

CANADA / JUDGMENT

Hartnell v. Hartnell

2023 BCCA 467

COURT

British Columbia Court of Appeal

DECIDED

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2023 BCCA 467 Hartnell v. Hartnell COURT OF APPEAL FOR BRITISH COLUMBIA Citation: Hartnell v. Hartnell, 2023 BCCA 467 Date: 20231206 Docket: CA48514 Between: David Philip Hartnell Appellant (Claimant) And Crystal Sinnika Hartnell also known as Crystal Sinnika Lagerbom Respondent (Respondent) Before: The Honourable Madam Justice Saunders The Honourable Madam Justice Stromberg-Stein The Honourable Madam Justice Horsman On appeal from: An order of the Supreme Court of British Columbia, dated August 4, 2022 (D.H. v. C.H., 2022 BCSC 1315, Vancouver Docket E190511). Oral Reasons for Judgment Counsel for the Appellant: A.S.K. Wormeli Counsel for the Respondent: I.M. Knapp J. Wang, Articled Student Place and Date of Hearing: Vancouver, British Columbia December 1, 2023 Place and Date of Judgment: Vancouver, British Columbia December 6, 2023 Summary: The appeal is from an order after trial addressing terms relating to parenting arrangements and support for their two children. With the assistance of counsel the appeal narrowed to two terms requiring this court's non-contentious intervention, a term addressing a hypothetical future move of one parent and retroactive child support orders. Held: The term concerning a move is ambiguous and is in the nature of a signpost to the parties. It is set aside. The terms relating to retroactive child support are set aside and the issue remitted to the trial court to find the facts of the parties' incomes at the relevant time and address the criteria for a retroactive award.

- [1] SAUNDERS J.A.: The appellant appeals the order made by Madam Justice McNaughton on August 4, 2022, in this claim brought under both the Divorce Act, R.S.C. 1985, C. 3 (2nd Supp.), and the Family Law Act, S.B.C. 2001, c. 25.
- [2] The judge's reasons are indexed as 2022 BCSC 1315. In them, she sets out the factual background. Given the co-operative approach taken by the parties at the hearing of the appeal, I refer only to certain salient circumstances.
- [3] The parties began living together in April 2000, and married on April 16, 2005. They have two children, K who was 13 years old at the time of trial and J who was seven years old. The parties separated on January 1, 2016.
- [4] Following separation, the parties shared an equal parenting arrangement. At the time of trial, the schedule was three days a week each, with alternating Saturdays.

- [5] In January 2021, the appellant moved to Mission, British Columbia, some distance from the respondent's home in Tsawwassen. The children had attended school in Ladner, British Columbia. The move created tension between the parties as to where the children would attend school and inevitably increased the driving time required of everyone concerned. In October 2021, Justice Mayer ordered that the children remain enrolled in school in Ladner, British Columbia.
- [6] A primary issue before Justice McNaughton was where the children would attend school commencing in September 2022.
- [7] The judge found that it was in the best interests of the children that they attend school in Mission, and she made several orders with that in mind. They included an order generally providing that the children reside with the appellant during weekdays, and the respondent on three of the four weekends a month, with certain terms fine tuning the schedule to account for disparate days of school attendance.
- [8] The notice of appeal challenged several terms of the order. With the assistance of counsel, the parties have resolved most of those issues. All that remain before the court are two terms. The first deals with the living arrangements for the children. The second deals with the financial obligations respecting the children. As to these two terms it is, I consider, noncontroversial as to what we should do.
- [9] As to the living arrangements, the judge set the schedule I have just described, and also determined that the children should spend more time in the summer school vacation with the respondent than with the appellant. Then, in anticipation that the parties may change their place of residence, the judge directed that the residency schedule should change when and if the parties' homes were closer. The entered order provided: "if [the respondent] moves closer to Mission, the Parties are to commence a week-on-week-off parenting schedule." The appellant would have us remove that term from the order.
- [10] The order addressing a move "closer to Mission" is ambiguous and is incapable of enforcement. Is closer a question of time or distance, and what degree of closeness triggers the provision? Through counsel, the respondent acknowledged the judge's expression is more in the nature of a direction - a signpost to the parties as to expectations in the event the respondent's residency changes.
- [11] It seems to me that this acknowledgement is accurate. The term in the entered order dealing with "closer to Mission" is in the nature of a direction. Retaining such an ambiguous provision is not in the interests of the parties. I would set it aside.
- [12] The financial issue concerns retroactive child support (referred to in the order as "arrear"). The judge declared that the appellant "owes child support arrears" to the respondent dating back to May 2017, and the entered order includes this term. The appellant says the judge was required to find the parties' incomes over the years before making such an order, and did not do so. He says also that the judge should have addressed the basis for an award

retroactive to May 2017. He contends these defects are errors that require us to set aside the "arrears" order.

- [13] Related to the retroactive support order, the judge determined the amount of retroactive s. 7 expenses that should be adjusted as between the parties, finding 57% is payable to the appellant and 43% is payable to the respondent.
- [14] The appellant is correct that the necessary findings of fact to support the retroactive support order have not been made. Nor did the judge engage with the criteria applicable to a retroactive child support order. *D.B.S. v. S.R.G.*, 2006 SCC 37, is the usual point of reference for that discussion. Such an order requires, in a minimum, consideration of the factors set out in s. 9 of the Federal Child Support Guidelines, particularly the parties' means and needs. I conclude that the order for retroactive child support must be set aside and remitted to the trial court for fresh determination.
- [15] Connected to that concern, I consider the order related to the retroactive payment of s. 7 expenses must also be set aside, to be reimposed after the facts are found in the Supreme Court of British Columbia of the parties' incomes at relevant times.
- [16] As I stated earlier, I do not understand my conclusions to be controversial to the parties. With the assistance of counsel, the parties have been able to reduce considerably the differences between them relating to the order. In the result, I would allow the appeal only to the extent of deleting paras. 5, and 23-26 of the entered order. I would remit the issues of retroactive child support and retroactive payment of s. 7 expenses to the Supreme Court of British Columbia for determination.
- [17] Considering the outcome of the appeal, and barring further submissions from the parties, I would not make an order of costs on this appeal. In the event the parties wish to make submissions on costs, I would ask that they so advise the Court's registry in writing, and that each party file a brief submission no longer than two pages, prior to December 16, 2023.
- [18] STROMBERG-STEIN J.A.: I agree.
- [19] HORSMAN J.A.: I agree.
- [20] SAUNDERS J.A.: Paragraphs 5 and 23-26 of the entered order are set aside. Unless the parties make submissions as to costs, they may take it that there are no costs ordered. "The Honourable Madam Justice Saunders"

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