
CANADA / JUDGMENT

Duffy v. Boisvert

2017 BCSC 500

COURT

Supreme Court of British Columbia

DECIDED

28 March 2017

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2017 BCSC 500 Duffy v. Boisvert

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Duffy v. Boisvert,

2017 BCSC 500

Date: 20170328

Docket: E12612

Registry: Campbell River

Between:

Miwako Duffy

Claimant

And

Ronnie Vigor Boisvert

Respondent

Before: The Honourable Mr. Justice Skolrood

Reasons for Judgment

Counsel for Claimant:

H.A. Henning

Counsel for Respondent:

D. O'Donnell

Place and Date of Trial/Hearing:

Campbell River, B.C.

February 14, 2017

Place and Date of Judgment:

Campbell River, B.C.

March 28, 2017

Introduction

- [1] This is an application by the respondent to determine child and spousal support and for various ancillary orders. The respondent also seeks a divorce.
- [2] One "housekeeping" order sought by the respondent is to amend the style of cause to set out his proper name, which is Ronnie Vigor Boisvert. The claimant consents to this amendment and I so order.

Background

- [3] The parties began living together in March 2011, were married on December 23, 2012 and separated on August 17, 2015.
- [4] The claimant has one child, T.D., from a former relationship. T.D. is currently 14 years old and has Downs Syndrome.
- [5] The parties lived in Alberta until 2013, when they moved to Port Hardy, B.C. for reasons related to the respondent's work. According to the claimant, in order to obtain the consent of her former partner Mr. Duffy, who is T.D.'s biological father, for her to move to B.C. with T.D., a consent order was entered into which provides for specified parenting time for Mr. Duffy in B.C. The order also provided that Mr. Duffy would not pay child support to the claimant for T.D., due to the costs he would incur travelling to B.C. to exercise his parenting time.
- [6] The respondent has Multiple Sclerosis ("MS"). While there is no expert evidence before the court on this application, he has attached to one of his affidavits a letter from a doctor describing his condition as "aggressive relapsing progressive multiple sclerosis". He no longer has the use of his legs and is confined to a wheelchair. He states that he also has reduced mobility in his arms and his condition is affecting his speech. After the parties separated, the family home was sold at a loss and the respondent moved to Chilliwack, where he currently resides in an extended care facility. He pays \$1,850 per month in housing costs plus an additional \$300 per month for in-home care assistance.

- [7] The respondent has worked for Telus for many years. He was originally a field technician, but more recently has worked from home answering calls from contractors about the location of buried utility lines and pipes, etc. Due to his medical condition, he stopped working in December 2015 and began collecting long-term disability ("LTD") benefits. For reasons that are not well explained, his LTD benefits ceased in July 2016. He was then able to return to work with Telus on a modified basis and currently earns about \$3,200 per month. He is uncertain about how long he will be able to continue to work, given the progression of his disease.
- [8] According to the respondent, prior to separation the claimant was employed in Port Hardy as a delivery driver for Canada Post from December 2014 to August 2015, but she quit shortly after separation. The claimant says she was an on call driver for Canada Post, but lost that job because the respondent removed the licence plates from her vehicle and she was unable to insure it. He denies this allegation.
- [9] The claimant is currently unemployed and says that she is unable to work due to her responsibilities for caring for her son. Of note, in an earlier affidavit sworn October 22, 2015, the claimant deposed that she "shall be seeking employment as well as further education to learn the English language". She repeats this statement in a subsequent affidavit sworn May 10, 2016. There is no evidence that she has taken any steps to obtain employment, although she does say in her affidavit sworn December 5, 2016 that she is attending training to upgrade her English language skills.
- [10] After separation, the claimant moved to Campbell River and on September 29, 2015 she obtained an interim protection order and an interim order restraining the disposition of family assets. The protection order was subsequently cancelled at the request of the claimant on December 18, 2015.
- [11] On November 23, 2015, the claimant obtained an order in Campbell River requiring the respondent to pay child support in the amount of \$1,015 per month and spousal support in the amount of \$2,347 per month, both commencing November 1, 2015. No one appeared on behalf of the respondent on that application.
- [12] The respondent apparently made no payments pursuant to that order. On September 12, 2016, on the application of the claimant, the parties entered into an interim consent order setting child support in the amount of \$631 per month and spousal support in the amount of \$1,456 per month, effective October 1, 2016. Pursuant to the order, all arrears of child support were cancelled and arrears of spousal support were set at \$7,123.50. The consent order also required that the respondent maintain the claimant and T.D. on his employment medical and dental insurance coverage.

- [13] Since the date of that order, the Family Maintenance Enforcement Program ("FMEP") has been garnishing the respondent's wages to make payments towards his ongoing spousal and child support and to apply against the past arrears of spousal support. According to a statement from FMEP, as of February 9, 2017, the respondent was in arrears for both spousal and child support in the amount of \$5,657.75.

The Parties' Positions

- [14] In his application, the respondent seeks orders determining both child and spousal support and reducing the arrears of both. He seeks a further order that he not be required to maintain the claimant and T.D. on his extended health plan or as beneficiaries under his life insurance policy.
- [15] His position, as alluded to above, is that the current amounts he pays in child and spousal support, as well as payments he is required to make towards arrears, are not reasonable or sustainable given his medical condition and financial circumstances. He submits that his income should be set at \$45,000, which reflects his likely income, based on disability benefits, that he will receive once he can no longer work. He submits further that the claimant is capable of working and that income of \$30,000 should be imputed to her. He also points to the fact that in the past the claimant has received social assistance.
- [16] The claimant submits again that she is incapable of working due to her child care obligations. While acknowledging that T.D. attends school full-time, she notes that there are professional development days, sick days and holidays during which he needs care. She provided a letter from an immigrant settlement worker with whom she has been meeting stating that there are no appropriate community agencies in Campbell River that can provide the type of care and supervision that T.D. requires. That situation is likely to continue until T.D. turns 19 and can access adult services. She also provided a letter from a family physician stating that she is required to care for T.D. full-time.
- [17] With respect to the respondent's income, the claimant notes that he continues to work and that pursuant to Madam Justice Fleming's interim order dated September 12, 2016, he was found to have a gross income of \$67,684. In his most recent financial statement sworn February 1, 2017, the respondent deposes to an income for both child and spousal support purposes of \$65,566.70. The claimant submits that this is an appropriate figure to use for determining his ongoing support.
- [18] The claimant wants both her and T.D. to be maintained on the respondent's medical and dental coverage as well as under his life insurance. She opposes a divorce at this time on the basis that this would disentitle her to ongoing coverage under the respondent's medical and dental plans.

Discussion

Preliminary Point

- [19] Before dealing with the substance of the respondent's application, I first want to address the adequacy of the notice of application which, under the "Legal Basis" heading, simply refers to the Family Law Act, S.B.C. 2011, c. 25 [FLA], and the "Rules of Court Summary Trial".
- [20] Such barebones recitation of the FLA and the rules is inadequate and does not comply with the Rules of Court. The adequacy of application materials have been commented on by numerous judges and masters of this Court. I refer in particular to the decision of Madam Justice Adair in *Dupre v. Patterson*, 2013 BCSC 1561, where she dealt with a similarly barebones notice of application, as well as the decision of Master Bouck in *Zecher v. Josh*, 2011 BCSC 311, where Master Bouck explained the rationale behind requiring a proper legal basis, specifically to give proper notice to the opposing party and to the court of the arguments to be advanced.
- [21] Madam Justice Adair quoted from Fraser, Horn and Griffin, *The Conduct of Civil Litigation in British Columbia*, 2nd ed. loose-leaf (Markham: LexisNexis, 2007), one of the leading texts on practice and procedure, where the authors say the following concerning the legal basis section of the notice of application at page 32-3:

The notice must set out the rule, enactment or other jurisdictional authority relied on for the orders sought and any other legal arguments on which the order sought should be granted. If appropriate, applicable cases may be cited. The argument to be made in chambers should be fully disclosed and should contain more than a cursory listing of the rules that might support the particular application.

- [22] While Madam Justice Adair is addressing the Supreme Court Civil Rules, B.C. Reg. 168/2009, identical requirements exist under the Supreme Court Family Rules, B.C. Reg. 168/2009.
- [23] While not clear from the notice of application, I was advised by counsel for the claimant that what was intended was a summary trial seeking final orders in respect of the issues raised in the notice. I have treated the application as such for the purpose of dealing with child and spousal support, despite the flaws in the application materials, because it would be in neither party's interest to require the respondent to re-file his application and start again.
- [24] However, there is no reference to the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) in the notice of application. Since divorces may only be granted under the authority of that Act, I am unable to grant this element of the relief sought by the respondent.

The Parties' Incomes

- [25] While I accept that there is uncertainty about how long the respondent will continue to be able to work to the same degree that he does currently, as recently as Madam Justice Fleming's order dated September 12, 2016 he consented to an income of \$67,684. As noted above, in his more recent financial statement, he claimed an income of \$65,566.70. In my view, that is a reasonable amount to use for determining his support obligation.
- [26] In a financial statement sworn October 22, 2015, the claimant claimed income for child support purposes of \$13,625.88 and for spousal support purposes of \$16,516.92. The \$13,000 figure is comprised of social assistance that she received and the higher figure includes amounts for the child tax benefit and BC family bonus. In her more recent financial statement sworn February 6, 2017, she claims zero in income for child support purposes and \$8,040 in income for spousal support purposes, which is again comprised of the child tax benefit and the BC family bonus.
- [27] The claimant's income for child support purposes is not relevant because T.D. lives with her full-time, thus there is no offset under the Federal Child Support Guidelines [Guidelines]. For the purposes of determining spousal support, I do not accept the respondent's position that I should impute income to her based on the fact that she has previously received social assistance. According to the Spousal Support Advisory Guidelines [SSAG], social assistance is not considered income (see s. 6.2). However, child tax benefit and the BC family bonus are considered income for spousal support purposes (see s. 6.3), thus at a minimum, the claimant's income must include the \$8,040 in benefits claimed in her recent financial statement.
- [28] In addition, while I accept that the claimant has a significant child care obligation for T.D., given that he is in school full-time I do not accept that she is totally incapable of finding any remunerative employment. She has worked in the past and, in my view, is capable of at least some form of part-time employment. I would therefore impute income to her of \$15,000, including the child benefits, for the purpose of determining spousal support.

Spousal Support

- [29] In applying for a determination of spousal support, the respondent did not address the question of entitlement, which is a threshold issue to be determined before considering the quantum and duration of support. In this regard, it is well established that the entitlement to spousal support may be based on compensatory or non-compensatory, needs-based grounds (see *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420 at paras. 41-3 and *Moge v. Moge*, [1992] 3 S.C.R. 813 at 850-53).

- [30] In the circumstances of this case, a claim for spousal support on compensatory grounds appears weak given that the evidence does not establish that the claimant suffered an economic disadvantage resulting from the marriage, given its short duration. However, I am satisfied that there is a sufficient income disparity between the parties so as to entitle the claimant to spousal support on non-compensatory grounds, particularly since the respondent did not take issue with entitlement.
- [31] Using the income figures set out above results in a spousal support range under the SSAG, using the "with child support formula", of \$525 at the low end, \$708 in the mid-range and \$904 at the high end, for a duration of between two to six years. The SSAG are of course simply guidelines and within those guidelines, there are acknowledged exceptions, including addressing the special needs of children (s. 12.10).
- [32] The needs of T.D. and the claimant's obligations to care for him are significant considerations. Balanced against those considerations are the short duration of the marriage, the respondent's own health challenges and his uncertain work future.
- [33] Taking account of all of the circumstances, I find that spousal support at the mid-range amount of \$708 is reasonable in that it provides the parties with roughly an equal share of net disposable income. In terms of duration, despite the short length of the marriage, spousal support beyond the minimal period is warranted. I therefore order that the respondent continue to pay spousal support to the claimant until August 15, 2020, five years after separation, at which time his obligation will terminate. However, to account for the uncertainty about the respondent's employment, the amount of spousal support payable may be reviewed after one year from the date of these Reasons, with the review to focus on the incomes of the parties.
- [34] This new spousal support amount will be effective as of January 1, 2016. The respondent is entitled to a credit for the amount that he has overpaid since that date, which may be applied against his existing arrears.

Child Support

- [35] On the issue of child support, the respondent acknowledges some responsibility towards T.D., but says that he never functioned as a true parent. In contrast, the claimant says that the respondent assumed the role of step-parent to T.D. and was prepared to support both the claimant and T.D. when the family moved together to Port Hardy.
- [36] The respondent's notice of application seeks an order "that child support be determined, and arrears of child support be reduced". He does not seek an order terminating his child support. Using the respondent's income of \$65,568 results in child support payable under the Guidelines of \$611 per month.
- [37] However, in the case of a step-parent, the court has some discretion whether to order the full table amount. Section 5 of the Guidelines states:

Where the spouse against whom a child support order is sought stands in the place of a parent for a child, the amount of a child support order is, in respect of that spouse, such amount as the court considers appropriate, having regard to these Guidelines and any other parent's legal duty to support the child.

[38] The obligation of step-parents is also addressed in ss. 147 (4) and (5) of the FLA:

- (4) A child's stepparent does not have a duty to provide support for the child unless
 - (a) the stepparent contributed to the support of the child for at least one year, and
 - (b) a proceeding for an order under this Part, against the stepparent, is started within one year after the date the stepparent last contributed to the support of the child.
- (5) If a stepparent has a duty to provide support for a child under subsection (4), the stepparent's duty
 - (a) is secondary to that of the child's parents and guardians, and
 - (b) extends only as appropriate on consideration of
 - (i) the standard of living experienced by the child during the relationship between the stepparent and his or her spouse, and
 - (ii) the length of time during which the child lived with the stepparent.

[39] The effect of these provisions is that, when considering the child support obligations of a step-parent, the court must also consider the obligations of the child's natural parents (see H. (U.V.) v. H.(M.W.), 2008 BCCA 177 [H.(U.V.)] at para. 38). The nature of those obligations will inform the exercise of the court's discretion under s. 5 of the Guidelines, as will the guiding objectives of the Guidelines, including the establishment of a "fair standard of support for children" (H.(U.V.) at para. 40). Primacy must be given to the children's standard of living (H. (U.V.) at para. 41).

[40] Here, T.D.'s biological father, Mr. Duffy, pays no child support pursuant to the terms of the Alberta court order. According to the claimant, his income is in any event so low that he would not pay support under the Guidelines even absent the court order.

[41] I am satisfied that the respondent has an obligation to pay child support in accordance with s. 147(4) of the FLA in that he contributed to the support of T.D. for at least a year and this family law claim was commenced within one year of when he last paid support.

[42] I am further satisfied that given the circumstances of the biological father, and more importantly, given the circumstances of T.D., the amount of child support to be paid by the respondent should be the full table amount of \$611 per month. This will also be effective January 1, 2016. This results in a small overpayment on his part since January 1, 2017 of \$20 per month, which may be credited against his arrears.

- [43] The parties will exchange income tax returns, including notices of assessment, annually when available and child support may be adjusted based on the updated income information. Any adjustment will be effective as of July 1, with the first adjustment to take place July 1, 2018.
- [44] I note that while the child support obligation will continue, some relief has been provided to the respondent in terms of his financial situation by way of the adjustment to spousal support.

Ancillary Issues

- [45] I have already indicated that I am not prepared to grant a divorce based on the application materials filed. In addition to the reasons stated above, there was no marriage licence in the court file or any clearance certificate. The respondent's counsel asked if there could be a conditional order, effective upon receipt of those documents, however I would not endorse such an approach.
- [46] The respondent is however free to re-apply with proper materials or by way of an application for a desk order divorce. I would not accede to the claimant's request to delay the divorce.
- [47] That delay, as I understand it, was sought so that the claimant could be re-instated under the respondent's dental plan which would permit some required dental surgery to proceed. While I am not prepared to order a delay in the divorce, should the respondent choose to re-apply, I would order that the claimant and T.D. be re-instated under the respondent's medical and dental plans. Coverage for the claimant will continue until such time as a divorce is finalized. Coverage for T.D. shall continue for so long as the respondent continues to pay child support.
- [48] With respect to the respondent's life insurance, he wishes to name his natural children as the beneficiaries under that policy. The claimant seeks to be maintained as the beneficiary in order to secure the support payable by the respondent.
- [49] Given the respondent's desire to benefit his natural children and given the relatively short duration of his marriage to the claimant, I think it reasonable that he be permitted to choose who he wishes to name as beneficiaries under his life insurance. There are cases where, after separation, one spouse is required to maintain their ex-spouse as their life insurance beneficiary, typically for the purpose of providing security for ongoing support. However, this is usually the case when the parties consent to such an arrangement under a separation agreement or by way of a consent order (see: *Milne Estate v. Milne*, 2014 BCSC 2112). I am aware of no authority requiring the respondent to maintain the complainant as his life insurance beneficiary post-separation.

- [50] Finally, the respondent seeks to reduce or eliminate his arrears of child and spousal support. In the September 12, 2016 consent order, all arrears of child support were eliminated and arrears of spousal support were reduced to \$7,123.50. According to the FMEP statement dated February 9, 2017, there were arrears of \$5,657.75 owing as of that date for both child and spousal support.
- [51] Given that the September 12, 2016 order was by consent, and that the respondent received considerable accommodation with respect to outstanding arrears as part of that order, I would not order a further reduction or cancellation of arrears. However, given the respondent's financial circumstances, I would limit the amount that the FMEP may attach as payment toward arrears to a maximum of \$200 per month.

Conclusion

[52] In summary, I make the following orders:

1. Effective January 1, 2017, the respondent will pay spousal support to the claimant in the amount of \$708 per month, based on Guideline income for him of \$65,568 and for the claimant of \$15,000. The respondent will continue to pay spousal support until August 15, 2020 at which time his obligation will terminate. However, the amount of spousal support may be reviewed after one year from the date of these Reasons, with the review to focus on the parties' incomes;
2. The respondent is entitled to a credit for any overpayment of spousal support since January 1, 2017, which may be applied against his outstanding arrears;
3. Effective January 1, 2017 the respondent will pay child support for the child T.D. in the amount of \$611 per month. The respondent is entitled to a credit for any overpayment of child support since January 1, 2017 which may be applied against his outstanding arrears;
4. The parties will exchange income tax returns and notices of assessment annually, when available, and child support may be adjusted based on the updated income information. Any adjustment will be effective as of July 1, with the first adjustment, if any, to take place July 1, 2018.
5. The respondent's application for a divorce is dismissed, with liberty to re-apply;
6. The respondent will reinstate the claimant and T.D. on his medical and dental coverage and will maintain that coverage for the claimant until such time as a divorce, if any, is finalized and for T.D. for so long as the respondent continues to pay child support;
7. The respondent may choose who to name as his beneficiaries under his life insurance policy and is not obligated to name the claimant and/or T.D.; and
8. A maximum of \$200 per month may be attached on payment towards the arrears owing by the respondent.

[53] As success has largely been divided, the parties will bear their own costs.

"Skolrood J."

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