
CANADA / JUDGMENT

Fray v. Borecky

2012 BCSC 791

COURT

Supreme Court of British Columbia

DECIDED

30 May 2012

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2012 BCSC 791 Fray v. Borecky

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Fray v. Borecky,

2012 BCSC 791

Date: 20120530

Docket: D110467

Registry: Vancouver

Between:

Isabelle Diane Fray

Claimant

And

Gary William Borecky

Respondent

Before: The Honourable Madam Justice Gerow

Reasons for Judgment

The Claimant, Ms. Fray:

In Person

Counsel for the Respondent:

L.A. Lam

Place and Date of Hearing:

Vancouver, B.C.

February 10, March 19 and 26, 2012

Place and Date of Judgment:

Vancouver, B.C.

May 30, 2012

Introduction

- [1] The parties separated in 1998. The parties have one child who was born in July 1994 and is currently 17 years old. Since March 1999 when the child was four years old, there has been a trial and a number of applications dealing with the custody and guardianship of the child, as well as child support and extraordinary expenses. The most recent order was in December 2011, at which time the child support and extraordinary expenses payable by the father were increased.
- [2] The parties have cross-applications dealing with custody and support. In her application, the mother is seeking retroactive child support from 2008 to present. However, at the hearing the mother sought retroactive child support from 2001 to present on the basis that until the father filed his most recent affidavit material in response to her application the father had not disclosed his income between 2001 and 2008, and she was unaware of his income during that time. The father is seeking an order varying a 2002 custody order granting sole custody to the mother to sole custody to him, and an order that the mother pay child support based on an imputed income. As well, he seeks an order that the mother pay her proportional share of extraordinary expenses.

Issues

- [3] The issues are:
1. Should the father be ordered to pay retroactive child support, and if so, in what amount and for what period of time?
 2. Should the 2001 custody order be varied? and
 3. If so, should the mother pay child support based on an imputed income?

Background

- [4] Since the parties separated there have been a number of orders dealing with custody, guardianship, access and child support. There was a six-day trial in 1999. At that time, the father was found to have income of \$32,000 for the purpose of the determining child support under the Federal Child Support Guidelines, S.O.R./97-175 (the "Guidelines").

- [5] In January 2000, the mother brought an application to vary the amount of child support payable and the father's Guidelines income was found to be \$46,472. He was ordered to pay child support of \$396 per month.
- [6] In April 2001, the father applied to vary the order on the basis that his Guidelines income had fallen to \$18,840. Based on that Guidelines income, the father was ordered to pay \$158 per month (the "2001 order").
- [7] In July 2002, an order was made granting the mother sole custody of the child. At that time the father advised the court that he was working part-time, and that his Guidelines income was \$18,000 per year.
- [8] In 2008, the father offered to increase his child support payment to \$250 per month if the mother would deregister with the Family Maintenance Enforcement Program (the "FMEP").
- [9] The most recent order was made on December 14, 2011, when the 2001 order was varied to increase child support payable based on the father's Guidelines income of \$69,441. The father was ordered to pay \$640 per month in child support and contribute \$250 per month to the special and extraordinary expenses commencing January 1, 2012. The mother's application for retroactive child support was adjourned and reset.
- [10] After the order of December 2011, the father and the child reached an agreement that if she lived with him he would place \$640 per month into a joint account that they both would have access to. The father deposes that he agreed with the child that he would deposit the amount of \$640 into the joint account, and that there would be deductions for her expenses, including food, prescription drugs, etc. At the end of the month there would be an automatic withdrawal of \$200 into a savings account. As evidence of the account, the father has attached a copy of an account with no names on it and some deposits and withdrawals which do not indicate who withdrew the money. As well, he has attached a handwritten ledger which he deposes is in the child's handwriting. Since January 1, 2012, the child has been living with the father.
- [11] It is apparent from a review of the evidence that the father misled the court regarding his income in 2001 and 2002 when he advised the court he was earning \$18,000 per year. In the father's affidavit filed in 2012, he deposes that at the time of the 2001 order he was employed part-time, earning an annual income of \$33,696, not \$18,000 as he told the court. His income for 2001 was \$33,696 and his income for 2002 was \$30,668.
- [12] The father says the reason for the disparity between what he advised the court and what he earned in 2001 and 2002 is that at the time of the hearings he was working part-time.
- [13] The fact that the father was not forthright with the court regarding his income is consistent with his conduct in the past as is evident from earlier reasons.

[14] In 2002 reasons granting sole custody to the mother (2002 BCSC 1251), Hood J. noted that despite giving assurances at the 1999 trial that he would assist the mother in settling in the Lower Mainland, the father did not provide any support or assistance whatsoever, and stated at para. 6:

...the plaintiff had to borrow money from relatives, which she is still paying back, and on her own, and with much difficulty, she found an appropriate residence and three jobs in order to meet her obligations.

[15] Hood J. went on to state that since trial there had been seven or eight applications, and that on most if not all the applications he came to the view that it was the father who was not cooperating (at para. 12).

[16] The father did not voluntarily pay child support after he was ordered to pay it. He only started to pay the child support that had been ordered after the mother enrolled with the FMEP.

[17] In August 2008, the father approached the mother and agreed to increase the child support to \$250 and pay 50% of the extraordinary expenses provided that the mother withdraw the order from the FMEP. However, he did not disclose to the mother that his Guidelines income in 2008 was \$73,381. Child support payable on a Guidelines income of \$78,381 was \$683 per month. Rather, the father advised the mother that he had an opportunity to work full time, but then advised her he did not get the job. Prior to that, he had been paying \$158 per month based on an income of \$18,000 per year which he advised the court of in 2001 and 2002.

[18] Not only did the father fail to advise the court of his actual income in 2001 and 2002, he also failed to advise the mother when he obtained a full-time position, and misled her in 2008 about his income. His affidavit material filed in response to the mother's application to vary child support was the first time the father provided evidence of his income from 2008 to 2010.

[19] The father was granted an adjournment of this hearing in order to put his income tax returns from 2001 to 2007 into evidence. Both the mother and father filed additional affidavit material.

[20] The evidence is that the father earned income in the following amounts between 2001 and 2010:

2001

\$33,696

2002

\$30,668

2003

\$56,559

2004

\$68,728

2005

\$80,858

2006

\$60,485

2007

\$53,648

2008

\$73,381

2009

\$67,326

2010

\$69,441

[21] In his financial statement filed in January 2012, the father swears his Guideline income is \$69,441, based on his 2010 income tax return. His average income for the three years, 2008 - 2010, is approximately \$70,000 per year. The child support payable on that amount is \$640 per month, which was the amount he was ordered to pay in December 2011.

Analysis

Should the respondent be ordered to pay retroactive child support, and if so, in what amount and for what period of time?

[22] As stated earlier, in her application the mother seeks retroactive child support for three years. At the hearing, the mother sought retroactive child support from 2001 to present, on the basis that until the father filed his most recent affidavit material in response to her application the father had not disclosed his income since 2001, and she was unaware that his income had increased.

[23] Retroactive child support orders were discussed by the Supreme Court of Canada in *D.B.S. v. S.R.G.*, 2006 SCC 37, [2006] 2 S.C.R. 23. The Court states at para. 54 that it is the responsibility of both parents to support the child in accordance with their income. A payor parent who does not increase his payments in accordance with increases in his income does not fulfil his obligations. The Court notes at paras. 58-59 that both parents have the responsibility to

ensure the children are receiving the proper amount of support. If they fail in that obligation, a retroactive award may be made to correct the failure. Such an order serves to enforce an obligation that should have been met at an earlier date. At para. 99, the Court emphasized that in determining whether a retroactive award is warranted and the amount of the award, the court should "strive for a holistic view of the matter and decide each case on the basis of its particular factual matrix."

[24] The Court stated at para. 133 that in determining whether a retroactive child support order should be made, the court should consider all of the relevant circumstances including:

1. whether the recipient parent has supplied a reasonable excuse for the delay in making an application. In determining whether an award is justified, the circumstances surrounding any delay in making an application will be crucial;
2. the conduct of the payor parent. A payor parent cannot hide increases in his income from the recipient in order to avoid support obligations;
3. the past and present circumstances of the children; and
4. the hardship a retroactive award might entail.

[25] The first factor to consider is whether the mother has delayed in making her application, and if so, whether she has supplied a reasonable excuse. The father asserts that the mother delayed in bringing her application. He argues that she was aware he was working full time and yet took no steps to vary the amount of child support he was paying.

[26] However, the evidence is that the father misled both the court and the mother about his income in 2001 and 2002. In 2008, he misled the mother regarding the increase to his income, telling her that he did not get a full-time job.

[27] As a result of the animosity between them, the mother and father had very little communication. For example, the mother did not know the father had bought his condominium in 2003 until he filed his financial statement in January 2012. In my view, the mother cannot be faulted for failing to bring the application earlier, given the evidence that the father did not communicate with her and misled her about the fact that he was working full time and the amount of income he was earning. As stated earlier, the mother had to register with the FMEP before the father would pay the child support he had been ordered to pay.

[28] The next factor to consider is the conduct of the payor parent. In this case, it is apparent that the father has misled both the court and the mother about his income and never voluntarily paid child support. It is evident that the reason the father failed to disclose his income was to avoid his child support obligations. The father was well aware that child support payments are based on his income as is evident from the fact he applied to the court to decrease his payments in 2000 and 2001. It is also evident that in 2001 and 2002, when he advised the court on two occasions that he was making \$18,000 a year, that was untrue as his

income tax returns show that he earned \$33,696 in 2001 and \$30,668 in 2002.

- [29] Although the father blames the mother for failing to request the information, and suggests that the reason he never approached her was because she was uncooperative, that does not accord with Hood J.'s statement that in the seven or eight applications between the time of the trial and the 2002 hearing, he found the father to be the parent who was uncooperative, and being difficult under the guise of a legitimate purpose. I note that Hood J. had the opportunity to observe both parties give evidence at trial in 1999, and observe their ongoing conduct following the trial through the various applications. As a result, I do not accept the father's affidavit evidence that it is the mother who has been uncooperative. The father has shown a consistent approach of attempting to avoid his obligations to pay child support based on his income throughout the time period in issue.
- [30] There are no automatic disclosure requirements in the Guidelines as noted in D.B.S. at para. 58. Pursuant to s. 25 of the Guidelines, each parent is obliged to disclose his or her income once a year on the written request of the other parent. However, in this case the father was untruthful when information was requested about his income. In my view, the father cannot escape his blameworthy conduct by saying the mother did not inquire. When she did, he did not tell her the truth. This factor favours the making of a retroactive support order.
- [31] The father points to the case of *Morgan v. Morgan*, 2006 BCSC 1197, as support for his proposition that he not be penalized for failing to report his increase in income. He says that the conduct of the payor parent in *Morgan* was arguably more blameworthy than his conduct, and the judge in *Morgan* found the conduct to be at the lower end of the blameworthy scale. However, as stated in D.B.S., each case must be determined on its own facts.
- [32] In any event, *Morgan* is distinguishable as the evidence was that for much of the time relevant to the application, the payor parent paid \$150 per month more than he was required to under the order, and that he paid for other child expenses. The court in *Morgan* did not sanction the payor parent's conduct and found it remained worthy of reproach because he should have paid more. In this case the evidence is that the father did not voluntarily pay child support; rather, the mother had to register with the FMEP.
- [33] The past and present circumstances of the child also favour the making of a retroactive support order. It is apparent from the evidence that the father avoided paying significant amounts of money while the mother in the early years struggled to work a number of jobs to support the child. The evidence of the mother is that the father did not pay the \$289 child support ordered in March 1999 until April 20, 2000, when the mother enrolled with the FMEP. In 2002, the mother returned to school while working and took out a student loan to supplement her income. Her evidence is that money was extremely tight, and she had to borrow money and attend the food bank. As a result, the child suffered hardship.

- [34] The mother subsequently entered into a new relationship and had two children, one in 2005 and the other in 2006. In 2007, the mother stopped working and has been at home caring for her children while her new partner works.
- [35] The child is graduating from high school this year and has been accepted to attend university in the fall. The child will require continued support during her post-secondary education.
- [36] The mother has worked hard and saved some monies towards the child's education. The father deposed in his December 2011 affidavit that he was unable to make major contributions towards the child's post-secondary education because his financial situation cannot support it. The father deposes he has remarried and supports his wife and her family who live in Thailand. In his most recent affidavit the father deposes that since he was ordered to pay increased child support in December 2011, he is unable to send the monies he was sending to Thailand of \$1,000 per month. The father deposes that now he is only able to send \$200 per month and sometimes nothing.
- [37] Based on the father's evidence, it is unlikely he will assist with the cost of his child's post-secondary expenses. It is reasonable to infer that the father will not support the child during her post-secondary education. Rather, he will choose to support his wife and her family.
- [38] The fact that there is little likelihood that he will support the child during her post-secondary education can be inferred from the contradictory affidavit evidence the father has provided. The father deposes that the only reason he is not putting funds into his daughter's bank account for her use is that he is having to pay child support to the mother. However, at the same time the father deposes that since the order of December 2011 increasing the amount of child support he has to pay, he has been unable to send monies to his wife and her family in Thailand. Based on his past conduct of never voluntarily paying for child support or extraordinary expenses, it is reasonable to infer that if an order is made that the child reside primarily with the father, he will not put money into a joint account to be used by his child, but will choose to send monies to his wife and her family instead.
- [39] The mother has indicated that any award for retroactive child support will be used, in part, to assist in the daughter's post-secondary education. As stated earlier, the child will be attending university in the fall and will need monies to assist her with the payment of tuition and other expenses. This factor favours an order for retroactive support.
- [40] This is a different situation from the Morgan case which the father relies on. In the Morgan case, the court found that there was no evidence that the child needed the retroactive support now or that her standard of living suffered because she did not have it in the past. In this case there is evidence of hardship in the past, and that the child will need assistance with her post-secondary education commencing in September 2012.

- [41] The final factor to consider is the hardship any award will cause. The father submits that a retroactive child support order will cause him hardship. He points to the fact that after 2002 he had debts as a result of relocating to the Lower Mainland from Montreal in 1995, legal fees, the dissolution of his savings and RRSP for divorce settlement, taxes on the redeemed RRSP funds, living expenses and ongoing child support and spousal support. He deposes that as a result he has been forced to carry a heavy debt load.
- [42] However, the evidence is that since 2002, the father purchased a condominium and contributed to his RRSPs. As well since 2010, he has sent \$22,000 to support his wife and her family in Thailand. The only debt the father lists on his financial statement sworn in January 2012 is a mortgage debt of \$66,755. He lists his assets as \$358,441. In my view, the father has failed to establish an award of retroactive support will cause him hardship that would preclude the granting of the award. It is apparent he has assets from which to pay it. In his affidavit, the father deposes that potential health issues may impact his ongoing ability to work. However, he has provided no medical evidence that any of the problems he refers to have impacted his ability to earn income. Rather, the evidence is that his income has been approximately \$70,000 per year for the last three years.
- [43] Having considered the factors set out in D.B.S., I conclude that a retroactive award is appropriate in this case.

What is the appropriate amount for the award?

- [44] The mother seeks an amount of \$48,408 for the period from 2001 to 2011. The father takes the position that the mother's request for a retroactive award extending beyond the three years she sought in her application is technically not before the Court. He acknowledges that he was granted an adjournment to file further material, but takes the position that any award should be limited to three years. The father submits that time period is in accordance with the case law, and that the three years should not be extended in the circumstances of this case.
- [45] However, it is clear from D.B.S. that in situations where a payor parent has engaged in blameworthy conduct, the date when increased support should have been paid will be a more appropriate date from when the retroactive order should start. As stated at para. 125:

The proper approach can therefore be summarized in the following way: payor parents will have their interest in certainty protected only up to the point when that interest becomes unreasonable. In the majority of circumstances, that interest will be reasonable up to the point when the recipient parent broaches the subject, up to three years in the past. However, in order to avoid having the presumptive date of retroactivity set prior to the date of effective notice, the payor parent must act responsibly: (s)he must disclose the material change in circumstances to the recipient parent. Where the payor parent does not do so, and thus engages in blameworthy behaviour, I see no reason to continue to protect his/her interest in certainty beyond the date when circumstances changed materially. A payor parent should not be permitted to profit from his/her wrongdoing.

- [46] The father points to the fact that the mother's original application was for three years; however, that was before the mother became aware of the father's income from 2001 to present. Rule 1-3 of the Supreme Court Family Rules, B.C. Reg. 169/2009, sets out the object of the Rules is to secure the just, speedy and inexpensive determination of every family case on its merits.
- [47] In my view, the father is not unfairly prejudiced by the mother being able to argue that the retroactive award should extend beyond the three years sought in her original application. The father was put on notice that the mother was intending to seek an order that the retroactive period be longer than three years at the hearing. He was granted an adjournment to put evidence before the Court in order to deal with the lengthier period being sought by the mother.
- [48] The father also takes issue with the amounts the mother has put forward. He asserts that the mother has not given him credit for some of the amounts he has paid in the past, and has not taken into account periods of time when the daughter came to live with him. He says the amount of support that would have been paid if he had paid support based on his Guidelines income over the period in issue is \$34,264. He says the amount for the three years from 2009 to 2011 is \$8,634. However, I did not find the father's evidence credible. As set out earlier, his affidavit evidence was contradictory and there is evidence he has misled the court in the past. I do not accept the father's evidence that he paid \$149 a month extra for three months in each of the years from 2001 to 2007. The mother denies he paid those amounts, and he has not provided any documentary evidence supporting his claim. In my view, the figures put forward by the mother as to the amount of child support paid are more accurate.
- [49] The evidence is that the child has lived with the father from time to time since becoming a teenager. The mother has given the father credit for part of the time the child lived with him, and for the increased amount of \$250 per month the father paid from 2008 to 2010. The evidence is that the mother re-registered with the FMEP in 2010, as the father was not paying any child support when the daughter returned to live with her after living with the father for a period of time. The father deposes that he was not paying child support in the fall of 2010 because the child lived with him until October 2010. The mother deposes that the child returned to live with her in August 2010. Given the father's history of misleading the court and his contradictory affidavit material, I accept the mother's affidavit evidence that the child returned to live with her in August 2010. After the mother re-registered with the FMEP in 2010, the father paid \$158 per month from August 2010 until December 2011, when the order was made increasing child support.
- [50] Doing the best I can on the basis of the affidavit evidence, I have concluded that a retroactive award in the amount of \$30,000 should be made. Although this does not include all of the Guidelines support that the father should have paid, s. 10 of the Guidelines provides that a court may vary an amount of child support if the payor spouse would suffer undue hardship. While I did not find the hardship pointed to by the father precluded a retroactive award, he does have the obligation to support his new wife. The amount of \$30,000 takes into

consideration the father's situation in which he is attempting to assist his wife and her family, and his child's need for assistance with her post-secondary education, and in my view balances those needs.

Should the 2001 custody order be varied, and if so, what child support should be paid by the mother?

- [51] The father argues that there should be a change to the 2002 custody order because there has been a material change in circumstances, in that the child decided to live with him permanently as of January 1, 2012. The mother opposes any change to the 2002 order because she says it is not in the best interests of the child.
- [52] It is apparent from the evidence that the father has, in effect, reached an agreement with the child by offering to pay her the child support he was to pay to the mother, if the child would come and live with him. The evidence is that the child has lived with him for short periods of time in the past and has returned to live with the mother.
- [53] As stated earlier, the father has remarried and his new wife lives in Thailand. He earlier indicated that he intended to visit his wife in Thailand. In his latest affidavit he deposes that in the event that he goes to Thailand, he has made arrangements for the child to stay with a friend.
- [54] It is apparent from the evidence that the change of the child's residence took place after the increase in child support in the December 2011 order. Given the unsettled nature of the father's living situation, in that he is attempting to have his wife join him in Canada, it is difficult to know how long the child will continue to live with the father. However, the child has deposed that she is intending to live with her father for the time being. As stated earlier, she is 17 years old and about to graduate from high school. She will be attending university in the fall.
- [55] In the circumstances, I am of the view that it is appropriate to vary the order of 2002 to grant the parents joint custody. That way the child can make the choice as to which parent she will reside with.
- [56] I agree with the father that the mother should have some income imputed to her for the purposes of child support and pay child support to him while the child resides with him. The evidence is that the mother voluntarily left employment in 2007 to care for her children. The two younger children are now school age and the mother could return to work. It is appropriate to impute \$20,000 income to the mother.

[57] The child has lived with the father since January 2012. The father has paid child support to the mother in accordance with the December 2011 order. He should be credited that amount. As well, the mother should pay child support to the father when the daughter resides with him. The amount of child support payable on a Guidelines income of \$20,000 is \$180 per month. As well, she should pay her proportionate share of agreed-upon extraordinary expenses.

Conclusion

[58] The father will pay \$30,000 in retroactive child support for the period between 2001 and December 2011. The payment should be \$15,000 in a lump sum payable by June 30, 2012, and \$1,000 per month commencing July 1, 2012. The father will be entitled to set off the amount he has paid to the mother for child support from January 2012 to present from the lump sum payment.

[59] The 2002 order will be varied to grant the parents joint custody of the child. Income will be imputed to the mother in the amount of \$20,000 per year for the purposes of child support and the payment of extraordinary expenses. The Guidelines amount of child support payable by the mother is \$180 per month commencing January 1, 2012. As well, the mother will pay her proportionate share of extraordinary expenses. In the event that the child moves back in with the mother, the father will pay child support based on his Guidelines income.

[60] The father is entitled to offset the child support payable by the mother from his monthly payments of retroactive child support.

[61] The parties will exchange income tax returns on June 1 of each year while the child remains a child of the marriage.

[62] Given the divided success, each party will bear their own costs of these applications.

"Gerow J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/SC/12/07/2012BCSC0791.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/fray-v-borecky-2012>

Prepared on 29 October 2026 · Esheria