C.D. while the defendant worked to provide income for the family. The defendant says the plaintiff has always worked full time and he assumed just as much responsibility for the care and upbringing of C.D. as the plaintiff did.
- [40] The defendant submits that with the plaintiff already having received spousal support for almost two years since the order of November 5, 2007, a further transitional period of two years is all that is necessary for a spousal support order and then this requirement should end.

- [41] Defence counsel submits the defendant's income presently is \$64,721 annually and with the plaintiff's Guidelines income at \$40,000 and her responsibility for child support, the range for consideration should be between \$497 per month to \$663 per month.
- [42] At \$663 per month the defendant would be left with a net disposable income of \$4,180 per month and the plaintiff with a net disposable income of \$2,717 per month.
- [43] Plaintiff's counsel submits that there is both a compensatory and non-compensatory basis for awarding ongoing spousal support to the plaintiff. This was a long term marriage of 19 years and there remains a discrepancy in the incomes of the two parties.
- [44] *Chutter v. Chutter*, [2008] B.C.C.A. 507, confirms that the longer a marriage the closer the economic union and the greater will be the presumptive claim to equal standards of living upon its dissolution.
- [45] Plaintiff's counsel submits that the appropriate range should be between \$584 - \$778 per month and it should continue for a period of time between 9.5 years and 19 years duration.
- [46] At \$778 per month the net disposable income per month would be \$3,460 per month for the defendant and \$3,140 for the plaintiff.
- [47] The difference between the two submissions as to the appropriate range appears to be that plaintiff's counsel for some reason has used the "without child support" formula while defence counsel has used the "spousal support paid by custodial parent" formula, which appears to be the more correct spousal guideline indicator to use.
- [48] Nevertheless there appears to be some overlap of the two ranges proposed.
- [49] Chutter confirms that the compensatory support is intended to provide redress to the recipient spouse for economic disadvantage arising from the marriage or the conferral of an economic advantage upon the other spouse from the marriage.
- [50] For non-compensatory support Chutter confirms that the support aims to narrow the gap between the needs and means of the spouses on marital breakdown and is informed by the standard of living previously enjoyed by the parties as compared to the relative standards of living of the spouses following marriage breakdown.
- [51] Here I am hard pressed to find any clear evidence in the affidavits of economic disadvantage to the plaintiff arising from the marriage or the conferral of any economic advantage on the defendant by the marriage, to support a compensatory award. The affidavits do not appear to have been designed to deal with this issue.
- [52] I also have the same difficulty finding clear evidence of the standard of living that the parties had during the marriage and their standards of living after the marriage in order to do a comparison between the two.

- [53] It is my conclusion that the defendant's offer of a spousal support order for another two years should be accepted.
- [54] I vary the interim order of November 5, 2007 and order the defendant to pay the plaintiff \$663 per month for the next two years to commence September 1, 2009 and to end August 31, 2011. At that time the defendant's obligation for spousal support will terminate.

Custody

- [55] The judicial case conference consent order of January 15, 2008 ordered joint custody with C.D.'s residence to be with the defendant's mother and not to be changed without further order of the court or without mutual consent of the parties. I believe that order should be continued as I see no reason to change it.
- [56] The affidavit evidence is contradictory as to whether the child has a meaningful relationship with her mother the plaintiff. I am unable to determine on affidavit evidence that there is any material change in circumstances justifying a change to the joint custody order. It will remain as such.

Family Assets and Liabilities

- [57] The motor home valued at \$57,440 will be reapportioned 100 percent to the defendant, accepting his evidence that he did most of the renovations after separation. At the same time he will also be responsible for the mortgage associated with it of \$54,519 as of June 1, 2009.
- [58] The defendant will also have the Prowler valued at \$4,000 together with the debt associated with it of \$2,768.
- [59] The defendant will have the Suzuki 650 motor bike valued at \$1,150, the F150 Ford truck valued at \$2,250, the quad valued at \$3,950, his rifles valued at \$2,000 and his tools of no set value.
- [60] He will also have the Harley Davidson motorcycle valued at \$12,000 but with that will go the debt against it of \$21,856.77 as of May 22, 2009.
- [61] Additional debts the defendant will be responsible for will be the Mastercard debt for \$2,000, the Capital One debt for \$2,000, the propane debt for \$1,762, the joint account debt of \$1,875 and his business debt of \$474.
- [62] As I total the assets given to the defendant against the debts he is responsible for he has received assets to a value of \$82,790 against debt responsibilities of \$87,264.
- [63] On the plaintiff's side she will have the Sunfire motor vehicle valued at \$5,500 and the boat, motor and trailer valued at \$1,000.
- [64] She will also be responsible for the National debt valued at \$5,200, the Visa debt of \$2,500, the Bay card debt of \$800 and the Avon card debt of \$300.

[65] Total assets given to the plaintiff are valued at \$6,500 and total debts she is responsible for are \$8,800.

[66] The plaintiff has on these figures \$2,300 more debt than assets while the defendant has approximately \$4,500 more debt than assets.

[67] Since the outcome is relatively even for both I leave the assets and debts as I have indicated.

"Truscott J."

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Prepared on 29 October 2026 · Esheria