
CANADA / JUDGMENT

Hankey v. Hankey

2017 BCSC 618

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Supreme Court of British Columbia

DECIDED

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2017 BCSC 618 Hankey v. Hankey

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Hankey v. Hankey,

2017 BCSC 618

Date: 20170301

Docket: E046090

Registry: New Westminster

Between:

Graeme Alan Hankey

Claimant

And

Maria Elizabeth Hankey

Respondent

Before: The Honourable Mr. Justice Skolrood

Oral Ruling

In Chambers

Counsel for the Claimant:

R.K. Khunkhun

The Respondent, Maria E. Hankey:

In Person

Place and Date of Hearing:

New Westminster, B.C.

February 8, 2017

Place and Date of Ruling:

New Westminster, B.C.

March 1, 2017

Introduction

[1] THE COURT: In this family law proceeding, the claimant seeks a number of orders, primarily concerned with his child support obligations. His notice of application also dealt with issues of custody and guardianship of the parties' youngest child, but to their credit, the parties have been able to resolve those issues. Counsel for the claimant provided me with a draft form of order on the matters agreed to and the terms of that draft order will be included in the order that I make today. The claimant also seeks a divorce, which is not opposed by the respondent. Evidence was presented to satisfy the criteria for the granting of a divorce under the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) and accordingly, I make that order.

Background

[2] Briefly by way of background:

[3] The parties were married on May 29, 1993, and separated on December 30, 2013. They have three children:

M. born November 9, 1993, currently 23 years old;

A. born March 3, 1998, currently 18 years old, although about to turn 19; and

R. born February 25, 2001, currently 16 years old.

[4] For much of the marriage, the parties owned an automobile repair shop, which they closed in April 2010. Thereafter, the respondent returned to school and obtained her teaching certificate. She is now employed full-time as a teacher.

[5] Following the closure of their repair shop, the claimant worked for a period of time as a service technician for Mercedes Benz. In late December 2012, he qualified as a mortgage broker and since 2013 he has been working as a mortgage broker, attempting to develop his business.

- [6] On May 16, 2014, the parties attended a judicial case conference before Master Caldwell. At the judicial case conference, they entered into a consent order that dealt with financial issues and family property. The JCC order also included the following terms dealing with child support for the children, who were defined in the order to include A. and R.:
2. BY CONSENT, on a without prejudice basis and based on the Claimant's imputed income of \$26,000, the Claimant shall pay to the Respondent child support in the amount of \$407 per month commencing June 1, 2016 and payable every month thereafter until the Children are no longer children of the marriage as defined by the Divorce Act;
 3. BY CONSENT, the Claimant shall pay section 7 extraordinary expenses to the Respondent, in the amount of \$93 per month commencing June 1, 2016 and payable each and every month thereafter until the Children are no longer children of the marriage;
 4. BY CONSENT, the parties shall exchange income tax returns each year commencing June 1, 2016 and on June 1st of each and every year thereafter and exchange their respective Notices of Assessment within 15 days of receipt of same and make adjustments to the child support payments effective July 1, 2016 and July 1st of each year thereafter for so long as the Children remain Children of the marriage as defined by the Divorce Act.
- [7] Despite the JCC order contemplating child support beginning June 1, 2016, from June 2014 to January 2015, the claimant paid the respondent \$500 per month, which equates to the \$407 in child support and \$93 for s. 7 expenses set out in the order. According to the claimant, after the JCC, he had limited contact with his lawyer and he simply complied with the respondent's demand that he began paying. He says further that it was not until January 2015 that he realized that he was paying by mistake.
- [8] For her part, the respondent has consistently taken the position that the JCC order contains a mistake, and that the reference to child support commencing June 1, 2016, was intended to read June 1, 2014.
- [9] This issue was the subject of an application before Mr. Justice Voith on October 9, 2015 and on November 12, 2015, he issued Reasons for Judgment in which he found that the respondent had not met the burden of proving that the June 1, 2016 date in the JCC order was a "slip" or error that should be corrected. No appeal was taken from Justice Voith's decision and as such, as I explained to the respondent during the hearing of the application, I am bound by that finding.
- [10] The claimant therefore asserts that he is entitled to a credit for the \$4,000 that he paid by mistake from June 2014 to January 2015 that should be applied against the current and future child support obligations.

- [11] Thereafter, the claimant paid no child support until October 2016, at which time he began paying \$427 per month. At the time of the hearing, he had made five payments totalling \$2,135. He acknowledges that he owes child support for the period of June to September 2016 as well as an additional amount for the period of October 2016 to February 2017 depending on what income is used to calculate child support.
- [12] I will return to the child support issue shortly. Before doing so, it is useful to briefly outline the circumstances of the children. I do not propose to say much about the eldest child M., who as noted is 23 years old. At the time of separation, M. was working and was not considered to be a child of the marriage. The evidence is that he successfully returned to school to become a metal fabricator, which program ended recently. While the evidence is somewhat unclear about what is next for him, there is nothing in the evidence to establish that he is at present a child of the marriage.
- [13] R. certainly is a child of the marriage. He currently lives with the respondent but sees the claimant weekly, largely around his sporting activities.
- [14] A., who again is about to turn 19, has been enrolled in a Bible College program that ends April 22, 2017. She has been living on campus, but the evidence is that once the program has completed, she will return to live with the respondent. The respondent says the following in her affidavit about A.'s future plans:

Upon her return to Port Coquitlam, A intends to get a full-time job. A intends on changing programs and returning to school part time at a different institution in September 2017.

- [15] The other pertinent fact about A. is that she has effectively closed off any sort of relationship with the claimant. In correspondence with him, she has made it quite clear that, at present, she wants nothing to do with him.

Issues/Parties' Positions

- [16] The principal issues, as framed by the claimant in his application are i) the determination of his income for the purpose of child support; and ii) whether A. continues to be a child of the marriage.
- [17] On the income issue, the claimant submits that the income of \$30,000 should be imputed to him, with a review to take place July 1, 2018. The \$30,000 figure is based on his 2014, 2015 and 2016 earnings as a mortgage broker. To be clear, the \$30,000 figure is not an average figure but rather it reflects the claimant's position about what is fair, given that he is relatively new to the business and is still working to build a client base. With respect to A., the claimant acknowledges the responsibility to continue to pay child support until the end of April 2017, when she will complete her program. Thereafter, he submits that the evidence is vague about her plans and there is no basis for finding that she continues to be a child of the marriage, particularly in light of her stated intention to terminate all contact with him.

- [18] The respondent submits that income of \$75,000 should be imputed to the claimant which is similar to what he earned during his time as a service technician for Mercedes Benz. She submits that he is deliberately under-employed. She notes that A. is likely to return to school full-time in 2018 and will require support at that time.

Discussion

- [19] I will deal first with the issue of the claimant's income, and in particular the question of whether he is under-employed.
- [20] Pursuant to s. 15 of the Child Support Guidelines, SOR/97-175 ("Guidelines"), the general rule is that a party's annual income will be determined by reference to his or her total income as reported in the relevant CRA T1 form. However, ss. 17-20 then set out the alternative means of determining income in circumstances in which use of the T1 income figure would be unfair. Section 19 provides for the imputation of income to a spouse, including under sub para. (a), where the spouse is intentionally under-employed or unemployed.
- [21] As set out in *Heppner v. Jylli*, 2010 BCSC 1020 at para. 18, the party alleging under-employment, in this case the respondent, has the burden of proving that allegation.
- [22] Mr. Justice Goepel, as he then was, in *Melnyk v. Glynn*, 2012 BCSC 219, discussed the court's approach to allegations of underemployment at follows at para. 29:
- [29] A parent is intentionally under-employed if he or she chooses to earn less than he or she is capable of earning: *Drygala* at para. 28. In *Hanson v. Hanson*, [1999] B.C.J. No. 2532 (Q.L.) at para.14 (S.C.), *Martinson J.* set out the principles that apply when determining capacity to earn an income:
- [14] The following principles apply when determining capacity to earn an income. (See Dr. Julien D. Payne, *Imputing Income*, "Determination of Income; Disclosure of Income", *Child Support in Canada*, *Danrab Inc.*, August 3, 1999.)
1. There is a duty to seek employment in a case where a parent is healthy and there is no reason why the parent cannot work. It is "no answer for a person liable to support a child to say he is unemployed and does not intend to seek work or that his potential to earn income is an irrelevant factor." (*Van Gool* at para 30.)
 2. When imputing income on the basis of intentional under-employment, a court must consider what is reasonable under the circumstances. The age, education, experience, skills and health of the parent are factors to be considered in addition to such matters as availability of work, freedom to relocate and other obligations.

3. A parent's limited work experience and job skills do not justify a failure to pursue employment that does not require significant skills, or employment in which the necessary skills can be learned on the job. While this may mean that job availability will be at the lower end of the wage scale, courts have never sanctioned the refusal of a parent to take reasonable steps to support his or her children simply because the parent cannot obtain interesting or highly paid employment.
 4. Persistence in unremunerative employment may entitle the court to impute income.
 5. A parent cannot be excused from his or her child support obligations in furtherance of unrealistic or unproductive career aspirations.
 6. As a general rule, a parent cannot avoid child support obligations by a self-induced reduction of income.
- [23] In the present case, the claimant deposes that he changed occupations from working as an automobile technician to a mortgage broker due to both physical and mental health issues. The respondent submits, however, that the claimant's physical injuries were not work related and did not impede his ability to continue to work in the automotive industry.
- [24] I acknowledge that there is no medical evidence before the court concerning the claimant's condition however I accept his evidence that the change in occupation was made in good faith and due in large part to his physical condition. On this point, I note that he had commenced work as a mortgage broker prior to separation and that the income imputed to him out of the JCC order, again dated May 16, 2014, accounted for the change in occupation.
- [25] While the claimant has in the past demonstrated an ability to earn upwards of \$75,000 in the automotive industry, I am satisfied that his transition to becoming a mortgage broker is now of sufficiently long duration that it would be unreasonable to compel him to return to his former occupation.
- [26] What then is a reasonable income to attribute to the claimant? The claimant's line 150 income for 2014 was \$1,397.47 and for 2015 it was \$17,390. In 2014, the claimant was really just starting his mortgage broker business and in 2015, his work was limited by mental health issues. In 2016, the claimant, although he has not yet filed an income tax return, claims that he had gross business income of \$52,885.33, which resulted in a net income of about \$31,200 once business expenses were deducted. On this basis, he submits that an income of \$30,000 is reasonable for the purpose of determining child support, with that figure to be reviewed as of July 1, 2018. The claimant says that he is optimistic that he will be able to achieve gross revenues of \$75,000 at some point going forward.
- [27] While I have accepted that the claimant's change in occupation was done in good faith and that his income should be based on earnings from his new occupation, I am not satisfied that \$30,000 is a fair estimate of his current income or income earning capacity. I come to this conclusion for two principal reasons:

1. As of January 1, 2017, he negotiated an 85/15 commission split with the lender with whom he works, in place of the previous 80/20 arrangement meaning that he will receive 5% more in commissions on all mortgages that he brokers; and
 2. While the claimant has deposed at some length to his business expenses, some of those expenses appear excessive, notably his expenses for telephone, motor vehicle and office. While these expenses may pass muster for income tax purposes, that does not mean that they are all legitimate for the purposes of determining income for child support purposes.
- [28] In my view, it is reasonable to apply an expense ratio of 30% to the claimant's approximately \$53,000 gross revenues achieved in 2016. This results in a net income of approximately \$37,000, which I find to be a reasonable amount to attribute to the claimant.
- [29] Using that figure, as of June 1, 2016, the date he was to start paying child support under the JCC order, the claimant's child care obligation for two children was \$568.00 per month. As noted above, leaving aside the initial \$4,000 he paid, he has made five payments of \$427 per month for a total of \$2,135. Upon the figures that I have determined, for the period of June 2016 to February 2017, child support of \$5,112 was owing meaning that he underpaid by \$2,977.
- [30] Before dealing with what that means in light of the previous \$4,000 payment, I will return to the issue of A. Again, the claimant acknowledges that she remains a child of the marriage, and that he is obliged to pay child support for her, until the end of her current school program in April of this year. The question is what happens after that.
- [31] The claimant has cited the well-known decision of Master Joyce, as he then was, in *Farden v. Farden*, 1993 CanLII 2570 (B.C.S.C.) which set out a number of factors that the court will consider when determining whether children who reach the age of majority but are attending school will continue to be children of the marriage.
- [32] In my view, *Farden* is of minimal assistance given that the evidence is at best vague about A.'s plans after completing her current program and falls short of establishing that she will in fact be continuing in school and in need of ongoing support. I note in this regard, the respondent's evidence that A.'s plan is to find full-time work.
- [33] The other significant factor that weighs against requiring ongoing support from the claimant is A.'s clearly stated desire to terminate any sort of relationship or contact with the claimant. This factor was considered by Master Joyce in *Farden*, as well as by the court in *Law v. Law* (1986), 2 R.F.L. (3d) 458 at 462 (Ont. S.C.), cited by Master Joyce, in not ordering further child support for the children in those cases who had reached the age of majority.
- [34] In the circumstances of this case, I find that it would be unreasonable and unfair to compel the claimant to continue to pay child support for A. once she has completed her current course of study.

- [35] If, as the respondent suggests, A. may return to school in a year or so, it may be open to the respondent to seek a review of A.'s status as a child of the marriage. However, one factor that will be considered on any such review will again be A.'s attitude towards the claimant.
- [36] I therefore order that the claimant's obligation to pay child support for A. will cease as of April 30, 2017. Up until that time, he will pay \$568 per month for A. and R., and thereafter will pay \$337 per month in child support for R. for so long as R. remains a child of the marriage.
- [37] The JCC order contemplated that child support would be reviewed and adjusted as of July 1st of each year based on the most recent notice of assessment. However, I accept the claimant's submission that the next review should be July 1, 2018 given that it is now March. Moreover, I expect that by July of 2018 the court will be in a much better position to assess the claimant's income as he will be that much more established in his business and he will have a whole of year of the new commission structure.
- [38] I return now to the issue of the claimant's overpayment of child support. As noted, he underpaid child support for the period of June 2016 to February 2017 by \$2,977, however he is entitled to a credit of \$1,023 as a result of the \$4,000 overpayment. While he is entitled to the benefit of that credit, it would be unfair to the respondent, and more to the point, to the children, to permit him to claim it in a lump sum. I therefore order that the claimant shall be entitled to recoup the credit of \$1,023 at a rate of \$50 per month applied against his ongoing child support obligation until such time as the credit has been fully retired.
- [39] Lastly, there is the issue of s. 7 expenses for R. To date, those expenses have comprised of annual soccer dues and some counselling expenses. With respect to soccer, the claimant paid the dues in 2015 and the respondent paid in 2016. With respect to counselling, the parties have agreed that R. will continue in counselling and the parties will share the cost equally. With respect to soccer and any other s. 7 expenses, they will be shared by the parties on a pro rata basis according to their respective incomes, apart from soccer, any additional s. 7 expenses are to be agreed to by the parties.

Summary

- [40] So in summary I make the following orders:
1. Subject to s. 12 of the Divorce Act, the parties are divorced from each other, with the divorce to take effect on the 31st day after the date of this order;
 2. Effective June 1, 2016, based on an income of \$37,000, the claimant is required to pay child support in the amount of \$568.00 per month for the children A. and R. up to April 30, 2017, at which time A. will cease to be a child of the marriage. Thereafter, the claim will pay child support for R. in the amount of \$337.00 per month for R. for so long as he continues to be a child of the marriage;

3. The claimant is credited with an overpayment of child support in the amount of \$1,023 which may be applied against his ongoing child support obligation at a rate of \$50.00 per month beginning March 1, 2017 until such time as the credit has been fully retired;
4. In keeping with the existing JCC order, the parties will exchange notices of assessment annually and child support will be reviewed and, if necessary, adjusted effective July 1st of each year, with the next review and assessment to take place effective July 1, 2018; and
5. Section 7 expenses will be shared on a pro rata basis according to the parties' respective incomes, except for R.'s counselling for which the cost will be shared equally as agreed by the parties.

[41] In addition to these orders, the following additional orders are granted on the terms agreed to by the parties:

1. BY CONSENT, pursuant to the Divorce Act (Canada), the Parties shall share joint custody of R., with his primary residence with the Respondent.
2. BY CONSENT, pursuant to the Family Law Act and the Divorce Act (Canada), the Parties shall share joint guardianship of R. and it is agreed that R. is considered a mature minor who can make decisions about his own welfare, such as whom he spends time with, living arrangements, and travel, and he has the right to expect and request privacy around the release of his personal information from doctors, teachers, counsellors, or any other source.
3. BY CONSENT, pursuant to the Family Law Act and the Divorce Act (Canada), the Claimant shall have the right to attend all school events, including but not limited to parent-teacher conferences, and/or extra-curricular activities of R. subject to the mature minor rule of consent. The Claimant shall be responsible for all online communication available through R.'s school's website and parent email system concerning extra-curricular notices and/or schedules. Any notices received in hard copy will be copied and sent to the Claimant by the Respondent in a timely manner.
4. BY CONSENT, pursuant to the Family Law Act, the Claimant shall have reasonable parenting time with R. at dates and times as agreed to between the Claimant and Ryan directly, including any holidays and family events.
5. BY CONSENT, pursuant to the Family Law Act, the Claimant shall have reasonable telephone and/or electronic communication with R. while he is in the Respondent's care.
6. BY CONSENT, pursuant to the Family Law Act, all communications between the Parties shall be by text or email, unless in the case of emergency, then by phone.
7. BY CONSENT, the Respondent shall continue to keep R. on her medical/dental coverage, and shall forthwith retain a dentist who is not a pediatric specialist for R. to attend.

8. BY CONSENT, pursuant to the Family Law Act and the Divorce Act (Canada), for so long as R. is a "child of the marriage", the Respondent shall not move out of the Greater Vancouver region of British Columbia or change R.'s school without reasonable notice (i.e. 60 days' notice) subject to the following:
 - a. Understanding that R. is 15 years old and will be turning 16 on February 25, 2017, meaning he can make decisions about his schooling and living arrangements.
 - b. The Respondent will provide 60 days' notice, a reasonable amount of time for any discussion that may be needed with the Respondent, R., and the Claimant in the case that a move will take R. out of Greater Vancouver Region of BC for living or schooling, so long as R. is under the age of majority.
 - c. After considering R.'s wishes, written consent will be provided only for a move that takes R. outside of the Greater Vancouver Region of BC, Canada (and he is under the age of majority).
9. BY CONSENT, neither party will apply for a passport for R. without the written consent of the other. The Parties will cooperate with the other in the provisions of passports, consent to travel, and other necessary documents as may be required to allow R. to travel with either party. R. will be able to independently decided about travel with either party and otherwise (i.e. mission trips, youth events, extended family members etc.) Notice about travel will be provided in a timely manner as events and occasions arise. Specifically, notice to travel outside of the Province or Canada for an extended period of travel over 3 days, will be provided to the other party one week in advance, along with a travel itinerary, contact addresses, and phone numbers.
10. BY CONSENT, R. will commence counselling with the Claimant under the care of his current counsellor, Ms. Marianna Kavanagh, of Polo Health & Longevity, or another counsellor with which R. is comfortable, the costs to share equally between the Parties. All counselling decisions and information requests will be based on the agreement that R. is a mature minor and can make decisions about his counselling needs and who sees and hears his private information.

[42] That concludes my Reasons. Both parties have requested that they be permitted to speak to the issue of costs, so I am prepared to hear you on that question.

(SUBMISSIONS ON COSTS)

[43] THE COURT: All right. Thank you. I am going to deal with the double costs right off the bat. I would not grant double costs. I appreciate that the respondent's offer letter set out very comprehensive terms which in some respects, as she points out, are more general than what I have found. But I think the law around double costs is still that any offer must be better in all respects than what the court orders.

- [44] I am not satisfied that that is the case here. In particular I have imputed to Mr. Hankey income greater than what was set out in the letter, which results in ongoing child support of more than what was contemplated thus an award of double costs is not appropriate. I would add to that I am generally loathe to order double costs in family cases except in exceptional circumstances because I think what happens then is that the financial balance between the parties gets upset in such a way which is not in anyone's interest, particularly not in the interests of the children.
- [45] Having said that, looking at the history, the communications and the ultimate order that I made, I am satisfied that the claimant, Mr. Hankey, has been substantially successful on this application. So I am prepared to order ordinary costs of this application. I am going to set those costs at \$1,000, which I think is consistent with what the family law tariff contemplates.

"Skolrood J."

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