

CANADA / JUDGMENT

Guerra v. Guerra

2020 BCSC 1538

COURT

Supreme Court of British Columbia

DECIDED

19 October 2020

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2020 BCSC 1538 Guerra v. Guerra

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Guerra v. Guerra,

2020 BCSC 1538

Date: 20201019

Docket: E42035

Registry: New Westminster

Between:

Amira Mounir Guerra

Claimant

And

Lawrence Mariotto Guerra

Respondent

Before: The Honourable Madam Justice W.A. Baker

Reasons for Judgment

In Chambers

The Claimant, appearing in person:

A. Guerra

(now known as A. Abraham)

The Respondent, appearing in person:

L. Guerra

Place and Date of Hearing:

New Westminster, B.C.

October 6, 2020

Place and Date of Judgment:

New Westminster, B.C.

October 19, 2020

- [1] Two applications were heard together, dealing with spousal and child support. The claimant, who now refers to herself as Ms. Abraham, seeks ongoing spousal and child support, adjusted to reflect the parties' current incomes, and retroactive spousal and child support going back to 2015. Mr. Guerra seeks termination of spousal support and an adjustment of child support based on his current income and an imputed income of \$58,000 - \$60,000 for Ms. Abraham.
- [2] In my reasons I will address the following questions, which arise in the combined applications: whether spousal support should be terminated, whether any retroactive orders should be made, the appropriate Federal Child Support Guidelines incomes for calculating support, and the quantum of any support payable.
- [3] The parties were not represented on the applications before me. Prior to this application, several interim spousal and child support orders had been made. I asked the parties if they were seeking a final order for support on this application, or a variation of the existing interim order. Both parties agreed they were seeking a final order, and I have proceeded on this basis.

Background

- [4] The parties were married on August 5, 2002. On August 1, 2011 they separated, although for approximately two years they continued to live in the same house, sharing expenses. In July 2013 Ms. Abraham moved out of the family home.
- [5] The parties have three children and share parenting time equally. At the time of this application the children were 16, 14, and 11 years old.
- [6] On August 1, 2013 an interim order for support was made, wherein Mr. Guerra would pay \$1,115 in child support and \$968 in spousal support for August 2013. On October 11, 2013 these support orders were continued and were not changed until December 19, 2014. In December 2014 the support payments were reduced to \$516 for spousal support and \$936 for child support.

- [7] Mr. Guerra has consistently made all support payments pursuant to these orders.
- [8] Ms. Abraham was a qualified teacher before the marriage, and continued as a full time teacher for one and a half years after they were married. When she had their first child, the parties agreed that she would stop working and be a stay at home parent.
- [9] Since their separation, Mr. Guerra has taken the position that Ms. Abraham has an obligation to go back to work to support the children. He submits that she did not make a serious effort to get back into the workforce until 2016, when she was accepted into the Simon Fraser University program assisting teachers to re-enter the workforce.
- [10] Since 2017, Ms. Abraham has been working as an on call teacher in the public school system. Initially she worked part time, but beginning this fall she has been working full time. Ms. Abraham agreed that under the collective agreement, a full time wage for teacher in her category (category 5) and step (step 4) in 2019 would have been approximately \$60,909. I was not provided with current 2020 income values for a category 5, step 4 full time teacher. Ms. Abraham notes that her 2020 income will be impacted due to the covid pandemic, as there were a number of months where she was not working. Ms. Abraham notes that she is also eligible for employment insurance benefits in the summers, as a teacher on call.
- [11] During the marriage Mr. Guerra worked full time, but in December 2013 the company he worked for filed for bankruptcy and he lost his job. Mr. Guerra was unemployed for most of 2014. At the end of 2014, he obtained a part time position with South Fraser Container Services (2005) Ltd., which has since become a full time position as comptroller. Mr. Guerra's current income is approximately \$90,000, which includes employment income and consultancy fees.
- [12] In 2016 Ms. Abraham had another child with a new partner. No evidence was given with respect to his income or contributions to Ms. Abraham's expenses. However, he is clearly responsible for providing his child with support. It was suggested that Ms. Abraham and her new partner do not live together. However, Mr. Guerra provided some evidence which suggests they continue to be in a relationship together, and the new partner has a step-father relationship with the parties' children. Ms. Abraham did not deny this.
- [13] Both parties agree that the Federal Child Support Guidelines are applicable to set the amount of child support payable. The only issues before me in relation to child support are whether a retroactive order should be made, and the guideline incomes to be used in applying the Guidelines.

Should spousal support be terminated?

- [14] The objectives of a spousal support order are set out in s. 15.2(6) of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp):

- (6) An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should
 - (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
 - (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
 - (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
 - (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.
- [15] The factors for the court to consider on an application for spousal support are set out in s. 15.2(4):
 - (4) In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including
 - (a) the length of time the spouses cohabited;
 - (b) the functions performed by each spouse during cohabitation; and
 - (c) any order, agreement or arrangement relating to support of either spouse.
- [16] The parties were married for nine years. For seven of those years, Ms. Abraham was a homemaker, and Mr. Guerra worked to support the family. Mr. Guerra has paid Ms. Abraham spousal support for seven years and two months, pursuant to court orders.
- [17] I accept that Ms. Abraham did not immediately take steps to re-enter the workforce after they separated in 2011. At that time their youngest child was only two years old, and it was not unreasonable for her to continue caring for the children for a period of time.
- [18] However, this could not go on indefinitely as both parents do have a responsibility to support their children. This is particularly so where Ms. Abraham had a professional degree and work experience as a teacher before she became a homemaker. It was not as if she was starting from scratch trying to gain an education and begin a career. In addition, the parents were sharing parenting time equally, and therefore 50% of the time Ms. Abraham did not have any child care responsibilities.
- [19] In 2016, Ms. Abraham was able complete the SFU re-entry program and she began teaching on a part time basis in 2017. She has obviously done well with this, and now is able to work full time. She chooses to work as a teacher on call, as this does not require her to do the lesson planning, marking, and other activities outside of school hours which are required of

permanent teachers. While this work is potentially unstable, she says that there is more work than she can handle right now, and is working five days a week. She also confirms that if she works as an on call teacher five days a week, she receives the same income as if she was a permanent teacher.

- [20] Ms. Abraham pointed to no continuing economic disadvantage or hardship she suffered as a result of the marriage breakdown. She owns a townhome, which she purchased with her share of the proceeds of sale of the family home. She has been able to save money. She has been able to return to full time employment at a good union job, with a clear path for income increases each year. The children do not require childcare, and she pointed to no extraordinary expenses or time commitments for the children which interfere with her ability to become self-sufficient.
- [21] I am satisfied that the objectives of spousal support as set out in the Divorce Act have been met with the interim spousal support payments to date. Ms. Abraham is now self-sufficient. The Spousal Support Advisory Guidelines recommend spousal support for a minimum of four and a half years, and Ms. Abraham has received slightly more than seven years of support. There are no extraordinary issues relating to the children which result in additional financial consequences for Ms. Abraham, and there are no continuing economic disadvantages or hardships for Ms. Abraham arising out of the marriage breakdown.
- [22] I find that there is no basis to continue spousal support payments.
- [23] Mr. Guerra argues that spousal support should be terminated as of the date this application was filed in January 2020. The delay in bringing this application arose because of early scheduling issues, the pandemic, and most recently a closure of the court house due to a fire in New Westminster. While it is open to me to terminate spousal support as of January 2020, I am not prepared to do so. I order that spousal support under the current interim order will be terminated as of October 31, 2020.

Should any retroactive support be paid?

- [24] Ms. Abraham argues that retroactive spousal support should be paid, going back to 2015. She seeks retroactive spousal support in the amount of \$6,564, and retroactive child support in the amount of \$12,086.
- [25] She bases her calculation of these retroactive awards on the actual incomes of the parties going back to 2015.
- [26] The court has the ability to order retroactive support payments. In particular, courts are concerned about child support payments, are a right of the child, and which are an obligation known to payor parents by virtue of the Federal Child Support Guidelines. The question before me is whether I should order retroactive payments. In *DBS v. SRG*, 2006 SCC 37, the Supreme Court of Canada set out the factors to be considered in this analysis. These include:

- a) a reasonable excuse for why support was not sought earlier,
- b) conduct of the payor parent,
- c) circumstances of the child, and
- d) hardship occasioned by a retroactive award.

[27] The first factor is whether the recipient parent has a reasonable excuse for not seeking a change in support earlier. In the case before me, Mr. Guerra provided Ms. Abraham with financial statements with tax returns attached in both 2016 and 2018. In 2018, she was provided with a draft settlement agreement which clearly set out the guideline incomes for Mr. Guerra at \$78,400 and Ms. Abrahams at \$29,920. Pursuant to the draft settlement agreement, Mr. Guerra would have paid child support of \$1,589 per month, and spousal support of \$943 per month. Ms. Abrahams did not respond to the draft agreement.

[28] With this financial information in hand since 2016, Ms. Abraham did not bring on any applications to vary support. Mr. Guerra states in his affidavit that Ms. Abraham did not request a review of child or spousal support until she filed the application before me, on February 10, 2020, after Mr. Guerra filed his application to terminate spousal support.

[29] When I questioned Ms. Abrahams as to why she did not seek an increase to Mr. Guerra's support obligations earlier, she replied that she was concerned about applying to court as Mr. Guerra kept telling her that she should be working full time, and that an increased income should be imputed to her. She was concerned that an application may not be favourable to her if Mr. Guerra was correct, and so she did not pursue it.

[30] In DBS, the Court stated:

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Not awarding retroactive child support where there has been unreasonable delay by the recipient parent responds to two important concerns. The first is the payor parent's interest in certainty. Generally, where the delay is attributable to unreasonableness on the part of the recipient parent, and not blameworthy conduct on the part of the payor parent, this interest in certainty will be compelling. Notably, the difference between a reasonable and unreasonable delay often is determined by the conduct of the payor parent. A payor parent who informs the recipient parent of income increases in a timely manner, and who does not pressure or intimidate him/her, will have gone a long way towards ensuring that any subsequent delay is characterized as unreasonable: compare *C. (S.E.) v. G. (D.C.)*. In this context, a recipient parent who accepts child support payments without raising any problem invites the payor parent to feel that his/her obligations have been met.

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The second important concern is that recipient parents not be encouraged to delay in seeking the appropriate amount of support for their children. From a child's perspective, a retroactive award is a poor substitute for past obligations not met. Recipient parents must act promptly and responsibly in monitoring the amount of child support paid: see *Passero v. Passero*, 1991 CanLII 8165 (ON SC), [1991] O.J. No. 406 (QL) (Gen. Div.). Absent a reasonable excuse, uncorrected deficiencies on the part of the payor parent that are known to the recipient parent represent the failure of both parents to fulfill their obligations to their children.

104 In deciding that unreasonable delay militates against a retroactive child support award, I am keeping in mind this Court's jurisprudence that child support is the right of the child and cannot be waived by the recipient parent: *Richardson*, at p. 869. In fact, I am not suggesting that unreasonable delay by the recipient parent has the effect of eliminating the payor parent's obligation. Rather, unreasonable delay by the recipient parent is merely a factor to consider in deciding whether a court should exercise its discretion in ordering a retroactive award. This factor gives judges the opportunity to examine the balance between the payor parent's interest in certainty and fairness to his/her children, and to determine the most appropriate course of action on the facts.

- [31] I find that Ms. Abraham has not acted reasonably in delaying her application to increase support. She knew of the changes in Mr. Guerra's income, but took no steps to obtain any increases until after Mr. Guerra brought his application to terminate spousal support. It was reasonable for Mr. Guerra to assume that Ms. Abraham agreed that he was meeting his obligations with the payments he was making.
- [32] The court must also consider the behaviour of the payor parent, and whether he has engaged in blameworthy conduct. In this case, I saw no evidence that Mr. Guerra engaged in blameworthy conduct. He always paid his support obligations in accordance with the existing court orders. He was forthcoming with his income information throughout.
- [33] During the year he was unemployed, Mr. Guerra did not seek to reduce his support obligations even though he was clearly paying far in excess of the Guideline amounts. Mr. Guerra calculated that during the year he was unemployed he overpaid \$6,924 in child support and \$7,140 in spousal support. He states in his affidavit that while he knew his support obligations should have increased in 2016, he expected that on a settlement any overpayment in 2014 would be taken into account, and this is why he felt it was not necessary to make the support adjustment in 2016. I accept that Mr. Guerra did not engage in blameworthy conduct in failing to increase his support obligations as he had a reasonable basis upon which to delay any changes to the support order.
- [34] With respect to the circumstances of the children, I was not provided with any evidence which would suggest to me that the children have suffered. In addition to the child support he pays, Mr. Guerra has paid the tuition for the children to attend private Catholic schools throughout their education, which until this year was a net yearly cost to him of over \$8,000. I heard no evidence that the children were lacking in any way. Based on the information

disclosed on her financial statements, Ms. Abraham has been able to save almost \$40,000 between 2018 and 2020.

[35] While I was not provided with any evidence that Mr. Guerra would suffer financial hardship if a retroactive award was made, this alone is not a reason to grant retroactive support.

[36] After considering all of the relevant factors, I decline to make any orders for payment of retroactive support against Mr. Guerra.

What are the Guideline incomes to be used for calculating support?

[37] There is no dispute that Mr. Guerra's line 150 tax return information is his appropriate Guideline income. His income for 2020 is approximately \$90,000.

[38] Mr. Guerra argued that a full time income should be imputed to Ms. Abraham. In his materials he submits her income should be imputed to \$58,000. In argument he submitted it should be imputed at \$60,000. Ms. Abraham agreed that full time earnings in her position in 2019 would be close to \$61,000.

[39] I am satisfied that for the purposes of determining ongoing child support, the incomes shown in the parties' income tax returns should be used. This is based on the assumption that Ms. Abraham will continue to work full time.

[40] For 2020, Ms. Abraham asserts that her income was interrupted due to the covid pandemic. I accept this assertion. I have also allowed the continuation of spousal support until the end of October 2020. As such, for 2020, Ms. Abraham's employment income is not appropriate to use as the Guideline income for determining child support.

[41] For the purposes of calculating child support for the remainder of 2020, I set Ms. Abraham's Guideline income at \$60,000. Similarly, I set Mr. Guerra's current Guideline income at \$90,000.

[42] By June 30 of each year, the parties will exchange income tax information, and child support will be adjusted in accordance with the Guidelines.

[43] For any adjustments to child support payments in June 2021 only, Ms. Abraham's 2020 Guideline income is set at \$60,000 and is not based on her 2020 income tax return. Beginning in June 2022, Ms. Abraham's Guideline income will be based on her current income tax return.

[44] For any yearly adjustments to child support payments beginning in June 2021, Mr. Guerra's Guideline income will be based on his current income tax return.

Quantum of child support payable

[45] Commencing November 1, 2020, Mr. Guerra will pay Ms. Abraham monthly child support in the amount of \$587. This child support obligation is based on Guideline incomes for Mr. Guerra of \$90,000 and for Ms. Abraham of \$60,000.

"Baker J."

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