

CANADA / JUDGMENT

Gamble v. Neale

2024 BCSC 1020

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Supreme Court of British Columbia

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2024 BCSC 1020 Gamble v. Neale

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Gamble v. Neale,

2024 BCSC 1020

Date: 20240611

Docket: E63001

Registry: Kamloops

Between:

Michael Erick Gamble

Appellant

And

Jessica Lynn Neale

Respondent

Before: The Honourable Justice E. McDonald

On appeal from: An order of the Provincial Court of British Columbia, dated February 16, 2024
(Jessica Lynn Neale v. Michael Erick Gamble, Kamloops Registry Action No. 18616)

Oral Reasons for Judgment

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J.L. Ball

Place and Date of Trial/Hearing:

Kamloops, B.C.

June 5-6, 2024

Place and Date of Judgment:

Kamloops, B.C.

June 11, 2024

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Introduction

- [1] This is an appeal from an order of the Provincial Court that mainly relates to changing the primary care parent of the parties' only child from Mr. Gamble to Ms. Neale. As a result, the child will no longer live primarily in Kamloops, British Columbia; rather, the child's primary residence will be with the respondent, Ms. Neale, in the nearby community of Merritt, British Columbia.

- [2] Mr. Gamble alleges that the application judge erred in numerous respects including by failing to treat Ms. Neale's application as an application for relocation. Mr. Gamble's position is that this court should set aside the application judge's order and after applying the appropriate statutory provision and test, deny Ms. Neale's application and reinstate the previous parenting arrangement.
- [3] For the reasons that I will explain, I have determined the order should be set aside only in respect of the calculation of arrears of child support and the requirement to pay child support for the months of July and August, 2024.

Background

- [4] In reasons for judgment dated February 6, 2024 (the "Reasons"), the application judge describes the nature and circumstances of the application by Ms. Neale, as follows:
- [1] Jessica Neale applies for the primary care of her son Bristen Gamble who is six years of age. Michael Gamble asks the court to dismiss Ms. Neale's application for primary residency. The child presently resides with his father in Kamloops as a result of the court Order of Judge Gouge made February 10, 2022 (the "Order"). The parties agree that since the Order there has been a material change in circumstances as Ms. Neale has moved from Vancouver Island, her residence at the time of the Order, to Merritt. In the circumstances the parties submit, and I agree, that the issue for the court is to determine the different issues by assessing the best interests of the child.
- [2] Ms. Neale also seeks a change of the Order to allow her parental responsibilities on what is commonly referred to as the Master Joyce model. Mr. Gamble asks the court to maintain his sole parental responsibilities as provided for in the Order.
- [3] The parties also seek a number of ancillary orders, including child support, which I will discuss in more detail in the body of this decision.
- [5] The parties' background is summarized by the application judge at paras. 4-9 of the Reasons, as follows:

Summary of the Circumstances

- [4] The parties entered into a relationship in approximately 2016. They became parents to one child, Bristen, who was born on May 30, 2017. The parties separated in either late September or early October of 2018. The child primarily resided with Ms. Neale following this separation.

- [5] The parties each have one child from a previous relationship. Ms. Neale has a son named Liam McFadden who is presently 14 years of age. Liam resided with the parties during their marriage like relationship, and has solely resided with Ms. Neale since the relationship ended. Mr. Gamble has a daughter named Addison Gamble, who is presently 8 years of age. Addison primarily resides with her mother, although visits with her father a few times each year.
- [6] Mr. Gamble says that he and Ms. Neale both worked when they resided together. He says he cared for the child when both parents were not at work, saying Ms. Neale "escaped to her room" and handed the child over to him. Ms. Neale denies this occurred. I note that when the parties separated the child remained with Ms. Neale.
- [7] The parents, following their separation, have had difficulty co-parenting. Ms. Neale says that Mr. Gamble initially had only sporadic and infrequent contact with Bristen. She says by court order he was allowed parenting time one day per weekend, and during the week, but he often did not show up. She says as a result the court ordered in May of 2019 that the only have parenting time one day on the weekend. Ms. Neale says Mr. Gamble's parenting time changed in April of 2020 to between 5:30 p.m. on Thursday to 5:30 p.m. on Saturdays. Mr. Gamble says Ms. Neale was often late for the exchange of the child.
- [8] Mr. Gamble then returned to reside in Kamloops in June of 2020. Ms. Neale initially remained on Vancouver Island. Mr. Gamble then began to have parenting time one week per month.
- [9] This arrangement changed with the Order and the child began primarily living with Mr. Gamble in Kamloops as of May 2022. The Order provided Ms. Neale with one week of parenting time over spring break, one month during the summer, and in even numbered years from the Sunday before Christmas to New Year's Day. Ms. Neale was also given the option to exercise not more than six weekends per year with the parenting time to occur in Merritt. The weekend hours were to be from 10:00 a.m. on Saturday to 3:00 p.m. on Sunday. The parents also could telephone or video call the child one day per week when the child was in the care of the other parent.
- [6] The parties agree that during their relationship, they initially resided with their child in Merritt before moving to Vancouver Island in 2017. The parties also agree that following a trial, Judge Gouge made an order on February 10, 2022, permitting the parties' child to relocate to Kamloops to have primary residence with Mr. Gamble and providing him all parental responsibilities. Meanwhile, Ms. Neale's parenting time with the child was to take place in Merritt.
- [7] The parties agree that after the February 10, 2022 order was made, Ms. Neale moved to Merritt in approximately May 2022. The parties further agree that since the February 10, 2022 order, Mr. Gamble and their child have lived in Kamloops. The child is now 7 years old and in grade 2.

The Order and Reasons of the Application Judge

- [8] Following a four-day hearing of Ms. Neale's application to vary the February 10, 2022 order that occurred on October 16 to 19, 2023, which included viva voce evidence, the application judge issued reasons for judgment on February 16, 2024 and made an order granting the application. The application judge notes the parties' agreement that since the February 10, 2022 order, there was a material change in circumstance associated with Ms. Neale moving to Merritt.
- [9] In the Reasons, the application judge summarizes the evidence and the jurisprudence that he found to be of assistance in considering the issues before him. He makes a number of findings and credibility assessments in the Reasons. Overall, he found Ms. Neale to be a credible and reliable witness and Mr. Gamble to be less so.
- [10] Mr. Gamble takes issue with many of the findings and credibility assessments made by the application judge.

Grounds of Appeal

- [11] In the notice of appeal filed on March 12, 2024, Mr. Gamble states that he appeals from the application judge's order on the following grounds:
1. The trial judge erred by determining that the relocation provisions of the Family Law Act do not apply. Specifically, the trial judge erred by stating that this is a situation where the parties are contesting the issue with which parent the child should primarily reside with, and not a parent seeking to relocate with the child to a new location.
 2. The trial judge erred by determining that the Appellant's municipal pension plan was a family asset without first determining that the parties were in a marriage-like relationship within the meaning of the Family Law Act.
 3. The trial judge erred by determining that the Appellant's lump sum payout from his municipal pension plan was income for the purpose of determining child support arrears.
 4. In the event that the trial judge was correct to include the Appellant's lump sum payout from his municipal pension plan as income for determining child support arrears, the trial judge erred by calculating those arrears at \$8,791.99, or in the alternative, did not accurately explain in his reasons for judgement how he calculated that number for arrears.
 5. The trial judge erred by ordering that no child support be payable during the summer months of the year of 2024, as the child will be residing with the Respondent for the full month of July and the Appellant for the full month of August, and not also ordering that no child support be payable during the summer months in the following years.
 6. The trial judge erred in his apprehension of the evidence, or in the alternative, ignored relevant evidence which led to a flawed assessment of the best interests of the child at issue.

Standard of Appeal

- [12] The parties are in agreement as to the standard of review, which sets a high bar for success on appeal.
- [13] The scope of appellate review in family matters is narrow and there is a high standard of review. It is not meant to provide an opportunity to retry or continue the case. Rather, the function of appellate review "is to examine the record below to determine if material or reversible error has been demonstrated, including an error of law, an error of principle, an error of fact, or a serious misapprehension of the evidence that could reasonably have affected the result and therefore warrants appellate intervention": *Kane v. Proffitt*, 2018 BCCA 106 at para. 42 [Kane].
- [14] As this is an appeal from an order of the Provincial Court, the scope and process is governed by ss. 233 and 234 of the Family Law Act, S.B.C. 2011, c. 25 [FLA], which describe the orders that the Supreme Court may make: *Kane*, at para. 44.
- [15] Section 233(3) of the FLA provides:
- (3) After hearing the appeal, the Supreme Court may do one or more of the following:
- (a) confirm or set aside the order of the Provincial Court;
- (b) make any order that the Provincial Court could have made;
- (c) direct the Provincial Court to conduct a new hearing.

Did the application judge err in not applying the relocation provisions of the FLA?

- [16] In Mr. Gamble's written outline and during submissions, his counsel submitted that in addition to failing to apply the relocation provisions, the application judge also, in the alternative, made errors of mixed fact and law in apprehending the evidence, or ignored relevant evidence, resulting in a flawed assessment of the child's best interests.
- [17] Division 6 of Part 4 of the FLA applies to relocation. Sections 65-71 in this division define "relocation" and provide the process and requirements for relocation.
- [18] Despite Mr. Gamble submitting that the relocation provisions applied, the application judge found that the application actually concerned the issue of which parent the child should primarily reside with.
- [19] After reviewing ss. 37, 38 and 40 of the FLA and noting that orders regarding parenting arrangements must consider the best interest of the child, the application judge states as follows:
69. Mr. Gamble also argues that the relocation provisions of the FLA apply as Ms. Neale is seeking to change the primary residence of the child to Merritt. I do not agree. The issue before the court is not of the parent of with the primary residence of the child seeking to relocate to a new location. This is a situation where the parties are contesting the issue of

which parent should the child primarily reside with, and not of a parent seeking to relocate with the child to a new location (see *K.W. v. L.H.*, 2018 BCCA 204, leave to appeal refused 2018 CanLII 110464 (SCC)) [K.W.]

- [20] Mr. Gamble submits that the authority of *K.W.* cited by the application judge does not support the finding that the relocation provisions do not apply. He also submits that the application judge disregarded s. 65(2) which applies where there is an order respecting parenting time and a guardian plans to relocate herself, the child, or both. Mr. Gamble further submits that it matters not that Ms. Neale had already moved to Merritt prior to the application because s. 65(2) makes it obvious that the relocation provisions in Division 6 of the FLA apply.
- [21] Ms. Neale disagrees that the application judge erred by not applying the relocation provisions. Ms. Neale further disagrees that *K.W.* has no application.
- [22] In *K.W.*, at para. 95, the court concludes the trial judge's relocation decision was based on a material error of law. In that case, there was an interim parenting order and the court discusses whether an interim order "takes the application out of Division 2 and into Division 6": *K.W.* at para. 78. Ultimately, the court concludes the trial judge erred in law in deciding the relocation application pursuant to Division 6 rather than Division 2.
- [23] While I agree that *K.W.* does not focus on the relocation analysis under Division 6, it does address the issue of relocation and whether it ought to be considered under Division 2 or 6.
- [24] In my view, when the Reasons are read as a whole, it is apparent the application judge considered the submissions that the relocation provisions in the FLA applied and he disagreed with those submissions. Ms. Neale had already relocated to Merritt and so the judge concluded (at para. 69) the issue between the parties was really a dispute over which parent the child should primarily reside with.
- [25] During Ms. Neale's application, counsel for Mr. Gamble provided the application judge with the law on relocation. Counsel submitted that Division 6 of Part 4 of the FLA applied because Ms. Neale's application sought to relocate the child from Kamloops to Merritt.
- [26] Counsel for Mr. Gamble also took the application judge to *McNaught v. Friedman*, 2013 BCSC 1836 [McNaught], describing that case as "quite similar to the case at hand". In *McNaught*, a final order on primary residence had already been made and the court dismissed the father's application for primary residence. Counsel specifically took the application judge to para. 28 of *McNaught* where the court dismissed the father's application for primary residence after finding it was not in the child's best interests to move her yet again when she needs stability, she is involved in various activities in her present location, and, she has already had her life disrupted by moving to the present location with the primary care parent.

- [27] Mr. Gamble submits that authorities such as *Berry v. Berry*, 2013 BCSC 1095 at paras. 28, 32-33 and *S.Z. v. D.Z.*, 2015 BCSC 2157 at para. 118 [S.Z.], demonstrate that to qualify as a "relocation", the move must have a significant impact on a child's relationships. It is unclear from my review of the transcripts and from the submissions of counsel whether Berry and S.Z. were brought to the attention of the application judge.
- [28] Mr. Gamble submits that these cases make it clear that the application judge clearly erred, whether by failing to apply the statutory provisions or misapprehending the evidence when he concluded that moving their child from Kamloops to Merritt was not a relocation within the meaning of the FLA. I do not agree.
- [29] When the Reasons are read as a whole, and keeping in mind the standard of review, I do not find that a reversible error has been demonstrated, including an error of law, an error of principle, an error of fact, or a serious misapprehension of the evidence. As stated in *Berry*, the test is child-centered and the focus is on the child's relationships and the impact of a change in residence to those relationships. To qualify as a relocation, the impact must be significant.
- [30] S.Z. involved the proposed relocation of three children from Merritt to Kamloops. The application to relocate in S.Z. is described (at para. 85) as an unusual application including because the overwhelming motivation for the relocation was the extracurricular activities of the children and it was contingent upon the left-behind parent paying more for child support and s. 7 expenses. In that case, the court found it was unclear whether the children, who were 13, 10 and 6 years old, preferred relocating from Merritt to Kamloops.
- [31] In S.Z., the children had spent their lives and had grandparents and most of their friends in Merritt, so the court concluded that relocating to Kamloops was not in their best interests.
- [32] However, I do not read S.Z. as standing for the proposition that, irrespective of the particular facts and evidence regarding the child's relationships and the impact of a change in residence, a move between Kamloops and Merritt is always a relocation within the meaning of the FLA. In my view, the conclusion in S.Z. is fact-driven and the court's child-centered analysis includes noting important facts such as the children spending their entire lives in the same community with nearly all of their family and friends located there.
- [33] The facts in the present case are substantially different, including because the parties' child is younger, the relationships and potential impacts are different and importantly, the child has not lived his entire life in the same location. Rather, in the child's life span of what was then six years, the application judge notes the child has lived in three different locations.
- [34] When I consider the Reasons as a whole, the application judge clearly conducted a child-centred analysis that focussed on the best interests of the child, including the child's relationships and the potential impact to those relationships of living in Merritt rather than in Kamloops.

- [35] Mr. Gamble also submits that the application judge ignored relevant evidence or misapprehended evidence about, for example, Ms. Neale's work schedule. He submits the evidence the application judge heard could have led to different inferences that were less favourable to Ms. Neale.
- [36] However, I find that I am essentially being asked to reweigh the evidence and come to a different conclusion - something that is not permitted especially where no error of fact, or serious misapprehension of the evidence, is demonstrated. In my view, the application judge heard and considered all of the evidence, including concerning Ms. Neale's work schedule, and I find the evidence is capable of supporting his findings and inferences set out in the Reasons. The appellant has not demonstrated an error in the findings of the application judge based on the evidence presented.
- [37] Again, in light of the standard of review, the issue is not whether I would weigh the evidence presented to the application judge to come to a different conclusion, but whether a reversible error has been demonstrated. In my view, no such reversible error is demonstrated.

Did the application judge err in treating Mr. Gamble's pension payout as income for support purposes?

- [38] Mr. Gamble submits that the application judge committed an error of mixed fact and law in finding that his municipal pension lump sum payment should be included in income for determining child support. Mr. Gamble further submits the error is related to failing to treat the lump sum payment as similar to an RRSP withdrawal with tax consequences and ignoring or failing to comment on his evidence that parts of the lump sum payment had already been included in his total income at line 15000 of his return.
- [39] At the hearing of the appeal, Mr. Gamble also submitted that the application judge erred in treating the lump sum pension payment as family property when there was no finding that the parties were spouses for purposes of dividing family property.
- [40] The relevant portions of the Reasons are found at paras. 58-59, 73-76 and 94-96:
58. The issue identified as most at issue in the written submissions is whether a pension plan pay out to Mr. Gamble should be included in his income of 2020.
59. The circumstances of the pension plan pay out, as taken from the written submissions, is that Mr. Gamble worked for the City of Colwood. Mr. Gamble left this employment when he moved back to Kamloops and received a pay out of \$43,360.24. It does not appear that any evidence was led setting out clearly when he earned these pension credits and more specifically if it was during the relationship of the parties. It appears from the evidence at the trial before me, however, that the pension would have been incurred during the time of the relationship as they moved from Merritt to Colwood for purposes of Mr. Gamble's employment.

73. On the issue identified above with respect to the pension payout received by Mr. Gamble, and whether it should be included as part of his income in determining child support counsel from the 2022 hearing in their written submissions provided statute and case law. In *McKenzie v. Perestrelo*, 2014 BCCA 161, the court was addressing whether an RRSP withdrawal should be included in income for child support purposes. The court found that there was a presumption that it was to be considered as part of a spouse's income, as it formed a part of the person's total income on an income tax return and was not listed as an exemption. The court further stated that the person seeking to exclude the amount as income had the burden of proving that to include it would not lead to the fairest determination of income (paragraph 82). I find the same principles apply with respect to the payout of a pension benefit.
74. A number of the cases have found that income generated from marital property that has already been divided should not be included as income for child support purposes (see *Brown v. Brown*, 2012 NBCA 69; *de Bruijn v. de Bruijn*, 2011 BCSC 1546 (para. 34)).
75. I note that there was no evidence before me indicating Mr. Gamble's pension, which appears to have been incurred during the parties' relationship, was divided as marital property. It appears that Mr. Gamble received the full benefit of this pension payout.
76. In *McKenzie*, the court also emphasized that a non-recurring payment did not on its own provide a sufficient reason to deny a child the benefit of that payment for purposes of determining child support (para. 98).
94. On the issue of child support I must address issues of retroactive and ongoing child support.
- (a) Prior to May 1, 2022
95. On the issue of retroactive child support prior to May of 2022, as noted above the main issue was whether Mr. Gamble's pension plan pay out should be included in his income of 2022. Mr. Gamble has the onus of proving that this pay out should be excluded. I find that Mr. Gamble has failed to prove on a balance of probabilities that this should occur. Significant to this finding is that this is a situation where the pension benefit appears to have been earned during the relationship of the parties. It also appears, and certainly there is no evidence to the contrary, that this property was not divided between the parties after separation.
96. I accept the figures provided by Mr. Gamble's counsel in the written submissions of the 2022 hearing. They were not contested by Mr. Neale's counsel in their written submissions at the time of the 2022 hearing, or at the time of the hearing before me. I find therefore that Mr. Gamble has child support arrears owing to Ms. Neale as of April 1, 2022, of \$8,791.99.

- [41] It seems the appellant's concern is not with the application judge's suggestion that it appears the municipal pension was earned during the parties' relationship, but rather, the suggestion that it appears the pension was family property not divided after separation. I do not read this aspect of the Reasons as the application judge making determinations regarding family property where he lacked the jurisdiction to do so.
- [42] Rather, it seems clear to me that the application judge was concerned about the potential for "double-dipping", i.e. that the pension payout is both divided as family property and also added to Mr. Gamble's income for purposes of determining his income for support purposes. The application judge was required to determine income for purposes of child support and, in my view, as part of doing that, he was properly concerned with a potential double-dipping issue related to the lump sum pension payout. My view of this is supported by the application judge's reference to the authorities at para. 74 of the Reasons.
- [43] Mr. Gamble states that he provided evidence about "portions" of the lump sum payout being included in his total line 15000 income which evidence was ignored. Mr. Gamble's evidence that was allegedly ignored or not commented on by the application judge is as follows:

Q. So what's your understanding of how you pay into this pension?

A. This pension it - all the money that's included in this pension is actually a part of your line 150 every year and so it's already calculated for--for child support purposes in previous years. And then if you are - if you leave your employment and you need to take the lump sum payment it's then re-added to your line 150 again because it has to be taxed again.

Q. So how did you receive this lump sum?

A. It was a cheque. They sent me a cheque in the mail. I had to fill out a form and then they sent me a cheque.

[Transcript of Proceedings at Trial, October 18, 2023, p. 17, lines 37-47 and p. 18, line 1.]

- [44] When I consider this evidence and the Reasons taken as a whole, I am unable to find that there is an error of fact or a serious misapprehension of the evidence that could reasonably have affected the result and therefore warrants intervention. I say this including because this evidence is somewhat vague and imprecise. Mr. Gamble's evidence is in response to a question about paying into the pension and his answer contains no express details about how his total income was arrived at in the year at issue.
- [45] In my view, the application judge's conclusion that Mr. Gamble failed to meet his onus has not been shown to be based on a material or reversible error.

Did the application judge err in calculating the child support arrears?

- [46] Mr. Gamble submits that the application judge erred in calculating child support arrears and he failed to explain how he arrived at the calculation.

- [47] During submissions, both parties provided submissions as to how they believe the application judge arrived at the arrears of child support amount of \$8,791.99 found at para. 96 of the Reasons. Mr. Gamble's counsel submits that if, as the application judge states, he had accepted the written submissions of his counsel, the arrears (which included the lump sum pension payout amount in income) would be \$5,425.00, not \$8,791.99. Ms. Neale's counsel submits that the difference between these amounts appears to relate to failing to credit Mr. Gamble for the payment of child support during a three-month period
- [48] Counsel for Mr. Gamble points out that Mr. Gamble testified about making all child support payments and yet, the application judge appears to have increased the arrears of child support as if child support had not been paid for some periods.
- [49] In my view, given that Ms. Neale does not deny receiving child support from Mr. Gamble in the three months in question, this is the type of calculation error that is ideally and normally dealt with consensually without the necessity of an appeal.
- [50] However, as Ms. Neale's counsel submits that the error is more than likely due to the application judge failing to account for payment by Mr. Gamble of three \$1,122.33 child support payments made after the period covered by the written submissions, the parties appear to agree that the correct amount of the arrears should be fixed at \$5,425.00, not \$8,791.99.
- [51] I therefore allow the appeal to correct the amount of child support arrears owing by Mr. Gamble to Ms. Neale as of April 30, 2022, in para. 10 of the Order entered June 4, 2024 to state \$5,425.00, not \$8,791.99.

Did the application judge err in failing to require the payment of child support in July & August 2024?

- [52] The application judge determined that Ms. Neale had an obligation to pay child support to Mr. Gamble until June 30, 2024. He also determined that, with the implementation of the new parenting time regime and the primary residence of the child being with Mr. Neale, Mr. Gamble's obligation to pay Ms. Neale child support commenced on September 1, 2024.
- [53] During the months of July and August, each party has one month of parenting time with the child. Counsel is unsure why the application judge effectively lifted the obligation to pay child support during these summer months.
- [54] The parties appear to agree that child support, which is the right of the child, is payable in the normal course during the months of July and August 2024.
- [55] I therefore allow the appeal to clearly impose the obligation to pay child support in July and August 2024. In para. 8 of the order entered June 4, 2024, it shall state that Ms. Neale's obligation to pay Mr. Gamble child support shall continue until August 30, 2024, rather than June 30, 2024.

[56] As the parties will note, I have concluded that Ms. Neale is required to pay the usual child support over July and August. That is because the new parenting schedule does not commence until September 1, 2024 and I find it appropriate for Ms. Neale to pay child support to Mr. Gamble until the new schedule begins.

[57] Unless there are other facts that I am unaware of, I am of the preliminary view that Ms. Neale has achieved substantial success on the main issues in this appeal and she is entitled to costs. However, should the parties wish to bring additional facts regarding the issue of costs to my attention, they are directed to contact SC Scheduling within 14 days of these reasons to request a date to appear before me at 9:00 a.m. by MS Teams to speak to the matter of costs.

"E. McDonald J."

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