
CANADA / JUDGMENT

G.L. v. S.J.L.

2016 BCSC 2401

COURT

Supreme Court of British Columbia

DECIDED

22 December 2016

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2016 BCSC 2401 G.L. v. S.J.L.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

G.L. v. S.J.L.,

2016 BCSC 2401

Date: 20161222

Docket: E1546348

Registry: Prince George

Between:

G. L.

Claimant

And

S.J.L.

Respondent

Before: The Honourable Mr. Justice Tindale

Reasons for Judgment

In Chambers

Counsel for claimant:

M.J. Chiu

Counsel for respondent:

A.G. Oliver Dunbar

Place and Date of Hearing:

Prince George, B.C.

June 27, 29 and 30, 2016

Place and Date of Judgment:

Prince George, B.C.

December 22, 2016

- [1] The respondent S.J.L. by way of a notice of application filed November 30, 2015 seeks orders relating to the custody, guardianship, parental responsibilities as well as child support both retroactive and prospective in this family law proceeding.
- [2] The claimant G.L. by way of a notice of application filed May 6, 2016 seeks orders relating to a child support, custody, guardianship and parental responsibilities.
- [3] On June 30, 2016 I granted an order for divorce as well as a name change for the respondent.

Background

[4] The parties were married on August 14, 1999 and separated on August 31, 2006.

[5] The parties have two children namely:

J.L. born September 17, 1998 and;

C.L. born July 8, 2001.

("Children")

[6] The claimant is 39 years of age having been born on March 25, 1977.

[7] The respondent is 37 years of age having been born May 16, 1979.

[8] On March 1, 2007 an interim order was made in the Provincial Court of British Columbia granting joint custody and joint guardianship of the Children to the parties. The order also ordered that the primary residence of the Children would be with the respondent.

[9] On March 29, 2007 an interim order by consent was made in the Provincial Court of British Columbia ordering the claimant to pay \$600 per month for the support of the Children commencing retroactively on December 1, 2006.

[10] On September 11, 2013 the claimant filed a "Statement of Claim for Divorce" in the Court of Queen's Bench in Alberta. On September 3, 2014 a consent order was made transferring the Queen's Bench Court file to the Supreme Court of British Columbia.

- [11] On July 31, 2015 Mr. Justice Sewell pronounced an order granting sole interim custody of the Children to the respondent. Orders were also made in relationship to the child C.L. for interim access.
- [12] Also on July 31, 2015 Mr. Justice Sewell pronounced an order prohibiting the claimant from having contact with the child J.L.
- [13] On November 30, 2015 the claimant pled guilty in the Provincial Court of British Columbia to committing assault on the child J.L. and received a conditional discharge with probation for one year which included a condition that he have no contact with J.L.

Position of the Parties

Re: Custody, Guardianship and Parental Responsibilities

- [14] The respondent seeks sole custody and guardianship of the Children.
- [15] The respondent deposes that during her relationship with the claimant he was physically and mentally abusive.
- [16] The respondent deposes that J.L. has been under the care of a psychiatrist and multiple counselors. She has been diagnosed with depression, mood disorder and a narcissistic personality.
- [17] The respondent deposed to the following in her third affidavit made on November 20, 2015 regarding J.L.'s living arrangements at paras 192-199:
- [192] [JL] was hospitalized on October 14, 2014, and discharged into my care on October 27, 2014. She did not want live at home, and I made arrangements for her to stay with my stepsister Monica.
- [193] [JL] lived with Monica from November 2014 to April 2015. I paid Monica rent (\$300.00) each month in the same amount that I paid each of my parents when [JL] lived with either of them.
- [194] I bought groceries for [JL] as I had done when she lived with my parents. I also paid for her personal living expenses including clothes, toiletries, medication and entertainment. I drove [JL] to appointments and to school.
- [195] [JL] mainly stayed with friends from May 2015 to July 2015. I did not contribute to the rent as I disapproved of her choice of accommodation. She was forewarned that if she left Monica's, I was unwilling to pay rent for her to live with her friends.
- [196] [JL] moved into her boyfriend's mother home in August 2015, and lived there until the house was sold in October 2015. [JL] and her boyfriend began living in their own apartment as of November 1, 2015.

- [197] Since May 2015, I have continued to buy groceries for [JL] and pay for her clothing, toiletries, medication and entertainment. I also have continued to drive [JL] to her appointments, and to work.
- [198] I bought her school supplies, and school clothing. Now that I am on parental leave, we have more opportunity to spend time together. We socialize, go shopping, have lunch or meet for coffee.
- [199] We discussed her new living arrangement, and her expenses. I told my daughter that I would continue to buy groceries, and pay her personal expenses including clothes, toiletries, medication and entertainment. I said that I would contribute to the rent if I were awarded Child Support for her.
- [18] J.L. in her first affidavit made on June 22, 2016 agrees that the respondent provides her with financial assistance in terms of buying groceries, paying some of her personal expenses including clothes, toiletries medications and entertainment. She also agrees that the respondent told her she would contribute to her rent if she were awarded child support for her.
- [19] J.L. also deposes that she had employment in 2013 and 2014.
- [20] C.L. was diagnosed as having Attention Deficit Hyperactivity Disorder at age 10. The respondent deposes that he has also been diagnosed with anxiety disorder, social communication disorder and mild developmental coordination disorder.
- [21] The respondent deposes that C.L. has been under the care of a multidisciplinary team including a pediatrician, psychiatrist and psychologist.
- [22] C.L. has had limited contact with the claimant since December 2014. The claimant deposes to the following in his second affidavit made on April 22, 2016 at para. 71:
- In the summer of 2015, [CL] told me that, "if mom or [JL] find out that I am hanging out with you, then I will get in trouble." When I did see him, he told me that, "I have to tell mom that I am going to see grandma because I cannot tell her that I am going to see you." He also told me, "I miss you and I want to spend time with you." In response I told him that I would try to ask his mother if I could bring him to Campbell River. After this incident, the Respondent filed her application on July 29, 2015, to inter alia seeking various relief regarding my parenting time with my children and a police-assist clause. I attach hereto as Exhibit V to copy of this application.
- [23] The respondent deposes in her ninth affidavit made on June 22, 2016 that C.L. has in fact told her that he does not wish to see the claimant. She also deposes that it would be beneficial if there was a "Views of the Child" report.
- [24] The claimant seeks a declaration that J.L. is no longer a child of the marriage for the purpose of determining child support, however, he takes no issue with the order being sought by the respondent in terms of custody or parenting relief in relation to J.L.

[25] The claimant seeks parenting time and parental responsibilities for C.L.

Decision

Re: Custody, Guardianship and Parenting Responsibilities

[26] Section 2 (1) of the Divorce Act R.S.C. 1985, Chapter 3 (2nd Supp.) defines "child of the marriage" as follows:

means a child of two spouses or former spouses who, at the material time,

- (a) is under the age of majority and who has not withdrawn from their charge, or
- (b) is the age of majority or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessities of life;

[27] Section 1 of the Family Law Act S.B.C. 2011, c. 25 ("FLA") defines "child" as follows:

except in Parts 3 [Parentage] and 7 [Child and Spousal Support] and section 247 [regulations respecting child support], means a person who is under 19 years of age;

[28] The claimant seeks a declaration that J.L. is not a child of the marriage. The evidence on this application is that J.L. is currently 18 years of age and has not lived with either party for a number of years. She currently resides with her boyfriend and has part-time work from time to time. However the evidence also discloses that the respondent over the years has continued to support her financially and emotionally.

[29] Based on the evidence before me I cannot say that J.L. has withdrawn from the charge of the respondent. The claimant's application in this regard is dismissed.

[30] The claimant takes no position with the respondent's application for custody or parenting relief in relation to J.L. In my view it is in the best interest of J.L. that the respondent be granted a final order of sole custody of J.L. pursuant to s. 16 of the Divorce Act.

[31] Section 37 of the FLA states that in making an order with regard to guardianship or parenting arrangements with a child the court must consider the best interest of the child only. Section 37(2) states the following:

- (2) To determine what is in the best interest of a child, all of the child's needs and circumstances must be considered, including the following:
 - (a) the child's health and emotional well-being;
 - (b) the child's views, unless it would be inappropriate to consider them;
 - (c) the nature and strength of the relationships between the child and significant persons in the child's life;
 - (d) the history of the child's care;
 - (e) the child's need for stability, given the child's age and stage of development;

- (f) the ability of each person who is a Guardian or seeks guardianship of the child, or who has or seeks parental responsibilities, parenting time or contact with the child, to exercise his or her responsibilities;
 - (g) the impact of any family violence on the child's safety, security or well-being, whether the family violence is directed towards a child or another family member;
 - (h) whether the actions of a person responsible for family violence indicate that the person may be impaired in his or her ability to care for the child and meet the child's needs;
 - (i) the appropriateness of an arrangement that would require the child's guardians to cooperate on issues affecting the child, including whether requiring cooperation would increase any risks to the safety, security or well-being of the child or other family members;
 - (j) any civil or criminal proceeding relevant to the child's safety, security or well-being.
- [32] Given the history of family violence involving the claimant and J.L. and the circumstances of their strained relationship, it is in the best interest of J.L. that the respondent be granted a final order of guardianship of her pursuant to s. 51 the FLA.
- [33] There was an interim order made on July 11, 2013 by the Provincial Court of British Columbia granting guardianship of the Children to both parties. C.L. is currently 15 years of age. The parties disagree as to whether or not C.L. wants to spend time with the claimant and what the claimant's role should be in C.L.'s life.
- [34] There is currently in place the order of Mr. Justice Sewell which allows for access by the claimant to C.L. subject to the consent of C.L. In my view given the conflicting affidavit evidence I am not in a position to determine whether or not the respondent should be the sole guardian of C.L. and what parenting responsibilities and time the claimant should have with C.L.
- [35] I am in agreement with the suggestion of the claimant that a "Views of the Child" report be ordered.
- [36] Pursuant to section 211(b) of the FLA I order that the "Views of the Child" report be prepared with regard to C.L. as to whether or not he wishes to have contact and what type of contact he wishes to have with the claimant. The parties will share equally the cost of the report.
- [37] Both of the parties' applications with regard to guardianship, parental responsibility and parenting time with C.L. are adjourned generally. Either party is at liberty to renew their application in this regard once the section 211(b) report is completed.
- [38] C.L. has primarily resided with the respondent since the parties separated. There is currently an interim order that the respondent have custody of C.L. It would be premature to make a final order of custody with regard to C.L. before the section 211(b) report is completed and the parties are in a position to argue what parenting roles they should each have.

Position of the Parties**Re: Child Support**

[39] On March 29, 2007 there was an interim consent order made in the Provincial Court of British Columbia that the claimant would pay \$600 per month for the support of the Children. This was based on a Guidelines income of \$39,000 for the claimant.

[40] In August of 2014 the claimant was involved in a serious motor vehicle accident ("MVA"). As a result of that accident his left leg was amputated below his knee. The claimant has initiated a lawsuit as a result of the MVA however this lawsuit has not yet been determined.

[41] The claimant deposes that he has remained unemployed from shortly before the MVA until present and has been unable to pay any child support payments. The claimant deposes that he receives \$1,200 per month from Intact Insurance which is used for his medical needs.

[42] The claimant further deposes that he receives an annual income in the amount of \$13,726 in disability benefits from Manualife Financial.

[43] The claimant's line 150 income for the years 2006-2008 and 2010-2014 was as follows:

2006

\$53,884

2007

\$52,183

2008

\$62,770

2010

\$115,597

2011

\$117,669

2013

\$81,887

2014

\$68,449

- [44] The claimant initially brought an application to vary or cancel arrears that have accrued pursuant to the order that was made on March 29, 2007. However his position at this application was that his application to cancel arrears should be dismissed as well as the respondent's application for a retroactive child support order.
- [45] The claimant seeks an interim order that he would pay child support in the amount of \$100 per month to the respondent.
- [46] The respondent seeks a retroactive child support order based on the parties' respective incomes and the Children's respective residences beginning November 1, 2006. The respondent calculates that the claimant would owe her child support arrears of \$51,617.81 after applying a set-off credit for the amount of child support owed by the respondent if a retroactive award is made.
- [47] The respondent also seeks an order that the claimant provide documents respecting his health, prognosis, re-training and wage loss along with any funds received from the MVA lawsuit.
- [48] The claimant filed a Financial Statement on April 1, 2016 which included a payment notice from Manualife Financial for January 20, 2016. This document shows that the claimant is actually receiving approximately \$2,750 per month in disability benefits from Manualife Financial which would equate to approximately \$33,000 per year. In addition the claimant receives approximately \$14,400 per year from Intact Insurance for a total of \$47,400 monies received by the claimant per year.

Decision

Re: Child Support

- [49] In my view it is premature to make an award for retroactive child support or to cancel arrears of child support because there is insufficient evidence as to the financial position of the claimant due to the injuries he received in the MVA.
- [50] The difficulty in this case is determining the claimant's prognosis and ability to earn income as a result of the MVA. The claimant is awaiting a settlement from the MVA. There is no information as to the claimant's prognosis as well as what he may receive (if anything) for wage loss as a result of the MVA.
- [51] The leading case on retroactive support is *D.B.S. v. S.R.G.* 2006 SCC 37. In that case Mr. Justice Bastarache set out a series of non-exhaustive factors to consider in determining whether a retroactive award is appropriate:
- (1) whether there was a reasonable excuse for the recipient parent in failing to make an earlier request for support, or variation;
 - (2) the conduct of the payor parent;

- (3) the circumstances of the children; and
 - (4) any hardship occasioned by a retroactive award.
- [52] Without knowing whether the claimant is going to be compensated for his past wage loss and any future wage loss as a result of the MVA, I am unable to determine the extent of any hardship occasioned by a retroactive award on the claimant.
- [53] Further with regard to the cancellation of any arrears owing without knowing what the claimant's future ability to earn income is and whether or not he will be compensated for any past wage loss I am not in a position to determine whether it would be grossly unfair not to cancel any arrears owing.
- [54] Unfortunately the claimant is not in a position at this point to be able to provide documentation as to what his settlement from the MVA might be.
- [55] The respondent's application for a retroactive child support order is adjourned generally. The respondent is at liberty to reset this application once the claimant's MVA lawsuit is determined.
- [56] The claimant's application for cancellation of child support arrears is adjourned generally. The claimant is at liberty to reset this application once his MVA lawsuit is determined.
- [57] Further with regard to a variation of the child support order prospectively the evidence discloses that the claimant earns approximately \$33,000 per year from his disability pension. He also received \$1,200 per month from Intact Insurance. This combined with his disability insurance monies results in him receiving approximately \$47,400 per year at present.
- [58] The respondent argues that an award for child-support should be made on a "without prejudice" basis for the Children and that amount be reassessed after a determination of the wage loss claim for the claimant from his MVA.
- [59] I find that the claimant has a Guidelines income of \$47,400 per year and I order that he pay the amount of \$719 per month to the respondent for the support of the Children commencing July 1, 2016. Either party has leave to apply to have this order re-assessed once the wage loss claim for the claimant from his MVA has been determined.
- [60] I order that the claimant forthwith produce any documents in his possession or control respecting his health, prognosis, retraining and wage loss along with any funds received from the MVA lawsuit.
- [61] Finally, I order that the claimant forthwith notify the respondent with regard to any settlement and the particulars of that settlement from his MVA lawsuit.

Special or Extraordinary Expenses

- [62] The respondent seeks an order that the claimant pay his proportionate share of special or extraordinary expenses pursuant to s. 7 of the Federal Child Support Guidelines specifically for tutoring and orthodontic costs for the Children.
- [63] The claimant is in agreement with this order being made on the conditions that the respondent provides to him as soon as reasonably practicable the receipts for the expenses and that he not be required to pay these expenses until after he receives his settlement from the MVA.
- [64] Given I have determined the Guidelines income for the claimant there is no reason not to make an order relating to the special or extraordinary expenses based on the parties paying their proportionate share of the expenses.
- [65] The claimant will pay his proportionate share of the special or extraordinary expenses of the Children to the respondent commencing July 1, 2016. The respondent will provide to the claimant the receipts for these expenses as soon as practicable.

Conclusion

[66] In summary I make the following orders:

- (i) The respondent shall have sole custody and guardianship of the child J.L.;
- (ii) The claimant's application for a declaration that J.L. is no longer a child of the marriage is dismissed;
- (iii) A section 211(b) "Views of the Child" report for C.L. shall be prepared. The parties will equally bear the cost of that report. The parties' respective applications regarding custody, guardianship, parenting rights and parenting time are adjourned generally. Each party is at liberty to renew these applications once the section 211(b) report has been prepared;
- (iv) The respondent's application for a retroactive child support order is adjourned generally. The respondent is at liberty to renew that application once the claimant's MVA lawsuit is determined;
- (v) The claimant's application for cancellation of child support arrears is adjourned generally. The claimant is at liberty to renew that application once his MVA lawsuit is determined;
- (vi) Upon finding that the claimant has a guideline income of \$47,400 he is ordered to pay child support to the respondent for the support of the Children in the amount of \$719 per month commencing on July 1, 2016 and continuing on the first day of each month until further order of this court or written agreement of the parties. Either party is at liberty to apply to have this child support order reviewed once the claimant's wage loss claim from the MVA lawsuit is determined;

(vii) The claimant will pay his proportionate share of the special or extraordinary expenses of the Children to the respondent commencing on July 1, 2016. The respondent will provide to the claimant the receipts for these expenses as soon as practicable.

(viii) The claimant is ordered to forthwith produce any documents in his possession or control respecting his health, prognosis, retraining and wage loss along with any funds received from the MVA lawsuit;

(ix) The claimant is ordered to forthwith notify the respondent with regard to any settlement and any particulars of his settlement from his MVA lawsuit; and

(x) The issue of costs is adjourned until the outstanding matters have been resolved between the parties.

"The Honourable Mr. Justice Tindale"

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