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CANADA / JUDGMENT

## Erasmus v. Singh

2018 BCSC 1195

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COURT

Supreme Court of British Columbia

DECIDED

16 July 2018

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2018 BCSC 1195 Erasmus v. Singh

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Erasmus v. Singh,

2018 BCSC 1195

Date: 20180716

Docket: E170082

Registry: Vancouver

Between:

Namrata Rebecca Erasmus

Claimant

And

Ashish Sushil Singh

Respondent

Before: Master Muir

Reasons for Judgment

Counsel for the Claimant:

S.S. Ali

Respondent appearing in person:

A.S. Singh

Place and Date of Hearing:

Vancouver, B.C.

June 26, 2018

Place and Date of Judgment:

Vancouver, B.C.

July 16, 2018

## introduction

- [1] These are cross-applications. The first is by the claimant for ongoing and retroactive child support and payment of s. 7 special or extraordinary expenses for the child of the marriage.
- [2] The second is by the respondent for parenting time for the summer and Christmas of 2018 and provision of the child's passport to facilitate this parenting time.

## Background

- [3] The parties were married on July 9, 2011 and separated on December 17, 2015.
- [4] There is one child of the marriage, E., born June 1, 2012. The child was born in Canada and is a Canadian citizen. After the child was born, the claimant and the child moved to the United Kingdom (the "UK") to live with the respondent.
- [5] The respondent presently resides in the UK.
- [6] The claimant and the child presently reside in Surrey, British Columbia.
- [7] The claimant alleges that the respondent was controlling and did not approve of western culture. She says that he controlled the finances and was emotionally distant. The claimant says that the respondent falsely accused her of adultery and that he later moved them to a small village in the UK such that they were physically isolated. The claimant says that that restricted her life, causing her to quit her job. She says he also monitored her phone and other communications.
- [8] The claimant alleges there were violent incidents perpetrated by the respondent and witnessed by the child. She says that life became unbearable and, as a result, she broke down at the child's daycare resulting in the police and children's services being contacted.
- [9] The respondent denies these allegations and says that the claimant fabricated a paper trail to justify her abduction of the child. The respondent agrees there was abuse prior to separation but says that the abuse was by the claimant, directed at him.
- [10] The claimant says she contacted the British Home Office who told her that she could leave the UK with the child and seek a court order in Canada.

- [11] She says rather than simply leave the respondent, she decided to leave the UK for several reasons:
- a) If she simply left the respondent she would not be permitted to work in the UK without permission, which may not have been granted;
  - b) She would not have been eligible for social assistance or other aid in the UK;
  - c) She could not find alternate shelter in the UK; and
  - d) She has family and friends in Canada who could support her.
- [12] The claimant says that on December 12, 2015, the respondent and she argued and she begged him to change. She says that he told her she was free to go, but that if she lived with him she would live by his rules.
- [13] She says that she left the respondent on December 15, 2015, leaving him a note that she could not continue to live with him and that she was leaving. The respondent reported her missing to the police and they contacted her. She says, however, when she explained her situation to the police, they simply assisted her to board her flight to Canada safely on December 17, 2015.
- [14] The respondent then initiated proceedings under the Hague Convention, but the claimant sought legal advice in Canada and returned to the UK with the child before those proceedings were processed in Canada.
- [15] Proceedings were commenced in the UK, which resulted in the order made October 27, 2016 by the Honourable Judge Yelton of the Family Court at Peterborough, Cambridgeshire, UK. That order provided that the child should live with the claimant and that the claimant had permission to remove the child permanently from the UK to Canada.
- [16] Recitals to that order recorded the claimant's intention and proposed schedule for contact between the child and the respondent.
- [17] The respondent appealed the order of Judge Yelton, resulting in the order of Mrs. Justice Roberts of February 20, 2017. I understand that the appeal was based on the respondent's desire to have his contact with the child be the subject of an order.
- [18] I gather that Justice Roberts concluded that jurisdiction over the child had shifted to Canada and that she could not make further orders regarding the child other than by consent.
- [19] Justice Roberts investigated extended contact for the child and the respondent, but the claimant would not consent. This is recorded in a recital to the order as follows:

AND UPON the appellant father having put forward proposals for direct contact for the holidays, as 30 days staying contact in England during first half of summer holiday every year, 10 days staying contact every alternate year in England during Christmas holiday, 10 days staying contact during spring holiday alternative yearly between Canada and England, including the offer that he would fund the costs associated with all travel for the purposes of his direct contact with the child.

[20] As a result, Justice Roberts ordered, by consent, that the recitals dealing with parenting time for the respondent in Judge Yelton's order be formalized as orders, which was done, albeit on slightly different terms, as follows:

- a) Skype contact for up to an hour as agreed in court and as guided by [E.] three times per week, on Tuesday, Thursday and Saturday (or such other days as the parties agree), at time which are agreed between the parties but no later than 10 p.m. UK time on Saturdays.
- b) Direct staying contact in England once or twice each year for periods of up to 10 days, to include alternate Christmases starting Christmas 2017.
- c) Direct staying contact in Canada once or twice each year for periods of up to 10 days at a time, taking into account the school holidays.
- d) Such other indirect contact (such as cards, letter, presents, etc) as the father may wish to send, with the mother agreeing to encourage and facilitate [E.] to reply.

[21] Presently the claimant is working as an instructor at Pacific Academy, a private school that the child attends. The child's tuition is reduced as a result of the claimant's employment there. The claimant earns \$36,336.00 per annum.

[22] The respondent suggests that the claimant is underemployed, as her training is as a chef. The claimant says that her position at Pacific Academy offers the child superior education, allows the claimant to have a similar schedule to the child and, thus, reduces child care costs and allows her to spend more time with the child.

[23] The claimant says although this is a reduction in salary for her, that she finds the work fulfilling and intends to pursue additional education to assist her career growth.

[24] The respondent is employed as a consultant by an energy firm, AMT Sybex, a part of Capita plc. A 2016 letter from his employer indicates his salary is £51,500 per annum. The respondent's most recent Form F8 financial statement sworn May 17, 2018 shows his salary as £4,315.87 per month, or £51,790.44 per annum.

[25] The letter from his employer states that the respondent works from home. The respondent indicates as well that he frequently travels for work.

[26] There is no explanation for the lack of any significant increase in the respondent's salary since 2016.

### Positions of the Parties

- [27] The claimant seeks both retroactive and ongoing child support.
- [28] The respondent has not paid any child support since the child moved to Canada, despite demand, other than \$300 in June 2017.
- [29] The respondent has paid for a school uniform for the child and offered to pay her school fees, but the latter has not materialized. His email of May 16, 2017 indicates that his offer was conditional. He states:

Now that I have seen the fee structure of the school, I am happy to pay full tuition fee and fee for uniform up until grade 12. I am happy for this to be recorded legally provided that I will not be legally liable for any other payment other than tuition fee plus uniform fee and most important my contact/parenting arrangement be agreed as per my request in my counterclaim.

- [30] The respondent expresses in his affidavits his desire to contribute towards the child. He says, however, that his financial circumstances, including the costs of exercising parenting time, create financial hardship and that he wants any support payable to be documented by court orders that take this into account. Further, he argues that the different tax regime between the UK and Canada should be considered.
- [31] The Federal Child Support Guidelines, SOR/97-175 [Guidelines] provide governance for spouses who receive income from a foreign jurisdiction as follows:

### Non-resident

20 (1) Subject to subsection (2), where a spouse is a non-resident of Canada, the spouse's annual income is determined as though the spouse were a resident of Canada.

### Marginal note: Non-resident taxed at higher rates

- (2) Where a spouse is a non-resident of Canada and resides in a country that has effective rates of income tax that are significantly higher than those applicable in the province in which the other spouse ordinarily resides, the spouse's annual income is the amount that the court determines to be appropriate taking those rates into consideration.
- [32] The respondent argues that, including his cost for compulsory national insurance, he pays 8 to 9% more tax in the UK than he would pay in Canada.
- [33] The claimant submits that there is no law on what constitutes a significant tax difference for the purposes of the Guidelines, but argues that the difference here is not sufficient to require an adjustment to the respondent's income.

- [34] In support of the respondent's hardship claim, he says that he owes £5,400 borrowed to fund legal fees here and in the UK proceeding, which he says have totalled £22,506.03. He says that the claimant's conduct in "abducting" the child to Canada caused him to incur these legal fees.
- [35] In addition, he says he will incur costs of £6,600 per year to exercise his parenting time with the child and another £1,200 per year to visit his family in India.
- [36] The respondent also points out that he has limited surplus in his budget, and provides a spreadsheet in his Form F8 financial statement indicating that he only has £151.67 per month or £1,820.04 per annum over and above his expenses.
- [37] As to parenting time, the respondent argues that it is in the best interests of the child to have as much time with him as possible. He argues that she should be allowed to travel to the UK to be with him in for 30 days this summer.
- [38] The respondent says that while the child is with him he should have her passport. He said, for example, he might want to take the child for a trip to Disneyland Paris and that would require her passport. Or, while he is in Canada, he might want to take the child to the U.S.
- [39] The claimant says that she has already arranged summer parenting time in accordance with the order of Justice Roberts. She has booked return tickets for her and the child, leaving Vancouver August 1 and returning August 14, 2018.
- [40] The claimant says that at this age and juncture, a trip of more than that would be very stressful for the child. The claimant points out that she has been the child's primary caregiver since birth, that she has never been away from her for longer than ten days and that the child has expressed concerns and has been anxious about time with her father.
- [41] The claimant brought evidence of the child's thoughts in a "Hear the Child Report" dated May 21, 2018 authored by Gerry Bock, a registered clinical counsellor. The respondent objected to this report, saying it had not been prepared in accordance with the guidelines for such interviews, set out in "Hear the Child Interviews", Kelowna Pilot Evaluation: May 2007. I did not find anything objectionable about the report, but it was of limited use. Given that the child is only five years old, there is nothing surprising in the report.
- [42] The claimant also points out that the child's summer activities have all been planned and arranged around the trip dates she has booked. To change them now would be an upheaval for the child.
- [43] The claimant agrees that a trip could be arranged for next summer of perhaps three weeks' duration. The respondent says that his parenting time next summer should be 30 days.
- [44] The claimant takes no issue with 2018 Christmas parenting time for the respondent and the child in the UK, but does say that she would travel with the child both ways to ensure that the trip causes the least anxiety possible for the child.

[45] The claimant says that given that the respondent has no specific plans for travel with the child and that she will travel with the child for the exchanges, it is not necessary for the respondent to have the child's passport. She says she has concerns that the respondent will remove the child to India, as he has family there and has expressed the intention in the past of taking the child there permanently. The claimant notes that India is not a reciprocating jurisdiction under the Hague Convention.

## Analysis and Conclusions

### Child Support

#### Respondent's Guideline Income

[46] The first step in the child support analysis is to determine the respondent's income. As per s. 20(1) of the Guidelines set out above, that is to be determined as if he were a resident of Canada.

[47] The Bank of Canada notes the following regarding exchange rates, sourced July 5, 2018, for the British pound sterling for the last year:

UK pound sterling (GBP)

Low [High]

2017-09-07

1.5899 CAD [0.6290 GBP]

Average

2017-07-05 to 2018-07-04

1.7117 CAD [0.5849 GBP]

High [Low]

2018-03-19

1.8371 CAD [0.5443 GBP]

[48] Looking at the respondent's May 17, 2018 Form F8 financial statement, he claims income of £4,315.87 per month, or £51,790.44 per annum. Using the annual average exchange rate, the respondent's annual income is the equivalent of \$88,649.70 CAD.

[49] The respondent claims UK income tax of £950.60 per month or £11,407.20 per annum and national insurance of £388.38 per month which would equal £4,660.56 per annum. However, I gather from his End of Year Certificate attached to his Form F8 financial statement that the maximum contribution for the year was £4,354.44.

- [50] Thus, the respondent's UK income tax is the equivalent of \$19,525.70 CAD and his national insurance costs the equivalent of \$7,453.49 CAD.
- [51] I calculate that the combined federal and provincial tax payable for 2017 on an income of \$88,649.70 in British Columbia would be \$19,489. There is obviously no significant difference in the income tax amount paid as between Canada and the UK.
- [52] The cap for employee contributions to Canada Pension Plan and Employment Insurance for 2018 in Canada is \$3,452.02. Thus, the respondent pays approximately \$4,000 more per annum for his national insurance.
- [53] There does not appear, however, to be any specific provision in the Guidelines to take account of this difference, other than in the consideration of hardship.
- [54] I conclude that the Guideline income for the respondent for child support purposes should be \$88,649.70.

### Undue Hardship

- [55] The respondent claims that the amount that he should be required to pay for support of the child should be reduced as he would suffer undue hardship if child support was payable at the table rate.
- [56] Regarding undue hardship, the Guidelines provide:

### Undue hardship

10 (1) On either spouse's application, a court may award an amount of child support that is different from the amount determined under any of sections 3 to 5, 8 or 9 if the court finds that the spouse making the request, or a child in respect of whom the request is made, would otherwise suffer undue hardship.

Marginal note: Circumstances that may cause undue hardship

- (2) Circumstances that may cause a spouse or child to suffer undue hardship include the following:
- o (a) the spouse has responsibility for an unusually high level of debts reasonably incurred to support the spouses and their children prior to the separation or to earn a living;
  - o (b) the spouse has unusually high expenses in relation to exercising access to a child;
  - o (c) the spouse has a legal duty under a judgment, order or written separation agreement to support any person;
  - o (d) the spouse has a legal duty to support a child, other than a child of the marriage, who is
- § (i) under the age of majority, or

§ (ii) the age of majority or over but is unable, by reason of illness, disability or other cause, to obtain the necessities of life; and

o (e) the spouse has a legal duty to support any person who is unable to obtain the necessities of life due to an illness or disability.

**Marginal note: Standards of living must be considered**

- (3) Despite a determination of undue hardship under subsection (1), an application under that subsection must be denied by the court if it is of the opinion that the household of the spouse who claims undue hardship would, after determining the amount of child support under any of sections 3 to 5, 8 or 9, have a higher standard of living than the household of the other spouse.

**Marginal note: Standards of living test**

- (4) In comparing standards of living for the purpose of subsection (3), the court may use the comparison of household standards of living test set out in Schedule II.

[57] The claimant submits that the threshold for a finding of hardship is quite high. The claimant referred me, amongst other cases, to *Van Gool v. Van Gool* (1998), 166 D.L.R. (4th) 528 (B.C.C.A.), where the court considered the application of the hardship provisions in the Guidelines and noted:

[45] The undue hardship test under s. 10 is two-fold. The spouse applying for relief under this section must prove that payment of the table amounts would cause undue hardship under s. 10(1) having regard to the criteria in s. 10(2). If this test is met, the applicant must go on to establish that, if required to pay the amount of maintenance otherwise payable under the guideline table, the standard of living of his or her household would be lower than that of the household of the other spouse. If this dual test is met, the court has a discretion to award a different amount of maintenance than that otherwise required under the Guidelines.

[50] Similarly, in an article dated March 1998, "Child Support under the Federal Child Support guidelines", Professor Julian Payne, Q.C. said of s. 10:

The requirement that the hardship be "undue" signifies that a stringent criterion will be applied. Some degree of economic hardship may be the inevitable consequence of separation and divorce. In order to meet the requirements of section 10(1), the hardship must be exceptional or excessive, rather than the inevitable consequence of dividing limited resources between two households. The use of the term "undue" implies something more than the hardship that ensues from a lower standard of living after divorce.

[51] Although s. 10 can be used by either the payor or the payee spouse to seek a level of maintenance other than that provided under the basic guideline table, thus far the applications have been almost entirely by payors for a reduction in the table amount. Since the basic tables were designed to be a "floor" for the amount of maintenance payable, rather

than a ceiling, it is not surprising that the authorities have held that the threshold for a finding of undue hardship is high. Hardship is not sufficient; the hardship must be "undue", that is, "exceptional", "excessive" or "disproportionate" in all of the circumstances. The onus is on the party applying under s. 10 to establish undue hardship; it will not be presumed simply because the applicant has the legal responsibility for another child or children and/or because the standard of living of the applicant's household is lower than that of the other spouse. The applicant must lead cogent evidence to establish why the table amount would cause undue hardship.

- [58] I do not consider that the legal fees the respondent incurred or the amount he chooses to pay to travel to India to visit his family create a situation where payment of the table amount of child support would cause undue hardship. Certainly, the claimant here has had her share of legal fees as well. I do not share the respondent's apparent view that he is the aggrieved parent here due to the "abduction" of the child by the claimant, and that entitles him to special consideration.
- [59] Nor am I moved by the respondent's assertion that after the required expenses, he only has £1,820.04 of annual surplus income that he could devote to supporting the child.
- [60] In addition, I consider it contradictory for the respondent to be claiming that he cannot pay Guideline support, but can afford to take the child, for example, to Disneyland Paris. In my view, appropriate ongoing child support must take precedence.
- [61] The respondent claims that his cost to exercise parenting time with the child will be £6,600 annually. He has yet to incur such costs, having only visited the child once since the child returned to Canada due to visa and other issues. Despite not having incurred those costs, however, he has refrained from paying anything but nominal support for the child.
- [62] I do not know what the respondent's estimated exchange costs are predicated on. The claimant has, for example, asked the respondent to repay the cost of the child's return flight to London, UK this August, of \$1,020.
- [63] I gather from his submissions that the cost is increased as the respondent proposes that he fly to Vancouver and return to the UK with the child and then fly with the child back to Vancouver and return again to the UK.
- [64] The claimant says that she will fly with the child to the UK and return with her, thus, reducing the number of flights required.
- [65] Assuming the cost of a single flight (Vancouver/UK) is \$1,500, three return trips between Vancouver and the UK would be \$9,000 per annum (\$3,000 return x 3 trips).
- [66] I will assume, for the purposes of this analysis, that this cost plus the \$4,000 additional annual national insurance cost would be sufficient to trigger undue hardship.

[67] I include the national insurance cost on the basis that the expense is firstly necessary to the respondent's employment and secondly would be of some benefit to the child if the respondent was disabled or otherwise lost his employment.

[68] I turn then to the Household Standard of Living Test, from Schedule II of the Guidelines:

Respondent

Claimant

Annual Income

\$88,649

\$36,336

Universal Child Care Benefits

\$5,400

Taxes and premiums

-\$26,978

-\$7,292

Undue Hardship

-\$13,000

Child support payable

-\$10,176

Child support received

\$10,176

Adjusted annual income

\$38,495

\$44,619

Low income measure

\$10,382

\$14,535

Household income ratio

3.7

3.1

- [69] The respondent would still have the higher standard of living of the parties. Thus, the respondent has not met the onus on him of establishing that payment of the child support table amount would result in undue hardship.
- [70] The respondent argues, however, that the claimant is intentionally underemployed in that she has taken a job that pays less than she is capable of earning as a chef. I do not agree. The claimant is being paid less at present, but is seeking to improve her education and hence her job future. The job she has with a private school entitles her to enroll the child at a reduced cost and as she works similar hours as the child is in school, it reduces or eliminates the need to pay for child care and allows her to spend more time with the child. Thus, in my view, there are good reasons, both economic and practical, for the claimant's choice of work.
- [71] Thus, the respondent will pay interim child support to the claimant based on a Guideline income of \$88,649 per annum. The child support amount will be \$847 per month.
- [72] The notice of application was filed May 11, 2018. Child support will be payable commencing May 1, 2018 and payable on the first day of each month thereafter.
- [73] The balance of the claim for retroactive support is adjourned generally.

## Section 7 Extraordinary Expenses

- [74] The Child has extraordinary private school and childcare expenses. Those will be shared in proportion to the parties' incomes, so the respondent will be responsible for payment of 59% of those costs forthwith upon receipt of invoices for same. The extraordinary expenses will include the cost of the summer camp that the child will be attending.
- [75] I am not satisfied that the other extracurricular activities presently undertaken, such as arts classes, swimming and ballet, are of a level to be characterized as extraordinary expenses.

### Respondent's Parenting Time

- [76] The respondent seeks an order that he be able to exercise parenting time with the child for 30 days this summer in England.
- [77] I believe that it is in the child's best interests to have as much contact with her father and extended family in the UK as can be accommodated given her age and circumstances.
- [78] This year, however, based on the terms of the order of Justice Roberts, the claimant has already arranged for her to travel with the child to the UK from August 1 to 14. I am satisfied that those arrangements should be maintained so as not to disrupt activities that the child has already embarked on for this summer.
- [79] The claimant agreed at the hearing of this matter that the respondent could have parenting time with the child for three weeks in the summer of 2019, and I so order.

- [80] In addition, the respondent seeks an order that he have two weeks of parenting time at Christmas. The school calendar shows that there are 16 days during the Christmas break. In my view, the child will need time to prepare for travelling and certainly time to acclimate to the time change on her return.
- [81] On balance, I believe that ten days of travel at Christmas is the most that can be accommodated taking into consideration those concerns.
- [82] Thus, the respondent will have parenting time with the child in the UK for ten days at Christmas 2018.
- [83] Given the age of the child, I consider that the claimant's suggestion that she travel with the child and return with the child is the best way to ensure the child is not overly anxious on these trips. Thus, the order will go that the claimant will travel with the child.
- [84] The parties will agree on travel dates for the Christmas travel by September 30, 2018 and the claimant will purchase tickets by October 15, 2018 and provide the respondent with confirmation of booking.
- [85] The respondent is to be responsible for the costs of the 2018 travel and will reimburse the claimant within ten days of being provided with confirmation of the travel costs.
- [86] The respondent will provide the claimant with the address or addresses where the child will be staying in the UK and his contact information for her. He will advise the claimant immediately of any changes to that information. The claimant is to be allowed telephone or other electronic communication with the child at least every second day of the respondent's parenting time.
- [87] As the respondent has not provided any evidence of specific travel plans, I see no need for him to have the child's passport while she is in the UK. In any event, plans for extensive travel with the child would seem contradictory to the respondent's position regarding financial hardship. Thus, the respondent's application to have possession of the child's passport is denied.
- [88] If the respondent wishes to make a special trip with the child in the future, there is liberty to apply.
- [89] The claimant has been substantially successful on both applications and she will have her costs of both applications. As it seems possible that there will not be a trial in this action, those costs are to be payable forthwith. I will summarily assess costs at \$2,000 for the day of hearing and \$250 for disbursements.

"Master Muir"

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